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Understanding the “Other” International Agreements

Ryan Harrington*

The United States regularly concludes agreements with foreign states that are not ratified pursuant to the Treaty Clause, which leaves many researchers with a cloudy understanding of the agreements and their legal status. This article explains variations in international agreement forms and provides advice on locating the agreement texts and the instruments that give the President’s agreements legal effect.

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* © Ryan Harrington, 2016. This is a revised version of a winning entry in the open division of the 2015 AALL/LexisNexis Call for Papers Competition. I am very grateful for the comments and suggestions of Gabriela Femenia, Sarah Ryan, Cate Kellett, Jordan Jefferson, and Fred Shapiro.

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Introduction

§1 On November 6, 2013, the United States deposited an “instrument of acceptance”1 with the United Nations to indicate its consent to be bound to the Minamata Convention, a treaty “to protect human health and the environment from the adverse effects of mercury.”2 The instrument of acceptance never passed through the Senate chamber for advice and consent because the executive branch insisted it could “implement Convention obligations under existing legislative and regulatory authority.”3 In other words, the executive branch not only negotiated and signed the Convention outside of the purview of the Treaty Clause in Article II of the U.S. Constitution, but it also bound the United States to the terms of the agreement without ratification from the Senate.4

§2 Similarly, the Office of the United States Trade Representative has repeatedly announced that the Anti-Counterfeiting Trade Agreement (ACTA) is consistent with existing U.S. law and is ready for implementation in the United States.5 The executive branch believes it has the authority to implement the Act without congressional action, although no academic commentators have agreed.6

§3 These two examples raise interesting questions about the way the United States concludes international agreements. This article seeks to shed light on the process and legality of these “other international agreements”—a term pulled from the official treaty publications series, United States Treaties and Other International Agreements. As the name of the series suggests, treaties, which this article will subsequently refer to as “Article II treaties,” are but one part of the range of international agreements. In fact, Article II treaties comprise only a microcosm of this body of law, perhaps as little as 6.2% of the whole.7

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4. U.S. Const. art. II, § 2, cl. 2 (providing that the President “shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur”).
5. “As noted, the ACTA is consistent with existing U.S. law and does not require the enactment of implementing legislation. The United States may therefore enter into and carry out the requirements of the Agreement under existing legal authority, just as it has done with other trade agreements.” ACTA: Meeting U.S. Objectives, OFFICE OF THE U.S. TRADE REPRESENTATIVE (Oct. 1, 2011), https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2011/september/acta-meeting-us-objectives [https://perma.cc/TV2U-PFWL].
7. The study of agreements concluded between 1946 and 1973 found that almost eighty-seven percent of all international agreements were executive agreements entered into by the President under
¶4 If Article II treaties comprise such a small portion of the total body of international agreements, how can it be that researchers know so little about the other forms? The largest examination of international agreement-making in the United States appeared in this journal in 1993, when Professor Erwin Surrency devoted four paragraphs to the phenomenon of these other international agreements, focusing specifically on congressional-executive agreements. There is nothing in the literature about legal apparatuses that enable the creation of the other forms and nothing that would guide a researcher through legal obstacles to implementation of the Minamata Convention or the ACTA, referenced above.

¶5 Even researchers who are aware of the sphere of international agreement-making outside of the Article II purview might be unaware of the distinctions in the forms of agreements. Professionals in the field use nomenclature such as “executive agreements” and “congressional-executive agreements” that only further muddies the waters because there are actually several types of executive agreements, and the distinctions between them are critical to understanding their legal legitimacy. There are “executive agreements” that the President is entitled to conclude from his constitutional powers. These are otherwise known as “sole executive agreements.” Then there are congressional-executive agreements: agreements concluded by the President with congressional authorization. However, there are two types of congressional-executive agreements, and they operate fundamentally differently. The first, “ex ante” agreements, are similar to “sole executive agreements” because the President operates pursuant to preexisting authority. With ex ante agreements, the legislative branch has already passed an authorizing statute that the President subsequently uses that authority to negotiate and conclude an international agreement. Once the President concludes an ex ante

statutory authority granted by Congress. Loch K. Johnson, The Making of International Agreements 12–13 (1984). A second famous, but also dated, study found that “the overwhelming proportion of international agreements are based at least partly upon statutory authority (88.3 percent of agreements reached between 1946 and 1972), followed by treaties (6.2 percent) and agreements based solely on executive authority and action (5.5 percent).” R. Roger Majak, 95th Cong., International Agreements: An Analysis of Executive Regulations and Practices 22 (Comm. Print 1977).


Other documents of significance in the conduct of international affairs are those declaring policies that the parties intend to pursue. For example, the Final Act of the Helsinki Conference on Cooperation and Security in Europe is not a formal treaty. This document’s purpose is to declare certain desirable norms for the nations to follow in the treatment of their own citizens. A number of similar documents to which nations refer are essential in understanding international relations. Id. More information on political commitments appears infra ¶¶ 16–17.

9. This article serves as a companion piece to a more thorough investigation of legal problems with international agreements that was published in the West Virginia Law Review. Ryan Harrington, A Remedy for Congressional Exclusion from Contemporary International Agreement Making, 118 W. Va. L. Rev. 1211 (2016). The focus of the current article is to illuminate the methods for researching international agreement-making.


11. Id. at 824 (explaining how “ex ante authorizations explicitly empowered the executive to make agreements under specified circumstances”).
agreement, no further congressional action is necessary. The second form, “ex post” congressional-executive agreements, refers to agreements that the President elects not to submit to the Senate for advice and consent pursuant to the treaty ratification process that appears in Article II of the U.S. Constitution. Instead, the President submits these agreements to both branches of Congress; the process is akin to the approval of ordinary domestic legislation pursuant to the Presentment Clause. Despite the similarity in nomenclature, the processes for forming the two types of congressional-executive agreements are dramatically different. Consequently, the legitimacy of each agreement requires an investigation into the source and authority for the agreement’s approval.

An even less understood and studied category of international commitments, sometimes called “political commitments,” are negotiated and concluded by the executive branch with absolutely no input from Congress. Political commitments differ substantially from the international agreements listed above because they do not provide legally enforceable rights and obligations. Instead they provide “moral and political guidance” on how a state should act. By creating political commitments in lieu of treaties, the states do not intend for the agreements to be legally binding. Agreements that are not intended to be legally binding do not constitute treaties under international law and therefore are not governed by international law.

This article begins by describing various forms of international agreements and Congress’s level of participation in their creation. Paragraphs 18 to 26 describe the standards used to create, and to differentiate among, international agreements. This section also describes the law that requires international agreements to be reported to Congress and the shortcomings of that law, known as the Case Act. Paragraphs 27 to 42 provide guidance for the researcher on identifying legal authority for congressional executive agreements, which might take the form of implementing legislation, prior authorization acts, or subsequent approval acts. As the examples above illustrate, it can be a challenge to find legal authority for international agreements because the President rarely makes this authority explicit.

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12. While this practice is commonly accepted today, Ackerman and Golove demonstrate how the agreement form was not historically understood to be the functional equivalent of an Article II treaty. Id. at 826–27.
13. Id. at 827. The focus of Is NAFTA Constitutional? is an investigation into the constitutionality and historical practice of ex post congressional-executive agreements.
16. Id.
17. The Vienna Convention on the Law of Treaties defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.” Vienna Convention on the Law of Treaties, supra note 1, art. 2. The United States is not a party to the Vienna Convention, but it has long recognized its precedence under customary international law. See Hollis & Newcomer, supra note 15, at 519 n.40.
An Overview of “Other” International Agreements

§8 This section provides a brief overview of the various forms of international agreements that exist under U.S. law. The section discusses each agreement form individually and focuses on the legal processes by which an agreement is created.

Ex Post Congressional-Executive Agreements Become Law After Approval by Both Houses of Congress

§9 The first of the four types of international agreement forms discussed in this article, the “ex post congressional-executive agreement,” is concluded by the President without any specific constitutional or statutory authorization in advance of the negotiations. In other words, the President or a representative forms an agreement on behalf of the United States with another nation and then brings the agreement back to Congress for approval. These agreements then pass through both houses of Congress as ordinary legislation or joint resolutions and are subsequently signed by the President pursuant to the Presentment Clause.

§10 The process of concluding an agreement and returning for congressional approval is similar to the approval process of an Article II treaty; however, approval of an ex post agreement does not require the concurrence of “two thirds of the Senators present.” The procedure for passing an agreement involves deliberation by both houses, which requires debate in parallel tracks. For ordinary legislation, variations in versions of a bill are reconciled in a joint session between the House and the Senate. The reconciled bill, once approved by both chambers, is then presented to the President for his signature. Congressional-executive agreements vary from ordinary legislation because they require the agreement from another state. Were Congress to make an amendment or a suggestion to the agreement’s text, the executive branch would need to take the altered agreement back to the original negotiating state for approval again. The extra step requires more time and involvement in this instance than for domestic legislation. Nonetheless, the result of this process is an agreement that involves both houses of Congress and the Executive approving the text of an agreement after it has been negotiated with a foreign state.

Sole Executive Agreements Are Valid Pursuant to the Executive’s Constitutional Authority

§11 Most researchers are familiar with the second category of international agreements: the sole executive agreement. The sole executive agreement is notorious because it allows the President, without the cooperation of Congress, to create binding federal law. The Supreme Court has long upheld the President’s authority

20. Ackerman & Golove, supra note 10, at 861 (tracing the creation of the agreement form to the 1920s, culminating in actions during the New Deal).
21. U.S. CONST. art. I, § 7, cl. 2. “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.” More information on this process is available in Harrington, supra note 9, at 1217–18.
23. Of course, the Senate might require amendments when it is presented with a treaty pursuant to Article II, § 2, cl. 2, requiring the Executive to return to the negotiating table with a foreign state, but the process of reconciliation is at least eliminated.
to enter into these agreements, provided that he rely on his own constitutional authority as Commander-in-Chief. The Commander-in-Chief authority provides the President with the ability to “make legally binding decisions—such as the disposition of armed forces personnel—without the involvement of Congress.”

The lack of congressional participation means a researcher will find no approval or authorization acts in the Statutes at Large and must instead consult the text of the Constitution and the slim body of cases that have come out of the Supreme Court.

§12 Sole executive agreements, although relatively common today, had not previously accounted for a significant portion of international agreements concluded by the United States. According to a study done in 1984, only seven percent of all international agreements were solely based on enumerated powers of the President, and of that seven percent, military agreements composed the majority. Michael Van Alstine, however, in his article on executive aggrandizement, cites to 15,000 sole executive agreements in the last fifty years, which would show a remarkable upward trend in Presidents’ willingness to claim sole executive authority.

Ex Ante Congressional-Executive Agreements Authorize the President to Conclude an Agreement Without Any Further Congressional Action

§13 As noted earlier, the third type of international agreement shares partial nomenclature with the first, which leads to some confusion. While both forms are colloquially known as “congressional-executive agreements,” the ex ante congressional-executive agreement does not require approval from Congress after its execution. Instead, Congress provides authorization for the President to conclude an international agreement in advance (ex ante) of the negotiations. The authority takes the shape of a statute, or public law, created by both houses of Congress and the President. Normally, these authorization acts do not expire without specific language in the text of the act, which means they provide authority for any subsequent President, not just the one signing the bill into law, to enter into an ex ante agreement. Consequently, the authorization for an agreement formed today might have been passed into law decades ago.

§14 There is no uniformity among the authorization acts; the terms and specificity of statutory authorization will vary. In some instances, the language authorizes someone in the executive branch (the President may be named, but others

27. Johnson, supra note 7, at 14.
28. Van Alstine, supra note 25, at 319 (describing the reliance on several Supreme Court decisions).
30. Id. (“Many agreements today are concluded under broad ex ante authority granted to the President by Congress four or five decades earlier in a vastly different context.”).
may be as well) to act in a very specific manner. For example, the Mapping Intelligence Authorization Act for Fiscal 1987 provided that “The Secretary of Defense may authorize the Defense Mapping Agency to exchange or furnish mapping, charting, and geodetic data, supplies and services to a foreign country or international organization pursuant to an agreement for the production or exchange of such data.” 31 While the actions were specified in the authorization, the foreign countries and international organizations were not, giving broad discretion to the executive branch to determine with whom to conclude the agreements. 32 In other authorization acts, such as the Mutual Education and Cultural Exchange Act of 1961, the executive was granted even broader range to conclude “agreements with foreign governments and international organizations, in furtherance of the purposes of this Act.” 33

¶15 The authorization will likely not even stipulate provisions for congressional oversight after the agreement in concluded. The Fishery Conservation and Management Act of 1976, for example, requires an agreement’s transmittal to Congress sixty days before the agreement enters into force. 34 However, the text of the Act does not require congressional approval ex post of the agreement. The Act instead provides that the agreement shall enter into force if Congress does not act. 35

Political Commitments Are Nonlegally Binding Agreements Concluded Without Congressional Involvement

¶16 The final form of international agreement can be thought of as a “political commitment,” 36 defined as “a nonlegally binding agreement between two or more nation-states in which the parties intend to establish commitments of an exclusively political or moral nature.” 37 Because of the nonlegally binding nature of political commitments, there are no constitutional requirements that govern their creation. 38 A political commitment might take the shape of an oral agreement or a memorandum of understanding among midlevel government officials. It might also be a formal document that shares all of the characteristics of a treaty, except for a disclaimer stating that the compact is politically, not legally, binding.

¶17 It is not possible to identify the number of political commitments that have been concluded in the past fifty years because, as this article will demonstrate, they are not required to be reported. We do know that the United States increasingly relies on “non-legal understandings” in foreign policy. 39 Harold Koh gave several

32. Harrington, supra note 9, at 1222.
35. Id. The Act does, however, provide the ability for Congress to disapprove of the agreement through a joint resolution. Id.
36. See Harrington, supra note 9, at 1224 n.62 for a brief introduction to the history of the nomenclature for this form of agreement (comparing “gentlemen’s agreement” to “nonbinding agreements” and even “soft law”).
38. No branch of the government regards these agreements as falling under the purview of the Treaty or Presentment Clause. Id. at 549.
39. Harold H. Koh, Address: Twenty-First Century International Lawmaking, 101 Geo. L.J. ONLINE 1, 13 (2012) (“[T]wenty-first-century international legal engagement is hardly limited to these traditional tools of treaties and executive agreements and customary international law.”).
examples during his speech on nonlegal understandings, including the “Arctic Council,” which emerged as a group of eight states to facilitate sustainable development and cooperation in the Arctic.\textsuperscript{40} The content and form vary widely, having “a significant impact on matters including security, arms control, nuclear proliferation, monetary exchange, financial capital, sovereign debt, trade, health, conservation, environmental preservation, pollution, development, and human rights.”\textsuperscript{41} The most recent example of a political commitment is the Iran Nuclear Deal, in which the United States and other countries agreed to end economic sanctions against Iran in exchange for restrictions on Iran’s nuclear program.\textsuperscript{42}

**Standards and Requirements for the Creation of “Other International Agreements”**

\textsuperscript{¶18} The previous section explained how various international agreement forms are concluded. This section discusses standards that are used in the creation of various types of international agreements, as well as legal responsibilities that ensue, depending on the form of agreement selected. Two interrelated questions arise: who makes the determination of which form of agreement to pursue? And are there rules that govern which form of an agreement must be used? For example, can an international treaty on human rights be concluded as a congressional-executive agreement, or must it be concluded as an Article II treaty?

\textsuperscript{¶19} The answers to these questions require a complicated inquiry into how international law is made in the United States. “Treaties and congressional-executive agreements are not used as perfect substitutes for one another, as interchangeability advocates would have it. Yet neither do the two instruments of international lawmaking have well-defined, exclusive, and defensible areas of authority.”\textsuperscript{43} Professor Oona Hathaway answers the question of when agreements are concluded and in which form by demonstrating that the agreement form appears not to be driven by content but by politics.\textsuperscript{44} Although historical evidence supports her claim, there is nonetheless some guidance on agreement formation in a State Department

\begin{itemize}
  \item \textsuperscript{40} Id. at 14 (“[T]he text is not legally binding, but it includes significant undertakings, and states have already made significant progress in fulfilling their pledges and improving nuclear security.”). The Arctic Council is even more interesting as it is layered on top of a legal backdrop of the Law of the Sea Convention, and the customary international law it reflects, which answer important questions about sovereign rights and jurisdiction in the Arctic. Now notice that the Council is not a formal international organization; it was not set up by an international agreement, and the majority of its work is not legally binding.
  \item \textsuperscript{Id.}
  \item \textsuperscript{41} Hollis & Newcomer, *supra* note 15, at 529.
  \item \textsuperscript{42} Joint Comprehensive Plan of Action (July 14, 2015), https://assets.documentcloud.org/documents/2165399/full-text-of-the-iran-nuclear-deal.pdf [https://perma.cc/DS38-EFFF].
  \item \textsuperscript{43} Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 Yale L.J. 1236, 1248 (2008). The concept of “interchangeability” refers to the question of whether Article II treaties and congressional-executive agreements occupy separate spheres in international agreement making, or whether they can be used as substitutes for one another. See id. at 1244–48.
  \item \textsuperscript{44} Id. at 1249 (arguing that “the decision to pursue an agreement through one or the other of the two major international lawmaking processes is driven principally by historical happenstance and political considerations”).
\end{itemize}
document known better as Circular 175. There is also an applicable federal law known as the Case Act; the law does not govern the form of the agreements, but instead requires that international agreements that were not concluded pursuant to the Treaty Clause be reported to Congress. This section of the article is intended to help the reader understand the extent of the legal requirements that the executive branch is bound to follow.

Circular 175

¶20 The Department of State makes the decision to conclude an international agreement as a treaty or as one of the other agreement forms. This decision is guided, in part, by an internal document known as Circular 175, which was created to ensure that “the making of treaties and other international agreements for the United States is carried out within constitutional and other appropriate limits.” The primary objective of the Circular is to differentiate between executive and congressional powers in the formation and conclusion of international agreements. The Circular also provides guidance on constitutional requirements that follow from the pursuit of one agreement form over another.

¶21 The Circular outlines eight factors to consider when selecting the agreement form:

1. The extent to which the agreement involves commitments or risks affecting the nation as a whole;
2. Whether the agreement is intended to affect state laws;
3. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;
4. Past U.S. practice as to similar agreements;
5. The preference of Congress as to a particular type of agreement;
6. The degree of formality desired for an agreement;
7. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and
8. The general international practice as to similar agreements.

¶22 Although the criteria may appear determinative at first glance, Hathaway argues that only the fourth and fifth factors “have any significant bearing on the choice between the Article II and congressional-executive agreements processes”: the fourth because past practices become entrenched in U.S. policymaking, and the fifth because the executive branch is likely to be influenced by congressional preferences.

47. Circular 175 Procedure, supra note 45.
48. Id. “Circular 175 clearly originates as an administrative internal document, with the purpose of having appropriate persons authorizing various documents and negotiations. It outlines procedures for transmission and the preparation of copies for certification.” Harrington, supra note 9, at 1242 n.147.
49. 11 FOREIGN AFF. MANUAL, supra note 45, at 723.3.
Limited Reporting Requirements of the Case Act

¶23 Circular 175 also provides guidance on compliance with the Case-Zablocki Act (the Case Act).51 The Case Act, a reporting requirement for international agreements, was inspired by the difficulty of tracking congressional-executive agreements.52 The Act was not created to wrest foreign affairs away from the President, but to notify Congress of international agreements that are not concluded pursuant to Article II.53 It requires the Secretary of State to transmit the text of any international agreement to Congress within sixty days after the agreement has entered into force.54 Agreements reported under the Case Act are public unless, in the opinion of the President, their disclosure would be harmful to national security.55

¶24 Critically, the Case Act does not require the Executive to publish the authority for the agreement. As a consequence, despite the internal decision-making process governed by Circular 175, it is nearly impossible for the researcher to discover whether the Executive exceeded his statutory authority for any given agreement. In fact, it can be a challenge to determine whether the agreement had statutory authority at all. Thus, when the Obama administration claimed it had the authority to put the ACTA into effect without congressional approval, it implicitly relied on either its sole executive authority in the Constitution or on an unspecified preexisting enabling statute.56 However, the executive branch did not produce “any extensive, publicly available explanation of why it considers that the President can constitutionally ratify the ACTA as a sole executive agreement.”57 The lack of transparency in this instance forces the public to speculate as to what authority might exist. The executive branch could not have relied on sole executive authority, given that so much of the ACTA provides regulations for each negotiating state, and nothing in the Constitution provides that the President can implement regulations without congressional authority.58 The President might have relied on an act such as the Trade Promotion Authority, had the terms of that particular act not expired in 2007.59 The statute that the President ultimately pointed to instead, the Trade Act of 1974, does not grant the Executive the authority to bind the United States without congressional approval.60 It is therefore entirely likely that the United States made an outward-facing commitment to other nations, binding the United States

51. Circular 175 Procedure, supra note 45.
52. See Executive Agreements, 28 CONG. Q. ALMANAC 619, 619–21 (1972) (discussing the Case Act and its purposes).
53. S. REP. NO. 92-591, at 3 (1972) (“The bill does not undertake to resolve fundamental questions relating to the treaty power of the Senate and the frequently countervailing claim—or simple use—of executive authority to enter into binding agreements with foreign countries without the consent of Congress. S. 596 undertakes only to deal with the prior, simpler, but nonetheless crucial question of secrecy.”).
55. Id.
56. See ACTA: Meeting U.S. Objectives, supra note 5.
58. “[T]he majority of ACTA consists of specific provisions on intellectual property remedies and enforcement procedures to which the legislation of each country must adhere. This cannot be justified as an implementation of mere executive power.” Flynn, supra note 6, at 917–18.
60. Flynn, supra note 6, at 922 (arguing that the “Trade Act of 1974 does not itself delegate power to the President to bind the United States to trade agreements absent congressional consent”).
under international law, even though the President did not have Congress’s permission to ratify or conclude this agreement on his own. Extending this point a bit further, the Executive may have committed to a number of legally binding international agreements without constitutional or congressional authority, but the authorization statutes were never fully investigated.

¶25 Finally, the Case Act has another limitation: it applies only to binding international agreements. Congress has no input on that determination, which is made solely by the Office of Treaty Affairs at the U.S. Department of State.61 The guidelines for determining whether an agreement requires reporting have been codified and appear in the Code of Federal Regulations. The gist of these guidelines is: (1) the parties to an agreement must intend to be bound under international law, (2) the agreement must be of international significance and not deal with trivial matters, (3) the obligations undertaken must be clearly specified and be objectively enforceable, (4) the agreement must have two or more parties, and (5) the agreement will preferably use a customary form.62 Of the aforementioned criteria, intent is the question on which most of the analysis will turn. States may indicate their intention not to be legally bound by expressly writing that into the agreement or by disclaiming any intention to create a legally binding instrument.63 The following sentence, which appears in the text of an agreement between the United States and Cambodia, illustrates this type of language: “Nothing in the document imposes, or should be constructed to impose, any legal or financial obligations on either State.”64

¶26 Political commitments are the only class of agreements that evade the requirements of the Case Act. It is the responsibility of the State Department, pursuant to the standards and effects of Circular 175, to determine which international agreement form to pursue. Each form may have a particular strength or weakness given the aims of the administration. An administration interested in flexibility might pursue a non–legally binding agreement, while one interested in demonstrating the agreement’s legitimacy might wish for approval from both branches of Congress. The purpose of this section was to draw the reader’s attentions to the standards and requirements that go into the selection process.

Finding “Other” International Agreements

¶27 This section describes where to locate the text of an agreement and how to find its authorization. This article excludes discussion of treaties concluded

61. 22 C.F.R. § 181.3 (2015) (“Whether any undertaking, document, or set of documents constitutes or would constitute an international agreement within the meaning of the Act or of 1 U.S.C. 112a shall be determined by the Legal Adviser of the Department of State, a Deputy Legal Adviser, or in most cases the Assistant Legal Adviser for Treaty Affairs. Such determinations shall be made either on a case-by-case basis, or on periodic consultation, as appropriate”).

62. Id. § 181.2.

63. Hollis and Newcomer compare the language in the NATO-Russia Founding Act’s preamble, “political commitments,” to the preamble to the 1987 Stockholm Disarmament Declaration, which describes the agreement as “politically binding.” Hollis & Newcomer, supra note 15, at 523–24.

pursuant to the Treaty Clause because a wealth of professional literature currently exists.\textsuperscript{65} This article attempts not to replicate that work, but to complement it by focusing exclusively on the “other” international agreements.

\textsuperscript{28} It is important first to explain what someone will need to locate when researching the other agreement forms. Ex post congressional-executive agreements will require the identification of enabling statutes, whereas ex ante congressional-executive agreements will require the identification of preexisting authorization. Sole executive agreements, because they rely on the President’s constitutional authority, will not have any authorization acts, nor will they have any enabling statutes. Political commitments will be particularly problematic to retrieve: not only will researchers not find text authorizing the agreement, but they will also have trouble retrieving the text of the agreements themselves because they are not required to be reported.

\textsuperscript{29} Nonclassified congressional-executive agreements should be printed in \textit{Treaties and Other International Acts Series}.\textsuperscript{66} If the text cannot be found there, a researcher can submit an inquiry to the Office of the Assistant Legal Adviser for Treaty Affairs to receive a copy of the missing text.\textsuperscript{67} Previously, the U.S. Department of State sponsored a website that listed all of the international agreements that were reported to Congress under the Case Act.\textsuperscript{68} At the time of this article, one can still retrieve international agreements from 2006 to 2013, but the page is no longer being updated.\textsuperscript{69} Researchers are instead advised to consult the \textit{T.I.A.S.} page, where they can find agreements from 1996 to present.\textsuperscript{70}

\textbf{Ex Post Congressional-Executive Agreements and Their Approval Acts}

\textsuperscript{30} As one might imagine, locating an ex post congressional-executive agreement is not as simple as locating an Article II treaty.\textsuperscript{71} An international agreement that is submitted for approval simply receives a bill number from one of the two chambers of Congress. As with all domestic legislation, numerous bills can be introduced that eventually do not become law. To take one example, Congress approved the United States–Peru Trade Promotion Agreement as an ex post congressional-executive agreement.\textsuperscript{72} Senator Max Baucus introduced the bill that would approve


\textsuperscript{66} \textit{Treaties and Other International Acts Series} (T.I.A.S.) (1946–present).

\textsuperscript{67} 11 \textit{Foreign Aff. Manual}, supra note 45, at 725.3 (“Unclassified international agreements that have entered into force generally will be released upon request.”).


\textsuperscript{69} Id.


\textsuperscript{71} The President formally submits treaties to the Senate; they are considered by the Committee on Foreign Relations and receive a Senate Treaty Document number, which enables researchers to track progress and identify Senate reports that consider the treaty. Greater specificity can be found in Surrency, supra note 8, at 346.

the agreement in the Senate, but it was Representative Steny Hoyer’s bill that eventually became Public Law No. 110-138.

§31 One can find enabling statutes by simply searching for the agreement names in the Statutes at Large, which is how I identified the United States–Peru Trade Promotion Agreement. The Statutes at Large are arranged chronologically and are therefore permanently archived. If a researcher were to search the U.S. Code directly for the title of an agreement, he or she would not be able to locate any enabling statute in the U.S. Code if the provision had been amended or rescinded. Using NAFTA as another example, one can easily find the enabling statute by searching the Statutes at Large for “North American Free Trade Agreement.” Section 101 of Public Law No. 103-182 provides that

the Congress approves—(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and (2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.

§32 Both of these examples use the name of the agreement in the authorization act, which means they are relatively easy to locate in the Statutes at Large. This might not always be the case, particularly when the researcher needs to locate not just enabling statutes but also further implementing legislation. Implementing legislation need not name the agreement to give it legal efficacy: what matters is not the title of the legislation but a subjective inquiry into whether the language in the act provides authority for executive action without further congressional oversight. Before venturing into the world of researching ex post congressional-executive agreements authorization acts, consult the 2008 article Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States. In that article, Oona Hathaway conducted the most comprehensive search of ex post congressional-executive agreements, finding agreements on fisheries, trade, atomic energy, investment, education,

75. Certain classes of agreements, like bilateral trade agreements and repatriation agreements, tend to have sunset provisions. See infra ¶ 40 for an example of a sunset provision in the repatriation agreement with Vietnam.
77. North American Free Trade Agreement Implementation Act § 101. Interestingly, the text also imposes conditions on the President during its approval. See id. § 101(b). One benefit of the ex post model, in contrast to the ex ante model described infra, is that Congress retains the ability to approve the agreement with oversight or with conditions.
78. Implementing legislation is a concept beyond the scope of this article, but refers to domestic law created to give an international agreement domestic effect. “Under U.S. law, the advice and consent of the Senate is not enough to create domestic obligations for treaties; the treaty must be categorized as either self-executing or not.” Harrington, supra note 9, at 1218. One of the most comprehensive discussions of implementing legislation and self-executing treaties can be found in Carlos Manuel Vázquez, The Four Doctrines of Self-Executing Treaties, 89 AM. J. INT’L L. 695 (1995).
and the environment, to name a few. This list should be a first stop on every investigation into enabling acts, in case the legislation has already been found.

**Sole Executive Agreements**

¶33 Ostensibly, it should be simple to locate sole executive agreements. The indexes that are available for treaties can also be used to locate executive agreements. Executive agreements receive a T.I.A.S. designation and are cumulatively published in the *Treaties and Other International Acts Series*, which has been in existence since 1946. If a President entered into a sole executive agreement between 1929 and 1945, the text can be located in the *Executive Agreement Series*. Previously, the agreements could have been found in the *Treaty Series*, which began publication in 1908. Executive agreements that predate the publication of the *Treaty Series* are more challenging to locate, but the most comprehensive modern collection of international agreements can be found in *Treaties and Other International Agreements of the United States of America 1776–1949*, popularly referred to as Bevans.

¶34 As the text of this article makes clear, the President rarely provides the public with the authorization for an executive agreement. If the State Department believes the President has the authority to conclude a given agreement pursuant to the Commander-in-Chief power, there will be no authorizing statute or implementing legislation to seek. Consequently, one must carefully read the text of an agreement to verify whether the content exceeds the President’s constitutional authority.

¶35 Earlier this article discussed the reaction to the executive branch’s claims that it has the authority to sign and implement the ACTA. The United States has behaved similarly with regard to Minamata Convention, releasing no statutory or constitutional authority for executive action, forcing the public to speculate on what the authority might be. Once again, there cannot be sole constitutional authority for the agreement because the Minamata Convention provides, in part, that “[e]ach Party shall not allow, by taking appropriate measures, the manufacture, import or export of mercury-added products listed in Part I of Annex A.” This article of the Convention clearly implicates the Commerce Clause, which gives Congress the power “to regulate commerce with foreign nations, and among the

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80. *Id.* Hathaway details the difficulty in exhaustively searching for these agreements: “Though as far as I am aware this is the most comprehensive listing of ex post congressional-executive agreements during this period, it is almost certainly true that this list misses several congressional-executive agreements.” *Id.* at 1256 n.49.


86. See sources cited *supra* note 5.

several states, and with the Indian tribes.”88 Because congressional authority is required, there must be some traceable congressional approval that permits the Executive to act. Otherwise, the President will have exceeded his constitutional authority.

**Authorizations for Ex Ante Congressional-Executive Agreements**

¶36 Although the President did not have the ability to ratify the Minamata Convention under his sole executive powers, he might have ratified it pursuant to a preauthorization act. Again, the Case Act does not require the executive branch to publish the authorization, but the State Department’s press release indicates that there is authority in place:

The Minamata Convention represents a global step forward to reduce exposure to mercury, a toxic chemical with significant health effects on the brain and nervous system. The United States has already taken significant steps to reduce the amount of mercury we generate and release to the environment, and can implement Convention obligations under existing legislative and regulatory authority. The Minamata Convention complements domestic measures by addressing the transnational nature of the problem.89

¶37 The researcher must next both identify an enabling statute and verify that the text gives the executive branch the authority it claims. The most recent public law on the topic of mercury is the Mercury Export Ban Act of 2008.90 According to the Act, “the long-term solution to mercury pollution is to minimize global mercury,”91 which might be the authorization to which the State Department refers, but that language does not explicitly grant the Executive the authority to participate in a legally binding international regime without further congressional approval. The Executive’s action in depositing the instrument of acceptance is troubling because it binds the United States under international law, even though the executive branch likely does not have the authority to do so.

¶38 At this point, there is nothing one can do other than hope to find another possible enabling statute. The Act that the State Department believes authorizes the Minamata Convention might not even contain the word “mercury” at all. Perhaps it refers instead to “toxic substances,” and one would need to return to the Statutes at Large to investigate. As one might glean, identifying preexisting authority will be fraught with guesswork. Furthermore, the executive branch’s willingness to test the limits of its authority means it may read a statute more permissively than the public would.

¶39 Nonetheless, using this method in 2008, Hathaway located authorizing legislation for nearly every subject matter imaginable.92 For example, to locate authorization acts for agreements on agriculture, she and her assistants searched the entire

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88. U.S. Const. art. I, § 8, cl. 3.
89. Press Release, supra note 3.
91. Id.
92. Hathaway, supra note 43, at 1260 (finding authorization acts for subjects from agriculture to space cooperation).
Statutes at Large for “agricultural commodities” or “agriculture” in the same sentence as “agreement.” They identified 167 executive agreements on agriculture, most of which were negotiated pursuant to authority in the Agricultural Trade Development and Assistance Act of 1954. Table X–3 of the Congressional Research Service’s report on international agreements also provides a nonexhaustive list of statutory requirements, including whether approval is required for an agreement to enter into force. These would both be excellent places to begin research.

Political Commitments

¶40 This article was inspired by a series of requests for repatriation agreements, which were difficult to locate because I assumed they were being concluded as legally binding agreements. The first repatriation agreement I was able to locate was, in fact, a bilateral congressional-executive repatriation agreement with Vietnam. Others, however, were not being concluded that way, nor were they concluded as Article II treaties. Exact numbers for repatriation agreements were therefore difficult to locate—the political commitment I identified with Cambodia evaded publication in the Treaties and Other International Acts Series, and it does not appear on the U.S. Department of State’s website, which had previously provided texts of international agreements reported to Congress under the Case Act.

¶41 As discussed in paragraphs 23 to 25, the Case Act does not apply to nonlegally binding international agreements, and therefore they are not reported to Congress. Consequently, without the executive branch’s own willingness to publish them, no formal and publicly accessible documentation will be made available, either on the establishment of these agreements or on the actions or decisions made during negotiations with foreign states. Texts either cannot be found or are located on unreliable hosts. Some, such as the Iran Nuclear Deal, relate so strongly to public interest that they are leaked or posted by reputable news sources. Some may appear on websites of foreign government ministries.

¶42 Kavass’s Guide to the United States Treaties in Force does publish an annual list of nonbinding international agreements in part of its collection. Many of the agreements in Kavass were previously published in locations such as International Legal Materials and American Foreign Policy Current Documents, which meant they

93. Id. at 1259 n.52.
94. Pub. L. No. 83–480, §§ 101–109, 68 Stat. 454, 455–57 (1954); see also id. § 101 (providing the President “authoriz[ation] to negotiate and carry out agreements with friendly nations or organizations of friendly nations to provide for the sale of surplus agricultural commodities for foreign currencies”); Hathaway, supra note 43, at 1268 n.76.
96. The evolution of political agreements, and their effects on legal rights and obligations, is more thoroughly explored in Harrington, supra note 9, at 1224–26.
98. U.S.–Cambodia Memorandum, supra note 64. The State Department site is no longer being updated: Reporting International Agreements to Congress Under Case Act, supra note 68.
99. See, e.g., Reporting International Agreements to Congress Under Case Act, supra note 68.
were already publicly available. There are few post-1990 agreements listed in Kavass, however. The latest agreements, as of the 2013 Guide, dated from 1997, including the Joint Statement on Parameters on Future Reductions in Nuclear Forces with the Russian Federation and the Joint Declaration on Security for the 21st Century with Japan, both of which were separately published in International Legal Materials.102

Conclusion

¶43 While many researchers are familiar with the treaty-making process in the United States, treaties concluded pursuant to Article II comprise only a very small percentage of the international agreements that the United States enters. Far more common are sole executive agreements, ex post congressional-executive agreements, and ex ante congressional-executive agreements. Finding documentation for these agreements is more challenging because it is more complicated to track the authorization than the agreement. However, events from the past two years, including the reaction to the Minamata Convention and the ATCA, have shown us that Congress and the public are interested in what the executive branch is doing and in finding the authority for these agreements.

¶44 Political commitments are even more difficult to locate because they currently operate solely within the province of the Executive. Unlike treaties and congressional-executive agreements, which require consultation and agreement by at least one party of Congress, political commitments are negotiated, concluded, and observed without any congressional participation. And unlike sole executive agreements, the authority for which is ostensibly grounded in the text of the Constitution, there is no such authority for the Executive to conclude political agreements, much less authority to conclude these agreements solely on its own volition. The result is that without congressional action or public outcry, many of these agreements will remain murky or secret.

¶45 The distinction among the forms is crucial because the legal authorization (whether an act of Congress or the Constitution) hinges on the form of the instrument. The authorization might take the shape of a statute passed prior to the agreement, a statute passed after the agreement, or an Article II provision in the Constitution. There may not need to be legal authority for the agreement at all, provided that the language in the text of the agreement imposes no legal obligation on the United States under international law. It is important therefore to closely read the text of the agreement and to have a broad understanding of how international agreements are concluded in the United States.


Wilhelmina Randtke** and Stacy Fowler***

Rising prices for print legal materials have caused an accelerated shift to acquisitions exclusively in electronic format. This study reports results of a survey of U.S. law libraries regarding indexing of electronic materials, including cataloging practices and other ways of making electronic materials available to and discoverable by patrons.
Introduction

¶1 For the past five years, steadily and steeply rising prices for print materials have met steadily and often steeply shrinking law library budgets. Meanwhile, prices for electronic materials have been relatively flat. This phenomenon has caused speculation that print law books are rapidly “going the way of the Walkman, Betamax players and 35-millimeter cameras.”1 A review of current literature, however, shows that many believe a nearly complete switch from print to electronic is still quite a way off, and a hybrid environment is something all law libraries are likely to be dealing with for quite some time to come.

Literature Review

¶2 Understanding the shift from print to digital requires having a clear picture of print materials pricing, electronic materials pricing, and law library budgets. Historically, two reliable sources have compiled print and electronic pricing: Svengalis’s Legal Information Buyer’s Guide and Reference Manual and the American Association of Law Libraries (AALL) Price Index for Legal Publications.2 The Price Index for Legal Publications tracks the average price of the same fourteen court reporters starting in 1998 and up through present, with a gap from 2005 to 2009 when the methodology was different. According to this report, annual costs for an average court reporter rose significantly, as illustrated in table 1 and figure 1.

¶3 Meanwhile, law library budgets have not experienced such sharp increases. In 2009, the AALL conducted an Economic Outlook Survey that asked about budget and personnel levels at law libraries across the country. More than 400 law libraries responded. At that time, about seventy-three percent of private law libraries had experienced recent budgets cuts, with about twenty-five percent of responding private law libraries experiencing budget cuts of fifteen percent or greater.3 While comprehensive information about law library budgets over time is not available, a sustained annual increase matching the documented eighteen percent annual increase that has occurred over the past fifteen years in print pricing certainly would have attracted some press. In reality, law library budgets have likely remained flat or decreased over this time period.

Table 1

Annual Costs for Court Reporters over Time

<table>
<thead>
<tr>
<th>Year</th>
<th>Annual Cost</th>
</tr>
</thead>
<tbody>
<tr>
<td>1998</td>
<td>$856.21</td>
</tr>
<tr>
<td>1999</td>
<td>$979.93</td>
</tr>
<tr>
<td>2000</td>
<td>$1,143.64</td>
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<tr>
<td>2001</td>
<td>$1,603.02</td>
</tr>
<tr>
<td>2002</td>
<td>$1,764.21</td>
</tr>
<tr>
<td>2003</td>
<td>$1,953.00</td>
</tr>
<tr>
<td>2004</td>
<td>$1,953.00</td>
</tr>
<tr>
<td>2010</td>
<td>$4,192.07</td>
</tr>
<tr>
<td>2011</td>
<td>$5,140.36</td>
</tr>
<tr>
<td>2012</td>
<td>$7,186.19</td>
</tr>
<tr>
<td>2013</td>
<td>$7,574.07</td>
</tr>
<tr>
<td>2014</td>
<td>$9,121.18</td>
</tr>
</tbody>
</table>

Figure 1

Court Reporter Prices over Time
In recent years, both the legal market and legal education have contracted. Since 2010, law school applications have dropped. The LSAC, which administers the LSAT, a standardized test required for law school admission, reports historical information about how many prospective law school students have taken the exam. This information indicates a drop in test takers, hence a drop in prospective law students for each year since the 2009–2010 cycle. Law school enrollment in the United States has also fallen during this time. Nationally there was a drop of 17.5% from 2010 to 2014, following several years of increases. This drop affects law school budgets and hence affects academic law library budgets.

Following decades of growth, there is also a general contraction in the legal market that began around 2007 or 2008. These economic impacts on academic and firm markets have directly impacted law library budgets. Although the current budget crunch follows a long period of boom, print prices continued to rise dramatically as the economy slowed and contracted. A survey covering academic law libraries from the five-year period just before the recession reported budget increases averaging twenty percent over that period, but forty percent of responding libraries also reported cuts to acquisitions due to pricing issues. In general, these cuts were to print resources, showing that cancellations of print had already begun at that time.

The literature supports print pricing as a driving factor for the cancellation of print materials. Yale and Cornell both canceled almost all regional reporters by 2012, primarily in response to steep price increases. Additionally, an informal survey on print cancellations circulated in June 2012 on the Law Library Directors listserv indicated widespread cancellations of print case reporters, digests, and codes when that same information was available in stable digital formats.

Over this same time period, electronic materials pricing rose at a much slower rate. Since 2010, the AALL has tracked electronic format pricing in its Price Index for Legal Publications. This tracks access to a specific set of loose-leaf services, newsletters, and periodicals in electronic form. From 2010 to 2013, pricing for this

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10. Id.
set of resources in electronic form actually decreased by 10.19%. Information from this study is not as detailed or comprehensive as for print, however, and it shows the lowest price when an electronic source is available through multiple vendors. It is also perhaps not the best way to measure electronic pricing since electronic resources are almost always purchased in bundles. When several resources are bundled in a large database, pricing for that database over time is more important than average price for a sample of individual titles as stand-alone electronic purchases. Electronic pricing may also vary for the same resource, based on what permissions are allowed for that resource. For example, a book can be loaned from one law firm employee to another, but an e-mail newsletter may have restrictions on forwarding or sharing. For a library that is open to the public but serves a specific closed community, such as law students at a university or judges and staff at a courthouse, public access may come with a significant surcharge. Nevertheless, available information on electronic legal materials indicates flat pricing from year to year. Other reasons for discontinuing print in favor of electronic include ease of access, ease of ingesting into a collection, space concerns, and regulatory requirements, such as accreditation standards, which require a resource be kept.

Indexing Costs and Ease: A Driving Concern for Electronic Resources

¶8 The library catalog was invented to hold information about books and allow users to locate physical copies of specific books. For print books, the catalog and stacks are a proven method of providing discovery and access. Cataloging print books is a mature system; any physical book can be ingested into a catalog and library, and the process is smooth and proven. The catalog provides discovery and the shelves provide access, working as a one-size-fits-all approach for any print collection.

¶9 In contrast, there is no universal approach for access to electronic materials. Databases have different ways to authenticate users, terms of use are different for different resources and may change over time, and online locations of resources can change with no control by or notice to the library. Pricing models range from an all-you-can-read model to a cost per checkout, and all must be managed to prevent libraries from going over budget. Often, catalog records can be loaded without


purchase, and parameters are set up by which specific activities will trigger a purchase of the full e-book.\textsuperscript{16} Volatile pricing can also mean a large set of resources will disappear all at once if a database becomes too costly for the library’s budget. This is in stark contrast to print collections, where a price hike may prohibit new purchases, but access to material already in the collection will not be removed.

¶10 In theory, the catalog can reliably provide comprehensive discovery of electronic resources, but if access cannot be guaranteed, then the process of getting to the resource cannot be completed. Concerns with access have motivated a variety of indexing procedures for electronic materials, and there is no consensus as to whether everything can or should go in the catalog. Instead, libraries may use a catalog, an e-journal locator, an online pathfinder, or some other tool to provide indexing information for electronic resources. Electronic resources have not been around long enough to develop a comprehensive and robust system for handling them. The special concerns for electronic resources that do not affect print are a relatively recent phenomenon, and there is not yet a reliable system for handling all electronic materials together in one unified collection. Hence the library catalog is a comprehensive inventory of print holdings but is unlikely to comprehensively cover electronic resources.

¶11 A 2002 survey on electronic resources cataloging in large academic research libraries identified these top reasons for not cataloging resources: insufficient staff time, the questioned value of cataloging electronic materials, and a preference for providing access through different means, such as a website.\textsuperscript{17} In response to an open-ended question on workflows for electronic journal titles, survey respondents reported problems specific to electronic resources, which included link rot, difficulty determining exactly what titles were included in a database at any given time, lack of communication with vendors, and concerns over ownership of materials.\textsuperscript{18} A 2007 survey of libraries generally found sixteen percent of respondents did not catalog electronic journals.\textsuperscript{19} Reasons cited included difficulties establishing a workflow, insufficient staff time, and compliance with cataloging standards.\textsuperscript{20} A 2011 survey on cataloging electronic journals noted that the workload for cataloging electronic materials far exceeds that of cataloging print.\textsuperscript{21} Difficulties also noted in cataloging electronic journals included record maintenance when links break.\textsuperscript{22}

¶12 Bundled pricing and indexing through third parties is also a possible natural trend for electronic materials. Search of electronic resources is fundamentally different from search of print resources. Physical constraints mean print books will be similar and recognizable whether bound volumes or loose-leafs. But for electronic materials, those constraints don’t exist. Electronic treatises don’t have

\textsuperscript{16} A good discussion of a trigger arrangement is available in Erin Gallagher, Edward Hart & Sarah Pearson, \textit{Two Florida Law Schools—One E-Book Collection}, CRIV SHEET, May 2012, at 5.
\textsuperscript{18} \textit{Id}.
\textsuperscript{19} Abigail C. Bordeaux, \textit{Single, Separate, or Something in Between: Results of a Survey on Representing Electronic Serials in the Catalog}, 7 J. INTERNET CATALOGING 37 (2007).
\textsuperscript{20} \textit{Id}.
\textsuperscript{22} \textit{Id}.
the size and organizational constraints of other books and could be reenvisioned as anything. For example, annotation tools, collaboration tools, and the ability to search across many treatises at once have already emerged as new traits of e-books.\(^{23}\) MARC was never designed for full-text search. Collaboration tools that work across electronic resources and full-text searching across sources have to be provided outside the catalog, and the importance of these features shifts emphasis away from the catalog.

¶13 When many treatises are bundled together in a database, MARC records can often be purchased as a package and batch-loaded. However, the trend is for third-party vendors to supply these, and, in fact, the availability of these began with pressure from law libraries. The vendor Cassidy Cataloguing created MARC records for Westlaw and LexisNexis treatises in response to a request by Rutgers University Law Library and Charleston School of Law, which was joined by several other law schools.\(^{24}\) So a purchase of MARC records is an additional cost on top of purchase of the database.\(^{25}\) It is important to note that the two dominant vendors in the legal market, Westlaw and LexisNexis, were not supportive of federated search. As of 2008, neither Westlaw nor LexisNexis provided indexing information to tools such as Serials Solutions, MetaLib, and WebFeat.\(^{26}\) In 2015, LexisNexis provided this information, but Westlaw still does not. Neither LexisNexis nor Westlaw currently markets MARC records, even for an additional fee. Third-party vendors for records pool the costs of cataloging and so are cheaper than individual libraries maintaining links; however, for many fields of study, the dominant vendors do provide indexing information that can be automatically loaded into federated search or a catalog.

¶14 Furthermore, studies on indexing of electronic materials may not look at the catalog at all. A 2010 study investigating whether open access law journals were indexed in library collections looked at whether specific resources were indexed in H.W. Wilson’s *Index to Legal Periodicals and Books* (ILP), Gale’s *Current Law Index* (CLI) (also known as LegalTrac), University of Washington School of Law’s *Current Index to Legal Periodicals* (CILP), and the AALL’s *Index to Foreign Legal Periodicals* (IFLP).\(^{27}\) All these are themselves databases or tools, which assist in discovery of journal articles but do not necessarily provide access to full-text articles. Library cataloging practices were not considered.\(^{28}\) Instead, it was assumed that discovery of these open access materials, if discovery came through a law library, would come in the form of a third-party database not maintained by the law library.

¶15 Just as pricing differs for print and electronic materials, costs for indexing also differ. Indexing a print book has a predictable cost in cataloging and handling


\(^{28}\) Id.
time, but indexing an electronic resource has a widely variable cost based on what indexing information, if any, is available and whether that indexing information can be ingested automatically into any existing search tool. For electronic material, the cost to process a collection or item is purely in the realm of technical services, and a technical services background is required to understand the issues thoroughly. Likewise, it may not be possible to include an electronic resource in a law library’s search tools: for example, if indexing information cannot be ingested easily or is not available, and staff are not available to manually maintain it. This is the aspect of collection development that this study seeks to address: how are law libraries enabling patrons to search and discover electronic materials?

¶16 Ease with which a resource can be ingested into a law library’s collection is a concern. Continuing resources from West Publishing have risen most steeply of all print materials.29 For more reasonably priced materials like law journals, costs of staff time to handle and index print copies that duplicate readily available online content was a driving consideration at Yale and Cornell.30 It is worth noting that the two dominant databases, Westlaw and LexisNexis, both include law journal coverage since the early 1990s in academic accounts,31 and both are often starting points for law students engaged in legal research. Older articles are readily available through HeinOnline’s Law Journal Library,32 and HeinOnline makes coverage information available to dominant federated search products like Serials Solutions, MetaLib, and EBSCO Integrated Search at no additional charge.33 Not only do academic law libraries have electronic copies of these items, they also have an easy and nearly automatic way to enable access with very little additional staff time. If students were not already in LexisNexis and Westlaw, or if indexing information were not available in a form that was interoperable with an e-journal locator or discovery tool, then costs of processing the electronic material would rise significantly. If indexing information were available through a third-party vendor, pricing for access would be higher. So the driving factor in the decision to cancel some print duplicates of electronic content was staff time, which is heavily impacted by what indexing information is available for electronic databases and how much that information costs. Significantly, the Yale and Cornell librarians who published on print cancellations did not mention indexing costs for electronic, even though cost was a driving factor for some cancellation decisions.

Methodology

¶17 This study began with the assumption that large-scale print cancellations have already taken place across U.S. law libraries and that digital resources are already heavily in use. This study was not concerned with the scope of adoption of

29. AM. ASS’N OF LAW LIBRARIES, supra note 11, at 6. Court reporters in print are almost all published by West, and the prices of these went up more than any other category of resource measured in the price index, almost doubling in price.
30. Aiken, Cadmus & Shapiro, supra note 9, at 15.
32. Id.
electronic resources, the scope of print cancellation, or the rate of adoption of electronic resources generally. Instead, this study concerns how electronic resources, once adopted, are made available and the thought processes driving library acquisitions.

¶18 This study was designed as an exploratory sampling into cataloging practices and ways to reveal the resources to library patrons. Information was gathered using a structured interview. The interview consisted of a series of general questions about the type of law library and whether it shared catalogs or other electronic resource tools with any other libraries. This was followed by a section of questions about how various listed types of electronic materials were made discoverable. Finally, interviewees were given the opportunity to speak about specific successes and challenges they had had with electronic resources.

¶19 Requests for participants were distributed through AALL’s online forums and by directly contacting librarians in the Southeastern Chapter, American Association of Law Libraries (SEAALL) and the Southwestern Association of Law Libraries (SWALL). Interviews were conducted by phone with both investigators taking notes on each interview. Only persons from law libraries located in the United States were interviewed. In locating a contact within the law library, emphasis was placed on both technical services and collection development roles. For some libraries, two people at the library participated in a single interview to capture both the collection development and technical services aspects of electronic resource discovery.

Analysis of Results

Academic Law Library Interview Results

Technologies

¶20 Thirteen academic law libraries participated in interviews. Technologies in use for connecting patrons to electronic treatises included OCLC WorldCat catalog, Sierra catalog, Millennium catalog, OCLC’s discovery tool, AquaBrowser discovery tool, Serials Solutions for journal tracking, virtual private network (VPN) for remote access, EZproxy for remote access, WAM for remote access, and LibGuides for keeping a treatise or subject list. Notably, no open source tools were mentioned by participating libraries, so access is always through a vendor-supplied tool.

¶21 Two law libraries were using discovery tools. One used AquaBrowser, which is a light, low-cost discovery tool. The other used Summon, a more expensive, high-end tool. Despite the high cost of Summon, the library appreciated the discovery tool and value provided to patrons.

Budget Drives Collection Development

¶22 Almost universally, budget pressure has driven the switch to electronic materials in academic law libraries. What was most striking was the lack of a planned switch or sense of control in librarians we spoke with. The shift to electronic was entirely dictated by economics and vendors. During the 2014–2015 academic year when this survey was conducted, there was a drop in law school applications nationally, and the legal market was widely believed to be in a contraction period. All but one academic law library we spoke with mentioned budget cuts,
and for almost a third of respondents, there had been recent budget cuts of twenty percent or more. Only one academic law library had had a flat budget (and had even had an increase over the last ten years).

¶23 In academic law libraries, a standard core academic Westlaw package and a standard core academic LexisNexis package are available. All academic libraries we spoke with had both Westlaw and LexisNexis. These standard packages are priced based on full-time equivalent student body size and provide accounts to current law students, law faculty, and law staff only. A common trend we heard from academic law libraries was to check whether a resource was available in the academic Westlaw or LexisNexis accounts and, if so, to cancel the print. This is a newer strategy. Librarians spoke of looking at value and overlap in previous years, but now many were making across-the-board cuts of any print materials that were duplicated in electronic format and only keeping print subscriptions for a small set of core legal materials for the state in which the law library is located.

**Cataloging Trends**

¶24 Of the thirteen academic law libraries interviewed, seven were sharing a catalog with a main campus library. In all cases, the main campus library took the lead in maintaining the shared catalog and often selected the integrated library system (ILS) independent of law library input. In general, when a catalog platform is shared by libraries, it will allow search by library, so patrons can get results for law library holdings only. Several libraries mentioned that while this approach means there is less systems work at the law library level, there are also many catalog records that are not relevant to their patrons as those resources have nothing to do with law.

¶25 We specifically asked interview subjects about the dynamics of adding links to a shared catalog if the links point to resources licensed only for law. In all cases, this was not a problem. Catalog records with electronic resources licensed only for law student and faculty use were acceptable to other libraries sharing the catalog as long as the catalog record noted that the resource was for law only.

¶26 Of the six schools interviewed that were operating their catalogs independently, only one of these was a stand-alone law school. The others were attached to larger campuses, and often there was not a clear reason for keeping a separate catalog. For one law library annexed to a large university, having a smaller set of resources to provide a search that contains only relevant results was a factor. For two others, the fact that the school’s law campus was not physically located in the same place as the rest of the university may have been a factor.

**Indexing Practices for Treatises in Westlaw and LexisNexis**

¶27 Each academic law library we interviewed was doing something with treatises in Westlaw and LexisNexis, although the extent and method of their inclusion varied greatly. The same library might use multiple strategies to expose the treatises. The most popular ways of providing access to these are by adding links from a law library website or by purchasing vendor-supplied MARC records. Only one library had activated treatise listings in the A-to-Z journal lists. The vendor Serials Solutions now provides tracking information on treatises, and this had been activated and used with that library’s discovery tool.
Six libraries were using a website link list, LibGuide, or something similar to post links to treatises in Westlaw and LexisNexis. These web links tended to focus on frequently used resources or around specific legal topics, like a research guide on a particular area of law. No academic law libraries interviewed were using web links to comprehensively catalog these resources.

Five libraries purchased vendor-supplied MARC records. Two obtained records from Serials Solutions, and four obtained MARC records from Cassidy. Three libraries we spoke with used MARC records to index treatises in Westlaw and LexisNexis, but only for select resources that were requested or heavily used. One library comprehensively cataloged all treatises in LexisNexis, Westlaw, CCH, and Bloomberg Law, but did so manually rather than by purchasing MARC records from a vendor.

Problems noted with vendor-supplied records included quality control, maintenance issues in vendor-supplied records, and issues with Westlaw discontinuing resources. One library that was using Cassidy records for both LexisNexis and Westlaw treatises had all the links break with the rollover to Lexis Advance and WestlawNext. Even though the library had a maintenance plan with Cassidy for the MARC records, the links never changed to WestlawNext, which currently does not allow deep linking. So the records are still loaded and still under a maintenance contract, but they have no hyperlinks. To address this, the law library added a note stating that the treatise is available in WestlawNext and directing the user to ask a librarian for assistance.

An additional concern was that if a treatise were dropped by Westlaw, then there would be no easy way to monitor for removal. A catalog platform might not have an easy way to do a batch removal of records for withdrawn resources. This was mentioned by one library using MARC records and by one library not using MARC records for electronic resources but considering whether to add MARC records.

E-book packages in use in academic libraries included Lexis Digital Library through OverDrive, demand-driven acquisitions packages from YBP, West Study Aids package, Oxford e-book collection, and Cambridge e-book collection. Only a few of the academic law libraries we surveyed were purchasing e-book packages, but many had patron access to e-books because they shared a catalog with the main campus.

Both LexisNexis and Westlaw have e-book platforms. LexisNexis makes its treatises available through the OverDrive e-book platform as the Lexis Digital Library. Westlaw has created its own e-book platform, ProView. Only one academic law library we spoke with had looked at ProView, but it was not purchased. One academic law library we spoke with had purchased the Lexis Digital Library. Additionally, seven libraries had looked at the Lexis Digital Library but did not purchase it. Three libraries cited pricing as a barrier, one cited outdated content as a deterrent, and one cited too many restrictions on use of the material.

Additionally, we asked about West Study Aids. Two libraries had purchased this package and were very pleased with the amount of student use it generated.
The best feature of this subscription was that it allows concurrent users, so if a professor recommends a Nutshell book, all the students in the class can read it at the same time, which also takes pressure off the reference desk. Two additional libraries had looked at West Study Aids but had not purchased it; both cited cost as a reason not to buy.

Open Access Materials, Including Government Documents

¶35 Government documents were far more likely to be indexed comprehensively by law libraries. Only one law library was not doing anything with open access government documents. Two others weren’t doing anything because the libraries were annexed to large university systems that cataloged all electronic Federal Depository Library Program (FDLP) materials. Those two libraries didn’t have to do any cataloging because the MARC records were already in the catalog.

¶36 The most common ways of making these available were MARC records or website links. For libraries indexing government documents, the most common way to index these was to get MARC records from a vendor. All ten libraries that indexed electronic government documents used MARC records as one strategy for making these available. Four libraries selectively cataloged material. One of those used to purchase records from Serials Solutions but found the quality was not good enough. Two libraries were purchasing and loading Cassidy records, and the other four libraries were using Marcive records.

¶37 Open access materials other than government documents were less likely to be indexed by academic law libraries. Ten libraries were doing something to make open access materials available, but the extent of what they were doing was limited. Libraries may add only a few links from a website for open access materials but comprehensively index, catalog, and list government documents. The most common way open access materials are exposed to patrons is through linking from library websites or LibGuides, a strategy used by five libraries. In general, this is not a comprehensive strategy, and only a handful of materials are listed. Additionally, an e-journal locator or discovery tool may allow a library to pull in a listing of open access materials, such as materials in the Directory of Open Access Journals. Four law libraries were using this method to expose open access materials, and two others were annexed to main campus libraries that include some open access material in the e-journal locator.

Electronic Access Bundled with Print Purchase

¶38 Many publishers provide electronic access with a print purchase of a single copy of a book. This can be provided through an access code and installation of a single copy, through registration of an Internet protocol (IP) address range for access, or through a single-user online account.

¶39 When asked, most academic law libraries said that if it was possible to provide access by IP, then they registered an IP address and added a catalog record to allow access. However, when asked about specific resources, such as National Consumer Law Center publications which do allow IP range access complementary with a print purchase, often the person we interviewed was not aware that specific treatises could be set up this way. For example, a law librarian we interviewed learned that National Consumer Law Center materials could be configured by IP range only when we asked a follow-up question about these materials during the
Because the electronic access bundled with print works differently for different publishers and different treatises, it takes time and effort to individually examine each treatise. This is a barrier to knowing what can be configured for campus-wide access and what resources will have to be accessed by different means.

If only a single installation of an e-book or a single-user registration is available, most academic law libraries do not make the resource available. Six libraries were doing absolutely nothing with these single-user e-books. Four libraries had some variation of keeping all registration codes in a folder. For two of them, it was an actual folder; for the other two, it was a shared drive. One library was loading current awareness tools onto a single iPad kept in a waiting room, and one library was registering single-user e-books on a specific reference computer. Only one library was noting in the catalog record that electronic access may be available and to see a librarian; that librarian keeps a password list. As can be seen, no good strategy emerged for handling individual e-books tied to a single print purchase. Quotes on the topic included, “I just won’t go there” and “Nothing seems important enough to justify a new process.”

Public Access to the Law and Academic Law Libraries

Of the thirteen law libraries we interviewed, eleven were open to the public. The two libraries that were not open to the public were both housed within law schools that were established within the last ten years.

Of law libraries open to the public, about half noted public access when asked a general question about who uses the library. The other half did not mention the public when asked about users in general, but did talk about public patrons when asked specifically. The extent to which the public was considered in acquisitions decisions, and even whether public access existed at all, did not correlate with whether the law library was part of a publicly or privately owned school.

Because the academic Westlaw and LexisNexis accounts provide access only through individual logins issued to students, faculty, and staff, shifting to electronic materials means the bulk of material may not be available to the public. Other databases commonly subscribed to by law libraries, such as HeinOnline, focus on specialty practice areas or older material and are not comprehensive legal research platforms.

Westlaw and LexisNexis both offer patron access accounts, where for each account, a single computer in the building has access to the online platform with no individual logins. Only one of the academic law libraries open to the public had purchased this type of access and provided a Westlaw Patron Access terminal. Motivations for the terminal included providing access to the public as well as to local attorneys. In the interview, the general public was specifically named as a beneficiary of this resource. Notably, this law library was housed in a private law school. Additionally, one of the academic law libraries not open to the public also had a Westlaw Patron Access terminal and a Lexis Patron Access terminal. Motivation for these was to provide access for alumni.

An alternative way to provide access to core legal materials is to subscribe to LexisNexis Academic or to Westlaw Campus Research. These are general purpose databases geared toward campus-wide use for undergraduates. Licensing allows the public access from inside the building. These databases were not mentioned by
interview subjects but were not specifically asked about. In general, it is our belief that a law school housed within a larger university would have access to these through the university but that a stand-alone law school would probably not purchase these as the cost might be redundant.

¶46 Electronic resources from vendors like HeinOnline, LLMC Digital, and most other legal research databases are typically licensed for use by the public from within a subscribing library and are commonly subscribed to by academic law libraries. However, the bulk of current legal materials are in Westlaw and Lexis-Nexis, and other legal research databases are often for older materials or a specialized research area.

¶47 The overall trend in the transition to digital is that academic law libraries no longer provide a full range of legal materials to the public, including to local attorneys.

*Federal Depository Library Program (FDLP) Trends*

¶48 Culturally, academic law libraries have a history of being open to the public. The FDLP is a federally established program through which libraries sign up to receive government documents free of charge from the Government Publishing Office (GPO). In return, the libraries must guarantee that they will provide everyone access to these materials. A hundred years ago, all the government documents would have been available in print. Now government publishing takes place both online and in print, with electronic access quickly becoming the more common of the two.

¶49 Six of the thirteen academic law libraries we interviewed were participating in the FDLP program, and a seventh had just dropped the program. Libraries participating in the FDLP program spoke of changes that came with the shift to electronic materials. As cataloging shifts to links that are accessible from anywhere and away from books that are physically accessible only from the main library or the law library, some law libraries have pulled back and reduced involvement in the program since main campus links are readily available.

¶50 Catalog records are available to FDLP libraries. For several years, the GPO has been running the Cataloging Record Distribution Program (CRDP), which provides participating libraries with free catalog records for FDLP materials. Approximately half the FDLP law libraries we spoke with were participating in this program. Records are received monthly and then batch-downloaded into the participating library’s catalog, which allows for more comprehensive indexing of government materials at a relatively low cost.

*Law Firm Library Interview Results*

*Technologies*

¶51 Interviews were conducted with twelve law firm libraries. The principal ILSs used were EOS, Softlink Liberty, and Inmagic. For the most part, remote access was provided using Citrix, EOS, or VPN. Intranet platforms include Sharepoint, Citrix, and homegrown solutions. No law firms we spoke with were using a discovery system.
Convenience Drives Collection Development

§52 Our interviews show that law firms have generally been quicker than academic law libraries to adopt new technologies for accessing legal materials. This is most likely due to the often urgent nature of a law firm’s work rather than the scholarly focus associated with academia. Accordingly, it is a main thrust of law firm librarians to make sure their patrons know how and where to access these electronic materials.

§53 One example relates to electronic access that comes bundled with print. Academic law libraries tended to do nothing with this type of access. In contrast, law firms were interested in getting the word out to their lawyers about electronic access, and most firms put notes in their catalog records regarding access information.

Treatises in Westlaw and LexisNexis

§54 The firms we spoke with were about evenly split, with four having only Westlaw, three having only LexisNexis, and five subscribing to both major databases; this largely depended on firm size. All firms subscribed to other common legal databases such as HeinOnline and CCH IntelligConnect, depending on firm size and specialization area.

§55 In each firm that had lawyers using both Westlaw and LexisNexis, there was still a strong tendency toward using one or the other, so all lawyers might have Westlaw, with only a handful having LexisNexis accounts, or vice versa. This is in contrast to academic law libraries, which universally had both LexisNexis and Westlaw accounts, and county and government law libraries, the majority of which had access to both platforms equally.

§56 According to our statistics, firms have taken a more robust approach to cataloging individual titles in both Westlaw and LexisNexis. The level at which each firm has cataloged items in those databases does vary, however, with some cataloging virtually everything and others making catalog records only for unmetered treatises. Unmetered access refers to access where the amount of use does not affect the price; in other words, more users or more time spent with the resource does not result in an additional cost.

E-Book Platforms

§57 E-book packages in use included LexisNexis Matthew Bender unmetered treatises, firm-wide electronic Bluebook, Lexis Digital Library through OverDrive, Courthouse Laws, and Law360. Additionally, several law firms we interviewed were using EBSCO Ebrary, which is available to their patrons through the New York Law Institute’s subscription. For libraries using the EOS catalog platform, the New York Law Institute catalog can integrate and allow seamless access through the law firm’s catalog.

Open Access Materials, Including Government Documents

§58 There was more of a tendency in law firms to catalog and link to open access materials, especially if they believed the resource would have heavy usage. Besides government documents, the majority of those open access materials were court rules and state statutes. No matter the library type, everyone had something from HeinOnline, and everything in the firm’s HeinOnline subscription was cataloged as
completely as possible. Many of the materials that firms purchase through Hein are government documents that have been canceled in print due to their availability electronically. Government websites were also linked to for government documents, especially when the print publication had been canceled.

Electronic Access Bundled with Print Purchase

¶59 For electronic access that comes bundled with print, academic law libraries tended to do nothing with this type of access, but law firms were more interested in getting the word out to their patrons that electronic access was available. Most firms put notes in their catalog records, with instructions on how to access the resource if access was available firm-wide, and it was common to add a catalog note telling the attorneys to speak with a librarian for those instances where access comes in the form of a single-access code.

Special Concerns Regarding Print Material at Law Firm Libraries

¶60 One reason specified for switching back to print for certain materials was given by a firm that had switched from Westlaw-only to LexisNexis-only and had to reorder print copies of some treatises that are only available in Westlaw. In other words, if something cannot be purchased electronically, as is the case for a LexisNexis-only firm eyeing a Westlaw-only electronic version, then print is the only option. Additionally, when a firm library has an exclusive contract with either Westlaw or LexisNexis, there will be less material available in electronic format. Another practical reason we heard for choosing print is that electronic books often do not have good displays of charts or may omit diagrams and illustrations. For resources in which this is the case, a firm will switch back to print, and the law firm librarians we interviewed gave examples of specific treatises where pictures mattered and the electronic version had not worked out.

¶61 Convenience was also cited as a major reason for choosing print over electronic. One librarian we spoke with described trying to get a lawyer connected with the e-book she had purchased for him. She had to order the book to an e-mail address. The vendor sent an automatically generated e-mail to the lawyer. The lawyer did not follow the instructions immediately, going to the e-mail a few days later. By that time, the activation link had timed out. She contacted the vendor, had the link resent, and again the lawyer waited until he needed the book, by which time the link had timed out yet again. She had to get another e-mail sent, then go to his office to walk him through installing the book, and it took more time than it should have.

¶62 Another concern told by multiple interviewees was about installing software, then more software, to be able to read a single e-book. It can take significant time to get an e-book ready to read, and lawyers often do not have that time. Instead, as one interviewee explained, a print book can be ordered with overnight shipping, and when it arrives the next day, it is ready to use.

Government Law Library Interview Results

¶63 We interviewed five county law libraries, three court libraries, and one law library for a large state agency. Only one of the court law libraries was primarily for the court with the other two split between serving the court and serving local attorneys and the public.
Technologies

64 Government law libraries used the following catalog platforms: Inmagic, LibraryWorld Gold, SyrsiDynix, Millennium, a Microsoft Excel spreadsheet of library resources, SidneyPLUS, and EOS. They used the following technologies for remote access: VPN, court-issued laptops that authenticate to the court’s network, and a custom build of WordPress to authenticate patrons through to resources. The sample size is too small to determine a complete range of technologies in use. Nevertheless, government libraries had a wide range of quality levels for technology tools, with catalog products ranging from a hand-created list all the way up to a full-fledged catalog like Millennium.

65 Each court library and the agency library had an intranet. They used the following technologies for intranet: SharePoint or a shared drive. The intranets each contained some e-book material or access information. Often, these offered PDFs of single-download e-books. In general, county law libraries did not have intranets unless the county law library was tied to and intended to support a specific court. However, some did have a drive or server that was available only from computers set up in the building, and this was used for providing access to PDFs and CLE material.

Space Reduction Drives Collection Development

66 While we did not ask about space reduction, three of the five county law libraries we spoke with volunteered this as a recent change that had affected collections. These were dramatic reductions. One library was going from 4000 to 200 square feet and from 15,000 to 4000 print volumes. Another had just gone from 10,000 to 3000 square feet. This indicates that space pressure is a significant force affecting county law library collection decisions.

Treatises in Westlaw and LexisNexis

67 The trend was for government law libraries either to index everything in Westlaw and LexisNexis or to index nothing. This was split almost equally. No libraries we spoke with were selectively cataloging; it was all or nothing. For those libraries cataloging everything, a common complaint was that there was no way to comprehensively monitor for discontinued material. If something were removed from the database, the library had no way to get a comprehensive list of removals to facilitate the removal of records. This was particularly a concern for Westlaw Patron Access materials. No government libraries were using a LibGuide or treatises list to expose items in Westlaw and LexisNexis.

E-Book Platforms

68 In general, more government law libraries had LexisNexis Library Patron Access and Westlaw Patron Access terminals than any other library type. This is in keeping with the public mission of these libraries. More of the government law libraries were using Lexis Digital Library (OverDrive) than any other library type. Reasons mentioned focused on competitive pricing, and reasons other law library types had for not subscribing do not apply to county law libraries. Firm libraries often did not subscribe because the content overlapped with attorney LexisNexis
accounts or because the firm only had Westlaw and outgoing links from the Lexis Digital Library went to LexisNexis and so did not work for the firm. These reasons do not apply to government law libraries, which primarily serve the public.

¶69 For other legal databases, those purchased by government libraries correspond with those purchased by other library types. Databases we found in our sample include HeinOnline, LLMC, open access legal materials in HathiTrust, CEB OnLaw, Aspen treatises library, Ravel, and Loislaw.

¶70 Consortial pricing figured heavily into tools and products used by government law libraries. Often the decision of what tool to use was made by a larger body. For example, one court library in a statewide system got the catalog through the statewide system, and all e-book cataloging was done by the central library.

Open Access Materials, Including Government Documents

¶71 Government law libraries were likely to catalog open access materials if a court system was pushing them out for pro se litigants or for the public to get self-help, or if the resource came up frequently in reference questions. A common way to expose links to government documents was through a website with a list of links. Libraries subscribing to HeinOnline specifically mentioned government documents collections in Hein.

Electronic Access Bundled with Print

¶72 Strategies for managing electronic access bundled with a print purchase were the same across all library types. Government law libraries would set up IP access, if possible. Government law libraries generally had done this to a greater degree than other library types. For example, government law libraries with National Consumer Law Center material knew that it could be set up by IP and had done so. We did not encounter any example of a government law library that was unaware that an item in its collection could be configured for access by IP, while we had encountered these in academic and firm law libraries. This may be done by necessity. Libraries that do not primarily serve the public can handle single-user accounts or can share passwords with specific patrons. Libraries that primarily serve the public cannot share passwords, and so practically must have IP access or nothing.

Regulations Restrict What Technologies Government Libraries Can Use

¶73 Several government libraries we spoke with mentioned regulatory constraints on what technology tools the library was allowed to use. For court libraries, it was important to protect in-process opinions. This prevents use of cloud technologies because the vendor would then have access to those opinions. The agency library had the same concern. One library could not put links in the catalog unless the link was to an .edu site or government agency, due to regulations on cloud computing. Public records concerns were also an issue and restricted what technologies could be used. Another library said these restrictions were the greatest barrier to overcome in moving to more extensive use of electronic resources.
Overall Trends

¶74 When it comes to money spent on print versus electronic materials, county and academic law libraries have generally not adopted as many electronic materials as have law firms. This was often because, for law firms, resources need to be available “just in time” rather than “just in case,” a model better associated with print resources. Percentages of acquisitions budgets in law firms that are now devoted to electronic resources rather than print were often in the seventy to eighty percent range, whereas government libraries were almost at an even split, and academic law libraries were more likely to be spending only thirty to forty percent of their acquisitions budgets on electronic resources.

¶75 While all interviewees had adopted quite a few electronic resources, most still felt that print was easier to use—with electronic access, you have to set up the platform, install software, register the software, download the material, and so on. But with a book, you buy it, the book arrives, and it is available. Major issues involved with electronic resources included getting the business model to work in the legal environment and problems caused by having so many platforms that have to be incorporated and no easy way to tie them together.

¶76 Almost universally, law librarians spoke of a need for a uniform way to access e-books, and preferably one not tied to a single vendor. Frustration with any resource requiring special access procedures was obvious. Even if a law library can arrange to provide access, it is difficult and frustrating for patrons to install software or learn a new procedure for accessing something. One stark example of this was that of the thirty-four libraries interviewed, none were using Thomson Reuters’ ProView. Most people we spoke with thought having a completely separate platform was unnecessary and problematic. One large firm tried to get its court rules through ProView, but we were told it never worked correctly, and because Thomson Reuters was making them buy the print as well, it was quickly dropped by the firm.

¶77 Frustrations were also readily apparent regarding stand-alone e-book purchases that did not come as PDFs. There was frustration with e-books that would need special software or unique access procedures or yet another password. For e-books in general, platforms exist into which e-books from multiple vendors can be loaded. For example, EBSCO Ebrary will hold books purchased from other vendors (although certainly not all vendors), and OverDrive is a platform that multiple publishers use for distribution. In law, the duopoly of LexisNexis and Westlaw dominates, but books from other publishers cannot be purchased and loaded into those platforms.

Conclusion

¶78 All law library types are rapidly transitioning from print to electronic materials. For academic law libraries, this is driven by budget pressure, has not been planned, and is not a choice. For law firm libraries, this is driven primarily by speed and convenience of access, with budget pressure a definite concern in the background. For government libraries, the transition is driven primarily by space issues as several libraries we spoke with had recently moved to significantly smaller facilities. Unfortunately, our interviews suggest that no matter the library type, in
general there has been no real “game plan” for when to switch from print to elec-
tronic; what resources to target for conversion; and, once the shift has been made,
how to manage the changes in workflow that invariably arise. Most of what has
been done has been on an ad hoc basis as various situations have arisen.

¶79 Previous literature predicted a hybrid environment of print and digital for
years to come, but we think the shift to an almost exclusively electronic legal
research environment is much more imminent. Core patron groups use print only
for a handful of treatises by small publishers and only because these resources are
not integrated into any usable electronic platform. Secondary patron groups, such
as bar members visiting an academic law library, use print only because licensing
restrictions prevent electronic access, but under budget pressure, the materials
available to these patrons are already drastically reduced. For treatises published by
the big two, West and LexisNexis, the research environment is electronic and not
particularly hybrid. If small publishers were able to accomplish electronic distribu-
tion through already existing electronic databases, then the shift to electronic
materials would be almost immediate.
Appendix

E-Book Interview Questions Used to Guide the Interviews

IRB statement: The purpose of this is to gather information about how law libraries are indexing e-books. We are conducting a series of interviews with librarians in U.S. law libraries. We plan to publish a summary of findings from the interviews, including examples of how law libraries make resources available and of barriers to efficiently indexing e-books.

- What size population does the library serve?
- What is your catalog platform?
- What is your remote access platform?
- Do you share a catalog with a main campus library?
- Describe how the law library shared resources for the catalog and remote access tools.
- How have dynamics with the main campus library (or other library) affected your ability to index e-books?
- What are you doing to index
  - treatises in Westlaw and LexisNexis?
  - OverDrive?
  - open access materials?
  - government documents?
  - CDs/DVDs that come with books?
  - electronic access bundled with print?
  - stand-alone purchases of e-books?
- What is your biggest success in e-books in the past two years?
- What is the largest hurdle to overcome?
Imagining the Use of Intelligent Agents and Artificial Intelligence in Academic Law Libraries

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Academic law librarians should consider ways to incorporate intelligent technology into their libraries in order to benefit the law school community. This article explains the distinction between intelligent agents and artificial intelligence, discusses current and potential future uses for both, provides examples of how academic law librarians can use them, and explores their benefits and drawbacks. Finally, it examines issues unique to law libraries, including how the ABA standards could affect the use of these technologies.

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Introduction

A common image of artificial intelligence is a robot that thinks like a human and interacts seamlessly with people, understanding their needs and learning from previous interactions. Artificial intelligence has aptly been described as a “digital sister-in-law”:

When I want to go out to the movies, rather than read reviews, I ask my sister-in-law. We all have an equivalent who is both an expert on movies and an expert on us. What we need to build is a digital sister-in-law.¹

While this model of artificial intelligence does not currently exist, agent technology, a subfield of artificial intelligence, has been used in a variety of settings.² Many scholars define “agent technology” as “a software entity which functions continuously and autonomously in a particular environment, often inhibited by other agents and processes.”³ This definition of “agent technology” includes intelligent agents that can make “decisions about how [they] act[] based on experience” and are “free to choose between different actions.”⁴ Agent technology has been used in connection with online shopping to assist in product search and selection.⁵ Agents have also assisted digital library patrons with locating materials and streamlining the search process.⁶ Additionally, a limited number of academic and public libraries have explored the use of agents in connection with reference and information literacy instruction.⁷ Undergraduate education has also successfully experimented with the use of agents in connection with teaching.⁸

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3. Dent, supra note 2, at 109 (quoting Yoav Shoham).
5. See Dent, supra note 2 at 112.
8. Baylor, supra note 1, at 36; Jafari, supra note 1, at 28; Yi Shang, Hongchi Shi & Su-Shing Chen, An Intelligent Distributed Environment for Active Learning, 1 J. EDUC. RESOURCES COMPUTING 1 (2001).
More than a decade ago, Roy Balleste, an academic law librarian and the current director of the law library at St. Thomas University School of Law, first introduced the concept of intelligent agent technology to academic law libraries through a virtual library assistant named Page. Balleste’s writings have also identified possible future uses for artificial intelligence in circulation, cataloging, distance education, and reference. The time is right to revisit the current uses of agent technology and the future possibilities for more sophisticated artificial intelligence in academic law libraries in light of technological advancements, the successful integration of agent systems in libraries and educational settings, changes in legal education, and an increasingly technologically savvy student body.

While artificial intelligence and intelligent agents are intriguing concepts, the question remains whether academic law librarians should consider using them with the ever-changing legal environment and budgetary constraints that plague many of our libraries. In a profession where librarians’ contributions to legal education are often undervalued, librarians must consider new ways to incorporate technology that may help improve the quality of library services. Artificial intelligence and agent technology should not replace librarians, however, as librarians are vital to the existence of libraries. Academic law librarians are highly educated and skilled multitaskers who are often pulled in many different directions yet strive to provide the highest level of service to the entire law school community. Law librarians provide reference services, instruct patrons on the use of library resources, teach law students in a variety of settings, and conduct research for faculty members as well as for their own academic endeavors. While patrons continue to interact face-to-face with reference librarians, many questions do not require a librarian’s expertise.

Integrating agent technology (and more sophisticated artificial intelligence in the future) into academic law libraries is a meaningful way to complement librarians’ work and alleviate some of the burdens placed on librarians that will allow them to focus on more complex and time-consuming obligations. Rubin, Chen, and Thorimbert, library scholars, assert:

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10. Roy Balleste, *A Hypothetical Case Study: Creating AI Assistants in the Law Library*, 26 LEGAL REFERENCE SERVS. Q. 47, 54 (2007) [hereinafter Balleste, *Hypothetical Case Study*]; Roy Balleste, Technology Trends in Law Libraries, in LAW LIBRARIANSHIP IN THE TWENTY-FIRST CENTURY 147, 155 (Roy Balleste, Sonia Luna-Lamas & Lisa Smith-Butler eds., 2007); Balleste, supra note 9, at 12–13 (Balleste touches on these subjects but does not provide specific examples of how patrons would interact with these technologies, nor does he discuss the use of intelligent technology in information literacy instruction).


13. Detlor & Arsenault, supra note 2, at 407–08 (‘‘[A] major benefit of an agent-based environment would be its relief of reference librarians from trying to service personal information requests for a large number of clients. This is more important nowadays given the budgetary and time constraints facing library institutions attempting to offer individualised service, and the demands of an ever-growing technology-savvy client base who want information needs satisfied in short turnaround times.’’).
At times when librarians are not available or are out of patrons’ reach, forms of artificial intelligence... could step into specific roles, such as automated virtual reference librarians, website tour guides, reader’s advisory service providers, and conversational or book club hosts. Just like nurses that can perform basic diagnostics prior to the physician’s examination, conversational agents could take care entirely of “the tedious and repetitive” tasks, and potentially triage patrons to a superior authority, a live human expert: the librarian.  

Additionally, academic law librarians may be missing the opportunity to assist patrons who are less comfortable with in-person reference and would prefer to use computers equipped with artificial intelligence to answer their questions. Librarians should be involved in the development of intelligent technology and the direction it will take in the future to help ensure that the technology is used in ways that meet librarians’ goals and objectives.

¶5 This article focuses on the current uses of agent technology and suggests some potential future uses of more sophisticated artificial intelligence in academic law libraries. For a discussion of the technical aspects of artificial intelligence, readers may explore the many textbooks and articles on these topics. In considering the premise of this article, readers are encouraged to resist the impulse to say “that can never happen” or “that will never work, at least not at my library,” because artificial intelligence can improve the library services provided to faculty, students, local bar members, and unrepresented litigants who frequent academic law libraries.

Artificial Intelligence and Intelligent Agent Technology

What Are Artificial Intelligence and Intelligent Agents?

¶6 Artificial intelligence is a science that is a “truly universal field.” Experts in the field debate what exactly constitutes artificial intelligence. In fact, scholars have advanced at least eight definitions of the term “artificial intelligence.” These definitions of “artificial intelligence” vary widely; some definitions focus on human thought process and thinking while others address human behavior. Still other definitions of the term emphasize thinking or acting rationally as the ideal concept of intelligence. Preeminent scholars in the field believe that artificial intelligence

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15. McNeal & Newyear, supra note 7, at 107 (For patrons “who are shy or uncomfortable making face to face information requests, chatbots provide a private, nonthreatening, nonjudgmental interface where they can seek the information they need.”).
16. Id. at 111–12 (“‘What happens if we ignore this technology?’ If we don’t embrace and attempt to direct this technology and its implementation, we are likely to have it thrust upon us in ways we cannot direct, either by library boards or administrations whose bottom line is the dollar cost per question answered. If we use Virtual Agents to enhance and streamline our information services... we can reap the benefits of this technology and, at the same time, position our professional librarians to provide those value-added services to our users of which they alone can excel.”).
19. Id.
20. Id.
21. Id.
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systems that act rationally are preferred. Over the years, scholars have considered all computer systems that satisfy any of these definitions to constitute artificial intelligence. Hence, the field of artificial intelligence is extremely broad. Artificial intelligence encompasses both concepts of human intellectual activity as well as specific tasks, including solving mathematical theorems and playing chess. The literature describes artificial intelligence as everything from relatively simple computer programs and conversational agents to sophisticated robots. To be considered artificial intelligence, however, a computer system or robot must meet certain benchmarks: it must (1) communicate using natural language, (2) store information, (3) engage in automated reasoning (i.e., logic) to evaluate stored information to answer inquiries, (4) adapt to new situations and extrapolate patterns, (5) contain computer vision, and (6) include robotics functions.

The technology driving artificial intelligence has not been developed to the point where robots or computer systems are capable of thinking cognitively like human beings. Currently, many intelligent computer systems function by using computer programs called intelligent agents that actually carry out and achieve the specific outcome. An intelligent agent is essentially the workhorse of intelligent technology. These agent-based computer systems most often act “to achieve the best outcome or, when there is uncertainty, the best expected outcome.” These systems attempt to predict the correct or best result based on the precepts (rules) that they receive and any prior knowledge of the environment in which they operate.

In the library context, scholars and librarians have been known to use the terms “intelligent agent,” “conversational agent,” and “artificial intelligence”

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22. Id. at 4–5; Guoying Liu, The Application of Intelligent Agents in Libraries: A Survey, 45 ELECTRONIC LIBR. & INFO. SYS. 78, 80 (2011) (stating that Russell and Norvig’s “book is widely adopted as the textbook by many undergraduate and graduate computer science and engineering courses around the world.”).
23. See RUSSELL & NORVIG, supra note 17, at 2.
24. Id. at 1.
25. See Bradshaw, supra note 1, at 6; Dent, supra note 2, at 109; Rubin, Chen & Thorimbert, supra note 7, at 496–97; Carina Kolodny, Stephen Hawking Is Terrified of Artificial Intelligence, HUFFINGTON POST (May 5, 2014 1:52 PM), http://www.huffingtonpost.com/2014/05/05/stephen-hawking-artificial-intelligence_n_5267481.html [https://perma.cc/J5WW-3L9E].
27. RUSSELL & NORVIG, supra note 17, at 4 (“But computer agents are expected to have other attributes that distinguish them from mere ‘programs,’ such as operating under autonomous control, perceiving their environment, persisting over a prolonged time period, adapting to change, and being capable of taking on another’s goals.”).
28. See id. at 4, 32–33.
29. Minoo Lohani & V.K.J. Jeevan, Intelligent Software Agents for Library Applications, 28 LIBR. MGMT. 139, 141 (2007) (“[A]n agent is software that lets the user define what is instantly or eventually wanted, and works towards that goal, without the user having to worry about anything else than waiting [for] the results of the agent’s work.”).
30. RUSSELL & NORVIG, supra note 17, at 4.
31. See id. at 4, 36 (“For each possible percept sequence, a rational agent should select an action that is expected to maximize its performance measure, given the evidence provided by the percept sequence and whatever built-in knowledge the agent has.” Id. at 36.).
interchangeably. In reality, however, many of the current systems seen in libraries are actually agent systems that use components of artificial intelligence, namely automated reasoning or logical searching, to assist library patrons. Additionally, a limited number of academic and public libraries have proposed or developed conversational agents called chatbots that use natural language processing. It is possible to imagine that these agent systems will develop beyond the current technology toward more sophisticated artificial intelligence in the future. Thus, some of the hypotheticals discussed in this article are futuristic in nature, allowing readers to envision how artificial intelligence in the future can provide increasingly important functions in academic law libraries, including engaging with patrons in circulation, fielding reference questions, increasing access to information, and information literacy instruction.

Intelligent agent systems and conversational agents can be developed in-house or by vendors. One company, Pandorabots, Inc., has developed fully customizable virtual chatbot assistants specifically for libraries. These virtual assistants are able to answer simple inquiries about topics including library hours, the location of materials, and upcoming library events. Pandorabots adheres to open source standards when possible, includes various hosting options, and provides an assessment about a library’s needs. In the future, Pandorabots intends to expand its functionality by providing “products that deploy interactive, measurable messages into mobile platforms, micro-blogging platforms, Instant Messaging platforms, internet, branded entertainment and custom solutions.” Another company, SitePal, allows customers to purchase and embed avatars into websites. These products allow library patrons to interact with the library and its resources in unique and meaningful ways.


33. See Dent, supra note 2, at 109–21; Detlor & Arsenault, supra note 2, at 405–06; Fuhr, Gövert & Klas, supra note 6, at 3–7; Pelletier, Pierre & Hoang, supra note 17, at 19–20; Sánchez et al., supra note 6, at 39–42.

34. See Abdul Ahad, Neva: A Conversational Agent Based Interface for Library Information Systems 6 (2005); Rubin, Chen, & Thorimbert, supra note 7, at 497.


37. Cybersphinx, supra note 36.


39. Id.

Recent Developments in Artificial Intelligence

¶10 Researchers have continued to improve the functionality of artificial intelligence. Beginning in the mid-1990s, artificial intelligence researchers began to design intelligent agents to function within the Internet, allowing people to navigate this new environment.\textsuperscript{41} Natural language technology also continues to develop, as evidenced by Apple iPhone’s Siri.\textsuperscript{42} Self-driving cars and Google Now, a computer software application that serves as a personal assistant, show the incredible developments in intelligent technology that may revolutionize many people’s lives.\textsuperscript{43} Projects such as Google Brain, a deep-learning research project, and Carnegie Mellon’s NEIL, a computer program that makes commonsense assumptions using a database of images, have also advanced the field of artificial intelligence.\textsuperscript{44} Companies like Google are serious about developing artificial intelligence, spending millions of dollars on research. Google recently purchased DeepMind Technologies, a company focused on artificial intelligence research, for $650 million, and Boston Dynamics, a robotics company, for an undisclosed amount.\textsuperscript{45}

¶11 Experts remain uncertain about when artificial intelligence will reach its full potential and cognitively think like human beings. With all of the money being spent on artificial intelligence research, it is possible that someone will develop an algorithm for it tomorrow.\textsuperscript{46} However, optimists predict that it will take 5 to 80 years for artificial intelligence to cognitively think.\textsuperscript{47} On the other hand, skeptics believe that it may take 200 to 400 years to develop artificial intelligence to its full capability.\textsuperscript{48} While scholars disagree about how close we are to realizing fully functioning artificial intelligence, one thing appears to be certain: it is here to stay.\textsuperscript{49}

How Intelligent Agents Have Been Used in Libraries and Other Academic Settings

¶12 Academic law librarians can identify ways to use intelligent technology to improve patron services by studying how other types of libraries and academic
disciplines, namely education, have successfully adopted this technology. Examples from undergraduate education, public libraries, and academic libraries where agent technology has been successfully integrated into teaching, reference, and circulation can show us how to use this technology to improve services to the entire law school community.

**Undergraduate Education**

¶13 Undergraduate students have responded positively to the use of agents in learning environments. In fact, students become emotionally connected to agents, “facilitating their enjoyment of the learning situation.” Evidence suggests that the use of agents also helps improve student engagement. Using agent technology as digital tutors allows instructors to depart from lectures as the primary teaching method and tailor lessons to how students learn best—as active participants in the learning experience. Learning is more likely to occur when agents are used to “support, guide, and extend the thinking processes” of students and the agents’ actions are transparent to the students. Agents should also adapt to students’ performances and anticipate students’ mistakes, suggesting correct alternatives. All forms of instruction, including the use of agent technology as a teaching tool, must actively engage students in the learning process, as they learn by doing.

¶14 One example of an agent-based digital tutor system used in undergraduate education is IDEAL (Intelligent Distributed Environment for Active Learning), which was designed with the goal of encouraging students to become active participants in the learning process. IDEAL is a “student-centered, self-paced, and highly interactive” web-based asynchronous learning environment. IDEAL maximizes the opportunities for learning by providing extensive course content and twenty-four-hour access to materials. “IDEAL provides an interactive learning environment that combines the visual presentation of course information, class notes,” and customized learning exercises. Agents working within IDEAL use information about each student’s background, learning style, interests, and other

53. Rubin, Chen & Thorimbert, supra note 7, at 506 (“One scholar found] that the increased level of control and feedback afforded by the chatbot interactions significantly improved the accuracy of students’ self-assessment abilities as compared to students using the same software minus the conversational agent. Incorporating chatbots helps improve student engagement, increase interactivity, and keep students on task.”); see also Baylor, supra note 1 at 38–39; Jafari, supra note 1, at 29.
54. Shang, Shi & Chen, supra note 8, at 1.
56. See Baylor, supra note 1, at 37.
57. Shang, Shi & Chen, supra note 8, at 2.
58. Id. at 3.
59. Id. at 4.
60. Id.
61. Id. at 12.
courses to act as a digital tutor. The digital tutor “creates exercises and questions according to the student’s background and learning status, provides solutions, and explains the concepts and solutions to remedy student’s misconceptions.” Through these customized exercises, students become active participants in the learning experience, and the teacher acts as “coach, expert guide, and role model.”

IDEAL also assesses each student’s performance by calculating a “learned score,” which tracks how extensively the student has studied the online course materials and the number of times the student has reviewed each topic. This type of information allows instructors to monitor student performance and help determine the effectiveness of course materials.

Digital tutors using agent technology have also been used in medical and dental schools where students interact with virtual patients in simulated clinical scenarios. This type of training allows students to learn without the consequences of making errors on human patients. The agents provide feedback to the students and suggest reference materials to help them learn. The agents can also monitor and manage course activities and notify professors when students’ assignments are overdue, participation is lacking, or online quizzes are incomplete. Law students may benefit from the use of intelligent agents as digital tutors in terms of increased student involvement and an increased connection to the learning experience, which may ultimately foster student learning.

Digital Libraries

The use of agent technology in libraries began in digital libraries. Examples include the use of agents to assist with searching for and retrieving information across digital library collections and helping with query formation, similar to the advanced Google search feature. One of the first digital library projects to incorporate agents was the University of Michigan Digital Library Project. This project created a digital library in which agents help patrons locate information across several libraries. The goal of the University of Michigan Digital Library Project was to prevent information overload by designing agents that retrieve only relevant search results based on the user’s search query.

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62. Id. at 5.
63. Id.
64. Id. at 6.
65. Id. at 10.
66. Rubin, Chen & Thorimbert, supra note 7, at 505–06; Advanced Distance Education (ADE), www.isi.edu/isd/ADE/ade.html [https://perma.cc/PLM3-WJRX].
67. Rubin, Chen & Thorimbert, supra note 7, at 506.
68. Id. at 505–06.
69. Jafari, supra note 1, at 29.
70. Crum, supra note 6, at 64.
71. See Valeda Frances Dent et al., Agent Technology Concepts in a Heterogeneous Distributed Searching Environment, 31 VINE 55, 58 (2001); Detlor & Arsenault, supra note 2, at 404, 406; Fuhr, Govert & Klas, supra note 6, at 1, 3; Pelletier, Pierre & Hoang, supra note 17, at 15–17; Sánchez et al., supra note 6, at 37; André Schaefer et al., Active Support for Query Formation in Virtual Digital Libraries: A Case Study with DAFFODIL (2005), at [1], http://www.is.informatik.uni-duisburg.de/bib/docs/Schaefer_etal_05.html.en [https://perma.cc/KS4G-5D5E].
72. See Crum, supra note 6, at 63–64.
73. See id.
74. See Birmingham et al., supra note 6.
A digital library at a university in Mexico has also explored the use of agent technology in connection with reference. An agent-based virtual reference system, referred to as Vref, allows library patrons to inquire about how to locate information from the university’s digital library. To answer the patron’s inquiry, Vref extracts keywords from the patron’s query. Vref can access the World Wide Web and also rely on the results from previous reference transactions to answer patron inquiries. Once Vref finds and filters the search results, it suggests relevant information and sources.

Public and Academic Libraries

A relatively small number of academic and public libraries have experimented with or proposed the use of agents to streamline circulation, assist with reference, and enhance teaching. The librarians at Mentor Public Library in Ohio introduced Emma, a chatbot, to patrons in 2009, who reacted positively to this new technology. Emma was developed initially using SitePal and later migrated to Pandorabot. Initially, Emma was programmed to answer 12 frequently asked questions. By 2010, Emma was answering approximately 300 questions each week. However, Emma’s ability to accurately answer questions was a concern for the librarians. For that reason, the librarians reprogrammed her to ask questions to patrons to determine whether their inquiries related to materials within the library or elsewhere. For inquiries that did not relate directly to cataloged items, Emma extracted keywords to find appropriate resources to meet patrons’ needs. In 2011, patrons had 7116 conversations with Emma, and by the end of 2011, Emma’s accuracy had improved to approximately ninety percent. While some of the library staff embraced Emma’s ability to answer directional-type questions, other staff members raised concerns about Emma. Namely, these staff members questioned whether Emma would eliminate their jobs and adequately perform customer service functions. In 2011, Emma was renamed InfoTabby.

The librarians at Hunter College have used agents to create a research module to assist with information literacy instruction. The agents guide students through a variety of library services and help them with the research process,

75. Medina, Chávez & Benítez, supra note 7, at 1.
76. Id. at 3.
77. See id.
78. Id.
79. McNeal & Newyear, supra note 7, at 101, 104 (suggesting that patrons’ positive responses were due to their ability to elect to interact with Emma).
80. Id. at 102.
81. Id.
82. Id.
83. Id.
84. Id. at 103.
85. Id.
86. Id.
87. Id. at 104.
88. Id.
89. See McNeal & Newyear, supra note 32, at 9. McNeal and Newyear indicate that InfoTabby is currently operating on the Mentor Public Library website. However, I was unable to locate InfoTabby when I visited the library’s website (http://www.mentorpl.org).
90. Dent, supra note 2, at 119–21.
including providing on-demand information literacy instruction, assisting with interlibrary loans, and locating electronic course reserves.\textsuperscript{91} The Hunter College model can be expanded to assist students by suggesting keywords for more accurate searches, providing on-demand instruction for students who encounter problems with search inquiries, proposing effective search strategies, and pairing students with similar research interests.\textsuperscript{92}

\textsuperscript{¶}20 Librarians from several large public libraries in Canada have advocated for the use of conversational agents to supplement the interaction that patrons have with librarians.\textsuperscript{93} Conversational agents have “human-computer interfaces designed to simulate conversation with a real person, are an effective, appropriate complement to many existing library services and may be the key to unlocking solutions to future interactions with information.”\textsuperscript{94} These conversational agents can provide reference and circulation assistance to patrons by answering simple reference questions, directing patrons to locations within the library, assisting patrons with library or other website addresses, locating online public access catalog records, renewing materials, and requesting interlibrary loans.\textsuperscript{95}

\textsuperscript{¶}21 Agent technology has also been used to streamline circulation services through the use of radio frequency identification (RFID) tags that track the use and location of library materials.\textsuperscript{96} This type of technology has been found to reduce the time library staff spends tracking inventory and check-in and check-out procedures.\textsuperscript{97}

\textit{Academic Law Libraries}

\textsuperscript{¶}22 As noted earlier, Roy Balleste was the first to propose the use of intelligent technology in academic law libraries.\textsuperscript{98} He argued that this type of technology could extend library hours, answer simple questions about the library, guide patrons on the use of the catalog, assist with distance education, and streamline cataloging and circulation operations.\textsuperscript{99} In 2002, Balleste discussed the launch of Page, a chatbot, at Nova Southeastern University Law Library.\textsuperscript{100} Patrons accessed Page through the library’s website.\textsuperscript{101} Page served as a guide to the library’s resources and enhanced customer service.\textsuperscript{102} However, in 2007, Balleste acknowledged the limitations of artificial intelligence:

These complex capabilities are still far from reality. Yet, the potential for this technology is fascinating. . . . We can only hypothesize about the future, yet there is plenty of evidence to suggest that artificial intelligence, as a trend, will continue to be explored and developed.\textsuperscript{103}

\textsuperscript{91.} Id. at 119.
\textsuperscript{92.} See id. at 121.
\textsuperscript{93.} Rubin, Chen & Thorimbert, supra note 7, at 497.
\textsuperscript{94.} Id. at 497.
\textsuperscript{95.} Id. at 508.
\textsuperscript{97.} Id.
\textsuperscript{98.} See Balleste, supra note 9, at 10.
\textsuperscript{99.} Balleste, \textit{Hypothetical Case Study}, supra note 10, at 54; Balleste, supra note 9, at 12–13.
\textsuperscript{100.} Balleste, supra note 9, at 10.
\textsuperscript{101.} Id.
\textsuperscript{102.} Id.
\textsuperscript{103.} Balleste, \textit{Hypothetical Case Study}, supra note 10, at 54.
In light of advances in agent technology, an increased acceptance for distance education by the legal community, and concrete examples of how this technology has been successfully applied, it is now time to revisit and expand on Balleste’s ideas about the uses of agent technology and artificial intelligence in academic law libraries.

**How Should Intelligent Agents and Artificial Intelligence Be Used in Academic Law Libraries?**

¶23 Academic law libraries should incorporate relevant aspects of the examples discussed above to enhance library services and help improve students’ information literacy skills.

**Reference**

¶24 Agent technology can help provide more effective reference services to academic law library patrons now and in the future as artificially intelligent technology continues to develop. Many reference questions do not require a reference librarian’s expertise. A recent study from the University of Kentucky found that roughly seventy percent of face-to-face reference interactions at the university’s law library were location-based inquiries.\(^{104}\) These questions related to the availability of resources, printing, circulation assistance, desk supplies, and computer problems.\(^{105}\) Approximately fifteen percent of the reference questions asked face-to-face of law librarians required their expertise.\(^{106}\)

¶25 With evidence suggesting that such a small percentage of reference questions actually require librarian assistance, the question remains whether academic law libraries should eliminate the traditional reference desk. Rather than forgo the reference desk, a better solution is to incorporate agent technology into academic law libraries so that librarians, along with intelligent reference assistants, answer patrons’ reference questions efficiently and effectively. While the University of Kentucky study found that a large percentage of students engaged face-to-face with librarians, other evidence suggests that students are willing to use technology to determine a library’s hours of operation and availability of materials.\(^{107}\) Answers to these directional questions should be provided by conversational agents that are embedded within a library’s website and accessible through computers, tablets, or smartphones. Librarians can then focus their attention on the percentage of reference questions that require their expertise and other important duties, including teaching and involvement in clinics or directed research.\(^{108}\)

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\(^{104}\) See Bishop & Bartlett, supra note 12, at 495. The study also found that sixty-six percent of reference questions asked at all of the university’s libraries were related to the location of study rooms, classes, bathrooms, and printing. Eighty percent of these directional questions were asked face-to-face to reference librarians.

\(^{105}\) Id. at 494.

\(^{106}\) Id. at 495.

\(^{107}\) Id.; Jin Wu et al., *Measuring Patrons’ Technology Habits: An Evidence-Based Approach to Tailoring Library Services*, 102 J. MED. LIBR. ASS’N 125, 127 (2014) (“[T]here is significant interest in using devices to communicate with the library to obtain information about hours, availability of materials, due dates, and interest in accessing materials licensed by the library, such as e-books and apps.”).

\(^{108}\) See Bishop & Bartlett, supra note 12, at 495; Vicenç Feliú & Helen Frazer, *Embedded Librarians: Teaching Legal Research as a Lawyering Skill*, 61 J. LEGAL EDUC. 540, 542 (2012); Ann
In the future, it is possible that intelligent reference assistants may be able to answer directional questions, as well as more sophisticated questions. If an intelligent reference assistant is unable to adequately answer a reference question, it should be able to refer patrons directly to librarians, identifying librarians based on their availability and expertise. Perhaps these intelligent reference assistants will be able to access the librarians’ calendars or contact them directly in their offices, giving librarians information about the patrons, the inquiries, and resources already considered. Below is a hypothetical interaction between an intelligent reference assistant (Martha) and a librarian:

Librarian: Yes, Martha. How can I help you?

Martha: I’ve been assisting a student patron who is looking for information about a proposed regulation in the Federal Register. I conducted a Google search and found the proposed regulation, but I haven’t been able to find much else.

Librarian: Do you know exactly what proposed regulation the patron is looking for?

Martha: Yes, a proposed regulation relating to the airworthiness of certain airplanes.

Librarian: OK, did you look at any government agency websites or the Federal Register?

Martha: I looked at the Federal Aviation Administration website first and then the electronic version of the Federal Register, but the patron still has some questions.

Librarian: Did you conduct a search on Westlaw or Lexis for law reviews or newspaper articles?

Martha: Yes, and I have referred the patron to a couple of citations to articles.

Librarian: OK, good. I will connect with the patron through the library’s website to discuss the proposed regulation and the regulatory process in more detail. Thank you, Martha.

Martha: Thank you.

This example of a more complex and futuristic reference interaction highlights how artificial intelligence may be able to conduct basic searches while deferring to reference librarians for more sophisticated questions that require their expertise. While

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109. See Dent, supra note 2, at 121.

110. See Jafari, supra note 1, at 33. This hypothetical is adapted from a similar example in the article where Jafari discusses digital teaching assistants in education. The relevant regulation is Airworthiness Directives; Airbus Airplanes, 80 Fed. Reg. 40942 (July 14, 2015).
admittedly this type of interaction may ultimately increase the length of the reference interaction, in the end, the patron’s question will be answered correctly and completely.

Information Literacy Instruction

¶27 Incorporating agent technology into information literacy instruction provides the perfect opportunity to help foster student learning.

Why Information Literacy Instruction Requires a New Approach

¶28 Legal research is a fundamental skill in the law school curriculum. However, practitioner responses to a recent AALL legal research survey suggest that law students lack many important legal research skills. Specifically, a large percentage of law students do not know how to conduct research relating to administrative law, regulations, legislative history, and nonlegal materials. Practitioners have noted that law students are not thorough researchers or prepared for many aspects of practice. Today’s law students may lack many legal research skills because they fail to obtain a solid foundation in research during college, including mastering basic concepts such as Boolean operators and index browsing. The use of agent technology may help improve students’ legal research skills by engaging them more fully in the learning process.

How Intelligent Agents and Artificial Intelligence Should Be Incorporated into Information Literacy Instruction

¶29 Incorporating agent technology into advanced legal research courses offered at many law schools provides the perfect opportunity to make students more active participants in the learning process, ultimately fostering student

113. Id.
learning. An intelligent instruction assistant can help personalize the learning experience by considering each student’s previous courses, activities, and employment experience. For example, if a librarian has determined that it is important for a student to identify the resources to conduct federal legislative history research, agents can help the librarian design activities and simulations that take into account the student’s background and experience. For a student who has an internship with a federal judge and is also taking an administrative law course, then appropriate exercises designed by the intelligent instruction assistant could require the student to identify resources pertinent to the Clean Air Act Amendments of 1977 that gave rise to *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*

¶30 In addition, exercises created by agents may also help students learn indispensable skills. For example, agents may help students learn how to navigate the new Google-like platforms that many proprietary fee-based systems have adopted. The activities and exercises created by the agent-based tutor should emphasize how to use terms and connectors, identify relevant databases, and limit search results. Exercises designed by agents can also teach students how to browse indexes and tables of contents, a skill that is often overlooked by many of today’s students.

¶31 Agents can also create virtual environments where students interact with simulated clients with “real” legal problems. Agents could construct various scenarios and outcomes, depending on how a student approaches the legal problems presented in the simulation. For example, an agent-based tutor could create a simulation where the student is required to identify possible causes of action after a client interview. In response, the student must then draft a complaint setting forth the appropriate causes of action. At the end of the simulation, the student would receive feedback and additional instruction, if necessary, from the agent-based tutor. These types of exercises provide opportunities for students to become active participants in the learning process, which helps foster student learning.

¶32 Agent technology can also assist librarian instructors with administrative tasks:

> [T]he instructor is expected to regularly check students’ progress by visiting many Web pages and using different tools within the [content management system] to verify student progress and participation. This includes monitoring the message board activities log to verify student participation, consulting the drop box tool to see if students have submitted assignments, and regularly visiting the course activity log to monitor the magnitude of students’ online activities. Performing these tasks in addition to handling hundreds of e-mail messages has become a major time-consuming operation for most instructors.

117. Baylor, supra note 1, at 38–39; Jafari, supra note 1, at 30; Jonassen, supra note 116, at 502; Levy, supra note 116, at 406; Shang, Shi & Chen, supra note 8, at 1.

118. See Shang, Shi & Chen, supra note 8, at 5.


120. Brooke J. Bowman, *Researching Across the Curriculum: The Road Must Continue Beyond the First Year*, 61 Okla. L. Rev. 503, 529 (2008) (“Since our law students grew up on the Internet, they overlook valuable resources because they do not understand what content is available in what type of sources and do not take the time to understand basic research strategies such as, using indices, consulting table of contents, and starting with general terms and working to more specific terms.”).

121. See *Advanced Distance Education (ADE)*, supra note 66; Rubin, Chen & Thorimbert, supra note 7, at 505–06.

122. Baylor, supra note 1, at 38–39; Jafari, supra note 1, at 30; Shang, Shi & Chen, supra note 8, at 1; see also Jonassen, supra note 116, at 502, Levy, supra note 116, at 406.

123. Jafari, supra note 1, at 28.
¶33 Agents can compile information about students’ lack of class participation or incomplete assignments, giving the librarian information about students who may be struggling.\textsuperscript{124} Librarians can then use information about student participation to reach out to these students to provide additional instruction or guidance.\textsuperscript{125} In addition, agents can compile data about student achievement to be used during course assessments, a new point of emphasis for the American Bar Association (ABA).\textsuperscript{126}

¶34 Librarians should also consider incorporating agents into courses taught remotely,\textsuperscript{127} as students learn through distance education:

\begin{quote}
[E]arly and continued evidence suggests that students using technology in distance education have at least similar learning outcomes to students in traditional classrooms. In some studies, distance learning students out-learn and outperform students educated in the traditional classroom.\textsuperscript{128}
\end{quote}

¶35 Currently, the ABA allows second- and third-year law students to take up to fifteen credits (twenty-three percent of the sixty-four total credits required for graduation) of distance education toward their Juris Doctor degrees.\textsuperscript{129} Many ABA accredited law schools offer distance education classes, either synchronously or asynchronously.\textsuperscript{130} Librarians can add value to these courses by incorporating agent technology into information literacy instruction.\textsuperscript{131} As the IDEAL and Hunter College examples show, agents can create effective digital learning experiences through customized activities, around-the-clock access to information, and on-demand instruction.\textsuperscript{132} Using agent technology in these ways may enhance students’ learning experience and ultimately foster student learning.\textsuperscript{133}

\textbf{Circulation}

¶36 Agents can also be used to streamline many circulation functions. RFID microchips can be placed in print resources to accurately identify the location of

\begin{footnotesize}
\begin{enumerate}
\item[124.] See id. at 30.
\item[125.] See id. at 30–31.
\item[126.] See Am. Bar Ass’n Section of Legal Educ. & Admissions to the Bar, Managing Director’s Guidance Memo, Standards 301, 302, 314, & 315, at 1, 5 (June 2015), http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/governance/documents/2015_learning_outcomes_guidance.authcheckdam.pdf [https://perma.cc/T9B8-FPF7].
\item[127.] See Balleste, supra note 9, at 12–13 (“Just think of the potential [for artificial intelligence], not to mention the benefits for distance education.”).
\item[130.] Ellen Q. Jaquette, Online Education and the Law Library: How Can We Best Serve Our Online Patrons?, AALL Spectrum, Feb. 2015, at 33, 33 (“[T]he number of law schools offering online courses using synchronous (real-time) or asynchronous (on your own time) methods, [is] already at 23 percent and 25 percent of law schools in 2010, respectively.”).
\item[131.] See id. (“Thirty-eight percent of [the survey] respondents offered for-credit courses on legal research, while 76 percent provided other opportunities for research training. Overall, more respondents listed research training than lending books as a service provided to distance learners, a seemingly more traditional function of the library.”).
\item[132.] See Shang, Shi & Chen, supra note 8; see also Dent, supra note 2, at 121.
\item[133.] See Baylor, supra note 1, at 38–39; Jafari, supra note 1, at 30; Jonassen, supra note 116, at 502; Levy, supra note 116, at 406; Shang, Shi & Chen, supra note 8, at 1.
\end{enumerate}
\end{footnotesize}
library materials. Agent technology can also be used to check in and out materials to patrons, provide use count information, and recommend other materials that may be of interest to them. In an era when libraries are trying to do more with less, automating some of these functions may free up time for the staff to answer patron questions and work on more labor-intensive library projects.

The Drawbacks of Using Intelligent Agents and Artificial Intelligence in Academic Law Libraries

§37 Despite the many benefits of agent technology and artificial intelligence, certain drawbacks cannot be ignored. Artificial intelligence is not without its critics. Some argue that artificial intelligence may lead to unemployment. Others argue that humans simply do a better job of providing customer service and cannot be replaced by technology. Visionaries in the fields of science, computing, and the Internet, including Stephen Hawking, Bill Gates, and Elon Musk, have been cited as opponents of artificial intelligence, claiming that thinking computers may harm humans and society. Their concerns may have validity, as autonomous weapons systems and artificial intelligence that outsmarts humans have been discussed as possibilities in the future.

§38 The cost of artificial intelligence may be another significant concern for academic law libraries. In the current era of tight budgets, where book budgets are being slashed and every dollar spent is scrutinized, using this technology may be cost prohibitive. It is difficult to quantify the cost of artificial intelligence, but with the millions of dollars that companies such as Google are spending on development, it is reasonable to believe that the use of this technology may come with a hefty price tag. However, agent technology may provide some lower-cost options.

134. Minami, supra note 96, at 243.
135. See id. at 240.
136. Martin Ford, Viewpoint: Could Artificial Intelligence Create an Unemployment Crisis?, COMM. OF THE ACM, July 2013, at 37, 39 (“I think there are good reasons to be concerned that advances in artificial intelligence and robotics are rapidly pushing us toward an inflection point where the historical correlation between technological progress and broad-based prosperity is likely to break down—unless our economic system is adapted to the new reality.”).
137. See John N. Berry III, Humans Do a Better Job, LIBR. J., Apr. 1, 2006, at 10, 10 (“Of course, machines can do many jobs better than live humans. But in public service and public information enterprises, machines are rarely better at even routine jobs like reshelving books.”).
138. See Kolodny, supra note 25 (“Hawking lays out concerns that seem straight out of a sci-fi horror film—essentially worrying that eventually the machines will outsmart us all.”); Nick Statt, Bill Gates Is Worried About Artificial Intelligence Too, CNET (Jan. 28, 2015, 12:55 PM), http://www.cnet.com/news/bill-gates-is-worried-about-artificial-intelligence-too/ [https://perma.cc/CMH9-AJUB] (“Microsoft’s co-founder joins a list of science and industry notables, including famed physicist Stephen Hawking and Internet innovator Elon Musk, in calling out the potential threat from machines that can think for themselves.”).
139. Kolodny, supra note 25; Stephen Hawking, supra note 43.
140. McNeal & Newyear, supra note 7, at 111 (“[The library’s chatbot] answered a total of 4774 library related questions in 2011; the cost of providing this service was $0.14 per use. As library funding continues to erode and chatbots become more intelligent, automated reference services will become an increasingly attractive option, if not a necessity.”).
Libraries should also consider consortia arrangements, allowing participating libraries to share the financial burdens associated with such technology.\textsuperscript{142} ¶39 The use of agent technology in academic law libraries also raises privacy and other legal concerns. “[C]ollecting and using learning data could create legal challenges for educational institutions. Universities should develop . . . appropriate policies for the collection of student learning data.”\textsuperscript{143} To alleviate these concerns, students may be identified by an anonymous number system, as they are during exams, to help protect their personal information. Patrons could also be grouped and identified in simple categories, such as “student,” “faculty,” or “public patron,” to help ensure that their privacy is maintained. Public access computers containing agents should be equipped with mechanisms to protect patrons’ private information. Law school IT departments should ensure that browsing and use history are erased after each user logs off of public access computers. Librarians must also balance issues of patron privacy with continued advancements in artificial intelligence that can be achieved by using transcripts of reference interactions between patrons and intelligent reference assistants. To this end, libraries should establish a policy where patron information is routinely purged from computer servers once librarians have had the opportunity to review reference transcripts.

¶40 Librarians who work for law libraries that are open to the public must also take precautions to ensure that agent technology is not perceived by patrons as engaging in the practice of law. The role of agents is to offer information and not legal advice.\textsuperscript{144} The unauthorized practice of law by agents or artificial intelligence is a real concern in light of Unauthorized Practice of Law Committee v. Parsons Technology, Inc., where the U.S. District Court for the Northern District of Texas found that a computer program engaged in the unauthorized practice of law by tailoring legal forms to individuals’ particular needs.\textsuperscript{145} The computer program created “an air of reliability . . . which increase[d] the likelihood that an individual user w[ould] be misled into relying on them.”\textsuperscript{146} Parsons Technology provides guidance

\begin{footnotes}
\textsuperscript{142} Christine N. Turner, E-Resource Acquisitions in Academic Library Consortia, 58 LIBR. RES. & TECH. SERVS. 33, 37 (2013) (“Throughout the history of consortia, cost savings have been touted as a benefit of cooperative collection development, but in fact, cost sharing and containment more accurately describes the reality.”).

\textsuperscript{143} Jafari, supra note 1, at 33.

\textsuperscript{144} See Charles J. Condon, How to Avoid the Unauthorized Practice of Law at the Reference Desk, 19 LEGAL REFERENCE SERVS. Q., no. 1/2, 2001, at 165, 166 (discussing the role of information providers as “providing information within the limits imposed by institutional policies and professional standards”).

\textsuperscript{145} Unauthorized Practice of Law Comm. v. Parsons Tech., Inc., No. Civ.A. 3:97CV-2859H, 1999 WL 47235, at *6 (N.D. Tex. Jan. 22, 1999), aff’d, 179 F.3d 956 (5th Cir. 1999) (“Subsequent to the filing of this appeal, however, the Texas Legislature enacted an amendment to §81.101 providing that ‘the practice of law’ does not include the design, creation, publication, distribution, display, or sale . . . of computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney; effective immediately.”); Condon, supra note 144, at 174 (“In Texas, the Unauthorized Practice of Law (UPL) Committee argued that ‘Quicken Family Lawyer,’ a software program designed to assist in the preparation of probate forms among other legal documents, was actually a ‘cyberlawyer’ practicing law without a Texas license. Although the federal district court agreed with the UPL committee, the Texas legislature amended the statute to exclude software from the definition of authorized practice.”); see also Pat Newcombe, Web Regulation Battles Heat Up, AM. LIBR., Nov. 1999, at 50.

\textsuperscript{146} Parsons Tech., 1999 WL 47235, at *6.
\end{footnotes}
with respect to the safeguards that must be in place to ensure that unrepresented patrons understand the limited role of artificial intelligence. Agents or conversational agents should only provide patrons with a list of available resources along with a brief explanation on how to access and use each resource.\textsuperscript{147} Agent-based computer programs must also include disclaimers directed to patrons, notifying them that its function is only to provide information and not to give legal advice.\textsuperscript{148}

¶41 This discussion of the drawbacks of agent technology and artificial intelligence is not meant to be an exhaustive list. Rather, its purpose is to highlight some of the most significant concerns associated with these technologies for academic law libraries. Despite valid drawbacks, the benefits to students and patron services outweigh these concerns. Integrating agent technology now and more sophisticated artificial intelligence in the future into academic law libraries will help librarians and library staff provide the highest level of service to the entire law school community.

Conclusion

¶42 The world of artificial intelligence, with all of its “possibilities, demonstrations, and promise,”\textsuperscript{149} is a virtually untapped resource for academic law libraries. Many academic law librarians pride themselves on being on the cutting edge of technological advancements. The services provided by academic law librarians as educators and public servants lend themselves to the exploration of agent technology and artificial intelligence in the classroom, at the reference desk, and in circulation. Considering ways to incorporate these technologies into academic law libraries provides the perfect opportunity to improve the services provided to the entire law school community and all library patrons now and in the future. Academic law librarians can learn how to effectively use conversational agents, artificial reference and circulation agents, and information literacy modules to serve law library patrons from other libraries and the field of education. The uses for artificial intelligence will likely expand to include services that we have yet to imagine. Academic law librarians should embrace these ideas and champion agent technology and artificial intelligence for the entire law school community.

\textsuperscript{147} See id.; see also Condon, supra note 144, at 170–73 (providing guidance on formulating a reference policy to avoid the unauthorized practice of law).

\textsuperscript{148} See Parsons Tech., 1999 WL 47235, at *6; see also Condon, supra note 144, at 171.

The State of Legal Research Education: A Survey of First-Year Legal Research Programs, or “Why Johnny and Jane Cannot Research”

Caroline L. Osborne

Prof. Osborne reviews the state of legal research education at U.S. News & World Report’s 200 rated law schools, and explores whether or not legal research is a required first-year class, the number of semesters of research instruction, the expertise of the instructor, the number of credits awarded for legal research, the scope of the legal research curriculum, areas of observed difficulties and challenges in instruction, and the type of grade assigned.

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Introduction

¶1 In 1993, Donald Dunn wrote, “No one seems happy these days with either the quality of the legal research instruction provided by law schools or the quality
of the research being conducted by law students and recent law school graduates.”

His article contains the now frequent and familiar refrain that all law school and law firm librarians know by heart:

[P]ractitioners complain about new associates who do not possess even the most rudimentary legal research skills. These practitioners worry when they have to “write off” portions of an associate’s billable hours because the time sheets submitted reflect research time far in excess of the reasonable cost of the final bill.

. . . . [Law firm librarians] want to know why law schools have abrogated their responsibility for teaching legal research and have left it in the hands of the law firms.

Law professors lament that their research assistants and the students in their seminars produce flawed work products because of superficial research or failure to consult standard sources. How is it, professors wonder, that after the first year law students do not know about basic legal research materials and methodologies?

¶2 Dunn attributes the decline in legal research skills to two seminal events: (1) an increased emphasis on writing and (2) the adoption of computer-assisted legal research.³ Relying on Dunn’s critique, this study tests the hypothesis that legal research education is sacrificed at the altar of a more vigorous writing curriculum. In no manner is my hypothesis intended to suggest that the desire to improve writing is misplaced; on the contrary, as a critical part of legal education, students should write early and often. My suggestion is that the cost of graduating fluent writers should not be the legal research curriculum.

¶3 This article reviews the state of legal research education at the top 200 law schools as ranked by U.S. News & World Report for 2015. Questions explored include whether legal research is a required first-year class, the number of semesters of research instruction, the expertise of the professor or instructor, the number of credits awarded for legal research, the scope of the legal research curriculum, areas of observed difficulties and challenges in instruction, and the type of grade assigned. The answers to these questions illuminate why the research skills of recent graduates are often labeled as insufficient. The first part of this article describes the methodology employed to collect data about the legal research curriculum taught during the 2012–2014 academic years. It then uses the data from the survey (as defined below) as supplemented by insights from the initial survey (as defined below). The final section suggests reforms to legal research instruction designed to respond to the refrain that “Johnny and Jane Cannot Research.”

Methodology

¶4 This article reflects on the results of a survey (hereinafter, “the survey”) conducted in December 2014. This survey was administered to the 200 law schools listed in U.S. News & World Report for 2015. Qualtrics, an online survey software platform and tool, was used to distribute the survey to the selected audience and to collect the responses. Recipients were identified using the distribution list from a

1. Donald J. Dunn, Why Legal Research Skills Declined, or When Two Rights Make a Wrong, 85 LAW LIBR. J. 49, 49 (1993).
2. Id. at 49–51 (footnotes omitted).
3. Id. at 52. Dunn argues for a combined research and writing class that emphasizes research, writing, and analysis.
prior survey (hereinafter the “initial survey”) on this same topic (the initial survey is further described below) as updated by the actual contacts from the initial survey and as further supplemented by information provided by the author. The survey was a traditional survey in which the recipients were provided specific questions with a framework of answers and the opportunity to complete the survey instrument in an online format. A copy of the survey is included as the appendix. Ninety-seven of a possible 200 survey recipients participated.4

§5 The initial survey was a phone survey conducted by the staff of the Washington and Lee University School of Law Library during March 2013. Nine staff members from the Washington and Lee Law Library conducted phone interviews of representatives of the top 100 law schools as ranked by the 2013 U.S. News & World Report rankings. I initially provided a point of contact to the surveyors. By default, the director of the law library was used when no other contact was identifiable in charge of legal research instruction at the specified school. The surveyors were instructed not to leave voicemail messages but to continue to seek direct contact with the appropriate representative of each law school. Surveyors worked from a script containing ten basic questions with numerous subparts. The questions were designed to discover basic information regarding the research program with a specific focus on who teaches the research classes, the qualifications of the research instructors, the number of credits awarded for research, the type of grade awarded, areas of research taught, the pedagogical approach to research instruction, types of assessment employed, and areas of greatest challenge to the instructor and student.

§6 All 100 potential respondents were successfully contacted and provided answers to the surveyor’s questions. The intended purpose of this initial survey was to gather information for the purposes of improving legal research instruction at Washington and Lee University School of Law. Surveyors were instructed to have a conversation about the research program with the intent to gather as much information about the existing research programs as those being interviewed were willing to share. Surveyors recorded the information using a survey created by Qualtrics. As the information collected in this prior survey was not intended for publication, data and comments from the initial survey are used in this article solely to provide additional insight to the results compiled from the survey.

The Status of Legal Research Instruction

§7 The 2014 ABA Technology Report indicates that attorneys spend approximately one-fifth of their billable hours engaged in legal research.5 The MacCrater Report lists the essential skills for legal practice as problem solving, legal analysis and reasoning, legal research, factual investigation, communication, counseling, negotiation, litigation and alternative dispute resolution, organization and management of

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4. This article divides the responses of the 200 schools into two subsets, the top 25 and the top 100 as indicated by their U.S. News & World Report rank, for the purposes of determining whether the rank of a school alters how research instruction is delivered. For the top 25–ranked schools, fourteen responses were collected. For the top 100–ranked schools, fifty-two responses were collected.

legal work, and recognizing and resolving ethical dilemmas.\textsuperscript{6} In 2005, the ABA amended its Standard 302(b)(2)(i) [now 302(b)(2)] to include legal research problem solving as an entry-level practitioner competency skill.\textsuperscript{7} Despite the emphasis on legal research by the ABA and MacCrate, it is notable that the Carnegie Foundation Report on Educating Lawyers for the Profession fails to include any discussion of legal research.\textsuperscript{8} As recently as 2009, law firms continued to decry the deficiencies in legal research skills of their new associates.\textsuperscript{9}

\begin{quote}
We are in an environment where research techniques generally and legal research techniques specifically are undergoing a significant transformation due to technological changes and the mass of information now available to attorneys. Technology presents a challenge with the proliferation of information that must be managed in an effective and efficient manner by the researcher.\textsuperscript{10} This means research tasks are significantly more complex, and the corresponding need for research education is ever greater.\textsuperscript{11} As Feliú and Frazer suggest, the current legal research curriculum focuses on writing and therefore requires minimal research, applies few sources, and employs minimal research strategies, ultimately producing attorneys who lack professional levels of expertise.\textsuperscript{12} Anecdotal evidence supports Dunn’s prediction that research education is diminishing in the effort to emphasize writing. Kaplan and Darvil are specific:

The current state of legal research instruction fails to train students to adequately research the law. Because of the limited amount of time devoted to teaching legal research and the superficial nature of that instruction, law students graduate and fail to perform at the level required of them by their employers. In order for law schools to fulfill their obligations to students, a fundamental change needs to be made in the way legal research is taught. Law students must be taught how to research in a cost-effective manner, with a variety of tools and in a variety of formats. They must also be taught how to research a problem conceptually within an ever-changing “legal paradigm.”\textsuperscript{13}

This is in an information environment increasingly made more complex by the abundance of resources at the fingertips of inexperienced researchers—researchers who are predisposed to regard Google as their first, last, and best research solution.
\end{quote}

\begin{itemize}
\item \textsuperscript{7} Am. Bar Ass’n, ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016, at 15 (2015); Vicenç Feliú & Helen Frazer, Embedded Librarians: Teaching Legal Research as a Lawyering Skill, 61 J. LEGAL EDUC. 540, 541 n.8 (2012).
\item \textsuperscript{8} Id. at 542.
\item \textsuperscript{9} See Patrick Meyer, Law Firm Legal Research Requirements for New Attorneys, 101 LAW LIBR. J. 297, 305, 2009 LAW LIBR. J. 17, ¶ 24; see also Aliza B. Kaplan & Kathleen Darvil, Think [and Practice] Like a Lawyer: Legal Research for the New Millennials, 8 LEGAL COMM. & RHETORIC: JALWD 153 (2011). “Legal professionals in particular are critical of new lawyers’ research skills; they say that new lawyers are unprepared to conduct legal research and that their research skills are unsophisticated.” Id. at 155.
\item \textsuperscript{10} Feliú & Frazer, supra note 7, at 544.
\item \textsuperscript{11} See generally \emph{id.} at 541 (supporting the argument that the research environment of lawyers is undergoing wide-ranging change due to technology, creating a need to reform the teaching of advanced legal research).
\item \textsuperscript{12} Id. at 550.
\item \textsuperscript{13} Kaplan & Darvil, supra note 9, at 164.
\end{itemize}
Further complicating the question of how to successfully teach research is the question of how prepared today’s first-year student is for law school. Analysis, research, and writing are symbiotic. You research to locate information, analyze it for fit to the specified context, and ultimately communicate the result, frequently in a written format, be it a letter, memo, brief, or e-mail. In Susan Stuart and Ruth Vance’s article, Bringing a Knife to a Gunfight: The Academically Underprepared Law Student and Legal Education Reform, the authors highlight what most of us see and know—today’s student is not the student of yesterday. The erosion of basic research and writing skills at the high school and college levels is not a figment of our collective imagination. Stuart and Vance cite deficiencies in written communication skills, social skills, and rudimentary problem-solving techniques. Today’s students highlight multitasking as a benefit, but most lack the ability to successfully multi-task and are likely not to have developed the brain circuitry that supports knowledge acquisition, indicative analysis, critical thinking, and reflection.

A preference for images over words also diminishes their desire to tackle lengthy written passages.

Any consideration of improving research skills and research education must embrace technology. The technological sophistication of today’s first-year law student is shallow. Yet the Google generation is in law school and entering the door to the legal profession. Accessing information is seemingly easy, particularly for the digital native who has never seen a phone book and relies on Siri or Google Maps for directions rather than navigating via an actual map. The ability of today’s first-year law students to find something through Google is not at issue; rather the issue is their ability to dig deep, to think critically, to evaluate the information they are finding for fit, and to engage in the legal analysis required in the practice of law.

For those involved in legal education, the goal is to provide students with the tools they need to succeed on graduation. The consistent critical evaluation of the ability of graduates to conduct effective legal research suggests pedagogical improvement is required; but exactly what should we change? This was the overarching question informing the initial survey and the survey. The surveys were designed to seek out basic information about what leading law schools are teaching, who is teaching in the legal research classroom, and how those schools signal the importance of legal research through grading and credit.

15. Id. at 65.
16. Id. This may also explain the appetite for visual tools such as Casetext, Ravel, and features such as Shepard’s graphical display. See also Katrina June Lee, Susan Azyndar & Ingrid Mattson, A New Era: Integrating Today’s “Next Gen” Research Tools Ravel and Casetext in the Law School Classroom, 41 Rutgers Computer & Tech. L.J. 31 (2015).
The Survey, the Data, the Results

Do We Require Legal Research Education?

Is Legal Research a Required, Graded, 1L Class?

¶12 Eighty-two percent of respondents indicated that legal research was a required first-year class. This leaves open the question as to what is done at the remaining eighteen percent of surveyed institutions that do not require formal research training in the first year. Creating subsets of the 200 schools sheds some light on this question. Ten percent of schools ranked in the top 100 indicate they do not require first-year legal research, and twenty-three percent of those responding from the top 25–ranked schools answer that legal research is not a required class.

¶13 Even if you accept the eighty-two percent as sufficient, this is deceptive. Here, the survey’s two follow-up questions are informative: “Is the 1L legal research course a one or two semester class?” and “Is the research class a separate stand-alone class or taught as part of a writing class?” These follow-up questions reflect on the significance assigned to research within the academy.

Is the 1L Research Course a One or Two Semester Class?

¶14 Sixty-seven percent of respondents indicated one or two semesters are required, but what occurs in the remaining third of institutions? One interpretation might be that research is required for more than two semesters. Comments to both the survey and the initial survey reflect a small number of institutions have legal practice or legal skills courses of more than two semesters involving writing, research, interviewing, and counseling. These comments are a distinct minority and would not account for the full one-third of institutions responding “other.” More likely, those schools responding “other” are spending less than one semester teaching research skills. Twenty-five percent of the top 25–ranked schools indicated “other.”

Is Research a Stand-Alone Class or Taught as Part of Legal Writing?

¶15 If graduates are expected to possess good research skills, adequate time to learn how to productively use those tools and methods is essential. Time is the key. Only sixteen percent of all responding institutions indicate they have a stand-alone research class. The percentage, seventeen, from the top 100 schools is similar. Some variance is seen in the responses from the top 25 schools with twenty-three percent reporting that they provide stand-alone instruction in legal research. While expected, the answers remain shocking. In an environment where the MacCrate report indicated legal research skills are fundamental and law firms routinely decry

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19. Unless otherwise indicated, where a percentage is stated, it is of those responding from the 200 rated schools.

20. The comments to question 2 from the respondents from the 200 rated schools reflecting that research is part of a larger skills program included “3 semesters” and “taught within our legal practice program.”

21. Comments to question 2 from respondents from the 200 rated schools indicating that research was less than one semester included “4 weeks,” “one-week intensive,” and “5 sessions.” “Seven weeks” was also a repeated comment.
the research abilities of our graduates, less than one-quarter of the top 25 law schools require a class focused solely on legal research.

¶16 At the same time, what message do we send our students about the importance of legal research? More specifically, what do we signal to first-years? For better or worse, today’s students, like those of yesterday and likely tomorrow, actively engage in a risk/reward analysis when deciding how to budget their time. Three survey questions attempted to address what we signal with credit and grading. With that in mind, the survey asked whether students received a letter grade in legal research or whether their class was graded pass/fail. The impetus behind the question was that students are more likely to assign importance to a class when they receive a letter grade than when they are graded on a pass/fail basis. Credit awarded is another signal indicating importance since how much credit a class is worth is another part of the risk/reward analysis.

¶17 The consistent theme emerging from the answers to this suite of questions is that we fail to signal the importance of legal research in the practice of law. Research is most frequently buried in a writing or general skills class that is already crowded for time and must teach a multiplicity of basic skills. Research and writing are symbiotic; thus the prevailing premise that they can and should be taught together seems sound, at least in theory. You use your research skills to find the content to communicate in a brief or memo. As you write, you find holes in your argument or understanding of the law and you return to research to fill the gaps. It seems natural to teach research and writing together, as they are part of the same process. Does it work, or is research lost in the larger task of teaching legal writing? The answers to this set of questions, as illustrated in figures 1, 2, and 3, imply that writing and other skills development are the focus of the class, with research as the orphan child.

¶18 When the answers to the type of grade assigned and amount of credit received to legal research questions are read together, they suggest that students typically receive a letter grade for a writing class that includes research. Comments on the question on letter grade versus pass/fail support this conclusion. Comments24 include:

• Legal practice is graded.
• Research counts for part of this grade.
• 10 percent of letter grade in writing class.
• Letter grade pertains to legal writing component of the class; legal research assignments are not graded.
• The legal research portion is pass/fail; the entire course is for a letter grade.

22. At least second- and third-year law students are likely to receive some glimmer of the importance of research from their summer positions. I have had more than one student return from a summer position and thank me for making them learn research. I always find those conversations interesting, as the students admit they did not grasp the importance of research until they were in a position that required them to research.


24. Comments included in the text are quotes taken from the survey unless otherwise indicated and include the abbreviations and other hallmarks one expects of an online survey comment field.
Figure 1
Grading Method for 1L Research

Figure 2
Credit Received for 1L Research
The research grade is incorporated into the writing grade.
Students receive a letter grade that is incorporated into their legal writing grade (worth 25% of their LW grade).
The grade is combined with the Legal Writing grade.
Legal writing class is graded and legal research portion is mandatory, but separate “legal research” grade is not given.
Letter grade appears on transcript but is worth 0 credits so it does not affect their GPA.

Comments on the follow-up question about the percentage of the writing grade attributed to research again affirm the diminished presence in the overall course.

- Not sure.
- Maybe 10%.
- Very little.
- Determined by the writing program.
- 25% of the total points available in the three credit course each semester.
- 12%.
- 20%.
- Varies by instructor.
- 40% of the grade for the 6-credit year-long course.
- 5%.
- Students must pass the research course or they fail the writing course.
- Not separated out.
- Maybe 20%? Counts as part of all writing assignments.
Similar comments were provided as part of the credit allocation question.

- 10 percent of the writing class.
- The legal research part of the class is not graded.
- It is part of the writing course.
- 25% of the 3-credit Lawyering Skills course each semester.
- Points.
- It is bundled into the three-credit LS II course.
- None.
- A percentage of the LRW class.
- The credit is combined with Legal Writing.

**Who Teaches Legal Research?**

¶19 In 1973, an ABA questionnaire of library instruction practices indicated forty-three percent of the then 124 law schools combined research and writing in one course.25 Of interest is that Helene Shapo, the author of the study, concluded that in most law schools law librarians did not teach research.26 She noted that “research instruction by adjuncts and third-year students tends to be more idiosyncratic and anecdotal than instruction informed by a more comprehensive study of the types of research materials available in the law school library.”27 Shapo’s argument for the combined class is that an integrated class avoids “treasure hunt” research assignments in favor of more realistic assignments teaching research as part of “the analytical process lawyers undertake. This process requires students to define issues, plan research strategies, evaluate the authoritative value of the materials they have found, and engage in further research as their writing reveals analytical weaknesses.”28 While sound in theory, this approach fails to address the question of who is teaching legal research. Again, if the experts are those who routinely use and engage with the tools of research, why are they not the ones charged with teaching our students? Shapo even alludes to the larger issue: if the legal writing instructors are experts in writing rather than research, where is their time and energy likely to be focused?

¶20 The results of the survey identify dual-degree law librarians and legal writing faculty as the primary instructors of legal research at forty-four and forty-three percent respectively. As written, the question provides for multiple options thus leading to results greater than one hundred percent. The descriptors include: (a) tenured/tenure-track faculty, (b) adjunct faculty, (c) legal writing faculty, (d) law librarians (not dual degreed), (e) law librarians (dual degree) and (f) other. Of note, the number of dual-degree librarians rises to sixty-two percent when viewing responses from the top 25 schools. This is significant. Who is best able to teach legal research but for those that are expert in the subject? As Richard Danner once suggested, we hire someon whose expertise is contracts to teach contracts, not someone whose expertise is torts.29

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26. *Id.* at 725.
27. *Id.*
28. *Id.* at 726.
What Is Taught?

§21 Next the survey turned to a series of questions targeting what is taught in the research class. Figure 4 illustrates the subjects taught in the research class and in what semester. A frequent observation from law firm librarians is the reluctance of associates to use secondary resources and engage in cost-effective research.\(^30\) Similarly, in a recent white paper sponsored by LexisNexis, forty-nine percent of those surveyed answered that research should be a larger part of the law school curriculum.\(^31\) The same paper recommends that increased time be devoted to statutory research and administrative law.\(^32\) Secondary resources, case law, statutory research, legislative history, and administrative materials are taught by a majority of the responding institutions.

§22 Sixty-seven percent continue to teach print research skills, with digests, reporters, statutes, and secondary sources all being taught by a significant majority of those responding. Of those who teach print research skills, large majorities report teaching statutory research (ninety-three percent) and secondary sources (seventy-nine percent). The question also permitted comments as to other resources taught. Practice materials, state materials, jury instructions, and legal forms were all cited in comments.

“Just as law school curriculum provides a contracts specialist, not a torts scholar, to teach the first-year contracts course, so should it provide someone with active knowledge of research sources and techniques to teach legal research.” Id. at 600.


32. Id.
¶23 Research assignments are integrated with the writing assignment at fifty-seven percent of the responding institutions. Independent research hypotheticals, “treasure hunt” assignments, and other variations on the research assignment follow at thirty-seven percent, twenty-two percent, and fourteen percent of responding institutions respectively. When the responses of the top 25 schools are isolated, integration of the research assignment into the writing assignment rises to seventy percent while the independent research hypotheticals and “treasure hunt” assignments fall to ten percent each.

¶24 Respondents were also asked how many research assignments were administered during the first year. In absolute numbers, for the fall semester 43 respondents indicated 1 to 4 assignments with only 12 indicating more than 4; for the spring semester 40 respondents indicated 1 to 4 assignments with only 18 responding more than 4 assignments. When asked whether a final exam was administered at the conclusion of the course, fifty-nine percent answered no. The forty-one percent that do administer a final exam employ a broad spectrum of assessment techniques, including oral exams, multiple-choice tests, short-answer exams, and other assessment formats. “Other” was the most frequent response at fifty-four percent. Multiple-choice and short-answer formats follow at forty-six percent each. Schools indicating no final exam is given were asked whether a final project or other form of evaluation is employed. Their comments are revealing. Somewhat surprisingly, a number of comments also reflect research projects as the final assessment—“comprehensive library research assignments,” “compiling research logs documenting the research for appellate briefs,” “‘research plan & report’ for the big writing assignments.” Despite the promise of the comprehensive library-type assignments, many of the chosen forms of assessment are consistent with that of a writing class. Examples include assigning open memos, closed memos, briefs, and oral arguments—all possible examples of an excellent end product for a research class to the extent research is a central focus and, yet, all consistent with a writing class where writing is likely to be the focus over the research. Briefs, memos, and oral arguments are the typical types of assessment reflected in the comments and often with language that the assessment is of a written product for a writing class. A typical comment is that “no, because the legal research classes are a component of the fall legal research and writing classes”; “first semester a closed memo and an open memo and second semester an open brief with an appellate argument.” Overall, the comments reflect the diminished presence of research with statements such as “no final evaluation of legal research skills” and “legal research training is extremely limited and targeted to the writing project.”

¶25 Ninety-nine percent of respondents offer an advanced research class, but only nine percent of those responding mandate that their students take the course. Descriptions of the advanced research class vary broadly. The class is most often a one-semester, two-credit class taught by a dual-degree librarian. Representative topics in the advanced class include review of basic skills, statistics, foreign and international law, and interdisciplinary sources. The other style of advanced research class is subject specific, with tax, intellectual property, international law, and health law being offered. The survey also inquired as to distance learning for the advanced legal research class. Eighty-eight percent indicated distance education is not used for the advanced class.
The survey also inquired as to the popularity and use of the flipped classroom. Forty-one percent indicated use of a flipped classroom, and of those, seventy-three percent were in their first or second year of this model. Nine percent of the cohort indicated use of a flipped classroom for more than four years. In-house generated modules and CALI lessons were the most frequently utilized components in the flipped classes.

What Are the Challenges in Teaching Research?

In the initial survey, the surveyors posed an open-ended question permitting a variety of responses. Benefiting from the initial survey, question 36 as asked in the survey was a structured question. Quotations from the responses from the initial survey as to challenges faced in teaching legal research are captured below and informed the ultimate design of question 36 in the survey. Figure 5 identifies common challenges in research instruction by rank of law school.

- Lack of time available to 1Ls for anything beyond that of their required courses.
- Not enough time in a one-credit required class to address all changes happening in the field and to prepare students for the many different eventualities.
- Finding interesting problems to use.
• They don’t like it, they are bored with it.
• 1Ls believe they are great researchers. In fact they are great at accessing information and often not particularly strong at making judgments about the quality of the information they’ve accessed or at determining how to use/integrate the information in their assignments.
• Lack of receptiveness to time-sensitive and cost-effective search methods, and the need to plan search strategies.
• They don’t seem to have a grasp of what it is they should be doing, as lawyers. The whole concept of legal research as an integrative process takes longer to sink in than it should.
• Organizational skills.
• Blind trust in the effectiveness of online research.
• Student frustration at the comparatively low credit they receive for the time they put into the required course.
• Students that arrive in possession of poor basic research and writing skills.
• Getting time with the students.
• Getting them to take it seriously . . . making them understand they need to know legal research.
• Teaching approach and concepts to the “Google” generation.
• Failure to understand the structure of the law.
• The closed reference model does not require actual research, therefore students get no practice at what they are taught.

Question 36 in the survey read: “What is your greatest challenge in teaching legal research?”

• Problem development
• Breaking the “Google-everything” habit
• Time allocation
• Getting the attention of 1L students
• Teaching a course worth fewer credits than substantive law classes
• Other. Please describe.

Those responding “other” were asked to expand on their responses. Similar to the comments from the initial survey, time, attention, and lack of understanding by the students of the importance of research are mentioned. One new comment of interest also appeared—“working with the writing faculty.”

**General Comments on Teaching Legal Research**

¶28 The final question of the survey asked respondents to comment generally on their experience of teaching legal research. The comments reflect the challenges in teaching this subject:

• Integrating is the only way to get students engaged in the work when the class is worth such a little percentage of an already devalued class.
• Try to break the Westlaw habit. Not every problem is best solved by typing words in a box to get everything and then filtering. There is still room to do searches that are more controlled for certain kinds of problems.
• Each spring semester brings a different class with a different attitude. Some are highly motivated, some not so much. I have taught a similar class over the past 11 years and detect a slight trend towards students only wanting to learn something they have an immediate use for.
• Has become more difficult in every aspect: learners come less prepared and less interested, there is more to cover as platforms have changed and more government information is on the web.

The Future of Legal Research Instruction

¶29 Based on the survey responses and paying particular attention to the challenges in teaching research identified by respondents, what is the ideal design of the basic legal research class? The ideal suggested here focuses on what an effective introductory research class should look like. Integration of research into the three distinct years of law school, although highly desirable, is beyond the scope of this recommendation and article. The introductory legal research class should employ four basic requirements. These basic requirements are simple and most likely controversial, if for no reason other than the increased cost in time in the curriculum and personnel:

1. A required research class of a minimum of two credits taught in the spring semester of the first year (one credit) and the fall semester of the 2L year (one credit)
2. A professor with both a J.D. and an M.L.S. or M.I.S., preferably admitted to the bar and possessing some experience in the practice of law or an equivalent level of practical experience
3. A grading schema equivalent to that of the first-year doctrinal courses
4. A curriculum that includes research strategy; the fundamental resources of secondary sources, case research, statutory research, and the administrative state; problem solving; and concepts of efficiency and effectiveness

¶30 Why a minimum of two credits? At a practical level, students equate credit with value. Anything less than two credits is likely to be dismissed in the risk/reward calculations conducted by students. More realistically, teaching everything a student should master in a research class designed to prepare that student for the rigor and realities of practice will exceed the minimum class time for two credits as established by the ABA.

¶31 The popular fiction that everything is online and thus easy to access plays not only to those who believe everything is free and online but also to the students who believe they are masters of research when, in all likelihood, Google is their master. As we all know, not everything is freely available online, and millennial students are more likely to lack the basic research skills of prior generations. This is certainly what is suggested by the comments from those in the trenches. To be valuable, the research class must be interesting, relevant, and integral to a student’s legal education. Today’s lawyer is “flooded with so much information that it is easy

to get lost. It is the lawyer’s job to find information that is pertinent to the legal problems presented and ultimately to create something meaningful from that information.”

Thus, the recommendation is for a professor with both the practice experience as a lawyer and the expertise of the lawyer librarian for credibility. In other words, permit the experts to teach the subject in which they are the experts.

Finally, a grade consistent with that of a doctrinal class is a must. Is pass/fail an option? Perhaps, if other required classes in the first year are also graded pass/fail. The key to the grade is to indicate value in the context of the legal education offered by the highly desirable institution. The class must be perceived by students to have real academic value. Students are likely to connect value with the concept of a letter grade, particularly if the research class competes for time with other classes that carry letter grades. The answer here lies not with pass/fail versus letter grade versus some other schema but answering the question of does it connote importance in the same way students’ other classes are perceived as important?

What is included in the curriculum? The goal of law school, for most, is admission to the bar and representation of clients in the practice of law. The goal of the research curriculum should be to provide students the research skills needed to practice law. We are already teaching the basics—secondary resources, case research, statutory research, legislative history, and the administrative state. We need to add research strategy, analysis in a research context, and cost-effective research. The advanced legal research class, especially as an elective substituting for the basic first-year class, is insufficient to cure the problem.

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35. See Peter Toll Hoffman, Teaching Theory Versus Practice: Are We Training Lawyers or Plumbers?, 2012 Mich. St. L. Rev. 625. Practical experience is rarely listed as a qualification required for traditional law school teaching positions, except for clinical and lawyering skills positions where such practice is the norm. Some suggest that actual law practice is a negative that is viewed as a lack of commitment to scholarship. Id. at 639; see also Callister, supra note 33, at 24, ¶ 38 (“[L]aw librarians may need to stretch (or reflect on earlier days when they practiced law) to fully understand the package of skills needed by their students.”).

36. Kaplan & Darvil, supra note 9, at 188 (“Historically, librarians taught legal research. During the last few decades, however, law schools merged the teaching of legal research with legal writing instruction under the guise that it could be taught properly only when paired with legal writing. Given the extent of criticism by members of the legal profession and the results of studies indicating that law graduates lack proficiency in legal research, it is safe to say that ‘giving responsibility of legal research instruction to legal writing faculty has [not] yielded the hoped for outcomes.’”).


In a significant number of schools, the basic first-year legal research and writing course is graded on a scale different from the other traditional courses. This has the advantages of reducing competitiveness in what can be a stressful time, encouraging collaboration when appropriate and instructor participation when needed, allowing for greater flexibility, freeing instructors from the onerous task of assigning precise grades, and taking into account the experimentation that students will, of necessity, be doing in their research and writing class.

However, a “unique” grading system has disadvantages that are equally obvious. The “incentive factor” of a graded course is not present if the grade does not carry the weight that grades in other courses do. In addition, an inconsistent system for grading further distinguishes the legal research and writing course from other academic responsibilities— a distinction which the students and faculty teaching in other fields could interpret to mean that the class is less worthy of serious attention.

38. Callister, supra note 33, at 23, ¶ 37.
Conclusion

¶34 The common refrain that law students lack the most basic legal research skills is likely to continue until law schools make fundamental structural changes in the method of teaching legal research. Changes to the basic research curriculum must reinforce the importance of research within the practice of law. This means a research course to which students will assign importance in a risk/reward calculation and a course taught by an expert with sufficient time allocated to effectively teach the complexities of research. A continued lack of emphasis on research within the framework of legal writing or legal practice skills, combined with the information explosion, will continue to diminish the importance of research and will result in a loud and appropriate chorus from the bench and bar that "Johnny and Jane Cannot Research."
Appendix

December 2014 Qualtrics Survey

Thank you for completing this survey. It should take no more than 15 to 20 minutes of your time.

Please complete the following information about you and your institution. Your response is confidential.

Name:
Role:
Institution:
Phone:
E-mail:

1L Legal Research Course

1. Is legal research a required 1L class?
   - [ ] Yes
   - [ ] No

2. Is the 1L legal research course a one or two semester class?
   - [ ] 1 semester
   - [ ] 2 semesters
   - [ ] Other

3. Which of the following best describes the instructors in your 1L legal research program:
   - [ ] Tenured/Tenure-track faculty
   - [ ] Adjunct faculty
   - [ ] Legal writing faculty
   - [ ] Law librarians (not dual degree)
   - [ ] Law librarians (dual degree)
   - [ ] Other

4. Is the research class a separate stand-alone class or taught as part of a writing class?
   - [ ] Stand-alone
   - [ ] Part of a writing course
   - [ ] Other
5. Do you employ a “flipped” classroom approach in the 1L legal research course?
   - Yes
   - No

   If yes, please describe the basic structure of your flipped classroom. For example, what types of materials do students view outside of the classroom? Video, audio, or interactive module? What technology was used to develop the materials? What types of activities do students complete in the classroom?

6. How long have you been using the flipped classroom approach?
   - 1–2 academic years
   - 3–4 academic years
   - More than 4 academic years

7. Do 1L students receive a letter grade or is the class graded pass/fail?
   - Letter grade
   - Pass/fail
   - Other

8. How many credits do students receive for the 1L legal research class?
   - 0.5 credit
   - 1 credit
   - 2 credits
   - Other

9. Is the 1L research grade a portion of the writing grade?
   - Yes
   - No

10. When are the following subjects taught in the 1L legal research class?

<table>
<thead>
<tr>
<th></th>
<th>Fall Semester</th>
<th>Spring Semester</th>
<th>Full Year</th>
<th>Does Not Apply/Not Taught</th>
</tr>
</thead>
<tbody>
<tr>
<td>Secondary resources</td>
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<tr>
<td>Case law</td>
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<td>Statutory research</td>
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<td>Legislative history</td>
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<td>Administrative materials</td>
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<td>Other</td>
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11. Does the 1L program teach students to conduct research using print materials?
   - Yes
   - No
12. If yes, is the use of print materials taught prior to the use of online materials or does the program take an integrated approach?

- Print materials first
- Online materials first
- Integrated, teaching both print and online together

13. Which of the resources are students taught to use in print?

- Digests
- Reporters
- Statutes
- Secondary sources
- Other

14. Have your 1L students demonstrated difficulty with any of the following basic research tasks?

- Using an index
- Using a table of contents
- Physically locating print resources in a law library
- Other

15. Which of the following research tools are taught in your 1L program?

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<thead>
<tr>
<th></th>
<th>Fall Semester</th>
<th>Spring Semester</th>
<th>Full Year</th>
<th>Not Taught</th>
</tr>
</thead>
<tbody>
<tr>
<td>Westlaw</td>
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<tr>
<td>LexisNexis</td>
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<td>Bloomberg Law</td>
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<td>Google</td>
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<td>Google Scholar</td>
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<td>Fastcase</td>
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<tr>
<td>GPO/Library of Congress/other free federal sources</td>
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<td></td>
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</tbody>
</table>

16. Do you restrict the use of Westlaw or LexisNexis in any manner?

- Yes, describe
- No

17. Do vendor representatives participate in your 1L program?

- Yes, please describe their role
- No, please describe why you chose not to involve vendor representatives
18. Which of the following phrases best describes your approach to 1L research assignments?

- Integrated with the writing assignment
- Independent research hypothetical
- Treasure hunt
- Other

19. How many research assignments are administered in the 1L legal research course?

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<th>1–2</th>
<th>2–3</th>
<th>3–4</th>
<th>More than 4</th>
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<tbody>
<tr>
<td>Fall Semester</td>
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<td>Spring Semester</td>
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</table>

20. Are 1L students expected to work independently on assignments or is collaboration permitted?

- Independently
- Collaboratively
- Varies per assignment

21. Is there a final exam administered at the conclusion of the course?

- Yes
- No

22. How is the final exam for the 1L legal research course administered?

Please choose all that apply.

- Oral exam
- Multiple choice
- Short answer
- Other

23. If there is no final exam administered in the 1L course, is there a final project or other form of evaluation? Please describe.

**Advanced Legal Research**

24. Does your school offer an advanced research class?

- Yes
- No

25. Is the advanced research class required?

- Yes
- No
26. Is the advanced research class offered as a distance learning course?

☐ Yes
☐ No

27. Which of the following best describes the instructors in your advanced legal research program?

☐ Tenured/Tenure-track faculty
☐ Adjunct faculty
☐ Legal writing faculty
☐ Law librarians (not dual degree)
☐ Law librarians (dual degree)
☐ Other

28. Is the advanced research course a one or two semester class?

☐ 1 semester
☐ 2 semesters
☐ Other

29. How many credits do students earn in the advanced research class?

☐ 0.5 credit
☐ 1 credit
☐ 2 credits
☐ Other

30. What topics are covered in the advanced research class? Please select all that apply.

☐ Review of basic legal research skills
☐ Interdisciplinary resources
☐ Statistical resources
☐ Foreign law
☐ International law
☐ Other, please describe

31. How many research assignments are administered in the advanced research course?

<table>
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<th>2–3</th>
<th>3–4</th>
<th>More than 4</th>
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<tr>
<td>Fall Semester</td>
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<tr>
<td>Spring Semester</td>
<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

32. Are advanced students expected to work independently on assignments or is collaboration permitted?

☐ Independently
☐ Collaboratively
☐ Varies per assignment
33. How is the final exam for the advanced research course administered? Please choose all that apply.

- Oral exam
- Multiple choice
- Short answer
- Other

34. Does your institution offer advanced research courses for specialized subject areas? If so, please indicate which subjects these courses cover.

- Tax
- Intellectual property
- International law
- Health law
- Other, please describe
- Do not offer specialized research courses

35. Please briefly describe the structure of the advanced legal research course to the extent not covered in the preceding questions.

**Teaching Legal Research**

36. What is your greatest challenge in teaching legal research?

- Problem development
- Breaking the “Google-everything” habit
- Time allocation
- Getting the attention of 1L students
- Teaching a course worth fewer credits than substantive law classes
- Other, please describe

37. Please use the space below to comment generally on teaching legal research.
Due Diligence: Company Information for Law Students’

Matthew M. Morrison”

Many law students are placed with corporate law firms whose clients are overwhelmingly companies. While many law school courses focus on doctrine, students need to learn company information and where to find it. This article explains why teaching company information is crucial, where to find sources, and how to use these sources.

Why Company Information?

Law students are not business students. Nonetheless, businesses are, so often, a significant portion of a law student’s future employer’s clientele. Many

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Why Company Information?

¶1 Law students are not business students. Nonetheless, businesses are, so often, a significant portion of a law student’s future employer’s clientele. Many

** Faculty Services Librarian and Lecturer in Law, Cornell University Law Library, Ithaca, New York.
firms, especially larger ones, are known as “corporate law firms” for a reason. Indeed, many law students take courses on corporations, business law, transactional law, or all of these. At schools such as Cornell, these courses are subscribed in large numbers. However, these courses focus on doctrine. For students to best serve their business clients, they need to understand the client itself: what does the company do; what is its competitive context; what basic law informs its activities; and what information does the client create, especially the information used to satisfy legal requirements?

¶ 2 A recent LexisNexis white paper underscores the importance of teaching business information¹ to law students. Three hundred hiring partners were surveyed, and ninety-five percent of those with transactional practices find new graduates lacking in relevant skills.² Skills identified as important include conducting due diligence research, finding basic company information, locating and using checklists, finding and reading Securities and Exchange Commission (SEC) filings, and staying current with business news.³ These are areas that I focus on when teaching a business information course. In what follows, I expound on the why and how of business information and the legal context in which it resides.

Employment Matters

¶ 3 According to the National Association for Law Placement, over half of the class of 2013 went into private practice, with twenty percent of these working for large corporate firms.⁴ Others go on to work with business clients directly.⁵ Whether in-house or outside counsel, new attorneys need to be versed in basic company information and its intersection with the law.

¶ 4 Thus, students need to know the sources of company information and how and where to obtain it. Enter the law library to teach the main sources and research methods. In my advanced research course in business information, my course objectives are for the students to gain awareness and proficiency in the massive and complex range of business information sources while learning to assess the quality and relevance of sources in a broad context. As a result of the employment reality, students must be prepared to handle the following three areas: current corporate clients, business development, and mergers and acquisitions transactions.

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¹ I use “company information” and “business information” interchangeably, although “business information” is broader and may include transactional materials such as sample contracts.
³ Id. at 5–6.
⁵ Id. at 4. Business employment was at eighteen percent, a historic high. Id.
Current Corporate Clients

To provide the best advice to a current client, associates must have knowledge of that client’s business and industry, including key company personnel. In its first-year associate training program, corporate law firm Drinker Biddle echoes this. Moreover, according to Steve Lastres, Director of Knowledge Management Services for Debevoise and Plimpton, law students need to understand legal problems within a client’s larger business context, including specifics of company information.

When working with current corporate clients, an attorney must also be aware of insider activity. They must know both the law and how to find the relevant documents. Relevant reports of insider transactions include Forms 3, 4, and 5. To properly defend against an action under section 16(b) of the Securities Exchange Act, a company’s attorney must be well versed in the investigation of these reports.

Business Development

Sizing up the competition and recruiting new clients is key in today’s competitive environment. Business development relies specifically on competitive intelligence, which includes client intelligence. Competitive intelligence focuses on competitors; however, it must also include “major clients and prospects and their industries.” To be strategic, firms must track the industry trends of potential clients. Moreover, identifying prospective clients relies not only on industry knowledge, but also knowing about key personnel working for the potential client. Client intelligence also directly informs the pitch to a new client. Attorneys

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11. See 1 JACOBS, supra note 9, § 2:1.

12. Competitive intelligence has multiple definitions but generally is focused on gathering and analyzing information to better understand the competitive marketplace. See Ann Lee Gibson, How to Create and Use Competitive Intelligence: 45 Tips for Law Firms, LAW PRACT., Mar. 2008, at 47–51.


15. Gibson, supra note 12, at 48.

16. Id.

17. Id. at 50.
should be thinking about how to prepare for the pitch and what solutions and strategies should be proposed. This preparation is greatly informed by both company and industry information.

Mergers and Acquisitions Transactions

¶8 Mergers and acquisitions (M&A) are a major piece of a corporate law firm’s work. When acquisitions are in negotiation, due diligence is crucial while also time-consuming and expensive; thus it is typically performed by young associates.

¶9 M&A due diligence involves several steps; the two most relevant ones are discussed here. The first is getting to know the company, which includes its industry, as well as trade publications and prospectuses. The second step involves compiling information that is disseminated in disclosure documents, including proxies and registration statements.

¶10 When one looks at M&A more closely, one can see the importance of teaching business information. M&A transactions require investigations—the acquiring company investigates the target, and the target investigates the acquiring company.

¶11 The acquiring company has three objectives in its investigation of the target. First, does the target meet predetermined acquisition criteria? Second, the acquiring company wants to uncover any potential deal breakers, such as undisclosed liabilities, internal accounting defects, and unobtainable but necessary consents. Third, the acquirer wants information to evaluate the transaction.

¶12 The target company should do an investigation, too. First, the board of directors must have sufficient information to confidently recommend the merger. Second, the target company, in a stock-for-stock sale, will want to know the full background of the acquirer. Finally, in a cash transaction, the target must know whether the acquiring company has sufficient funds.

¶13 The nature of these investigations reveals the importance of the range of documentation that provides company information. Whether seller or buyer, the details revealed in disclosure and other documents are critical. Moreover, that most of this due diligence work is done by young associates emphasizes the importance and utility of offering a business information course to law students.

18. Id.
20. Id. at 84.
21. Id.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
Finding and Understanding Company Information

¶14 Clearly, teaching business information will help a significant number of future attorneys to hit the ground running when joining a corporate law firm. With the foundation laid as to why teaching this information is crucial, let’s turn our attention to finding and understanding the information.

¶15 I divide company information into three major categories: (1) what third parties say about the company and its industry; (2) what the company says about itself; and (3) insider information and stock prices. I treat insider information as a separate category because it deals specifically with the personnel—officers and directors—of a company and not directly with what the company says about the corporate entity. Moreover, insider information goes directly to executive compensation, which, as a matter of great importance to shareholders, draws much attention.29

What Third Parties Say About the Company and Its Industry

¶16 A plethora of business information is generated by third parties. Discussion of four major categories follows: directories, news, analysis, and industry information. I also include a section on a special resource called Capital IQ. Under each category is a diverse selection of products that I have found to be the best sources. Of course, any given firm may subscribe to one or more of the following products, or it may subscribe to none of them. My aim is to provide an idea of what is available, including free resources, and compare their relative merits.

Directories

¶17 Directories provide a broad overview of a company. They are quick sources for obtaining pertinent facts without the depth of SEC filings or company annual reports. These sources provide a new attorney with a way to quickly get up to speed on a client or potential client.

¶18 Hoover’s, a product of Dun & Bradstreet, is a standard company directory. It is available both as a stand-alone product and on Lexis Advance. The stand-alone platform provides the complete range of information available, while records on Lexis Advance are somewhat sparse and inconsistent.

¶19 The stand-alone platform allows users to search by company, people, or industry. Company profiles provide a complete overview of the company, including a company description, news, industry information, product information, financials, a competitors list, real-time stock information, and profiles of officers and directors.

¶20 Lexis Advance splits Hoover’s into basic and in-depth records. Nonetheless, the information provided is sparse compared to the stand-alone platform. For example, the entries for the Boeing Company provide a brief company description, an industries list, a short list of competitors, and some basic financial and stock

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information. The in-depth financials and people profiles are two items missing from the LexisNexis records that attorneys need to have. Detailed financial records provide a view into the health of the company, while officer and director profiles inform attorneys of who the main players are and their executive compensation data.

¶21 Mergent Online, another Dun & Bradstreet product, is similar to Hoover’s. While there is certainly overlap between directories, Mergent provides more details in a nicely organized format. Basic data—such as address, date, and state of incorporation, and IRS number, auditor, and registered agent—appear in a banner along the top. Then the user has ten tabs from which to choose for additional information. Most tabs are subdivided into more specific topics. An area of contrast between Hoover’s and Mergent is competitor information. Mergent provides several additional pieces of data for each competitor, which give a broader financial view of the competitor company.[30]

¶22 An excellent feature of Mergent is the report builder. Users may select pieces of data from five categories: company details, pricing information, company financials, executives, and news. The report can be created in one of several formats, each of which uses a crisp, professional look.

News

¶23 News sources are rich in current company information. Reports of upcoming deals, company actions, changes in executive officers, stock performance, and other information can all be found in news.

¶24 Bloomberg Law is a product of the Bloomberg news and stock information company. Bloomberg’s history[31] establishes it as a major source for business news. While one can browse or search the latest news on Bloomberg Law, generally an attorney will want news about a specific company. The user may simply type the company name in the upper-right “go” bar and select the profile page for the company. Once on the profile page, the user will see a news section that includes the current headlines for the company. [32] Use the “More” link to run a search of news for the company. The results can be filtered by topic, person, and region, or one may select a different company. One may also manipulate search criteria to narrow by date and relevancy, and also to exclude web sources.

¶25 An interesting feature of Bloomberg Law is the Rumors, Leads, and Insights section within the Business Development Center. Drawn from various wires and media entities, the content is organized into several categories, including M&A Rumors, Initial Public Offerings Rumors, Potential Investigations, and Attorney Moves. Users may draw content for all companies or can tailor the content to a

30. Mergent includes EBITDA (earnings before income tax, depreciation, and amortization), total assets and liabilities, PE ratio, and market capitalization.

31. Bloomberg began in 1981 with a mission to provide information and data to make capital markets more transparent. See Bloomberg History & Facts, BLOOMBERG, [https://perma.cc/3X6U-SDEB]. Today, Bloomberg delivers 5000 news stories daily, sourcing from more than 150 bureaus in 73 countries. Id.

32. There is also basic information that one would find in the directories discussed above. See supra ¶¶ 17–22.
specific company. The content helps attorneys stay abreast of developments, or potential developments, that have legal consequences.

¶26 MarketWatch, a Dow Jones company, provides free access to a plethora of company news. The main page is devoted to national news, market news, and headlines for various companies. The main page also includes real-time market information for the United States, Europe, and Asia. As with Bloomberg, users may limit by company by going to the profile page. Using the search icon in the upper-right of the page, one enters either the company name or ticker symbol. Once on the profile page, users have access to real-time stock prices, as well as company-related headlines on the right side. For complete company news, click the News link found on the top of the page. Much of the news reports on company and stock performance and competitor activity. Also, many analyst discussions are included.

Analysis

¶27 The business world is replete with analysts. Most analysis is focused on company stock performance, thus providing relevant information for investment decisions and choices. Analysis also focuses on the company itself. The legal practitioner can use this analysis to gain greater understanding of the company and its business context, company decisions, financial situation, market challenges, and, of course, stock performance. There are many sources for obtaining expert analysis. These include Business Source Complete and Thomson One.

¶28 A main feature of Business Source Complete is the SWOT analysis. Prepared by MarketLine, the report analyzes a company’s strengths, weaknesses, opportunities, and threats, hence “SWOT.” In addition, the report provides an overview and key facts.

¶29 Initially, the SWOT analysis is summarized in a boxed format with several key points in each category. For example, the General Dynamics Corporation’s recent report notes “broad product portfolio and balanced revenue streams” as one strength. An opposing weakness is “business and customer concentration.” Similarly, a “growing global aerospace and defense market” is noted as an opportunity, while an opposing threat is “intense competition.” Each of the points is then fleshed out in the balance of the report with extensive discussion of company activity and statistics. SWOT analyses thus provide a new attorney with a sense of the competitive context in which the company operates, while contrasting positive factors with challenges.

33. Users will need to place a company of interest onto their Company Watchlist to access company-specific content.
37. Id.
38. Id.
39. Id. at 29–34.
¶30 In addition to being a directory, Thomson One has extensive analyst reports. As a directory, Thomson One provides comprehensive coverage of company news, financial data, deal information, and coverage of company officers. Nonetheless, Thomson One excels in analyst coverage.

¶31 To access reports, which are primarily targeted to investors, use the Company Views tab, then select the Research tab. Links to reports now display and can be customized by date, title, and contributor. Users may also exclude a contributor and remove nonbroker research. Several of the contributors should be familiar, including Deutsche Bank, Barclays, and Wells Fargo. For each contributor, the name of the analyst is listed.

¶32 The reports themselves vary but typically have common components. Most combine a narrative with relevant data presented in charts and graphs. They also note the stock’s buy/hold/sell rating and the stock’s target price.

¶33 The narratives have value as they provide an expert’s view of the company, its performance, and its stock performance. In a recent report on the General Dynamics Company, contributed by Deutsche Bank, the analyst discussed specific financial items, such as quarterly sales, earnings per share, and cash flow. Nonetheless, the analyst also identified investor fears related to a particular product line and what the company has done to allay those fears, as well as discussing risks the company faces.

Industry Information

¶34 We finish “what third parties say” by looking at industry information. Two sources to consider are Standard & Poor’s (S&P) NetAdvantage, and Mergent Industry Reports, available on LexisNexis. Industry information helps an attorney understand the company’s broader business context and the legal issues that arise in such a context. Company clients do not operate within a vacuum—they compete within an industry and face the challenges that competition presents. Attorneys versed in industry information will better understand the competitive context within which a company is situated.

¶35 S&P NetAdvantage provides extensive surveys on more than fifty industries, from advertising to gaming to textiles, which are written by equity analysts. Users can browse the list of major industries to find a survey, or they can use a company name and the database will provide the relevant industry survey.

¶36 The surveys are divided into an executive summary, an industry performance discussion, an industry profile, and comparative company analysis. A glossary of terms is also provided. Particularly useful pieces of the survey include “how” sections: How the Industry Operates and How to Analyze This Industry. The comparative company analysis shows how a client, or potential client, stacks up against its competition on several key financial metrics.

40. Thomson One (www.thomsonone.com) would be suitable as a stand-alone product.
41. For broad searching, use the Screening & Analysis tab, then the Research tab.
42. An analyst’s view of whether a security should be bought or sold in the current market or held for a future disposition. See Downes & Goodman, supra note 22, at 310.
43. A projected price that a broker or analyst advises will be an advantageous time to sell. See id. at 702–03.
44. See generally Gibson, supra note 12, at 47–51.
¶37 NetAdvantage also includes sub-industry reviews. For example, in addition to a broad survey on the retailing industry, users can see a review specific to the apparel retailing industry. The sub-industry reviews provide information comparable to the surveys but in a condensed one-paragraph treatment of the specific industry.

¶38 Similar to NetAdvantage, Mergent Industry Reports covers a broad range of industries, including aviation, chemicals, and banking. A key difference is that it provides reports that are specific to parts of the world—North America, Asia, Europe, Latin America, and Oceania—while NetAdvantage is North America–centric. The reports combine significant narrative with citations to statistics when relevant.

¶39 The Mergent reports discuss numerous points of interest for each industry/region combination. Many reports include a scope note. Reports include a sector overview and discussion of sector performance. For example, the Aviation-Asia Pacific report notes that the region leads growth in the aviation industry, accounting for $500 billion in economic activity. The sector performance section is more granular, looking at specific companies and their stock performance. This leads to an expanded discussion of each of the leading companies in the industry.

¶40 Other important sections of the reports include a M&A discussion, policy and regulatory information, industry size and volume, and useful web links. While S&P’s Net Advantage is a very useful product, being able to access Mergent via LexisNexis is an advantage.45

Capital IQ

¶41 S&P’s Capital IQ is a product that goes well beyond the standard directory. It’s essentially a broad combination of the products discussed above and is becoming a de rigueur resource in many corporate law firms. The product includes profiles of companies, industries, people, and funds. Also available are news, government filings, and annual reports. For a given company, the information is extraordinary. This includes a company summary, key people including compensation, financials (balance sheet, cash flow, and capitalization), transactions, equity details, business relationships, investors, and investments.

¶42 Of particular interest to attorneys is the transactional information. Capital IQ provides M&A information, public offerings, and takeover defenses.46 Specifically, M&A information provides the announced date, the closing date, the transaction type (M&A or buyback), the company’s role (seller, buyer, target, with parent company indicated when relevant), buyer details, target details, and size in dollars. Also available are steps a target has taken to guard against a takeover, including corporate documents such as bylaws and other documents.

¶43 Public offering information is also available. This includes when the registration was filed, the offer date, the issuer of the securities, the type of securities issued, and the size of the offering in dollars. The type of securities can include corporate bonds, common stock, and other security types.

45. Of course, this assumes that Mergent is included in an employer’s LexisNexis subscription.
46. Approaches a company takes when it is the object of an unfriendly attempt to acquire the company by another company. See Downes & Goodman, supra note 22, at 700.
¶44 With its sheer breadth and depth, an entire article could be devoted to Capital IQ. It is important to address in a business information course because new corporate attorneys are likely to encounter it. However, it is unlikely that a law school library will subscribe to Capital IQ. Business information course instructors might consider bringing in a business librarian to guest lecture on the product.

**What the Company Says About Itself**

¶45 Companies provide information about themselves in multiple ways. These include annual reports to shareholders, press releases, and information divulged during investor conference calls. Government filings represent the core of what publicly traded companies say about themselves. Companies must make filings with the federal SEC; as well, companies must make basic corporate registrations with appropriate state Secretary of State offices.

¶46 These communications are vitally important to corporate attorneys. They offer attorneys an in-depth understanding of a company, as well as any significant legal ramifications. These include potential legal consequences of what is said, as well as monitoring the content, accuracy, and timeliness of federal and state filings. Moreover, attorneys must maintain intimate knowledge of the company to properly advise their client on the legal aspects of current and planned activities.

**Basic Legal Structure: Disclosure**

¶47 When delving into corporate and securities law, it is easy to get into the weeds. Remember that the information conveyed by an instructor is in the context of a research course. However, students must understand both the broad legal structure governing public companies and some finer details, especially as they pertain to SEC filings.

¶48 The two major laws that govern company communication to the government and the investing public are the Securities Act of 1933 (’33 Act), and the Securities Exchange Act of 1934 (’34 Act), and concomitant regulations codified at title 17 of the Code of Federal Regulations (C.F.R.). The overriding purpose of these laws is disclosure. The ’33 Act regulates the registration of public offerings. The ’34 Act seeks integrity in the markets via periodic reporting to the SEC and solicitation of proxies. The ’34 Act also includes registration requirements.

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50. Id. § 1.2[3][A].
51. Id. § 1.2[3][B]. The ’34 Act created the Securities and Exchange Commission. Id. A proxy solicitation is a request that a corporate shareholder authorize another person to cast the shareholder’s vote at a corporate meeting. Proxy Solicitation, *Black’s Law Dictionary* 1421 (10th ed. 2014).
52. See 2 Hazen, supra note 49, § 9.2[1].
¶49 Under the ’33 Act, when a company is offering new shares, the company must prepare and file two main documents: the registration statement and the prospectus. One should be aware of three significant code sections in title 15 of the U.S.C. that apply. First, section 77g lays out what is required in a registration statement. Second, as section 77g notes, documents specified in either Schedule A or Schedule B must be included. These important schedules are explained in section 77aa. Finally, the requirements for the prospectus are laid out in section 77j.

¶50 The ’34 Act provides for periodic reporting and solicitation of proxies. Two sections of title 15 form the core requirements. Section 78m covers periodic reporting, while section 78n covers proxies. A researcher would benefit from looking at neighboring sections; nonetheless, sections 78m and 78n are fundamental.

¶51 Here we seek to lay out the basic statutory structure governing publicly traded company disclosure. As we take up specific types of company information, we’ll see that much of the information is governed by regulations codified in title 17 of the C.F.R. This holds especially true for SEC filings.

Annual Reports

¶52 Annual reports to shareholders are required by federal regulation. As the regulation states, the report is to accompany a proxy statement made before the company annual meeting. Required content of the report includes audited balance sheets and income and cash flow statements. Detailed requirements of financial statements are laid out in further subsections of the regulation.

¶53 In years past, annual reports were glossy print publications mailed with a proxy solicitation and prior to the annual meeting. Now, as then, the publication includes management discussion of company performance with an emphasis on positive results. Financial statements are provided, as well as a roster of corporate officers and directors.

¶54 Annual reports are now offered online. Many companies include them on their company websites. For example, General Electric makes available on its site

55. A prospectus is given to prospective buyers of a public offering and contains financial information, company history, officers, etc., thus allowing for an informed investment decision. See Downes & Goodman, supra note 22, at 545.
57. Id. Schedule B applies to securities issued by a foreign government.
58. Id. § 77aa.
59. Id. § 77.
60. Id. § 78m.
61. Id. § 78n.
63. See id. § 240.14a-3(a). Proxy statements are discussed later; see infra ¶¶ 72–73.
64. 17 C.F.R. § 240.14a-3(b).
65. Id.
66. Id.
both current and past annual reports, going back to 2005.\textsuperscript{67} Another source is AnnualReports.com.\textsuperscript{68} The site is a one-stop shop for annual reports from a broad range of companies and for various reporting years. Reports are made available in both PDF and HTML formats, with the HTML version being a reproduction of the company’s 10-K.\textsuperscript{69} The site may be searched by company name or ticker symbol, industry, or stock exchange.

\textsuperscript{¶55} ProQuest Historical Annual Reports offers back issues of annual reports. This database provides annual reports for U.S. companies from 1844 to the present, in PDF format. Both browsing and searching are available. The advanced search allows users to look up companies by name, NAICS\textsuperscript{70} code, location, person, and Fortune rank, among other parameters. For a sample of the depth of the database, ProQuest provides seventy-four reports for Abbott Laboratories covering the years 1931 to 2003. By consulting historical reports, users can get a sense of the company over time. Users can track where the client was financially and competitively and how the company has evolved over a span of years. Users may also identify and trace the executive officers of the company.

### Press Releases

\textsuperscript{¶56} The legal issue presented by press releases is forward-looking statements. Black’s Law Dictionary defines a forward-looking statement as “a business’s announcement about something yet to happen, such as its possibilities or expectations for future operations or economic performance.”\textsuperscript{71} Such statements may be misleading if it is unclear whether the speaker is making predictions or stating facts.\textsuperscript{72}

\textsuperscript{¶57} Forward-looking statements are addressed statutorily. Under 15 U.S.C. § 78u-5(c), a safe harbor is provided for forward-looking statements\textsuperscript{73} made by issuers\textsuperscript{74} and related parties under specific conditions.\textsuperscript{75} These conditions include identifying the statement as forward-looking, as making meaningful cautionary statements, or as immaterial.\textsuperscript{76} Moreover, a statement is covered by the safe harbor if a plaintiff fails to prove that the statement was made with actual knowledge that the statement was false or misleading, or, if made by a business entity, that the

\textsuperscript{67.} Annual Reports, General Electric, \url{http://www.ge.com/investor-relations/investor-services/personal-investing/annual-reports} [https://perma.cc/Q88H-4XQF]. The reports are made available in both PDF and an interactive, graphics-heavy website. See id.

\textsuperscript{68.} AnnualReports.com, \url{http://www.annualreports.com/} (last visited Apr. 7, 2016).

\textsuperscript{69.} See, e.g., Procter & Gamble’s entry at \url{http://www.annualreports.com/Company/1793} (last visited Apr. 7, 2016). The 10-K filing is discussed later; see infra ¶ 71.

\textsuperscript{70.} North American Industry Classification System.

\textsuperscript{71.} Forward-Looking Statement, Black’s Law Dictionary, supra note 51, at 770.

\textsuperscript{72.} Id.

\textsuperscript{73.} Defined statutorily as statements that contain projections of revenues, income, earnings, etc., as well as statements that contain projections on future operations, plans, and objectives. See Application of Safe Harbor for Forward-Looking Statements, 15 U.S.C. § 78u-5(i)(1) (2012).

\textsuperscript{74.} An issuer is a person or entity that issues securities and other financial instruments. Issuer, Black’s Law Dictionary, supra note 51, at 960.

\textsuperscript{75.} 15 U.S.C. § 78u-5(c).

\textsuperscript{76.} Id., § 78u-5(c)(1)(A). For extensive discussion of forward-looking and cautionary statements in press releases, see Harris v. Ivax Corp., 182 F.3d 799 (11th Cir. 1999).
statement was made with approval of a company officer and the officer spoke with actual knowledge that the statement was false or misleading.\textsuperscript{77}

\textsuperscript{¶}58 Increasingly, companies are posting their press releases to their company websites. The placement and prominence of the releases vary. For example, Abbott provides releases under the Newsroom section of its site, with the Newsroom link found at the bottom of the main page.\textsuperscript{78} General Dynamics, however, makes press releases available under both the Investor Relations and News sections, which are linked on the top of the main page.\textsuperscript{79} Sample content of General Dynamics releases includes awards of multimillion dollar contracts and the authorization of additional share repurchases.\textsuperscript{80}

\textsuperscript{¶}59 Another major source of press releases is PR Newswire. The Newswire is a one-stop-shop platform that accumulates and disseminates press releases from across the globe.\textsuperscript{81} PR Newswire is available on Lexis Advance, Westlaw, and its own website. On the site, releases may be browsed or searched.\textsuperscript{82} Releases may be searched by company using either the company name or ticker symbol. They then can be filtered by date range.\textsuperscript{83}

\textbf{Investor/Earnings Conference Calls}

\textsuperscript{¶}60 Investor, or earnings, conference calls relay information to investors and analysts to highlight company successes and calm any investor fears.\textsuperscript{84} These conference calls typically occur at the end of the quarter with the release of financial results.\textsuperscript{85} Aspects of a call are (1) the call is facilitated and always acknowledges forward-looking statements and that investors and analysts should not assume future events will happen for certain; (2) participants include the company chairperson, Chief Executive Officer, Chief Financial Officer, and other relevant executives all covering performance issues and future expectations; (3) the call ends with a question and answer period.\textsuperscript{86}

\textsuperscript{¶}61 The legal issue presented by conference calls is the same as the one presented by press releases: forward-looking statements. Conference calls are specifically covered by rules for oral statements.

\textsuperscript{¶}62 Oral forward-looking statements fall within the safe harbor if they are accompanied by a cautionary statement that the statement is forward-looking and that actual results may materially differ from those projected in the

\textsuperscript{80} See \textit{id.}
\textsuperscript{81} About PR Newswire, PR NEWSWIRE, http://prnewswire.mediaroom.com/about-pr-newswire [https://perma.cc/8NXT-DNLF].
\textsuperscript{85} \textit{Id.}
\textsuperscript{86} \textit{Id.}
forward-looking statement. Moreover, if there are specific factors that could cause results to materially differ from those stated in the forward-looking statement, then the factors must be contained in a readily available written document, the document must be identified, and the document must contain a cautionary statement that meets the safe harbor in 15 U.S.C. § 78u-5(c)(1)(A).

¶63 For conference calls, both transcripts and recordings are available. Transcripts and recordings can be found on a company’s website. These will be found in Investor (or similar) sections on company sites. General Dynamics makes audio available of the four most recent quarterly calls. Under Investor Relations, users should then look for News and Events and then Webcasts. The call is available as an MP3 file. Compare this to Pfizer, which makes both recordings and transcripts available on a page titled Pfizer Presentations. On this page, users will see links for conference call audio, transcripts in PDF, and presentations in PDF. Pfizer requires a brief registration to access the audio. The presentations consist of slides that present bulleted highlights and multiple charts and graphs detailing company performance.

¶64 Nasdaq.com makes transcripts available, including for companies traded on the New York Stock Exchange. From the main page, users should use the search box and type in “call transcripts.” Next, entering a company name or ticker symbol will pull up a history of conference call transcripts. The transcript is complete and includes a listing of the analysts on the call. The coverage goes back one to two years.

¶65 Another source to be aware of is InvestorCalendar. It provides access to current, upcoming, and archived conference calls. The calendar for upcoming calls is the site’s most useful feature, allowing users to plan to access calls from current or potential clients. For current day and archived calls, the user can listen to the call transcript. The site can be searched by company name or ticker symbol.

SEC Filings

¶66 The statutory foundation of SEC reporting has already been discussed, including both the ’33 and ’34 Acts. Here, we delve into the regulatory regime that governs, specifically, filings made to the SEC. These regulations are found in title 17 of the C.F.R. In turn, registration statements, prospectuses, 10-Ks, 8-Ks, 10-Qs, and proxy statements will be addressed.

88. See id. § 78u-5(c)(2)(B).
91. Id.
94. See id.
95. See supra ¶¶ 48–50.
General rules and forms fall under the '33 or '34 Act. C.F.R. part 230 provides general rules,\textsuperscript{96} and part 239 provides for forms,\textsuperscript{97} both under the '33 Act. Under the '34 Act, general rules are at part 240,\textsuperscript{98} while forms are prescribed in part 249.\textsuperscript{99}

There are also regulations that apply to both the '33 and '34 acts. Regulation S-K provides standard filing instructions.\textsuperscript{100} Regulation S-X details the form and content of financial statements.\textsuperscript{101} Regulation S-T provides rules on electronic filing.\textsuperscript{102}

As noted, the registration statement and prospectus are filed when a company offers the public new stock shares or other securities. Numerous regulations govern the disclosure of information when companies are offering new shares. The general requirements are laid out in part 230 of title 17.\textsuperscript{103} There are numerous rules governing the prospectus as well. Details such as legibility, date, and presentation of information are prescribed.\textsuperscript{104} Moreover, an additional rule provides for when a prospectus can incorporate by reference and when it cannot.\textsuperscript{105}

When a company makes a registration statement, it must file one of several forms, the most significant being S-1, S-3, S-4, and S-8. Form S-1 must be used for initial public offerings, as well as by companies that have been filing for less than three years.\textsuperscript{106} S-3 is used by seasoned filers, so it is most commonly encountered.\textsuperscript{107} Form S-4 is for stock acquired by stockholders in a merger or stock swap.\textsuperscript{108} When stock is offered to employees as part of a benefit plan, Form S-8 must be filed.\textsuperscript{109}

As noted earlier, periodic reporting is required under the '34 Act.\textsuperscript{110} The three main periodic reporting forms are the 10-K, the 8-K, and the 10-Q. The 10-K is the annual report, including audited financials, and there are rules on the timing of the filing.\textsuperscript{111} The 8-K, which keeps investors up-to-date, is for interim

\begin{itemize}
  \item \textsuperscript{97} Forms Prescribed Under the Securities Act of 1933, 17 C.F.R. pt. 239.
  \item \textsuperscript{102} Regulation S-T—General Rules and Regulations for Electronic Filings, 17 C.F.R. pt. 232.
  \item \textsuperscript{103} Preparation of Registration Statement, 17 C.F.R. § 230.404.
  \item \textsuperscript{104} See id. §§ 230.420–230.434.
  \item \textsuperscript{105} Incorporation by Reference, 17 C.F.R. § 230.411.
  \item \textsuperscript{106} Form S-1, Registration Statement Under the Securities Act of 1933, 17 C.F.R. § 239.11.
  \item \textsuperscript{107} Form S-3, for Registration Under the Securities Act of 1933 of Securities of Certain Issuers Offered Pursuant to Certain Types of Transactions, 17 C.F.R. § 239.13. The rule lays out what constitutes a “seasoned filer.” Id. A sample form is available at Forms List, supra note 29.
  \item \textsuperscript{108} Form S-4, for the Registration of Securities Issued in Business Combination Transactions, 17 C.F.R. § 239.25. A sample form is available at Forms List, supra note 29.
  \item \textsuperscript{109} Form S-8, for Registration Under the Securities Act of 1933 of Securities to Be Offered to Employees Pursuant to Employee Benefit Plans, 17 C.F.R. § 239.16b. A sample form is available at Forms List, supra note 29.
  \item \textsuperscript{110} See HAZEN, supra note 49, § 1.2(3)[B].
  \item \textsuperscript{111} See Form 10-K, for Annual and Transition Reports Pursuant to Section 13 or 15(d) of the Securities and Exchange Act of 1934, 17 C.F.R. § 249.310. A sample form is available at Forms List, supra note 29.
\end{itemize}
reporting—events that occur between reporting periods are filed on this form.\footnote{112} The 10-Q is for quarterly reports and is filed three times per year.\footnote{113}

¶ 72 A disclosure similar to periodic reporting is the proxy statement.\footnote{114} Proxies disclose information specifically to shareholders.\footnote{115} This serves shareholder suffrage—shareholders need appropriate information to make informed decisions on how their shares will be voted at a company annual meeting.\footnote{116}

¶ 73 Proxy disclosure requirements are governed by Regulation 14A.\footnote{117} Need-to-know information includes how terms are defined\footnote{118} and what information must be included in documents used for proxy solicitations.\footnote{119} Moreover, filers must be aware of Schedule 14A.\footnote{120} This extensive schedule lays out what companies must provide in the proxy statement. Specific items are presented, and these include matters to be acted on, executive compensation, and financial information.\footnote{121}

¶ 74 Regulation S-K\footnote{122} provides standard, detailed filing instructions under both the ’33 and ’34 Acts and covers forms 10-K, 10-Q, 8-K, and proxy statements, which are filed as Form 14A to reflect what is being filed is directly from Schedule 14A.\footnote{123} Regulation S-K includes subparts that cover business information,\footnote{124} financial information,\footnote{125} management,\footnote{126} registration statements,\footnote{127} and required exhibits.\footnote{128} The specific sections address items such as description of business,\footnote{129} legal proceedings,\footnote{130} management discussion and analysis of financial condition,\footnote{131} and officers.\footnote{132} Compare the items in the regulation to what is in the filed forms.\footnote{133}

\begin{itemize}
  \item 112. See Form 8-K, for Current Reports, 17 C.F.R. § 249.308; see also id. § 240.13a-11 or 240.15d-11. A sample form is available at \textit{Forms List}, supra note 29.
  \item 113. See Form 10-Q, for Quarterly and Transition Reports Under Section 13 or 15(d) of the Securities and Exchange Act of 1934, 17 C.F.R. § 349.308a; see also id. § 240.13a-13 or 240.15d-13. A sample form is available at \textit{Forms List}, supra note 29.
  \item 114. Defined as “information that the Securities and Exchange Commission requires must be provided to shareholders before they vote by proxy on company matters.” See \textit{Downes & Goodman}, supra note 22, at 546.
  \item 115. See 3 \textit{Hazen}, supra note 49, § 10.2[1].
  \item 116. See id. §§ 10.1, 10.2.
  \item 117. See id. § 10.2[2]. The regulation is codified at 17 C.F.R. §§ 240.14a-1 to 240.14a-103 (2015).
  \item 118. Definitions, 17 C.F.R. § 240.14a-1.
  \item 119. Information to Be Furnished to Security Holders, 17 C.F.R. § 240.14a-3.
  \item 120. Schedule 14A, Information Required in Proxy Statement, 17 C.F.R. § 240.14a-101. Proxy solicitations must be accompanied or preceded by Schedule 14A information.
  \item 121. \textit{Id}.
  \item 125. Financial Information, 17 C.F.R. §§ 229.301–229.308.
  \item 128. Exhibits, 17 C.F.R. § 229.601.
  \item 129. Description of Business, 17 C.F.R. § 229.101.
  \item 130. Legal Proceedings, 17 C.F.R. § 229.103.
  \item 131. Management’s Discussion and Analysis of Financial Condition and Results of Operations, 17 C.F.R. § 229.303.
  \item 132. Directors, Executive Officers, Promoters and Control Persons, 17 C.F.R. § 229.401.
  \item 133. \textit{Forms List}, supra note 29.
\end{itemize}
¶75 Once familiar with the regulatory regime governing SEC filings, students must know where to find actual company filings. This is done through the SEC’s EDGAR system—the Electronic Data Gathering, Analysis, and Retrieval system.\(^{134}\) EDGAR is available on several platforms; here we will look at the system on the SEC website, as well as on Bloomberg Law.\(^{135}\)

¶76 On the SEC website,\(^{136}\) EDGAR may be searched in multiple ways. To access a particular company’s filings, search by company name, ticker symbol, or Central Index Key (CIK) number.\(^{137}\) The CIK number, which is an identification number assigned by the SEC to individual corporations and people,\(^{138}\) is the most accurate way of pulling up a specific company. This is because doing a name search will return various subsidiaries and related entities, each of which has its own CIK number. Fortunately, the site provides a CIK lookup tool.\(^{139}\)

¶77 Once one has done a company search, the filings will appear in reverse chronological order. There is also a header on the results page. The header contains pertinent information, including company name and address, industry, state of location, and state of incorporation. Below the header is an option to filter results by filing type and date.

¶78 For each filing, the form number, description, and date are listed. Proxy statements are indicated by the filing code of DEF 14A, or definitive proxy statement.\(^{140}\) A filing is opened by clicking the Documents link. Users will now see multiple links, one for the form itself and others for exhibits.\(^{141}\) When users open a form, they will note that the content follows what is prescribed by regulation.\(^{142}\) The 10-K includes a very useful management discussion and analysis, while the DEF 14A includes important executive compensation information. Be aware that filings may refer users to other filings for information; for example, a 10-K may refer readers to the DEF 14A for executive compensation information.

¶79 Should one need to search across companies,\(^{143}\) full-text keyword searching is available for the past four years,\(^{144}\) as well as Boolean searching of archived filings.


\(^{135}\) While both Westlaw and LexisNexis provide EDGAR, I believe that the offering on Bloomberg Law is superior.

\(^{136}\) Bloomberg is a very useful service, but keep in mind that companies file in EDGAR directly online with the SEC, thus giving the SEC website additional credibility over the for-pay services.


\(^{139}\) See id.


\(^{141}\) See Exhibits, 17 C.F.R. § 229.601.

\(^{142}\) See supra ¶¶ 70–73.

\(^{143}\) This is useful for comparative research.

dating to EDGAR’s advent in 1994. The full-text searching option includes an advanced search that allows users to narrow by filing type, date, company name, CIK number, and SIC classification. One may use Boolean searching on the full-text search function; however, the query will not search both filings and exhibits.

Bloomberg Law presents EDGAR in a user-friendly format with multiple search options using an all-in-one interface. EDGAR is linked from the main page, as well as from the transactional and company tabs. Like the SEC site, Bloomberg allows users to search companies by name, ticker symbol, CIK number, location, and SIC code. As well, both allow users to search by filing type or form. Bloomberg does a nice job of categorizing the forms so that users can browse by topic to find the forms they need. Topics include registrations, periodic reports, and proxies. This helps students learn the functions of the various forms.

A useful feature of Bloomberg Law is the ability to keyword-search both forms and exhibits. Exhibits may also be accessed by exhibit title or type. A browse-able drop-down menu is provided that guides users through exhibits by type, which are each assigned an exhibit number. This is another great learning feature as students can go through a complete list of exhibit types, learn what exists, and see how they are numbered.

Searching EDGAR on Bloomberg Law is enhanced by the fact that users may combine search parameters. Working from the all-in-one interface, researchers may run searches that combine company name with one or more exhibits or one or more forms. Thus, if one needs Boeing’s most recent 10-K and 8-Ks, that is easily done. Date restrictions are also available; thus if one needs a company’s material contracts (exhibit 10) from the past year, this is also easily done.

State Filings

While the focus on filings thus far has been federal, companies make filings with the states, too. State filings are made with a state’s Secretary of State office. The filings include a registered office, a registered agent, and UCC filings. The most important is the registered agent. The agent is the person on whom the state may make notices and service of process.

Delaware provides a good example for finding the registered agent for a company. On the website, click the Search for a Business Entity link. Search by company name. The search may provide numerous results that include subsidiaries. One may want to go to the company website to verify its formal name. The record for the company will show some basic information, such as incorporation date. Below this is the registered agent information. This includes the name, address, and phone number of the agent.

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145. See [EDGAR Archive], U.S. SEC. & EXCH. COMM’N, http://www.sec.gov/cgi-bin/srch-edgar [https://perma.cc/S4KG-2ACQ]. This allows users to do historical research on a company by looking at what was reported in years past.

146. Standard Industrial Classification code, which is a federal standard numbering system identifying companies by industry, giving users the ability to compare documents filed by industry cohorts. See DOWNES & GOODMAN, supra note 22, at 665.


Insider Information and Stock Prices

¶84 As previously noted, insider information stands alone as a separate topic because it deals with significant personnel, as opposed to the corporate entity, and the transactions of company stock by these personnel, or “insiders.” Moreover, executive compensation is involved, information that is paid considerable attention. Insider activity is also highly regulated, so future attorneys need to know the where and how of this regulatory regime to best serve business clients.

¶85 Three groups of people constitute insiders: first, members of the board of directors; second, officers of the corporation; and third, beneficial owners of more than ten percent of equity securities.

Disclosure

¶86 The legal regime governing insiders seeks to ensure market integrity and investor confidence. The legislation that addresses these principles are sections 10 and 16 of the ’34 Act. These statutes address disclosure of securities transactions conducted by insiders and the prohibition against engaging in manipulative or deceptive devices in securities transactions.

¶87 Section 16 of the ’34 Act directly governs disclosure by insiders, including the disclosures required, time of filing, contents of statements, and other details. In addition, the SEC promulgates numerous rules. These include rules detailing insider reports. The core rule is 240.16a-3, titled “Reporting transactions and holdings.” This rule explains the reporting process and provides for three important forms: Forms 3, 4, and 5.

¶88 Forms 3, 4, and 5 are the vehicles of insider reporting. These forms are further detailed by SEC rules. Form 3 is “for initial statements of beneficial ownership of securities” held by insiders. This form provides notice to the SEC that an individual has become a director, officer, or beneficial owner, and it must be filed within ten days of becoming such an insider. Form 4 is to disclose changes in an insider’s

150. See Executive Compensation, 17 C.F.R. § 229.402.
151. See Downes & Goodman, supra note 22, at 66.
152. Defined at Definition of Terms, 17 C.F.R. § 240.16a-1(f).
153. Id. § 240.16a-1(a).
154. See generally 1 Jacobs, supra note 9, § 1:1.
156. Id. § 78p.
157. Id. §§ 78j to 78j-4.
158. Id.
159. Id. § 78p(a).
160. Id. § 78p(a)(2).
161. Id. § 78p(a)(3).
162. See id. §§ 78p(b)–78p(g). These details include profits from purchase, conditions for sale, and securities held in an investment account.
163. See 17 C.F.R. §§ 240.16a-1 to 240.16a-13 (2015). Reporting exemptions are covered by id. §§ 240.16b-1 to 240.16b-8 and §§ 240.16c-1 to 240.16c-4.
164. Reporting Transactions and Holdings, 17 C.F.R. § 240.16a-3.
165. Form 3, Initial Statement of Beneficial Ownership of Securities, 17 C.F.R. § 249.103. See a sample form at Forms List, supra note 29.
166. See 4 Hazen, supra note 49, § 13.1[1].
ownership of securities. This form is most common and is very important as it provides the means for tracking an insider’s transactions over time. Form 5 is the annual statement of beneficial ownership. It provides filers with a way of disclosing any transactions that were not previously disclosed, were exempt from reporting otherwise, were small acquisitions, or were not reported in the previous two fiscal years of the issuer because the insider acted in good faith in believing their prior reporting was complete.

Manipulative and Deceptive Trading Activity

¶89 While section 16 of the ’34 Act governs disclosure, section 10 of the Act furthers market integrity and investor confidence by addressing insider malfeasance. Section 10(b) of the Act has an “antifraud provision that renders unlawful manipulative and deceptive acts and practices in connection with the sale or purchase of a security.”

¶90 Several rules directly regulate manipulative and deceptive devices in trading. The centerpiece rule is 10b-5. This rule identifies the specific conduct that is proscribed. First, it is unlawful, directly or indirectly, “to employ any device, scheme, or artifice to defraud.” Second, it is unlawful to make false statements of material facts “or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.” Third, it is unlawful “to engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”

¶91 Courts have applied four factors to determine whether trading is sufficiently suspicious. The first is timing: the closer the trade is made to a subsequent release of information that impacts the stock price, the more likely scienter exists. Next, one looks at the percentage of stock sold, with larger proportions of total holdings being more suspicious. Third, courts review how trades in question compare to an insider’s trading history: are any anomalies revealed? Finally, courts review how many insiders traded at the same time, with a higher number being more suspicious.


169. 17 C.F.R. § 240.16a-3(f).


171. See Manipulative and Deceptive Devices and Contrivances, 17 C.F.R. §§ 240.10b-1 to 240.10b-21.

172. Id. § 240.10b-5(a).

173. Id. § 240.10b-5(b). Information is material if it is information that reasonable investors would find significant in making their investment decisions. COX & HAZEN, supra note 170, § 12:9[1].

174. 17 C.F.R. § 240.10b-5(c).


176. Id.

177. Id.

178. Id.

179. Id.
When considering rule 10b-5 and the above factors, one can see how an attorney must review Form 4 filings made by a defendant insider. An attorney must track the transactions that Form 4 documents to determine whether there is credible evidence against a client. Moreover, stock prices become important: stock price history must be compared to trading activity and the release of pertinent company information. Historical stock prices are important for determining any ill-gotten gains. To determine profits made or losses avoided, courts must look at purchase and sale prices, and this requires the attorney to review historical prices for the time period at issue.

As with other SEC filings, I look for insider filings on the SEC website or Bloomberg Law. Finding the filings on the SEC site is very similar to looking up the periodic reporting documents, such as the 10-K. Go to the main EDGAR filings search page and search the company by ticker or CIK number. Once you have the complete results, you can manipulate them to see ownership reports. To see just ownership forms (Forms 3, 4, and 5), click the Only button under Ownership?, and then click Show All. You now have a list of ownership reports; you will see mostly Form 4 filings. This is the most common form filed as it reports transactions for established insiders. Click into a Form 4 to see shares acquired or disposed of, share price, and amount of securities owned by the insider after the transaction.

To find ownership forms for specific company insiders, go to the Insider Transactions for This Issuer link, found in the blue header on the EDGAR company results page. Click the name of the insider of interest to see a chart of their filings. Be aware that if the insider sits on other company boards, those filings will be included. The chart will list the transactions in reverse chronological order. Click the form number to see the filed document. However, a summary of the filing is provided in the chart. The summary information includes the type of transaction, the number of shares involved, and the number of beneficial shares owned after the transaction; thus, the chart summary provides the most pertinent data.

Bloomberg Law operates similarly to the SEC site. Access the EDGAR page on Bloomberg. In addition to inputting the relevant company information, the search template allows one to limit the search to ownership forms. In the Forms section at the top of the template, access the Browse button; then select Securities Ownership and Trading and select a form. The other option is to type the form number into the Forms search box and a list of forms will drop down. Search results are in reverse chronological order; forms themselves are replicas of the original filed form.

To find an individual’s filings on Bloomberg, return to the EDGAR search template. Go to the Company/Filer section and use the last name of the insider in the Name box. In the Role box, select Reporting Owner. There is no need to specify the form needed, but one may do so. Again, the results will be in reverse chronological order.

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180. See id. § 8:2; see also 4 HAZEN, supra note 49, § 13.2[7]. In a case in which investors brought a class action against company insiders, the court’s holding relied on the rise in stock prices and average purchase prices. See generally Acticon AG v. China North East Petroleum Holdings Ltd., 692 F.3d 34 (2d Cir. 2012).

181. See EDGAR Company Filings, supra note 137.

182. For explanation and instructions, including transaction codes, of ownership forms, see the instructions for Forms 3, 4, and 5 at Forms List, supra note 29. See also DOWNES & GOODMAN, supra note 22, at 268, 269.
chronological order and, as noted above, will include any and all boards of directors the insider sits on.

¶97 For stock prices, I use two free websites: MarketWatch183 and Yahoo Finance.184 Both offer historical quotes in addition to the current day’s trading. Charts are available for up to ten prior years on MarketWatch, while Yahoo charts go back five years. Charts are useful as you can see stock price activity for a certain day, week, or month and compare the price to dates that an insider made a trade. This can then be compared to dates that information was made public, prior to which only an insider would know. On MarketWatch, look up a company by name or ticker symbol and select the Charts tab. On Yahoo, look up the company and click the Interactive Charts link.

¶98 Both sites also offer day-by-day historical prices. These include opening, high, low, and closing prices for the specific day. On Yahoo, select the Historical Prices link once you have pulled up the information for the relevant company. Historical prices go back to 1962 and can be presented as daily, weekly, or monthly numbers. On MarketWatch, pull up the relevant company and select the Historical Quotes tab. Enter the desired date and click Set. The results provide the opening, high, low, and closing prices for the day. Some company quotes go back as far as 1971. The advantage of Yahoo is that one can set a range of dates to easily note specific prices on specific dates over a relevant time period. Again, this can be compared to insider activity and dates of announcements that affect stock prices.

Conclusion

¶99 Many law students will go on to work for firms that serve numerous company clients. We know that many students are ill prepared to hit the ground running at a corporate law firm for lack of company intelligence. The information I have outlined here constitutes a relatively comprehensive course in company information. Company clients want their attorneys to know them well and to understand their businesses. We can instruct our students to have a means of developing deeper knowledge of company clients. With an understanding of the information they are seeking, its legal context, and how to find it, new associates will offer their firms and their clients a competitive advantage.

183. See MarketWatch, supra note 34.

# Keeping Up with New Legal Titles

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

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* The works reviewed in this issue were published in 2015 and 2016. If you would like to review books for “Keeping Up with New Legal Titles,” please send an e-mail to bkeele@iu.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.

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Reviewed by Alison M. Hancock

Kelly Lynn Anders’s second edition of *The Organized Lawyer* is different from other organizational guides. For one, it does not try to impose any particular organizational system on readers, but instead guides readers to develop organizational systems that work for them. Second, it focuses exclusively on the organizational needs of those working in the legal industry. The second edition updates the first edition published in 2009. It adds social media to the chapter on marketing and accounts for the many recent changes in the legal industry. Anders factors the changes in the legal industry and individual organization styles into a broad, flexible discussion of organization across the multiple arenas in which a lawyer needs to maintain order.

The book first gives readers a general overview and then allows them the flexibility to pick and choose chapters based on what they wish to accomplish. Anders believes that there are four main organizational types: stackers, spreaders, free spirits, and packrats. The first chapter includes a quiz to help readers determine their type or types. Each ensuing chapter begins with an inspirational quote followed by an overview of the topic, a breakdown by organizational type, and a chapter checklist. The chapter topics include office layouts, desk arrangements, files, financial recordkeeping, organizers, home offices, portable offices, libraries, marketing, and wardrobes. This flexible approach enables attorneys to tailor their organizational projects to their needs and time constraints.

Throughout the book, Anders attempts to relate organizational practices to trends in the legal industry and studied patterns of attorney behavior. She discusses the changes in typical office layouts that have occurred in recent years, including smaller offices, and the increased use of cubicle space, conference rooms, and war rooms. She also discusses how the greater rate of turnover has increased the need for organizational systems that can be passed along to an attorney’s successor or to another attorney at the firm. This awareness of current trends in the legal industry combined with discussion of issues specific to the legal industry, such as organizing time tracking for billing purposes, set this book apart from more general books on organization.

Anders claims that the scope of her book is intentionally broad. The book does cover many topics. However, it does not provide much in-depth coverage of any of them. When discussing organizing some of the more traditional areas, such as office space and files, the book gives vague recommendations about the most useful types of storage for each organizational type rather than specific examples. For example, the book suggests that stackers should use open storage and free spirits should use closed storage. When the book discusses organizational concepts in relation to less discussed areas of attorneys’ lives, such as wardrobe and marketing, much of the advice tends toward matters of etiquette rather than tips on getting organized. For example, less than a page of the chapter titled “Looking the Part” discusses organizing one’s wardrobe. While this book is useful for starting to

* © Alison M. Hancock, 2016. Librarian, Williams Mullen, Richmond, Virginia.
conceptualize creating organizational systems in many areas of readers’ professional lives, it does not provide illustrative examples of what those systems might look like.

¶5 This book could be useful to anyone working in the legal industry. However, it is especially useful for attorneys in small firms and solo practitioners. Solo and small-firm practitioners have less administrative support staff to help them handle things like marketing, library resources, records management, and financial records. They also tend to have less guidance on organizational matters from experienced colleagues. Since small-firm or solo practitioners more frequently meet clients in their offices rather than in conference rooms, it is even more important for them to maintain an organized office space. Practitioners in large firms might be more concerned about organization for succession planning purposes or for collaboration with colleagues on large projects. However, the small-firm lawyer or solo practitioner will get the most use out of this book.

¶6 Overall, The Organized Lawyer is a useful guide for the attorney who is ready to get serious about being organized. The book helps readers develop their own organizational systems rather than imposing a particular system on them. This makes it more likely that changes made as a result of reading the book will be lasting changes because those changes will be based on the conscious decisions of the readers. Perhaps a third edition will include some illustrative examples based on organizational systems that its readers have created. However, there is something of value in this book for anyone who is employed in a legal environment and ready to work toward a more organized life.


Reviewed by Margaret Kiel-Morse*

¶7 In Women and Justice for the Poor: A History of Legal Aid, 1863–1945, Felice Batlan exposes the important role of women lay lawyers (women who provided legal aid without the credentials of a law degree or bar certification) and social workers in the development of legal aid in America. This development was nonlinear in nature, and varied widely due to the complexities of gender, race, class, and social structures. Similar to the history of women in other professions such as medicine, women were essential to the founding of legal aid societies until men stepped in to “professionalize” the field and thereby excluded women. Through exploring the hidden history of women in legal aid, Batlan also sheds light on the origins of social work as a profession, the often contentious relationship between the two fields, and the frequent overlap of legal and social needs among low-income people.

¶8 Batlan introduces her book by sharing her personal experience providing legal aid in New Orleans in the immediate aftermath of Hurricane Katrina. She volunteered to provide legal assistance at a Federal Emergency Management Agency disaster recovery center and instead provided much more than what her previous definition of legal assistance entailed. She found that people needed help

with a wide range of issues that had her engaging in mediation, advocacy, education, and social work. Batlan’s experiences caused her to “reflect broadly on volunteer work, charity, lawyers, social workers, and the ambiguities of what the practice of law means in an environment of massive and aching need” (p.3). Throughout this book, Batlan questions the definition of practicing law, discusses how the definition has changed over time, and examines how the line between legal aid and social work often blurs.

¶9 The book is divided into three parts, each exploring a different phase of the development of legal and social assistance. Part 1 covers 1863 through 1910 and reveals the role of women and women’s organizations at the beginning of the legal aid movement. In the first two chapters, Batlan discusses the rise of urban upper- and middle-class women who were interested in self-education, community improvement, and social reforms. Many of these elite women were particularly interested in legal issues and saw it as their duty to provide legal assistance to poor women.

¶10 Batlan compares associations in New York City, Boston, and Chicago. She examines different ways that women provided assistance, the types of cases each association handled, and the consequences of involvement by male lawyers attempting to exclude women lay lawyers. Batlan seems to emphasize how the Chicago association took a more holistic approach to legal aid, viewing legal assistance as part of a larger mission to improve working women’s overall quality of life, advocate for broader community and social reforms, and join with other women’s social service groups.

¶11 Part 2 details the professionalization of legal aid during the period from 1890 to 1921. The professionalization of legal aid by male lawyers also led to the rise of social work as a separate field for women. According to Batlan, male lawyers viewed traits associated with practicing law and professionalism as masculine traits, whereas traits associated with social work were viewed as feminine and unprofessional. Throughout the book, Batlan frequently points out where gender-based stereotypes were used on both sides of the debate. To protect their members’ work as lay lawyers, some of the women’s groups relied on the view that men and women were inherently different, and therefore only women could truly understand and represent women in legal matters. Men relied on stereotypes of women as weak and in need of protection to validate the removal of women from practicing law. However, women continued to provide much of the available legal aid services, especially to women clients, and still carried out a blending of legal aid and social work.

¶12 Part 3, describing 1921 to 1945, illustrates more of the tensions between professional legal aid organizations dominated by men and the role of women and social workers. However, Batlan notes a reconvergence of legal aid and social work occurring within more progressive legal aid groups. Additionally, the Great Depression severely restricted funding for stand-alone legal aid groups, causing them to join forces with other social assistance groups that were in better financial standing.

¶13 New Deal programs and World War II caused views of charity and social work to change. A nationwide emphasis on caring for servicemen and their families led to more women as both legal aid providers and clients. Social workers were also viewed more positively and with more respect during this time. Unfortunately,
those opinions did not last. According to Batlan, the 1950s saw a move back to professionalization of legal aid by male attorneys, the removal of women from the legal field, and a return to men viewing social work as negatively feminine.

¶14 Personally, I found this book fascinating, and I strongly recommend it to anyone interested in the history of women in the legal field, the history of legal aid, and modern access to justice issues. Batlan’s passion for the subject shines through and makes it a real page-turner. She makes a strong case that many clients’ legal needs have roots in social needs, and thus it would be beneficial to allow some blurring of legal aid and social work to provide more complete and efficient services to people in need.


Reviewed by Lynne F. Maxwell

¶15 Ari Berman, political correspondent for the Nation and investigative journalism fellow at the Nation Institute, presents a powerful exploration of the struggle for African Americans to obtain voting rights in America, as promised in the book’s title. What is even more impressive, though, is that he is able to hammer home the fact that the struggle to vote, while pervasive throughout the history of the United States, persists to this day. In particular, he details the alarming periodic assaults on the Voting Rights Act (VRA) and concludes with the retrograde motion by the U.S. Supreme Court in its infamous decision, Shelby County v. Holder. Even well-informed readers who are not experts on the subject will be appalled by the ceaseless struggle of African Americans to obtain a fundamental right that has been ostensibly granted again and again. If Berman’s intent is to enlighten and infuriate readers, he has done a superb job. It is well nigh impossible to finish this book and remain unchanged by its soul-wrenching plea for African American voting rights in a progressive, rather than regressive, society.

¶16 Give Us the Ballot: The Modern Struggle for Voting Rights in America begins with “The Second Emancipation,” a chapter on the civil rights movement and President Johnson’s endorsement of voting rights for African Americans. As expected, Dr. Martin Luther King, Jr., Ralph Abernathy, and John Lewis figure heavily in the narrative, as does their archnemesis, George Wallace. Berman dedicates much of the chapter to chronicling the events leading up to the confrontation in Selma, along with the passage of the original VRA in 1965. While the VRA heralded promise of African American power at the polls, the reality was altogether different. Insurmountable, illegal, and arbitrary literacy tests became additional obstacles, as did reprisals against black voters. While the VRA guaranteed—at least in theory—the voting rights of black U.S. citizens, creative gerrymandering diluted their ability to elect their desired leaders. Tragically, this impediment persists, despite multiple iterations and affirmations of the VRA.

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1. 133 S. Ct. 2612 (2013) (invalidating existing preclearance requirements under the Voting Rights Act).
¶17 Berman astutely makes his case in subsequent chapters as well. Titles such as “The Second Reconstruction,” “The Counterrevolution,” “Challenging the Consensus,” and “The Realignment,” among others, emphasize that change has been largely illusory and clearly lacking as structural reform. One constant, though, has been the perennial challenge to section 5 of the VRA. According to Berman, section 5 “was the VRA’s most important enforcement provision, the tool that allowed the federal government to ensure that the law did not meet the same cruel fate as Reconstruction, which lasted only twelve years before federal troops pulled out of the South” (p.7). In short, section 5 provides the enforcement mechanism, the teeth, of the VRA. Sadly, revisionist strategies have eviscerated section 5 to such an extent that, under the guise of protecting states’ rights to forge and determine election policies, section 5 has essentially been eradicated.

¶18 In the chapter so aptly titled “Old Poison, New Bottles,” Berman emphasizes the fraught reality that the struggle continues. One need only consider the relatively recent controversy regarding voter ID laws to recognize that, in essence, poll taxes are alive and well. Voter ID laws unduly burden minority voters of lower socioeconomic status who might be less likely to hold official government identification cards, such as driver’s licenses. Accordingly, such voters would need to travel to the appropriate agencies and pay the requisite fees to obtain the documents, assuming they are realistically in a position to do so at all. Thus, old forms of voter oppression have not been exterminated; rather, they continue to reappear in new, deeply unsettling permutations and combinations.

¶19 Finally, Berman excoriates Shelby County and its aftermath. In Shelby County, the Court infamously refused to uphold the constitutionality of section 5 of the VRA. In essence, the majority opinion blithely undermined the long-term struggle for voting rights in America. The fact that this chilling opinion was handed down a mere three years ago should terrify any proponent of constitutionally protected voting rights in America. And that is the ultimate force and wisdom of this superb book. The more things change, it seems, the more they stay the same—if we passively permit them to do so. In the end, every academic library should acquire Give Us the Ballot, and every legal academic should hasten to read it. Verily, we shall be changed.


Reviewed by Ashley Sundin* and Patrick J. Charles**

¶20 Idaho Legal Research, Second Edition is part of the Carolina Academic Press’s Legal Research series, of which there are currently guides for thirty states, as well as one for federal research. Many of the guides are in their second or third editions. The first edition of Idaho Legal Research was published in 2008.

¶21 Tenielle Fordyce-Ruff is director of the Legal Writing and Research program at Concordia University School of Law in Boise, Idaho, and Kristina J. Running is a

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** © Patrick J. Charles, 2016. Assistant Professor of Law and Library Director, Chastek Library, Gonzaga University School of Law, Spokane, Washington.
clinical professor at the University of Idaho College of Law in Moscow, Idaho. Both authors do a fine job of explaining the sources of Idaho law and the process of conducting legal research using those sources. The majority of the titles in this series are authored by legal research and writing professors, with a sizable minority coauthored by law librarians.

¶22 *Idaho Legal Research* follows the familiar format of other titles in the Legal Research series. It caters to the novice legal researcher as it outlines the general legal research and analysis process and introduces research tips for both print and online resources covering the major areas of legal research. More experienced researchers will also benefit from using this book as a refresher to sharpen their research skills or as a quick reference guide for specific help.

¶23 Compared to other states, Idaho is limited in its state-specific practice materials and secondary sources, so *Idaho Legal Research* is a welcome resource for legal researchers in Idaho. As the title suggests, this book offers a focus on legal materials specific to Idaho, but it also discusses federal legal research. The materials cover a range of issues that are well organized in separate chapters covering areas such as judicial opinions, constitutions, statutes, legislative history, administrative law, court rules, and ethics. Each chapter is broken down into headings that make it a breeze to flip through and find your area of interest.

¶24 Throughout the book, the discussion of online legal research focuses heavily on the commercial databases Westlaw and Lexis Advance. While this is great for readers who have access to these databases, it will likely not be very helpful for those without such access. The online legal research chapter does include a table listing a few commercial databases and some free sites to access some of the same information, but it does not go into detail on how to use them. While it would not be practical for a short reference book to go into great detail, a more thorough discussion of other online resources, such as Bloomberg Law or Casemaker (which is provided for free to Idaho bar members) would help provide extra assistance to practitioners using this book.

¶25 The chapter on bill tracking and legislative history is very comprehensive and provides a step-by-step guide for compiling a legislative history in Idaho. It even includes an example with illustrations that are very understandable. The chapter on secondary sources does a satisfactory job of including information about Idaho civil and criminal jury instructions and their availability on Westlaw and Lexis Advance; however, they are also available on Bloomberg Law and Casemaker, which is not mentioned in the chapter.

¶26 The chapter on citators is incomplete in that it only discusses KeyCite on Westlaw and Shepard’s on Lexis Advance. Bloomberg Law’s citator, BCite, has been around since 2009, and it is arguably equal to KeyCite and Shepard’s and should be treated as such. Casemaker also has its own citator, CiteCheck, and although it is not as comprehensive as KeyCite, Shepard’s, and BCite, it should be discussed.

¶27 *Idaho Legal Research* can be used as a ready reference book for anyone practicing law in Idaho. From a student perspective, *Idaho Legal Research* and other titles in the series are helpful and affordable options for textbooks in legal research classes. The beginning chapters on basic research strategies, analysis, and organization along with the helpful screenshots and images of book pages are great supplements to in-class lectures. The book also does a good job of providing some
background information and context that may be helpful to students. For example, in the chapter on judicial opinions, there is a brief detailing of court structure and a section on reading and analyzing cases, including a short explanation of civil procedure. Overall, Idaho Legal Research does a great job of covering Idaho legal research and is a valuable resource for beginner and expert researchers alike.


Reviewed by Justin O. Abbasi

¶28 Rick Friedman’s Becoming a Trial Lawyer: A Guide for the Lifelong Advocate is a self-help book for trial lawyers (defined in this context as lawyers representing people in court, or the plaintiff and criminal defense bars). Friedman is open and refreshingly honest about his views; he clearly wants his fellow trial lawyers to succeed. He expressly recognizes that others will have different views and wrote the book in a way that empowers readers to arrive at their own conclusions. However, this book is polarizing. Friedman makes generalizations about lawyers representing corporations and the government to expose their vulnerabilities and break down their techniques. These generalizations do not detract from the book’s purpose, but they are something to be aware of.

¶29 Becoming a Trial Lawyer is not an academic study of the law but one lawyer’s reflection on the law from the trenches, akin to Gerry Spence’s Win Your Case (2005). Friedman, a successful trial lawyer, wrote the book he wished he had received at the beginning of his career. It even contains an annotated recommended reading list with a suggested reading order. Becoming a Trial Lawyer does not contain a simple formula for courtroom success because Friedman does not believe such a formula exists. Instead, he advocates for a holistic approach to success. Friedman recognizes that the verdict will reflect how the jury sees the world or wants it to be, and he teaches readers how to make winning arguments. For example, in chapter 21 he explains how to sincerely reframe an issue to make your case more appealing to a jury.

¶30 This is the second edition of Becoming a Trial Lawyer (the first edition was titled Rick Friedman on Becoming a Trial Lawyer, published in 2008); new chapters include chapter 26, “The Cancer of Comparison,” and chapter 28, “Luck.” Other than those chapters, there is little difference between the two editions. At 225 pages, the book is concise, and its thirty-four chapters are easy to read. Each chapter focuses on different tools of the trade and aspects of being a trial lawyer. Without feeling disjointed, each chapter feels distinct. For instance, in chapter 22, “Silence Can Be Your Friend,” Friedman explains how well-timed pauses can be effective and provides read-aloud exercises; in chapter 27, “Losing,” he includes an e-mail he sent to an attorney that contains ways to learn from a loss and closes the chapter with an inspirational paragraph on the trial lawyer’s willingness to lose.

¶31 The book contains plenty of exercises and practical advice that will help trial lawyers do their exceedingly difficult job effectively, but Friedman’s
overarching focus is the need for lawyers to reflect introspectively and not hide behind a mask because a jury will know. Friedman emphasizes that juries will recognize the trial lawyer’s case as a vehicle for justice when a trial lawyer is honest with them. He uses the psychologist Carl R. Rogers’s On Becoming a Person (1961) to support his arguments, and even counsels trial lawyers to get therapy because it will help them become aware of their psychological wounds.

¶32 The book is divided into three parts: “Entering the Jungle,” “Traps in the Jungle,” and “At Home in the Jungle.” Friedman uses works from nonlegal disciplines to symbolically frame his arguments. A memorable example is Friedman’s use of the historical fiction writer Steven Pressfield’s Gates of Fire (1998) to analogize the emotional relationships of trial lawyers to the Spartans from ancient Greece. Like the life of a Spartan, Friedman’s candid portrayal of the life of a trial lawyer will ultimately be appealing to a select few. Resilience is a necessary trait all trial lawyers must have to last in this profession, and Friedman wants aspiring trial lawyers to be sure about what they are getting into. A lawyer who needs a formula to be comfortable at trial chose the wrong area to practice in, he suggests. Friedman uses the astrophysicist Neil deGrasse Tyson’s Death by Black Hole and Other Cosmic Quandaries (2007) to contrast the failed conclusions scientists make due to limited information with the unpredictability of trial, and Friedman makes a convincing argument that trial cannot be reduced to a science. He also goes to great lengths to dispel pervasive myths in the profession and to give trial lawyers the tools to recognize legitimate forces in the courtroom.

¶33 Becoming a Trial Lawyer is a guided discovery for those planning to become trial lawyers and for trial lawyers early in their careers, but it can also operate as a useful tool for seasoned trial veterans to reference and against which to compare their experiences. The book may also be valuable to researchers interested in a plaintiff lawyer’s perspective on the legal profession, a perspective not readily available in law library collections. There is no shortage of advice, metaphors, and anecdotes in this work, but this title does not belong in all libraries. It would be particularly ironic for this work to be found in the law firm library of a civil defense lawyer. Conversely, any academic law library with a social justice mission or trial advocacy focus would benefit from having this title. Friedman’s book would also be popular in law libraries offering resources to members of the bar.


Reviewed by David Sanborne*

¶34 Point Taken: How to Write Like the World’s Best Judges is Ross Guberman’s follow-up to his highly successful Point Made: How to Write Like the Nation’s Top Advocates (now in its second edition). Where Point Made focused on providing in-depth, practical guidelines for lawyers writing pleadings, Point Taken is targeted more or less exclusively at judges and their law clerks. Guberman focuses tightly on judicial writing. His examples are drawn from more than thirty judges, mostly

from the United States, but other common law jurisdictions are also represented. The text avoids prescriptivism in general, instead providing examples of multiple writing styles and explanations for what makes each style work, what type of cases each is best suited for, and how to maximize that style’s effectiveness.

§35 Guberman repeatedly emphasizes the value of clear, concise language and the elimination of extraneous details. To that end, the text assumes that the reader is already familiar with the basics of legal writing and needs no hand holding when it comes to the factual content of a judicial opinion. *Point Taken* should not be seen as a starting point for how judges should write but rather a tool for honing their skills and streamlining their style. *Point Taken* encourages the reader to consider the impact that writing style has on the ultimate interpretation of the decision.

§36 Structurally, the first half of *Point Taken* examines discrete parts of a good judicial opinion. Beginning with introductions, Guberman then discusses how to describe the facts of a case before moving on to discussing legal reasoning (which he calls the meat of the opinion). The majority of the second half is concerned with usage of individual words or punctuation marks in sections discussing what is imperative and what is desirable, but not essential, in style. Here the text has the potential to become pedantic, but Guberman’s efforts to avoid strict prescriptivism mitigate the effect somewhat. Guberman concludes with the most politically charged chapter on dissents. While most of the chapters feature examples from a wide variety of courts, the dissents are almost exclusively derived from the highest-profile U.S. Supreme Court cases of the past two decades, including *Bush v. Gore,* 2 *Lawrence v. Texas,* 3 and *Shelby County v. Holder.* 4 It is certainly intentional that in this chapter he uses an equal number of examples from Justices Ginsberg and Scalia.

§37 The initial chapters of *Point Taken* improve on *Point Made*’s organization by moving the fine details into footnotes. This means readers looking to understand the structure and informational organization of a good judicial opinion can do so without having to skim over fine mechanical details; at the same time, that information is still readily accessible for those looking for a more in-depth treatment. The second half of the book necessarily abandons that convention since it is entirely concerned with these fine details. Guberman clearly advocates for making judicial writing, above all else, concise and clear. He advocates for eliminating most or all Latin and replacing constructions like “with respect to” or “regarding” with “on,” “for,” or “about.” He even praises the oft-overlooked semicolon.

§38 It is important to appreciate and use *Point Taken* for what it is: a writing guide. While it may occasionally touch on what types of legal reasoning are more persuasive than others, *Point Taken* is not a book about or a guide to legal reasoning. Guberman’s examples have been chosen with an eye toward effective and persuasive writing, not for the strength of their reasoning. Guberman quotes only those portions of an opinion that demonstrate the stylistic point he is making, potentially omitting important parts of the reasoning behind a decision. This means that in more than one case it looks like Guberman is praising circular logic

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or otherwise poorly supported conclusions. As this is not particularly relevant to
the aims of the book, it is not a flaw per se, but is perhaps a reason why it may not
be suitable for legal novices.

¶39 Point Taken’s tight focus is a boon for judges, but that focus is also a limit-
ing factor when it comes to collection development. It is an excellent purchase for
any library patronized by judges, arbitrators, or law clerks, but firm libraries would
be better served by augmenting Point Made with something like Matthew Butter-
rick’s Typography for Lawyers (2d ed. 2015). The majority of the content in Point
Taken is applicable to legal writing in general, but given the high quality of the
advice in Point Made, there is little incentive to acquire Point Taken in addition to
or instead of its predecessor.

Jost, Richard M. Selecting and Implementing an Integrated Library System: The Most
$78.95.

Reviewed by Camilla Tubbs*

¶40 Among all of the challenges and competing interests facing libraries today,
and with current technological advances, why, you may ask, is a decision regarding
your integrated library system (ILS) the most important decision you will ever
make?

¶41 By way of background, I experienced the pressures of helping to select a
new ILS when I was director of the Thurgood Marshall Law Library (TMLL) at the
University of Maryland Carey School of Law. TMLL participates in the University
System of Maryland and Affiliated Institutions (USMAI) Library Consortium, an
alliance of sixteen libraries at the public universities and colleges in Maryland. For
more than a decade, USMAI libraries shared a single Ex Libris Aleph ILS that is
centrally administered and managed at the University of Maryland College Park.
This shared ILS provides a combined catalog of all member libraries, facilitates
resource sharing, and provides a more complete and sophisticated library automa-
tion environment than TMLL would otherwise have been able to afford. However,
the USMAI contract with Ex Libris is near expiration. And while Ex Libris has a
strategic interest in keeping Aleph viable for the next few years, the company’s
attentions are more focused on its next-generation platform, Alma. Complicating
matters is the University of Maryland College Park’s concurrent participation in
the Kuali Open Library Environment, an open source, community-directed library
management system project that is still in its infancy.

¶42 The next steps that the USMAI directors take toward selecting and imple-
menting a new ILS are daunting: the current system supports nearly four million
bibliographic records, so any new ILS will likely cost millions of dollars to imple-
ment, and regardless of which system is chosen, the end product will impact the
workflow of dozens of library staff and thousands of library patrons for years to
come. While the decisions regarding what to do next might not have been the most

* © Camilla Tubbs, 2016. Associate Dean for Library and Technology, University of California,
Hastings College of the Law, San Francisco, California.
important that I had to make as TMLL’s director, they were definitely the most expensive and time-consuming!

¶43 I imagine that Richard Jost, of the University of Washington Gallagher Law Library, felt similar pressure when his library decided to move away from its long-standing Innovative Interfaces system to develop a request for proposals (RFP) for a shared ILS system with thirty-seven other public college and university libraries in the Orbis Cascade Alliance project. “Implementing a new system is demanding for any library but doing it while changing workflows and collaborating with new partners (many of them geographically removed from one another)” (p.103) can be downright overwhelming.

¶44 From lessons learned as the project manager for the University of Washington in the Orbis Cascade Alliance project, Jost provides detailed guidance in his book on what considerations should be made by administrators selecting either their very first system or to those who are migrating to a next-generation system. Jost lays out a useful blueprint for how to approach this complicated task, breaking up the project into distinct, digestible parts that make the whole seem less complicated. This book may also be used as a guide for institutions dealing with staffing changes or looking to make technical enhancements to an existing ILS.

¶45 The first few chapters—“Brief History of Library Technology,” “Record Types and Print Library Workflows,” “Electronic Resources,” and “Systems Librarians”—provide a great overview of library automation, as well as how librarians manage the information lifecycle in this hybrid print/digital age. While the lingo in these chapters may not provide new information to the well-versed librarian, the chapters serve as excellent summaries to an administrator (or person holding the purse strings) to explain the importance of managing operations and workflows. We may take for granted that a collection development librarian and acquisitions librarian have distinct and separate tasks, and that, out of necessity, one person may be doing both jobs in a library. But being able to articulate those differences and to understand how those skill sets might differ from that of a systems/digital resources librarian are important in determining what a library could or should be able to handle, and how those choices can be affected by technology choices. Jost explains clearly what processes need to be in place, which of these processes is automated, and the skill set needed by people to bridge the gaps.

¶46 The two chapters that follow, “Project Management” and “Change Management,” set the framework for the rest of the book by discussing how to mitigate the risks involved in moving to a new system. This process involves being realistic about what a new system can do and how this will impact library operations. But just as important, Jost argues, is the composition of the staff appointed to make these determinations. Those charged with the change process must have the trust of the library staff to ensure the success of the project. While each institution has its own interpersonal dynamics and politics, Jost provides various constructive approaches to obtaining staff buy-in, being transparent, and effectively managing everyone’s expectations.

¶47 Chapters 7 through 10 alone are worth the price of this book as they cover how to conduct a needs assessment, when to seek the guidance of a consultant, and the all-too-scary RFP process. Even if your institution is not required to go through
the RFP process, conducting this sort of analysis provides an opportunity for the library staff to define and prioritize exactly what it is looking for in a new system and how to objectively evaluate a system’s value. Jost’s book provides step-by-step instructions and templates for how one could organize information about the library’s current operations and future needs in a way that could be applied to any library, regardless of size or type.

¶48 The remaining chapters cover what to do once a new system is selected, including data migration and staff training, and discuss the role of discovery platforms and the end-user experience. It might seem odd to wait until the book’s end to discuss discovery layers and Library 2.0 functionality (geotagging, social media interaction, and so on), as those tend to be the flashy aspects of a catalog that many librarians (myself included) enjoy showing off and explaining to patrons, but I think it was wise for Jost to distance the two components in his book. As Jost notes, sometimes the desire to have the new and shiny technology can blind the process of organizing a workflow and selecting a system that best supports a library’s primary functions. Not to discount the importance of end users being able to find what they need, it might be impossible to anticipate how search behaviors and the use of a catalog as a search tool will change over time. A well-run organization, crafted through a thoughtful process like the one articulated in this book, should be able to responsively adapt to change. Framing the discussion in this process-based method avoids the endless debate over the need for a catalog in the first place.

¶49 In the end, it is not the decision of which ILS to select but the process through which you arrive at the most appropriate technology for the institution that is of the greatest importance. This book is a worthy addition to any library ready to embark on that journey.


*Reviewed by Nancy B. Talley*

¶50 Imagine police officers knocking on your door to ask you questions about a recent homicide. Your spouse and children witness this interaction. You are questioned about your knowledge of the victim and the crime. The police ultimately do not charge you with the crime. However, the damage has been done. Your neighbors witnessed the presence of police officers at your house, and the neighborhood gossip mill has convicted you of the unspeakable crime. What the police officer fails to tell you (nor is he required to under the law) is that you became a suspect because your DNA closely matches the DNA of a distant family member whose sample is included in a forensic DNA database.

¶51 With the news media and television shows quick to declare a defendant guilty simply due to the presence of forensic DNA evidence, Erin E. Murphy, a law professor at New York University School of Law, presents a captivating counterargument to the presumption of guilt. *Inside the Cell: The Dark Side of Forensic DNA*
reads like a novel and is engaging from start to finish, yet it is clearly an academic book, as she supports each of her arguments with authority (notes to each chapter and an index are included). Throughout the book, Murphy weaves numerous accounts of specific cases and demonstrates how forensic DNA has been misused due to negligence or outright fraud on the part of forensic scientists and laboratories. At times, however, a balanced approach to presenting both sides of an argument is missing and needed to bring readers along and bolster Murphy’s argument.

¶52 In part 1 of the book, Murphy provides necessary background regarding forensic DNA typing and explains certain challenges associated with DNA samples, including transfer (passing DNA from one person to another), mixtures (DNA from multiple contributors), and laboratory errors, which can lead to inaccurate results. Murphy discusses the lack of meaningful accreditation standards for forensic laboratories and highlights two other issues. First, the forensic laboratory industry is not sufficiently transparent, and second, the industry favors police departments and prosecutors, often limiting or preventing defense counsel’s access to forensic data.

¶53 In part 2, Murphy provides an in-depth discussion of certain problems with forensic DNA databases. Specifically, Murphy discusses the problems associated with identifying a single suspect as a result of coincidental matches that occur in forensic DNA databases when two (or more) people happen to have matching DNA along the genome. Murphy also discusses state law enforcement agencies’ constitutionally questionable procedure of constantly combing forensic DNA databases with the hope of uncovering cold hits that will yield suspects in unsolved cases. The limitations of forensic DNA databases are further explored when Murphy points out the error rates associated with DNA testing methods and faulty statistical evidence that is often introduced at trial. Murphy also highlights the problems associated with still-developing computer programs that have been touted as providing matches to sophisticated forensic DNA samples, pointing out that this technology is currently not advanced enough to make such conclusions. Throughout part 2, Murphy supports her arguments regarding the dangers of forensic DNA databases with persuasive statistical evidence.

¶54 In part 3, Murphy confronts primarily Fourth Amendment search and seizure issues relating to the collection of DNA samples. Murphy begins her argument by pointing out that many states require both convicted offenders and arrestees to provide DNA samples, despite the presumption of innocence afforded arrestees. Next, Murphy convincingly argues that the U.S. Supreme Court’s decision in *Maryland v. King*, 5 which found that DNA samples are akin to fingerprints and gave states the power to take DNA samples from arrestees, was wrongly decided because of the differences between fingerprints, which are used for a variety of purposes, including identifying individuals, and forensic DNA samples that are used exclusively by law enforcement to solve current, past, and future crimes. Murphy argues that *King* will lead to a slippery slope because it essentially places no limits on law enforcement’s use of forensic DNA.

Murphy’s argument is even more compelling as a result of her discussion of various techniques that law enforcement uses to collect DNA samples, including surreptitious collection, dragnets, creating DNA mugshots, using heritable characteristics to identify suspects, and familial searches, where potential suspects are found based on the similarity of their DNA to individuals with samples already in forensic DNA databases. Murphy further supports her argument by explaining how state law enforcement uses rogue forensic DNA databases that allow them to ignore searching protocols put in place by the FBI and search forensic DNA samples for almost any purpose they see fit. In this section of the book, Murphy also briefly touches on how race and distinct situations, such as twins, affect DNA sampling results.

In part 4, Murphy sets forth her vision of a more effective DNA policy. Murphy makes a compelling case that a future DNA policy must include increased funding and crime scene sample testing, greater transparency surrounding all DNA testing, fewer laboratory mistakes, openness between defense counsel and DNA laboratories, evidence retention and preservation, decreased sample backlog, and improved data collection, including more accountability for laboratory personnel and externals audits. *Inside the Cell* is highly recommended for all academic and county law library collections.


Reviewed by Candle M. Wester*

I was first introduced to Kent Olson, along with Morris Cohen and Bob Berring, through the hornbook *How to Find the Law* (1989) in Rich Leiter’s advanced legal research course. I still have my copy, the ninth edition bound in green, because it is a treasure trove of all things legal research with respect to sources, process, and history that I still use from time to time.

Yet *How to Find the Law* was a little dated and due for a revision. This led Olson to write the first edition of *Principles of Legal Research* (which included “Successor to *How to Find the Law, 9th Edition*” on its cover) in 2009. Part of the Concise Hornbook series from West Academic, *Principles of Legal Research* kept the bones and integrity of *How to Find the Law* while being more, well, concise, and recognizing evolving technology.

While I was part of the Legal Research and Writing program at Southern Illinois University School of Law, I was introduced to the first edition of *Principles of Legal Research* when we started to look for a new book as our required text for the research portion of the course. We ended up using it for our first-year students, although Olson points out in his preface that it is not meant for legal research beginners. Yet we believed it was a strong text and would be a solid foundation for our students during their two semesters of legal research (a program that covers the gamut from the basics to legislative history and to practice aids). Additionally, we had received feedback from our past students that some would have liked to have

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had a legal research text that they could refer to not only in law school but once practicing as well. *Principles of Legal Research* fit the bill on all fronts.

¶60 Yet again time has passed, and in 2015 Olson updated *Principles of Legal Research* to reflect the changes within the legal research realm—Bloomberg BNA, Lexis Advance, and WestlawNext, to name a few. As he did in the first edition, Olson starts the second edition by laying out the foundation of legal research with its process and context. The first chapter reviews the U.S. legal system, provides a clear description of the forms of legal information, and, in the last seventeen pages of the chapter, sets forth one of the most concise guides to legal research methods to be found.

¶61 Chapters 2 through 9 cover U.S. primary sources, both state and federal, and the resources used to find and update them. One change from the first to the second edition is that Olson has not included *Shepard's Citations in Print* in the section on citators. This makes sense given the topic, and he includes a footnote referring readers to the first edition if one wants to know how to use Shepard's in print. The next three chapters focus on secondary sources and provide more illustrations than in the first edition. Those illustrations, not only in the chapters on secondary sources but throughout the book, are a mix of examples from print sources and color screenshots (versus the black and white illustrations in the first edition). Screenshots of sources such LegalTrac, Index to Legal Periodicals and Books Full Text, and Social Science Research Network remind the reader that there is more than just Westlaw and LexisNexis when it comes to research. The last two chapters cover international and foreign resources, which give the reader a good foothold on the resources in a complex area of research.

¶62 One of the best features of *Principles of Legal Research* is the appendix, which covers treatises and services by subject. Although there are legal research guides online that cover treatises, Olson breaks down each subject area by multi-volume treatises, one-volume treatises, hornbooks, and services, when available. He also includes the Library of Congress call number range for each area of law, giving the reader a starting point for finding a treatise in practically any law library. Especially useful is the URL Olson provides in the preface to a regularly updated list of all the links in the book. It is a veritable portal of legal resources at one’s fingertips.

¶63 *Principles of Legal Research, Second Edition*, is an outstanding text for those who have a budding interest in legal research and for those of us needing a refresher in certain areas or sources. It, like the first edition, carries on the exemplary format that *How to Find the Law* gave its readers. In *Principles of Legal Research*, Olson has succeeded at presenting the foundations of legal research succinctly while demonstrating its growth and evolution.
As both a librarian and a legal research professor, I have often been asked by students and new attorneys for a guide or resource to refer to when they are working on a research project. Because of time constraints, these individuals frequently need a brief and highly informative resource to refer to quickly as a practical guide. *Impeccable Research: A Concise Guide to Mastering Legal Research Skills* is a great choice.

This is the second edition of Mark Osbeck’s book. The basic structure of both editions is virtually the same. Like the first edition, the book presents a logical and pragmatic approach to conducting legal research, with a primary emphasis on strategy. This is not a new concept, but the author does a superb job of establishing the important role strategy plays in conducting effective legal research. In this edition, Osbeck now includes a checklist and makes various updates throughout the book to reflect the changing legal research environment. To assist the reader in understanding these modifications, the foreword to the second edition clearly enumerates how the book expands on the first edition.

In part 1, “A Five-Step Strategy for Impeccable Legal Research,” Osbeck sets out the research strategy framework. Chapter 1 focuses on planning research. Of particular interest in this chapter is the discussion of the research plan and proper search terminology. Chapter 2 concentrates on the importance of secondary sources in providing a general understanding of legal issues and how taking advantage of these resources will greatly benefit legal research outcomes. Chapter 3 tackles the search for primary authority. In this chapter, besides discussing the types of primary authority, Osbeck also suggests using a preliminary outline to set out each individual issue and sub-issue to be researched. The outline is further developed by linking to authorities that correspond with each particular issue or sub-issue. Chapter 4 deals with expanding and updating research. Particular attention is placed on locating relevant cases and validating these cases through the use of citators. Chapter 5 completes part 1 by focusing on analyzing and organizing research results. Part 1 sets forth a very clear and logical strategy for legal research.

Part 2, “Refining Your Legal Research Skills,” sets out the basis for perfecting research skills. Chapter 6 provides ten tips for summer associates and beginning lawyers. The tips are somewhat obvious but merit listing and discussion for the benefit of the novice legal researcher. Chapter 7 provides a troubleshooting guide, which Osbeck has expanded to include additional information on finding the best case to use. Part 3 provides an overview of the principal sources of law, with chapter 8 specifically addressing secondary sources of law and chapter 9 addressing primary sources of law. Osbeck ends with a research strategy checklist. The checklist is an extremely helpful guide for researchers and establishes a method to ensure accuracy and completeness in a legal researcher’s work product.

All in all, I highly recommend *Impeccable Research* for use by law students and new attorneys. Although it is brief, it provides a wealth of important information to the reader while still encouraging efficiency and competency in legal research. The book is well organized from the introduction to the research strategy checklist. It would make a good addition to any library’s collection.


Reviewed by Jamie J. Baker*

In *Divergent Paths: The Academy and the Judiciary*, Judge Richard A. Posner posits that the academy needs to do more to prepare the federal judiciary. He specifically takes aim at the overreliance on legal formalism in both the judiciary and legal education. Throughout the book, Posner makes many valid points as he draws from his distinguished career as a judge on the U.S. Court of Appeals for the Seventh Circuit and a law professor at the University of Chicago Law School.

*Divergent Paths* starts with a discussion of the problems facing the modern federal judiciary, focusing heavily on what Posner dubs process deficiencies. Posner’s main issue is with legal formalism, which is, as he mentions, “still the dominant style of judicial opinions,” using a two-step process—interpretation and “the application to the facts of the case of a legal rule or standard derived by interpretation” (p.76). He says that formalism leads judges to “hav[ing] things backward when . . . they start their analysis of a new case with a consideration of precedents . . . created in a different setting from the present, often a different era, a different world really” (pp.77–78).

Posner argues that judges should follow realism when deciding cases by using practical considerations in their decisions. He notes, “A realist judge pays attention to precedent and the other formal sources of law, but to much else besides” (p.79). Much else includes “social values, caseload considerations, administrability, respect for expertise, moral intuitions, . . . . precedents, finding useful ideas in opinions, [and] academic writings” (pp.82–83).

The second half of the book is devoted to identifying the shortcomings of the current law school curriculum and offering constructive suggestions to the academy to help contribute to the improvement of the judiciary. As to the shortcomings, Posner discusses the proclivity of law students toward formalism, explaining that formalism welcomes jargon and even the complexity of legal citation form because it helps make students “feel in possession of a technical vocabulary,” making them feel like “a budding expert” or a “real professional” (p.299). Posner quotes from a private note that an unnamed law professor sent to him: “students are natural formalists because formalism is an intellectual crutch and they are in an unfamiliar environment” (p.302). The law school curriculum and legal writing programs encourage this formalism with their current structure. Additionally, with the trend to make statutory interpretation a mandatory first-year course, the law schools are churning out legal formalists who may eventually become judges.

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According to Posner, the law school curriculum is the perfect place to address these process deficiencies in the judiciary and bridge the widening gulf between the federal judiciary and the legal academy. And it will take systemic changes over a period of time to implement successful reform. He states: “The competitive pressures besetting the legal profession help explain why law schools are reluctant to train students in unconventional methods of legal advocacy [by relying on realism, for example]” (p.321). Because law schools are partially to blame for the formalist culture, the law schools should atone.

The most helpful and practical part of the book appears in appendix D, where Posner lists the judiciary’s problems and possible academic solutions. One of the most useful suggestions appearing in the list is to extend legal writing over three years, deemphasize writing memoranda, and teach judicial opinion writing. Posner thinks learning to write judicial opinions will help students better understand opinions they read.

Posner argues that good judicial opinions should do the following: not use jargon and footnotes, ignore specific citation forms, remove any superfluous words, sparingly use adverbs and adjectives, avoid using section headings, and “[b]e grammatical, but not fussy” (p.271). Also, opinions should be brief, candid, and truthful.

Posner’s suggestions are in line with the call for writing across the law school curriculum⁶ and will help fill the writing deficiencies of the current crop of law students. Like many other suggestions for legal writing reform, legal research is given short shrift. In addition to Posner’s call for legal writing reforms, there should also be an emphasis on legal research to help inform the very realism that he would like law students to employ.⁷ Ultimately, this ambitious book provides thought-provoking criticism of two institutions that should work in tandem, yet find themselves further apart than ever.

Because of Posner’s experience in both the federal judiciary and legal academy, all law school faculty and administrators should take note of his sensible suggestions for improvement. While some of his suggestions may be deemed too ambitious, there are others that would be positive incremental changes. Academic law libraries should include this book in their legal education collections. Anyone interested in the American legal system will be provoked by this book.


Reviewed by Katie Hanschke*⁸

New Field, New Corn: Essays in Alabama Legal History is divided into eight essays that discuss important events or persons in an attempt to paint a broad

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⁷ See Brooke J. Bowman, Researching Across the Curriculum: The Road Must Continue Beyond the First Year, 61 Okla. L. Rev. 503 (2008).

picture of Alabama's history as viewed through a legal lens. The book begins with a foreword by Bryan K. Fair, a law professor at the University of Alabama. Using Justice Oliver Wendell Holmes, Jr.'s phrase “[a] page of history is worth a volume of logic” (p.i) to set the stage, Fair begins with a discussion of history's role in understanding current legal precedent and moves on to emphasize the importance of intertwining history within the structure of legal education. According to Fair, “[d]eveloping analysis and writing skills goes to the very heart of legal education” (p.v). The collection of essays contained within *New Field, New Corn* is the end result of this philosophy.

After Fair’s foreword, the heart of the publication begins with an introduction to Alabama legal history as a field of study. Editor and special collection librarian Paul M. Pruitt, Jr. divides his introduction into three parts. First, he discusses why the studies of history and legal theory have not been fully linked. His theory is that “this division marks the difference between lawyer’s deductive mindset and the historian’s inductive training” (p.1). Next, he tracks the progression of documenting and interpreting southern legal history. Pruitt makes the case that “[t]here is, as yet, no thesis or generally accepted interpretation of what makes southern law distinctive . . .” (p.6). Finally, he emphasizes the importance of Alabama legal history as a part of understanding a greater legal narrative. Pruitt’s introduction prepares the reader for the eight essays that follow by emphasizing the importance of the historical context and its legal ramifications addressed within each of them.

Each of the essays is written by a student and covers an individual topic relevant to Alabama's legal history. Examples of topics include “The Militarization of the University of Alabama,” “A Man in a Boy’s Coat: The Evolution of Alabama’s Constitutions,” and “The ‘Breakthrough Verdict’: Strange v. State.” The essays serve as fascinating, short reads on topics that shaped Alabama's legal, social, and political landscapes. As a reader, I found myself gaining an interesting introduction to distinctive periods in Alabama’s history. As Pruitt emphasizes in his introduction, each of the essays demonstrates how the law both influenced and was shaped by the historical event, period, or person highlighted by the essay.

While I believe the book is worth reading, the essay’s space limitations may leave the reader with more questions than answers. It is difficult to cover many of the topics in just a chapter, and some of the essays came across as unfinished. Further, it is important to note the limitations of the book. Not all viewpoints are included throughout each essay, even though it is important to recognize diverse perspectives as an integral part of Alabama's history. I would love to see that fleshed out as Pruitt continues his research.

While the book is by no means comprehensive, the introductory materials do an excellent job of informing the reader of that limitation. Finally, there is a level of inconsistency between the essays. Though much of the writing is of a high caliber, there are instances where an essay is not as polished as one might expect of a scholarly book chapter. Since the chapters are by law students and the most effective way to develop writing skills is practice, perhaps this is not an issue. Introducing a book that is primarily written by students into a collection will need to be a decision each law library makes. That said, *New Field, New Corn* accomplishes what both the foreword and introduction promise. It gives the reader a taste of various parts of Alabama's interesting history and lays the foundation for more in-depth and meaningful research.

Reviewed by Elaine M. Knecht*

¶83 For the past several years, Sterling Publishing has been releasing collections of 250 milestones: 250 chemistry milestones, 250 math milestones, 250 space milestones. Each of these collections is edited by an expert researcher in the specific field. Michael H. Roffer, who pulled together these 250 intriguing milestones in the history of law, is a member of the legal research faculty at the New York Law School.

¶84 The Code of Hammurabi is often identified as the oldest compilation of laws, but in this collection we learn of the Code of Ur-Nammu, which appeared some 300 years before the more well-known code. This collection, however, takes us back even further, with reference to the oldest example of a written will. This document, discovered by the English Egyptologist Flinders Petrie, dates from 2548 B.C.E. In the will, Sekhenren left everything to his wife, Teta. There is an attestation clause witnessed by two scribes. The 1889 newspaper article reporting this remarkable find notes the discovery’s “singularly modern form” and that such a document “curiously illustrates the continuity of legal methods” (p.10).

¶85 Organized chronologically, the book takes us from the twenty-sixth century B.C.E. through the trial of Socrates (399 B.C.E.), the establishment of the first law school (c. 250 C.E.), the Magna Carta (1215), the first Blue Laws (1629), the Salem witchcraft trials (1692), America’s first copyright law (1790), the recognition of labor unions (1842), and 148 other milestones of the twentieth century alone. Each of the milestones is faced by a work of art (a reproduction of a painting or poster) or a photograph of historical significance, such as the picture of Judge Robert Rosenberg of the Broward County Canvassing Board using a magnifying glass to view a dimpled chad.

¶86 The Law Book would be an excellent congratulatory gift for an aspiring attorney or anyone with more than a passing interest in the history of law. Clients who must spend some time in your waiting room may appreciate the opportunity to become familiar with the many important historical events outlined in this popular collection.


Reviewed by Ellie Campbell*

¶87 David S. Roh’s *Illegal Literature: Toward a Disruptive Creativity* challenges our increasingly inflexible copyright laws by positing an alternative model of creative cultural production, which he terms “disruptive textuality.” Roh argues that the ideology of authorship that copyright law takes for granted, that of a single authorial genius, does not reflect the messiness of actual creation. His conception

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of disruptive textuality assists us in understanding that “literary and cultural development is a struggle between subcultural and canonical texts influenced by constructs such as intellectual property and distribution networks rather than an internal linguistic tension” (p.5). Current copyright laws stifle rather than encourage this kind of cultural production. Roh uses the examples of legal battles over published works, “extralegal texts” like fan fiction, and collectively created open source software to demonstrate his vision of disruptive textuality and show why laws based on that model would benefit society.

¶88 In his first chapter, Roh examines the lawsuits over two novels, Alice Randall’s *The Wind Done Gone* (2001) and Pia Pera’s *Lo’s Diary* (1999), that “intertextually engaged,” or drew heavily and commented on, older works. In *The Wind Done Gone*, Randall rewrites *Gone with the Wind* from the perspective of a female slave, and in *Lo’s Diary*, Pera presents the story of *Lolita* from Lolita’s point of view. In both cases, the estates of Margaret Mitchell and Vladimir Nabokov sought to prevent the publication of the two later works. Roh uses these two battles to highlight how modern copyright law has evolved to overprotect the economic interests of authors at the expense of supporting creativity and furthering cultural development within a professional writing environment.

¶89 Roh next compares the phenomenon of American fan fiction and Japanese *dojinshi* to demonstrate what more amateur and extralegal literature looks like under two different legal systems. In both fan fiction and *dojinshi*, law does not inhibit creativity and cultural production to the same extent that it does in professional writing. Both genres employ what Roh calls a “dialogic relationship with canonical texts” (p.58). Roh defines fan fiction as “a text written by an amateur writer that directly lifts characters and settings to create new narratives” (p.64), and argues that its writers share several characteristics: they are ardent fans of a particular work, they participate in a community of other fans, and they usually write without the expectation of financial compensation. Roh compares fan fiction to Japanese *dojinshi*, which he defines as “manga written and illustrated by amateurs, often fans, for limited distribution, from a critical, humorous, satirical, emulative, or erotic perspective” (p.70). Due to a looser interpretation of copyright law, *dojinshi* involves far more works, reaches a much wider audience, and interacts more deeply with professional texts than American fan fiction, which mostly remains in online ghettos. Additionally, less legal interference means that *dojinshi* has been able to develop a more robust infrastructure for creation and distribution, which in turn supports more growth.

¶90 Roh’s last chapter explores other examples of distribution networks, particularly that of XDA Developers’ open source software community, and how those networks encourage rather than stifle creativity in development. He examines qualities of open source software communities in which “constant, iterative tinkering leads to quicker developments in cultural trends, ideas, and innovation” (p.99), made possible by decentralized structures of online textual exchange. These structures support maximum access and collaboration that result in more rapid development and creativity than strongly centralized and legally regulated distribution networks.

Extrapolating from this model, Roh suggests that literary culture should break free of the single authorial genius model and instead embrace what he calls “literary versioning.” He defines literary versioning as “derivative creative acts serving an important function . . . by perpetually recontextualizing and creating multiple dimensions of a popular work seeded in the cultural consciousness, the text is renewed, refreshed, and, most importantly, a vehicle for innovation in genre and content” (p.119). Roh offers literary versioning as an alternate vision of literary authorship that “legitimat[es] and codifi[es] the dialogic impulse,” examples of which he discusses in the first two chapters (p.119). If cultural production is driven by exchange between canonical texts and noncanonical texts, such as between Gone with the Wind and The Wind Done Gone, or between the Harry Potter novels and fan fiction written about those novels, then Roh’s literary versioning offers copyright law an alternate model of authorship that encourages rather than stifles the creative impulse.

Roh is an assistant professor of English at the University of Utah, and his text lives at the intersection of literary theory, legal studies, and new media theory. Especially in the introduction, he leans heavily on postmodern literary theory that may be unfamiliar to a legal audience. Once he dives into his chapters, however, Roh does an excellent job of explaining what may be unfamiliar works or genres—Randall and Pera’s reworkings of Gone with the Wind and Lolita respectively, American fan fiction and Japanese dojinshi, and various types of open source software—and how those examples illuminate different aspects of the relationship between creativity and copyright law. This text assumes basic familiarity with some of the major debates within copyright, so it would be especially appropriate for a law library collection that focuses on copyright and intellectual property. Though Roh does not offer an alternate legal model for copyright law, he does prompt the reader to rethink many of the dominant theories on which modern U.S. copyright law is based. This book may thus be helpful for law professors or students who are interested in the subject, especially from an interdisciplinary perspective.


Reviewed by Michael O. Eshleman*

Ohio has long had a wealth of legal information available. Numerous series of unofficial reporters were published in the nineteenth and twentieth centuries. Two major legal publishers were based in the state—Cleveland’s Banks-Baldwin, now part of West, and Cincinnati’s Anderson, now part of LexisNexis—and their successors continue to publish treatises specific to Ohio. Two of the biggest publishers of city ordinances—American Legal Publishing and Conway Greene—are based in Ohio. Having nine law schools plus a statutory requirement to have a law library in every one of the eighty-eight counties means Ohio lawyers have a bounty not enjoyed by all states’ practitioners.

¶94 *Ohio Legal Research* is part of Carolina Academic Press’s Legal Research series, which covers research in thirty states plus the federal system. The book opens with introductory concepts: binding versus persuasive authority, the structure of the Ohio and federal court systems, and how to approach a legal research problem. Constitutions, statutes, how to read a case, how to find cases, court rules, administrative law, local ordinances, secondary sources, research strategies, and legal citation each receive a chapter. Attention is paid both to Ohio and federal sources.

¶95 The authors are experienced Ohio legal researchers. Sara Sampson is the director of the Ohio State University’s Moritz Law Library, Katherine L. Hall worked there in the past, and Carolyn Broering-Jacobs teaches legal writing and research at Cleveland-Marshall College of Law. The authors have done an excellent job of clearly explaining their subjects without jargon. This very approachable book would be ideal for a beginning legal research class or self-study. It would be less intimidating (and less expensive) than the most recent *Legal Research in a Nutshell* (12th ed. 2016).

¶96 The book is not without its disappointments, however. Despite its title, its general nature means it is not laser-focused on Ohio—the authors’ preface acknowledges that several chapters of the book are based on those in the Oregon volume in the Legal Research series—and it confines itself to current materials.

¶97 *Ohio Legal Research* does not mention the first reporter of Ohio Supreme Court decisions, *Ohio Reports*, which covers 1821 to 1851. Nor does it list the many older Ohio reporters, such as *Ohio Law Abstract* or *Ohio Decisions Reprint*, citations to which are still encountered. Nothing is said about the *General Code* or other compilations of laws prior to the 1953 adoption of the *Ohio Revised Code*.

¶98 Certain Ohio peculiarities are not explained. Ohio’s unique syllabus rule, in place from before the Civil War until 2002, declared that the Ohio Supreme Court–written syllabus was the law of the case and not the text of the decision.11 (But that doctrine did not apply to lower court decisions.)12 Nor does the book explain the Ohio Supreme Court’s former practice of putting its statement of facts before the judge’s authorship line, even though an illustration of such a decision is in the book. This practice means that in some databases the facts will be missing because the compilers mistook the factual summary as part of West’s synopsis and headnotes from the *North Eastern Reporter*. And it will be confusing to those who have been taught that material in headnotes and syllabi are not part of the decision.

¶99 For these reasons, *Ohio Legal Research* cannot be considered a replacement for Melanie K. Putnam and Susan M. Schaefgen’s *Ohio Legal Research Guide* (1997), which the authors acknowledge in their list of additional resources. Although now out of print, *Ohio Legal Research Guide* is available on HeinOnline as part of Spinelli’s Law Library Reference Shelf. While parts of *Ohio Legal Research Guide* make it outdated—the lists of current materials and no discussion of the Internet—its

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coverage of older Ohio material and its bibliographies make it essential to keep on
the shelves of libraries and practitioners.

¶100 *Ohio Legal Research* has its virtues as well. It is concise, clear, and accessible. It is a solid introductory guide to legal research, and for those learning the ropes, it will serve them well. All public libraries in Ohio will do well to purchase a copy for each of their branches.


Reviewed by Duane A. Strojny*

¶101 Higher education accrediting bodies are making law schools rethink their teaching methods. Institutions face regular questions about what they are doing in relation to learning outcomes and assessments. Lori E. Shaw and Victoria L. VanZandt’s *Student Learning Outcomes and Law School Assessment: A Practical Guide to Measuring Institutional Effectiveness* can support law schools preparing for ABA accreditation visits. Both authors have significant experience dealing with law school assessment and also bring to the table wider experience of working on assessment and leadership at both university and national organizational levels. They spell out the process from beginning to end and demonstrate how you can establish the loop of creating outcomes, assessments, and reviewing results. Since this is a new topic in legal academia, there is really nothing to compare this book with, although there are many general books available dealing with higher education assessment. It is an easy read on the subject and approaches various tasks with straightforward and consistent terminology.

¶102 This is a how-to guide on outcomes assessment. Given that premise, there are plenty of charts and checklists for the readers to use as guidelines at their own institutions. The first chapter does a nice job of defining all the terminology dealing with this topic, including what outcomes assessment, formative assessment, summative assessment, and institutional assessment mean. Chapter 2 deals with the theory behind the field of legal education assessment, including discussion of ABA standards and why all these changes are occurring. Explaining who should be involved and what their roles could be is the purpose of chapter 3. If all the background information does not make your head spin, chapters 4 through 6 clearly spell out steps to develop a fairly comprehensive outline of a law school assessment program. The authors admit that this is uncharted water and the process of developing learning outcomes, assessment, and the overall loop of institutional planning is new to many legal educators and administrators. The book follows a scenario of the reader walking through all the steps based on a request from the law school dean to put this plan in place. Not surprisingly, each chapter lists a learning outcome for the chapter along with ways to assess whether that outcome is achieved. This book is a thorough attempt to help the reader both become more knowledgeable in the topic and develop a plan.

* © Duane A. Strojny, 2016. Associate Dean of Library and Instructional Support and Professor of Law, Western Michigan University Thomas M. Cooley Law School, Lansing, Michigan.
¶103 Sidebars provide tips and comments for quick reference. These light blue boxes have bolded headings and contain a wide variety of information depending on the topic of the chapter. Although the material is covered more in depth within the larger text, these synopses, along with detailed action lists at the end of each chapter, serve as general overviews of the plan the authors lay out for creating detailed learning outcomes and an assessment protocol at your institution.

¶104 If the main chapters of the book leave you wanting more, do not worry. There is a glossary; sample forms for each of the development, implementation, and evaluation stages of assessment; and illustrative examples of learning outcomes adopted by a representative number of law schools set forth in the appendixes. Of course, the representative institutions’ outcomes are very different, but all look as though they reflect the authors’ general guidelines. A selective bibliography would have been a helpful addition, especially one that pointed readers to additional templates and guidelines, even if they were not law-school specific.

¶105 This is a solid effort to go where no one has gone before in the legal education world. *Student Learning Outcomes and Law School Assessment* is an excellent tool for any legal or general academic setting that is reviewing what specialized schools are undertaking. From beginning to end, the authors consistently bring the reader along through the details of a front-end intensive process. They define and outline, summarize and plan, and are very open about the possible pitfalls throughout the progression of dealing with assessment. In no way does the book present its methods as perfect for every setting, but its approach makes it likely that you will extract something of use for your specific situation. This book can help you close the loop in assessment planning and institutional effectiveness. It is a valuable purchase that can help make your work easier.


Reviewed by Stewart A. Caton*

¶106 *Guns Across America: Reconciling Gun Rules and Rights* is a readable work that examines the contentious politics of the modern gun debate by looking at the history of gun regulation in the United States. Robert Spitzer, a political science professor, has authored several pieces on gun control and regularly appears in popular media as an expert on the subject. As he states, a major purpose of this book is to “show that the predicates of modern American gun politics are mostly built on quicksand” (p.3).

¶107 *Guns Across America* is presented in five chapters followed by an appendix of state gun laws from 1607 to 1934, endnotes, and an index. The chapters are presented in a top-down manner in that the initial chapters cover broader subject matter and tend to extend further back in history. Starting at the top, in the first chapter the author reviews why government exists in the first place. In the second chapter, he delves into our forefathers’ relationship with gun control. Chapter 3 focuses on the Second Amendment, with a heavy emphasis on the modern assault weapons

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debate. In the fourth chapter, the author compares historically tested self-defense law and the castle doctrine with modern stand-your-ground laws. Finally, in chapter 5, Spitzer evaluates recent legislation in New York and personally investigates the law by building an assault weapon and applying for a license for a pistol.

¶108 In chapter 1, Spitzer demonstrates that the state has a monopoly over the use of force. This pushes against the popular argument that our nation’s founders created the Second Amendment as a means to prevent tyranny. He notes that the founders relied on philosophers like Locke and Hobbes, agreeing that the state alone holds a monopoly over force. This recognition continued into the nineteenth century with the U.S. Supreme Court’s 1886 ruling in *Presser v. Illinois*\(^{13}\) and quotes from historical figures like President Lincoln: “Among free men, there can be no successful appeal from the ballot to the bullet . . .” (p.18).

¶109 In the second chapter, Spitzer discusses the long history of wide-ranging gun laws in North America. He introduces the chapter with an example of a 1619 gun law promulgated by the first legislative body in the Virginia colony to demonstrate how inseparable gun regulations are from American history. Like much of the book, chapter 2 has many examples and statistics to convince readers that his points stand on firm ground. Particularly, he relies on an exhaustive study amassing gun regulations in America ranging from 1607 to 1934, which he includes in the appendix of state gun laws.\(^{14}\) These materials are cited in his endnotes.

¶110 Spitzer devotes chapter 3 to the Second Amendment. Of course, gun rights advocates often turn to the Second Amendment as support for a fundamental right of gun ownership. Here, the author discusses Second Amendment constitutional interpretation with a heavy focus on recent Supreme Court decisions like *District of Columbia v. Heller*.\(^{15}\) The larger part of this chapter applies his constitutional analysis to an in-depth look at assault weapon bans and makes approachable reference material for those interested in assault weapons.

¶111 Spitzer shifts from assault weapon bans to stand-your-ground laws in chapter 4. He introduces stand-your-ground laws by examining the evolution of self-defense and the castle doctrine. Unsurprisingly, he devotes substantial time to stand your ground in Florida, looking specifically at George Zimmerman’s killing of Trayvon Martin. The author details efforts by the National Rifle Association to successfully lobby for similar legislation in other states. In the final part of this chapter he discusses failures of stand-your-ground laws by pointing to statistics and specific examples.

¶112 The fifth chapter takes place in New York. Recent controversial legislation in New York creates several strict gun control regulations. The author examines the passage and results of this legislation. He sandwiches this analysis with two personal experiences. First, he and a colleague build an AR-15, an assault weapon, while staying within the confines of the New York legislation. Likewise, the author walks readers through his trek to obtain a New York pistol permit. His point here

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13. 116 U.S. 252 (1886) (holding that militias and similar voluntary military groups are subject to the regulations and controls of state and federal governments).


15. 554 U.S. 570 (2008) (holding that American citizens have a Second Amendment right to own and use firearms for lawful purposes).
is to demonstrate to readers that even in a strict state like New York, the process of gun ownership is not unduly burdensome.

¶113 This book makes for a nice addition to any law library as a reference work easily approached by members of the public, students, and faculty. Admittedly, the trade-off for its readable nature is that it does not have the depth of treatment on a specific aspect of gun control that one may find in a more focused work. Also, readers should bear in mind that the author approaches the work as a proponent for gun control. For students or faculty researching gun control, this book will prove useful, particularly the endnotes and the appendix of state gun laws.


Reviewed by Michael N. Umberger*

¶114 In *Constitutional Personae*, Cass R. Sunstein identifies four distinct roles that U.S. Supreme Court Justices adopt in interpreting the Constitution: the Hero, the Soldier, the Minimalist, and the Mute. These constitutional personae are defined as “judicial roles and self-presentations that sharply separate judges as well as those who comment on their work” (p.1). Sunstein theorizes that Court watchers are attracted to particular approaches to constitutional interpretation not because of underlying reasons but because of the characters they require Justices to assume. These judicial personae evoke immediate attraction or aversion as though they were literary heroes or villains; indeed, Sunstein overtly draws attention to the literary nature of these types by naming them personae, as though they formed the cast of a play.

¶115 The book is divided into four chapters loosely united through the concept of judicial personae. The first chapter details the personae, using actual Supreme Court cases and Justices to illustrate how the personae are defined and how they interact. Judicial Heroes are characterized by their devotion to causes and their willingness to render sweeping change. Chief Justice Earl Warren is the paragon of a judicial Hero and *Brown v. Board of Education* the paradigmatic example of a Heroic decision. In contrast, Soldiers prefer to follow established order and precedent and respect the authority of the political branches whenever possible. Justice Oliver Wendell Holmes was the typical judicial Soldier, frequently deferring to the legislature, although he also exhibited a strong Heroic streak with respect to freedom of speech.

¶116 The Minimalist favors actions that result in incremental change; as Sunstein’s preferred persona, the Minimalist is the exclusive subject of the third chapter of the book. Finally, the Mute, a rare player in the Supreme Court’s drama, is silent when others speak, preferring inaction in the face of difficult constitutional questions. Sunstein is clear to assert that no one Justice embodies any of these personae wholly or at all times. Instead, Justices gravitate toward certain roles based on their personalities or preferred theories of interpretation and strategically assume them when appropriate.

In the second chapter, Sunstein moves on to the heart of his analysis, revealing that even though the four personae are what immediately attract people to certain figures on the Court, judicial personae often emerge as a consequence of the various methods of interpretation. Identification of the right theory of interpretation is more important from a legal perspective, and the best judicial persona will be the one that naturally arises from the best method of interpreting the Constitution. In Sunstein’s terms, the best theory of interpretation is the one that manages to make the constitutional system better by minimizing the costs of making decisions and of committing errors.

On this point, in the third chapter Sunstein turns to the Minimalist persona, specifically Burkean Minimalism, an approach that emphasizes respect for established tradition and avoidance of destabilizing independent moral or political argument. It makes intuitive sense that in areas requiring stability, such as separation of powers, Burkean Minimalism is most appropriate. On the other hand, Sunstein recognizes that other areas, such as equal protection, are better suited to a related approach known as Rationalist Minimalism, which values traditions but only when supported by sufficient reason. Sunstein advocates a Minimalist approach to constitutional interpretation because it produces opinions that minimize decision and error costs without dividing people who fundamentally disagree.

In its final chapter, the book turns to the historical origins of the constitutional personae concept. Sunstein explains how the Court has shifted from a norm of consensus to its current state, which favors open dissent. Chief Justice John Marshall, a noted Hero, advocated early on for a norm of consensus with unanimous decisions. Statistical data verify the sudden rise of dissent at the Court in 1941 with the appointment of Chief Justice Harlan Fiske Stone, and the level of dissent remains high today. Divided rulings, much the norm today, run the risk of producing fragile precedent that is easily overturned, and they are susceptible to instability and uncertainty. The Minimalist persona tends to moderate these concerns because the rulings are narrow and shallow, but Sunstein also cautions that no persona, not even Minimalism, is a panacea.

The book ends, somewhat oddly, with a comparison of judicial personae to political types, comparing famous political leaders to their analogous judicial personae. These closing words seem out of character with the rest of the work, but they do, in that respect, reflect the entire work’s structural deficiencies. The four chapters, each fine on its own, simply do not adequately follow from one another. Sunstein begins with a thorough analysis of judicial personae but then proceeds to graft this analysis onto chapters on theories of interpretation, Burkean constitutional interpretation, and unanimity and dissent at the Supreme Court. A note after the text in the acknowledgments explains why the work seems discordant: the book was constructed, à la Frankenstein’s monster, from a number of Sunstein’s preexisting articles, essays, and book chapters going back to 2006. The content has been updated, for certain, but the work does read as a succession of separate pieces that have been editorially conjoined.

This is not to suggest that the book is not important, but a reader should understand its composition when approaching the work. Despite its disjointedness, Sunstein’s book has substantial relevance as a work of legal scholarship and is recommended for any academic collection. Sunstein’s writing is clear, and his
arguments are set out in an orderly, logical manner. Many will find the discussion of judicial personae especially relevant in light of current political debate over the vacancy on the Supreme Court. Professors of constitutional law will be particularly interested in Sunstein’s presentation of judicial personae and his appreciation for Burkean Minimalism, if only for insight into Sunstein’s own views on constitutional interpretation.


Reviewed by Sara E. Campbell*

¶122 Missouri Legal Research, Third Edition, was written by two University of Missouri–Kansas City professors to share their collective wisdom. The goal was to be a reference for students in clinics or clerkships after completing the first-year curriculum, a reference for practitioners as they hone the skills taught in law school, and a guide for paralegals, undergraduates in other disciplines, and the common person. No one researches the law without intending to create a written product from the fruits of research, so it follows that chapter 9 (on summarizing and organizing research) and appendix A (on legal citation) should focus heavily on legal writing.

¶123 With this being the goal of the book, I expected to find a well-rounded survey of resources that rural, public interest, corporate securities, and practitioners in the Eastern District of Missouri would find more tailored to their practice. Instead, I found the book to be heavily biased toward urban Kansas City practice, with a focus on Missouri bar materials, Fastcase, and Lexis Advance, but most heavily on Westlaw resources. Unfortunately, some of the resources mentioned now have changed ownership or names, which may confuse first-year law students, inexperienced paralegals, undergraduates, or the public. Chapter subsections are inconsistent as to whether they contain a summary at the end of the subsection, a feature that made the chapters with the summary more cohesive. I would like to have seen a summary at the end of every subsection for each chapter.

¶124 The legal research methodologies (known-authority, known-topic, and know-nothing or descriptive-word approaches) are applied with examples consistently throughout in a way that makes sense to all intended audience members. The authors use correct technical legal research terminology at all times. The layout and approach of Missouri Legal Research falls in line with the course outlines most Missouri law schools use. Missouri Legal Research is less verbose than Linda H. Edwards’s Legal Writing: Process, Analysis, and Organization, Sixth Edition (2014), used in some programs, but not as cleanly worded nor with as many visuals as Amy E. Sloan’s Basic Legal Research: Tools and Strategies, Fifth Edition (2012), also frequently used in Missouri law schools.

¶125 Missouri Legal Research takes a broad approach to the subject with nine chapters, an appendix on citations, a bibliography, and an index. While there is mention of primary and secondary authority, little or no discussion concerns

procedure. Anyone researching the law to generate a written product needs to know early on that there are rules of court and procedure that must be followed. If you do not follow court rules and rules of procedure, then you have wasted your one bite at the apple as a pro se litigant or you have done your client a great deal of harm as an attorney. It would be very difficult to provide competent representation if you are not aware of strictly enforced procedural and court rules in Missouri.

¶126 An advantage of the book is chapter 7, which deals in great detail with legislative history and legislation. Most students are not fortunate enough to have had a class on this subject, so they could use the detailed instructions in this book once in practice to track bills. This chapter is valuable, but I am not sure it alone justifies a $29 purchase.

¶127 The outline analysis in chapter 9 on research strategies and organizing research briefly discusses the IRAC method of analyzing cases. There is also discussion about knowing when one has found enough. These are good lessons for a novice legal researcher, but they could have been fleshed out a bit more. Adding a practical example might have been helpful.

¶128 If you are looking for a shorter, less expensive alternative to Sloan’s Basic Legal Research that is specific to Missouri law, Missouri Legal Research would be an excellent acquisition. If you are new to the state and want to quickly get a feel for what the law is, this title would be suitable. If your collection development policy demands a more in-depth resource that is easy to understand and provides visuals, Basic Legal Research is still worth the money.


Reviewed by Genevieve Nicholson*

¶129 The legal status of bodily material—cells, blood, semen, organs, and other parts separated from the body or from deceased persons—remains unsettled. Although common law has long held that there is no property in the body, advances in using and storing bodily materials have led to disputes concerning rights to control these materials and exposed a void in the law. For instance, a couple anticipates that the wife’s upcoming medical treatment will leave her infertile and decides to create and store embryos for future use. Later, the couple divorces. May the man prevent his ex-wife from using the embryos, her only chance at having a child that is biologically hers? May the woman use the embryos to have her ex-husband’s biological child against his wishes, effectively forcing him to procreate?

¶130 In another scenario, an infant dies, and her parents consent to a post-mortem examination on the condition that all of the organs be returned to them so the body may be buried whole. The hospital retains several of the organs without the parents’ knowledge. Many years later, the hospital discloses this conduct to the parents. What remedies do the parents have against the hospital? Other increasingly common issues involve whether a widow has a right to extract her deceased husband’s sperm or whether, when a doctor retains samples of a patient’s cells,

tissue, or blood without the patient’s knowledge or consent and ultimately profits from them, the patient has a right to a share of the profits.

¶131 Courts have handled such disputes in disparate, often unsatisfying ways, and legislative attempts to allocate rights and duties with respect to bodily material are narrow in scope. In Being and Owning: The Body, Bodily Material, and the Law, Jesse Wall contemplates the appropriate legal status of bodily material and explores how the law should conceptually and structurally approach rights to possess, use, control, transfer, and profit from bodily material.

¶132 The first half of Being and Owning examines the ownership, objectification, and commodification of bodily material. Drawing from Anthony Honoré’s taxonomy of ownership, Wall discusses theories of ownership and distinguishes between ownership, a nonlegal concept that describes a functional relationship between people and things, and property, a legal concept that allocates rights and duties that protect the ownership relationship. Next, Wall uses concepts from such thinkers as John Locke, Georg Hegel, and Maurice Merleau-Ponty to explore self-ownership; how separation of bodily material or death affects the status of bodily material; and when entitlements to possess, control, or use bodily material should arise. Finally, Wall considers justifications for, and arguments against, a right to profit from bodily material.

¶133 The second half of the book focuses on questions of law and legal theory. It contains three chapters organized around the concept, structure, and limits of property law. Each chapter compares features of property law to those of other areas of law, including the right of bodily integrity and the right of privacy, and then determines how these features would work if applied to bodily material. Wall also examines the legal theories behind judicial decisions and legislation related to bodily material and, ultimately, proposes a dual approach that draws from property law and privacy law.

¶134 In Being and Owning, Wall offers a detailed analysis of a complex issue. Concepts and theories develop cumulatively in the book, so it needs to be read as a whole; chapters and sections do not stand alone. Although the text can be confusing at times, the introduction, detailed table of contents, chapter summaries, and conclusion help the reader stay on track. The table of cases, table of legislation, index, and bibliography are comprehensive and very useful.

¶135 Being and Owning is a theoretical work best suited for scholars interested in jurisprudence, property law, bioethics, and the emerging law of bodily material. I also recommend this book for law and graduate students working on comprehensive papers or projects in these subject areas. Although legal practitioners in need of a quick answer would not find this book useful, those litigating cases that involve bodily material or drafting legislation related to bodily material would benefit from the policy analysis presented here. I should note that the cases and legislation referenced throughout the book come primarily from the United Kingdom; just a few cases from Australia, Canada, and the United States and some legislation from Australia are included. However, considering the unsettled nature of this area of law, the concepts and theories presented in the book should be of interest to readers outside of the United Kingdom.
Ms. Whisner describes what specialized legal research is and how students are initially exposed to the various topics that fall within the category, including taxation, intellectual property, and health law. She then provides strategies for learning about specific bibliographic sources and about the specialized vocabulary used to perform the necessary research.

To help our law library interns get up to speed, we reference librarians give them one-hour “reference talks” at intervals throughout the year. Even a bright student who has completed law school and perhaps practiced law doesn’t always know enough to respond effectively to the range of questions that come into the reference office. And although their research class will address some topics we cover, such as state legislative history, that lesson might not come until after patrons have already needed help. One of those reference talks each year is “Specialized Legal Research.” Since it generates an interesting conversation with the students, I thought it would be worth a brief essay.

What Is Specialized Legal Research?

Although it’s easy enough to put “Specialized Legal Research” in the list of topics, it’s a little harder to say what it is. When I ask the students, they have a variety of answers. They might start with their own subjective experience (it’s hard), institutional factors (it’s research done by attorneys in a law firm practice group), or bibliography (it’s an area that has unique publications or online resources). Each perspective captures something useful about specialized legal research.

The subjective response isn’t a bad place to start. Specialized legal research does seem hard to many researchers because it’s unfamiliar. Most legal research classes don’t cover it or introduce it only briefly. Classes aimed at first-year students typically base problems on topics accessible to those students, either because they stem from first-year classes, like Torts and Contracts, or because they (like some Law & Order plots) are “ripped from the headlines.” Even “advanced” legal...
research courses, aimed at second- and third-year students, have plenty to cover without venturing too far into specialized areas. Because “students [enter] the second and third years of law school with lower levels of training in legal research sources and methods than might have been true at earlier times,” upper-level courses have to cover the basics as well as adding breadth and depth. Even if the students had some exposure to researching cases and statutes in their first year, review and elaboration are appropriate. And if the first course did not reach administrative regulations or legislative history, then they should be introduced. Students who can use the “type in the box” features of Lexis Advance and Westlaw probably have little idea of Boolean searching, let alone alternative services like Fastcase, Casemaker, and Ravel Law. And so on. It’s just not likely that students have had much instruction in or practice with specialized legal research.

Moreover, specialized legal research involves work in substantive areas, like securities regulation, tax, and environmental law, that are generally covered in elective classes—classes that seem technical and scary and that students might have avoided. So specialized legal research seems hard to the interns because they haven’t been taught it and because it’s connected with difficult classes.  

Thinking institutionally, the students suggested that specialized legal research is research in an area within a law firm practice group. That’s a good start, but it’s not a perfect match. Many firms have practice groups that map onto what I think of as specialized legal research—for example, labor and employment, intellectual property, or banking. But some firms have practice groups that do not correlate with specialized legal research skills—for example, litigation, real estate, family law. Of course, practitioners in those areas may use some specialized sources, but not to the same extent as, say, attorneys specializing in environmental law.

I looked at a few firm websites (see table 1) to sample practice areas. White & Case lists under Practices some specialized subject areas like banking and tax, but also lists practice groups defined by type of client—Private Clients and Pro Bono—clients who might be affected by virtually any area of law. K & L Gates, another very large national firm, lists dozens and dozens of practice areas. You can view them in alphabetical order (Advertising & Marketing, Africa, Agribusiness, AIM—The World’s Leading Growth Market in the London Stock Exchange, Alternnative Dispute Resolution, etc.) or grouped by broad area (e.g., Corporate and


\[3\] Some technical and scary classes, like Federal Courts, don’t involve specialized legal research. But most technical and scary classes do. Like “specialized legal research,” “technical and scary class” is an ambiguous term—but I think students know a technical and scary class when they see one.

\[4\] “We assist high net worth individuals and families worldwide with the accumulation, management, transfer and protection of personal wealth.” Private Clients, WHITE & CASE, http://www.whitecase.com/law/practices/private-clients [https://perma.cc/5N4H-XVCE].

\[5\] Depending on the pro bono project, there might be some specialized resources needed, but it would depend more on the subject (e.g., immigration law, environmental law, or employment law) than the fact that the firm is working pro bono. Some firms might encourage lawyers doing pro bono work to use low-cost sources, but thrifty legal research is not the same as specialized legal research.

Transactional, Intellectual Property, Litigation and Dispute Resolution). The cluster under Cross-Practice Services includes some geographic regions (e.g., Africa, Indonesia) and some areas defined by industry (e.g., Agribusiness, Higher Education Institutions). Africa is too big to be an area of specialized legal research: its jurisdictions include civil law, common law, Islamic law, and mixed systems; legal issues might be as diverse as employment law in South Africa, piracy off the coast of Somalia, or mining in Liberia. The industry groups also would research in different areas—for example, a higher education group might advise clients on employment, cybersecurity, and intellectual property law, each an area of specialized legal research on its own.

Table 1

Sample Law Firm Practice Areas

<table>
<thead>
<tr>
<th>White &amp; Case</th>
<th>K &amp; L Gates</th>
<th>Miller Nash Graham &amp; Dunn</th>
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<tbody>
<tr>
<td>Antitrust/Competition</td>
<td>Corporate and Transactional</td>
<td>Admiralty &amp; Maritime</td>
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<tr>
<td>Asset Finance</td>
<td>Energy, Infrastructure and Resources</td>
<td>Bankruptcy &amp; Creditors’ Rights</td>
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<tr>
<td>Banking</td>
<td>Finance</td>
<td>Business Condemnation &amp; Real Estate Valuation</td>
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<td>Capital Markets</td>
<td>Financial Services</td>
<td>Construction &amp; Design</td>
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<tr>
<td>Commercial Litigation</td>
<td>Intellectual Property</td>
<td>Education: Higher Education</td>
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<tr>
<td>Construction</td>
<td>Labor, Employment and Workplace Safety</td>
<td>Education: K–12</td>
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<tr>
<td>Data, Privacy &amp; Cyber Security</td>
<td>Litigation and Dispute Resolution</td>
<td>Employee Benefits</td>
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<td>Employment, Compensation &amp; Benefits</td>
<td>Policy and Regulatory</td>
<td>Employment Law &amp; Labor Relations</td>
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<td>Environment &amp; Climate Change</td>
<td>Real Estate</td>
<td>Environmental &amp; Natural Resources</td>
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<tr>
<td>Financial Restructuring and Insolvency</td>
<td>Cross-Practice Services</td>
<td>Franchise &amp; Distribution</td>
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<td>Intellectual Property</td>
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<td>Government &amp; Regulatory Affairs</td>
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<td>International Arbitration</td>
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<td>Intellectual Property</td>
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<tr>
<td>International Trade</td>
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<td>International Business &amp; Dispute Resolution</td>
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<td>Islamic Finance</td>
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<td>Land Use</td>
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<td>Mergers &amp; Acquisitions</td>
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<td>Litigation (Overview)</td>
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<td>Private Clients</td>
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<td>Native American Tribes &amp; Organizations</td>
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<tr>
<td>Pro Bono</td>
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<td>Petroleum</td>
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<td>Project Finance</td>
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<td>Real Estate</td>
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<td>Regulatory &amp; Compliance</td>
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<td>Sourcing &amp; Technology</td>
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<td>Transactions</td>
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<td>Tax</td>
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<tr>
<td>White Collar/Investigations</td>
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7. Id. (click on link to sort by category).
Law firms aren’t the only institutions whose structure could suggest areas of specialized legal research. Law school LL.M. programs or concentration tracks often mark specialized research areas as well—at least those in subject areas like tax, intellectual property, and health law. Institutionally, we can also look at how lawyers organize themselves. Many of the ABA’s sections—for example, Antitrust Law, Health Law, Taxation—reflect subjects where specialized research skills are needed. We might also look to other professional associations, such as the American Immigration Lawyers Association: AILA (www.aila.org) or the Copyright Society of the U.S.A. (www.csusa.org). Again, the match isn’t perfect (think of associations based on locality or ethnicity), but it’s a start.

Bibliographically, an area is specialized if significant print or online resources are devoted to it. Take tax. It has three major topical services (Standard Federal Tax Reporter, U.S. Tax Reporter, Federal Tax Coordinator) available in print (loose-leaf) and on online platforms (CCH IntelliConnect and Checkpoint), plus the Tax Management Portfolios, available in print (spiral-bound portfolios) and online (Bloomberg BNA’s web product and Bloomberg Law). There are agency issuances you don’t meet in other subject areas (Revenue Rulings, Letter Rulings, General Counsel Memoranda, and more). A novice could stumble along with general sources (e.g., legal encyclopedias, an annotated United States Code, and case law databases), but effective, efficient, thorough research requires familiarity with these special sources. Another bibliographic approach is to look at areas that have separate research texts or research guides devoted to them. Or we might say that specialized legal research includes (at least) those topics that have chapters in Specialized Legal Research: securities regulation, the Uniform Commercial Code, federal income taxation, copyright law, federal labor and employment law, environmental law, admiralty and maritime law, immigration law, military and veterans law, banking law, federal patent and trademark law, federal government contract law, customs law.

We can also look at these areas in terms of legal authority. Typically, specialized legal research topics are statutory rather than common law. National guides focus on the federal statutes, but practitioners also need to be familiar with the state frameworks. For instance, in labor and employment law, major federal statutes include the National Labor Relations Act, Title VII of the Civil Rights Act of 1964, and the Occupational Safety and Health Act. But each state may have labor laws (especially for public employees), antidiscrimination laws, and industrial safety or workers’ compensation laws. Administrative agencies typically play a big

11. See Post J.D. Programs by Category, AM. BAR ASS’N, http://www.americanbar.org/groups/legal_education/resources/llm-degrees_post_j_d_non_j_d/programs_by_category.html [https://perma.cc/2L4D-C3PN]. Programs categorized as “general” and those designed to introduce the U.S. legal system to foreign lawyers do not define specialized legal research areas.
13. Or, paraphrasing Henny Youngman: Take tax, please.
role in these areas, perhaps with a large body of regulations, administrative decisions, and agency guidance.\footnote{15}

\paragraph{12} Finally, there’s a linguistic perspective. Specialized areas have their own vocabulary, often peppered with acronyms. Just for fun, match the following strings of jargon with their legal fields:

\begin{itemize}
  \item a. PRP, EIS, LUST, FONSI, brownfield\footnote{16}
  \item b. sweetheart contract, zipper clause, open shop, wildcat, impasse\footnote{17}
  \item c. home copy, plant application, pseudo mark, kind code\footnote{18}
  \item d. innocent spouse, generation-skipping\footnote{19}
  \item e. ECI, FDAP, BEPS, C-by-C reporting\footnote{20}
  \item f. “primarily geographically deceptively misdescriptive,” PHOSITA, transformativeness\footnote{21}
\end{itemize}

\section*{How Can You Get Up to Speed in a Specialized Area?}

\paragraph{13} So we know that an area of specialized legal research might be practiced by lawyers in a practice group or students in an LL.M. program, that it has print and

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\footnote{16} “PRP” (potentially responsible party under Superfund), “EIS” (environmental impact statement), “LUST” (leaking underground storage tank), “FONSI” (finding of no significant impact under the National Environmental Policy Act), and “brownfield” (a former industrial site that might be contaminated) are all from environmental law. Thanks to Todd Wildermuth, who gave me some of these examples. He adds “NPDES” (National Pollutant Discharge Elimination System), which he says is more confusing than average “because (a) it is hard to turn into a phonetic sound (‘Nip-Deez’ is what most people try; it does not roll off the tongue) and (b) it stood for the proposition that we were going to rid our nation’s waters of all pollution by a date certain, now passed (1990?).” E-mail from Todd Wildermuth, Dir. Envlt. Law Program & Pol’y Dir., Regulatory Envlt. Law & Pol’y Clinic, Univ. of Wash. Sch. of Law, to author (June 10, 2016, 12:21 PM PDT) (on file with author).

\footnote{17} Labor law. \textit{See, e.g.}, Definitions for Common Labor Terms, TEAMSTERS, https://teamster.org/content/definitions-common-labor-terms [https://perma.cc/V4FU-C59M].


\footnote{20} International tax. “ECI” is Income that is Effectively Connected to a trade or business. “FDAP” (pronounced “F-Dap” or “fudap”) income is Fixed, Determinable, Annual, and Periodical. “BEPS” refers to Base Erosion and Profit Shifting, “tax planning strategies that exploit . . . gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations where there is little or no economic activity, resulting in little or no overall corporate tax being paid.” \textit{About Base Erosion and Profit Shifting (BEPS),} OECD, http://www.oecd.org/ctp/beps-about.htm [https://perma.cc/N4YC-KLLR]. “C-by-C” reporting is done country by country; a quick Google search reveals that it’s also spelled “CbyC.” I am grateful to Shannon McCormack and Scott Schumacher who shared these terms. I don’t know anything about international tax, but I know some people who do.

\footnote{21} Intellectual property again. The four-word tongue-twister is right out of the Trademark Act, 15 U.S.C. § 1052(e)-(f) (2012). “PHOSITA” stands for Person Having Ordinary Skill In The Art. The acronym was coined by Cyril Soans, who asked rhetorically: “Would the patents subcommittee of the House Judiciary Committee have approved H.R. 3760 of the 82nd Congress if they had known that the person skilled in the art in Section 103 of the 1952 Act would turn out to be the superhuman Frankenstein monster Mr. Phosita? I think not.” Cyril A. Soans, \textit{Some Absurd Presumptions in Patent Cases}, 10 IDEA 433 (1966–1967). My thanks to Zahr Said, who offered these gems of jargon.
online resources devoted to it, that one or more statutes govern it, that agencies regulate it, and that it has its own vocabulary. So what? Does any of that help us get past that first reaction that it’s hard? I think it does because it gives novice researchers in an area some structure and ideas about where to turn.

¶14 When entering an unfamiliar area, look for a research guide—from a brief one on a library website to an entire book.\textsuperscript{22} The guide should tell you the chief sources of authority, the important agencies, and key vocabulary words. If you want to talk to an expert, think institutionally: can you ask the lawyers in your firm’s practice group or the professors in your school’s LL.M. program? If you’re stuck in the quest for an obscure source, consider calling the librarian at the relevant agency.

¶15 Recognizing the commonalities in specialized research areas can help a researcher move from one to another. Once you learn to look for a statute and a regulatory agency in one area, you know to do that in another. Since each area is likely to have at least one loose-leaf service (or online topical service), you can transfer the skills you learn using one to another. For instance, if you know how to use the digest system for BNA’s labor law cases, then you can quickly see how BNA organizes cases in \textit{United States Patents Quarterly}. If you can navigate the \textit{Standard Federal Tax Reporter} (in print or on IntelliConnect), then you will be able to use CCH services in banking or securities regulation.

¶16 If you are going to be working in a specialized area for a while—for instance, if you’ll be helping faculty and students from an LL.M. program again and again—you can educate yourself about the subject you once thought was difficult and scary. You don’t need to become an expert, but skimming a \textit{Nutshell} or otherwise picking up some basics will help you recognize terms and concepts. Research is much easier when your head isn’t spinning. Consider subscribing to a newsletter or following a topical blog so you will know the hot topics, even before the questions about them roll in.

¶17 Specialized legal research can be challenging. But it can also be rewarding because it’s satisfying to face the unknown and sail through.\textsuperscript{23}

\textsuperscript{22} E.g., Gail Richmond, \textit{Federal Tax Research: Guide to Materials and Techniques} (9th ed. 2014).

\textsuperscript{23} See Peggy Roebuck Jarrett & Mary Whisner, “Here There Be Dragons”: \textit{How to Do Research in an Area You Know Nothing About}, \textit{6 Persp.: Teaching Legal Res. & Writing} 74 (1998). Although this piece is eighteen years old, I find I don’t have much to add to its advice besides using the online versions of loose-leaf services.
Professor Wheeler discusses the deadly mass shooting of June 12, 2016, in Orlando, Florida, and his belief that more empathy is needed in the world. Wheeler then relates, through personal anecdotes, his own journey toward empathy. He concedes that there is no recipe for empathy, but believes that sharing personal stories can spur conversation, thinking, and collective action.

Introduction

¶ 1 On the evening of June 12, 2016, I landed at Boston’s Logan Airport at a little after 6:00 p.m. Eastern Standard Time. I was frankly exhausted. I was returning from Dublin having attended my first British and Irish Association of Law Librarians (BIALL) Conference held during four of the six days I spent in Dublin. Generally, when I do conferences, I am all in. So I was sleep deprived and anxious about the mountains of work waiting for me at my day job. Nevertheless, I felt inspired about the profession of law librarianship. I had met numerous U.K. colleagues whom I felt certain I would now call lifelong friends. I had discovered visionary vendors developing exceptional research tools. I had partied like a fool, and I had learned so much! All of these things were running through my head when my Aer Lingus flight touched down in Boston and I turned on my cell phone.

¶ 2 Immediately, I recognized the small chime indicating I had received a text message. It was from my friend Elaine Manning in Detroit,¹ and it read, “Just checking on u after watching the news. U ok?”² I found this odd for several reasons. First, although Elaine is a delightful friend of mine, I would hardly call us close. In fact, this was only the second text message I’d ever received from her. But, more important, I wondered what danger she thought I might be in and what news she was referring to.

¶ 3 My first reaction to that text message was fear! Since September 11, 2001, I have a dread of broadcast news telling of disasters. I am especially fearful of somehow missing disastrous news because of work, travel, or my unavoidably human preoccupation with the mundane realities of everyday life. So my reply text was

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1. Cataloging Assistant, University of Detroit Mercy School of Law Library, Detroit, Michigan.
2. Rather than use correct punctuation and spelling here, I chose to transcribe the text message verbatim in the not uncommon text jargon used by my friend Elaine.
written with shaking and fearful hands. I replied “Yes, I am fine. Just landed from trip to Ireland. What news?” I then recalled a Facebook post from my friend Jocelyn Stilwell-Tong from earlier in the day, which I couldn’t figure out. It read “What horrible news to wake up to. My Florida friends, my LGBTQ friends . . . . My heart goes out to you.” So now I was really scared. As people began deplaning around me, I sat back down, and I searched Google until I came across the New York Times online headline “Orlando Gunman Attacks Gay Nightclub, Leaving 50 Dead.”

¶ As I read the news, I lost track of my surroundings, trying to comprehend the words on my tiny cell phone screen. I read the sentences slowly as if that would help make them more comprehensible. I read them again, thinking that I surely missed the point, the motivation, the explanation contained there somewhere within the story. I was finally approached by an Aer Lingus flight attendant instructing me to please deplane. I exited the plane dazed and lacking understanding.

¶ I walked through the airport and somehow arrived at the correct baggage claim carousel, and I again read the online news stories covering the Orlando shooting of June 12, 2016. I posted a Facebook message in an attempt to communicate my feelings, express my condolences, voice my disbelief, and acknowledge having heard the news. Then came my tears. Yes, I am that guy who sometimes cannot hold back the tears. So there I stood among the mostly Irish American travelers, in the Aer Lingus baggage claim area at Boston Logan Airport, and I cried.

Empathy

¶ Once I pulled myself together, collected my suitcase, found a taxi, and began my ride home, I started to wonder about empathy. Why empathy? What is empathy? The Oxford English Dictionary defines empathy as “[t]he quality or power of projecting one’s personality into or mentally identifying oneself with an object of contemplation, and so fully understanding or appreciating it. Now rare.” The more contemporary definition listed is “[t]he ability to understand and appreciate another person’s feelings, experience, etc.” I think a lot about empathy because, quite honestly, I am lucky enough to see quite a bit of it demonstrated by the exceptional people with whom I surround myself. I am also regularly shocked by how little empathy exists in the world today. I am horrified by the regular acts of violence, hatred, and murder that evince an absence of empathy. I wonder whether empathy is the cure for these ills. I also wonder what builds empathy. What makes

3. Law Librarian, California Court of Appeal, Sixth Appellate District, San Jose, California.
4. Jocelyn Stilwell-Tong, FACEBOOK (June 12, 2016, 8:00 AM) (on file with author).
6. My post read, “Just landed in Boston after a fabulous time in Dublin, and I am just reading the news of the Orlando shooting. Trying not to shed my tears here at Logan Airport. My heart is broken like our gun laws thinking of 50 dead young people whose lives ended on the bloody floor of a gay nightclub. For what? Orlando you have my condolences.” Ronald E. Wheeler, Jr., FACEBOOK (June 12, 2016, 6:35 PM) (on file with author).
8. Id.
me that guy who cries in an airport while others never seem compelled to do so? Can there ever be too much empathy? What causes people to lack empathy? Can empathy be legislated? Some countries have tried by outlawing hate speech of various types. I may never be able to answer any of these questions, but I have thought a lot about myself and what makes me this version of Ron Wheeler. I also have a great therapist with whom I talk regularly about these things, so I have reason to believe I have a degree of understanding about my own journey toward empathy. Since I really do find empathy to be perhaps the most important ingredient lacking in the world today, I offer here an examination of my own journey toward empathy. I offer it as part of our ongoing Diversity Dialogues.

Empathy, Poverty, and Homelessness

¶7 My first memory of receiving a lesson in empathy occurred when I was three or four years old. I can pinpoint my age because I know that my parents moved into the home I grew up in on Detroit’s west side in 1968 when I was four. This memory occurred before that time, when we lived with my grandparents on Detroit’s east side. It is odd because I have very few memories, only a handful in fact, from so early in my childhood. But I have always had a vivid memory of this incident, which inexplicably had a profound impact on me.

¶8 I was walking down a crowded street in downtown Detroit with my father, Big Ron, and my grandfather, Charles Sr. I spent a lot of time during my childhood with my mother and grandmother, mostly because the men were always working. Earlier in his life, my grandfather had become the first in our extended family to graduate from high school and thus achieved the highest level of education in the family. He nevertheless often had to work multiple jobs to support his wife and two children. By the time of this incident, he worked as a chauffeur for Wayne State University’s Merrill Palmer Institute. He often drove professors or distinguished speakers around the city of Detroit or to the Detroit Metropolitan Airport located just west of the city. He therefore often worked odd hours. My father worked several odd jobs before landing his job at Ford Motor Company in late 1967 or 1968. At Ford he often worked overtime and regularly worked midnight or afternoon shifts. Although my father went to great lengths to spend time with my sister and me each and every day, this extended outing felt special.

¶9 As we walked, I recall perceiving that we’d crossed into a neighborhood that felt unfamiliar. As we continued, I began understanding that there was more to this feeling than unfamiliarity. I didn’t feel unsafe, because at that age I felt so loved, so

10. We have three men named Charles and two men named Ronald in my family, which confuses most people. My father is Ronald Sr. or Big Ron, and I am Ronald Jr. or Little Ron. My grandfather is Charles Sr., my uncle is Charles Jr. or Chuck, and my cousin is Charles III or Little Charlie.
11. The Institute still exists as the Merrill Palmer Skillman Institute at Wayne State University. It is a research institute studying child and family development. For more information, see Merrill Palmer Skillman Institute, Wayne State Univ., http://mpsi.wayne.edu/ [https://perma.cc/6EGC-J39R].
safe, and so protected when in the company of my Dad and my Daddy.\textsuperscript{12} I did think something was odd. I recall smelling what I now know was urine. The street was dirty and contained more litter than I was used to seeing on city streets. Nevertheless, I was primarily focused on seeing the sights and trying to understand the adult conversation going on between my father and my grandfather. I also knew I wanted their attention. I wanted them to notice me. I wanted to be the focal point, to say something witty, and to receive their praise. I have a very vivid memory of seeing a man dressed in tattered clothing, sitting on the ground leaning against a streetlight post. He smelled bad, and he looked dirty. I don’t recall ever seeing something like this before. As we walked past, the man blurted out something directed at us. I assume he asked us for money. I recall his words were slurred, his breath smelled strongly of what I now know was alcohol, and his teeth were badly discolored. Encountering a man like this was new and intense and provocative and interesting. I knew not how to respond to all of these things. Yet, I did respond. I have no idea why I did so, but my childish response was to laugh.

\textsuperscript{¶}10 What has become unforgettable is the response I got from my father and grandfather. Their response was swift and focused and intense. It was harmonious, and one man’s response built on the other’s. I recall the increased volume, the firmness, and the disbelief in their voices. I recall knowing that this was something important, that I had made a grave mistake, that I had to listen carefully because nothing thus far in my life (to my childish recollection) mattered quite as much as this. They stopped walking. My father bent down to look into my eyes. He held me by both of my shoulders, and he said, “There is nothing funny about this.” That was the opening line of what I now recall as a public lecture, a talking-to, a dressing down, right there on a public street, and right there in front of the panhandler.\textsuperscript{13}

\textsuperscript{¶}11 Of course I don’t recall each and every word of what the two men said. I have more of a visual picture. However, I do know that I never forgot the message that came through loud and clear that day. Part of that message was that hunger, poverty, and homelessness are not laughing matters. Moreover, these problems are common and tragic and easily acquired by anyone. I recall my grandfather asking me, “Do you think you are better than him?” He asked me, “Don’t you know that this could easily be you?” He went on to convey that any of us, anyone in our family, any of the people whom we loved could become like this man before us at any time. I remember his message was that you don’t laugh at people like this. On the contrary, you must do whatever you can to help them.\textsuperscript{14} After what felt like an

\textsuperscript{12.} At that time we lived with my grandparents. This grandfather, Charles Sr., is the man whom my father and mother referred to as Dad. My sister and I picked up that name. Thus, we also began calling my grandfather Dad. We therefore called my father Daddy. We both call Big Ron by the name Daddy to this day.

\textsuperscript{13.} I use the word “panhandler” here as a way to describe a person others might refer to with more derogatory terms like “bum,” “vagrant,” “homeless person,” “drunkard,” or “derelict.” I chose the term “panhandler” because it describes what he was doing and does not draw conclusions about who he is or why he is there. It is also, increasingly, the language of the law. See, e.g., \textsc{Cal. Penal Code} § 647 (West, Westlaw through Ch. 22 of 2016 Reg. Sess.); \textsc{Mass. Gen. Laws Ann. Const.} pt. 1, art. 16 note (West, Westlaw through amendments approved June 1, 2016); \textsc{N.Y. Penal Law} § 240.35 (McKinney’s West, Westlaw through L. 2016, chapters 1 to 64) (examples of state statutes using the word “panhandler”).

\textsuperscript{14.} Counterintuitively, these powerful moral lessons, which some might describe as religious, were taught to me by the two men in my family who were never baptized and who both rejected organized religion.
extremely long lecture and public talking-to, I vividly recall that both my father and my grandfather shook the panhandler’s hand and spoke with him in respectful tones, and they each gave him money. Today, almost fifty years later, I recall that scene each and every time I encounter homelessness, alcoholism, poverty, and the like.

¶12 I tell this story because I credit it as the source of my empathy toward people living in poverty, the homeless, and the addicted. I know there is more to it than that, but I also know that it was my father and grandfather who both stressed the importance of empathy, compassion, and giving even to those whom you do not like or understand. They taught me not to judge but to accept and to help whenever possible. Each of them had difficult upbringings characterized by times of poverty, abuse, mistreatment, illness, disrespect, and oppression. Each of them also created families filled with love (to the extent possible), compassion, and empathy. So for me, they provided at least some of the pieces to the empathy development puzzle. For me, the nurture component or the early teaching of compassion and empathy was significant.

### Mental Illness and Empathy

¶13 My mother struggled with mental illness for most of her adult life. She was schizophrenic. She had her first psychotic break days after my sister’s birth in 1963 when, my father reports, she handed her newborn daughter over to him and asked, “Whose baby is this?” That day was when my father discovered that his new wife was mentally ill.

¶14 So what did that mean for me and my childhood? Oddly enough, it meant that I have memories that are incredibly wonderful and others that are quite sad. My mother was exceedingly loving, and the people she cared most about in the world were her two children. All of her efforts in life, including her ongoing struggle to stay sane, to stay mentally healthy, and to remain fit for society, were driven by her need to be there for her children. My mother was never violent toward us, she was never suicidal, and she was never irrationally angry or anything like that. She held clerical jobs for most of her life having achieved only a twelfth grade education. She was in so many ways an idyllic mother who ensured that we always had hot meals (even hot breakfasts), we had clean clothing, we were hugged and kissed.

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15. Seeing them hand a stranger money made a lasting impact on me because I was always aware that money was not plentiful in our household and that the adults all worked really hard at difficult jobs to earn money.

16. Since my mother’s death in 2007, I have decided to speak openly about her mental illness because I believe shedding light on mental illness can help reduce the societal stigma and misinformation that abounds. Mental illness is not uncommon. See Mental Health By the Numbers, NAMI: Nat’l Alliance On Mental Illness, https://www.nami.org/Learn-More/Mental-Health-By-the-Numbers [https://perma.cc/UPB9-BMDS] (providing statistics such as “Approximately 1 in 25 adults in the U.S.—10 million, or 4.2%—experiences a serious mental illness in a given year that substantially interferes with or limits one or more major life activities.”).

17. See Mental Health America, http://www.mentalhealthamerica.net/conditions/schizophrenia/ [https://perma.cc/UFR3-CZLL] (defining schizophrenia as “a serious disorder which affects how a person thinks, feels and acts. Someone with schizophrenia may have difficulty distinguishing between what is real and what is imaginary; may be unresponsive or withdrawn; and may have difficulty expressing normal emotions in social situations.”).
daily, and we felt loved. She helped with our homework, she taught us to read before we went to school, and she kept our house as clean as she could. When early in the preschool portion of my childhood, I was diagnosed with hyperactivity disorder,\textsuperscript{18} she worked tirelessly playing games and doing exercises with me to help lengthen my attention span so that I would be better able to “sit still and listen” when I entered kindergarten. She communicated in so very many ways how much she loved me, and luckily, I carry that love with me even today.

\¶\textsuperscript{15} My mother was also quirky. I recall knowing at a very early age that she was prone to saying odd things. I’m not sure how I knew what was odd and what was not. I just knew. She also was not like other moms. She was not a big laugher. She often smiled and chuckled, but I recall that when she really cracked up, which I only remember happening a handful of times, it made the whole room laugh. It infected everyone. I remember that she sometimes missed the point, or at least she saw things differently from others, and perhaps that made me uneasy about what she might say. I sometimes found her embarrassing, but I also knew that everyone, including all of my friends, loved her. She would regularly have psychotic breaks characterized by her inability to sleep. These breaks would lead to and often culminate in her acting oddly or acting “crazy” and being hospitalized. She would be hospitalized for about a week during which time her medications would be adjusted and she would rest. This happened every few years for most of her adult life. I have memories of my sister and me coloring in hospital waiting rooms while my father went upstairs to visit her in the locked ward where children were not allowed.\textsuperscript{19}

\¶\textsuperscript{16} In retrospect, these psychotic breaks were never anything frightening or threatening, and we knew what they were because my father talked to my sister and me about them. He talked openly with us about her odd actions and that she was mentally sick. He never used judgmental language or cast blame. He was clear that we were lucky to be able to get her medical help.\textsuperscript{20} He stressed that she still loved all of us, and that she deserved our love and our help. More than once, when things got bad, she sat on the sofa and had conversations with her dead mother. Another time she took a walk around the block in her nightgown. These things never prompted fear in me. I was clear that the goal was to try to ensure that the neighbors didn’t see or hear her odd behaviors and to get her help. My father asked us to think about what it would be like to lose control of your mind and what you would

\textsuperscript{18} The terms now used are Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD). See \textit{AD/HD and Adults}, MENTAL HEALTH AMERICA, \url{http://www.mentalhealthamerica.net/conditions/adhd-and-adults} [https://perma.cc/6JMY-J94H], for a fuller definition and discussion of these disorders.

\textsuperscript{19} This memory sounds so sad and terrible, but that is not how I remember it. It was just part of our lives. It was like waiting in a dentist’s office or waiting anywhere else where adults had to conduct business. Until my tween years, there were no negative emotions attached to these visits other than sadness that I could not see my mother.

\textsuperscript{20} My father had incredibly good medical insurance provided by Ford Motor Company, so affording care was thankfully never an issue. However, things were always changing as treatments changed and as the laws governing the mentally ill evolved. In the 1960s, my mother was given electroshock treatments, which were in vogue then. Also, my father was able to sign her into psychiatric facilities without her consent in the 1960s; later only she could sign herself into a residential psychiatric facility, See HERBERT HENDIN, \textit{SUICIDE IN AMERICA} 214 (1996) (noting that until the first third of the twentieth century or later in most jurisdictions, all committals to public psychiatric facilities and most committals to private ones were involuntary).
want from others. Today I know that living with and watching my mother’s struggles taught me so much about empathy and compassion and how misperceptions and ignorance about mental illness fuel anger and fear and hatred and draconian public policies that demonize andunderserve those in need of mental health treatment.

¶17 I mention these events here because each and every time I encounter some facet of mental illness, and I do so regularly, I think about my mother and her struggles. I think of the mentally ill as somebody’s mother, sister, child, or parent. I picture myself in the shoes of the mentally ill, and I think about how I would feel if I were them. I think about what I would need from others if I lost track of reality, and I ask myself how I can help others who have. In fact, I have had employees who have struggled with mental health issues, and I am sure that my mother’s experiences made me a more compassionate supervisor. I want to be clear about my intent here. I offer these thoughts not as proof of being somehow more evolved than anyone else, but because I want to tell about my personal journey toward empathy with the hope that it will inspire others on their journeys.

**Religion and Empathy**

¶18 This part of the story of my journey toward empathy is particularly painful. It exposes me as a bad actor who carried around hatred. It sheds light on how I used hatred as a weapon against hatred, and I caused even more pain. It involves stories of me lashing out in anger and pain. I find this part of my personal journey ugly and embarrassing and base and ignorant. It is also incredibly human and has many parallels to the violence we see in the world today.

¶19 Sometime around 1983 I came out fully, to myself, as a gay man. One of the very first people I came out to before my parents was my sister, whom I recall having no particular issues with my sexual orientation whatsoever. A few years later, my sister became born again. Much of that time is unclear in my mind, and I am absolutely sure her version of this story might be told differently, but in the following years, our relationship became severely strained. We lived in different cities, we did not talk often, and we struggled when we did. I recall that we corresponded via snail mail, and I admit that I wrote numerous terrible and hate-filled letters to her, which I now wish were never sent. We had grown up liberal Catholics, and I carried around a large sense of personal pride in my ongoing work to be Christ-like, although I no longer attended Catholic masses. So when my sister told me numerous times and in numerous ways that I was going to hell because I am gay, it hurt me in ways that I had never anticipated.

¶20 What ensued was a war of words and a war of wills that left emotional scars on my entire family. I was not a victim in this war. I actively participated, I vehemently hated, I fought unfairly, I hurled insults, I cried real tears, and I suffered. At some point during this war, my sister and I stopped speaking to each other alto-

21. See Born Again, Wikipedia, [https://en.wikipedia.org/wiki/Born_again](https://en.wikipedia.org/wiki/Born_again) (“In some Christian movements [especially Fundamentalism and Evangelicalism], to be born again is to undergo a ‘spiritual rebirth,’ or a regeneration of the human spirit from the Holy Spirit. This is contrasted with the physical birth everyone experiences.”).
gether, and that was when my real suffering began. I thought I could hate my way through it. I was, after all, the wronged party. I was morally right. I had the moral high ground. I was truth. I was being unfairly targeted due to my sexual orientation, and that fact justified my use of hate as a weapon and a shield. I was, after all, using hate to combat hate. I recall an incident in 1997 or so when, while talking to my mother about my hatred of my sister, I began to cry uncontrollably, and I recall breaking down and breaking dishes and just sobbing in her arms.

¶21 My sister and I did not speak to each other for about two years, and during that time, I really learned how to hate. Hate put me to sleep at night, and hate drove me to wake up in the morning and brainstorm new depths of hatred. I became obsessed by hatred. I was addicted to it. It thrilled me, and it drove me to recklessness in other aspects of my life. I drove myself, through hate, into darkness and despair. What I became was exactly the person I did not want to be. I began to hate myself.

¶22 One day, after numerous conversations with everyone I loved, I decided I hated being unhappy. I hated being driven by hatred. I hated what I had become. The only way out for me was to let go of the hate, and that only worked if I found a way to forgive my sister for her part in this war. Forgiveness is a tricky thing because true forgiveness must happen without any expected outcomes or reciprocation. I had to say to my sister, “I forgive you for hurting my feelings, and I do so no matter what you believe about a god or about a hell or about my sexual orientation.” I did not think I could do it, and some days I slip, but I forgave.

¶23 What I now believe is that empathy could have prevented this war. Religious zealots of the homophobic variety could have their beliefs if they also found a way to have empathy for LGBTQ people. I don’t want to get into anyone’s head or mandate anyone’s beliefs. What I do want is compassion and caring and empathy. If religious zealots of that ilk began volunteering in LGBTQ service organizations, providing support and mentoring for LGBTQ youth, doing any direct service work in the LGBTQ community and demonstrating love, compassion, and empathy, it would be the greatest and most powerful evangelical tool they’d ever imagined. Conversely, if I had chosen to ignore the hateful words “you are going to hell” and found empathy for my sister, I would have saved myself a decade of unhappiness. Had I dug deep and tried harder to understand the ordeals she may have been going through; had I investigated the people and the issues, beyond the two of us, that might have motivated those words; had I found empathy and compassion; I might have curated some sort of peace. Today, I think about how hard it would be to be one of those religious zealots who feel morally compelled to shout insults at gays, to shout insults at pregnant youth outside of Planned Parenthood centers, or to follow hateful evangelical leaders. It doesn’t make me angry and hateful when I see these types of people today. It just makes me very, very sad. I think, what if I really believed that my God compelled me to do such horrible things? What would I want from others if I were that person? My answer is always compassion and caring and empathy. To this day, I wish I had known the way I do today that those words, “you are going to hell,” were far less about me than about her and her life and her need for compassion and empathy and understanding. Yet, sadly, those were the exact things that I was ill equipped to give at that time.
People of seemingly divergent religious beliefs have two paths to harmony, and each requires empathy. First, they must visualize themselves in the other’s position. What if I felt driven to kill others by my version of God? How horrible that would be. But, what if I did? What would stop me? For me, the answer is always love, compassion, understanding, and empathy. The act of visualizing oneself as another is the only effective way I have found to begin recognizing the humanness of another. Get to that place, and the rest will come. Second, to get to that place of harmony, people must accept that there is more than one absolute truth, even in religion. My sister’s absolute truth is hers to have, and it is indeed absolute. It is hers, and I must respect it. She feels as absolutely morally right in her truth as I do in mine, and she gets to have that as much as I get to have mine. However, empathy has allowed us, to the extent that we can, to step around those absolute truths and that moral rightness to get to the human beings underneath. Somewhere along the line we, the human race, forgot how to revel in or celebrate the diversity of truths in the world. Now instead we fight wars. Empathy for others with whom we vehemently disagree allows us to find respect, to refrain from judging, and to find commonality where it exists. My relationship with my sister is far from perfect, and I admit that we probably don’t really understand each other. We don’t talk often. However, we are no longer at war, and I can live with that. I wish her every happiness.

There is a particularly moving quote by Rumi, the thirteenth-century poet, jurist, Islamic scholar, theologian, and Sufi mystic. I think his words may be the key to everything. He wrote: “Out beyond ideas of wrongdoing and rightdoing, there is a field. I’ll meet you there. When the soul lies down in that grass, the world is too full to talk about. Ideas, language, even the phrase each other doesn’t make any sense.”

Orlando

So I stood in the airport and cried. I cried real tears, and I cried hard. I didn’t want to cry, I was embarrassed about crying, I felt alone in my grief as I stood there in the Aer Lingus baggage claim area with tears running down my face. That embarrassment has made me think about why it is that I always have to be that blubbering guy. But today, after a night of rest, I really do feel proud to be that guy. I honestly do not know how to be anything else except that guy, and I never want to become anyone other than my most authentic me. When I see tragedy, when I encounter people in pain, people in need, people who are troubled, I feel for them. I can’t help it, I just feel it. I wish we could all feel that way. If we did, we might minimize the mass shootings that occur in this country. We might also stop debating with each other about heartfelt issues and just accept each other and our own personal truths. That is what empathy could offer us.

I feel compelled to add here that for me the greatest tragedy of the Orlando shooting is the ages of those killed. I have read through numerous websites that

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detail both photos and biographies of those killed. They feature such flattering photos of young men and women, ages thirty-four, twenty-two, twenty-three, thirty-six, twenty-two, twenty-six, and so on. Young people with hopes and dreams and goals and passions. These young people were our future. I lived through the AIDS epidemic in the 1980s and 1990s, where I saw scores of young gay men and other young people, including all of my close friends, die in their twenties and thirties. My hope was that I would never experience anything similar again. So today to be faced with something like this is heart wrenching. The Orlando shooting is “the deadliest mass shooting in U.S. history.” It is also “the worst act of terrorism on American soil since September 11, 2001, and the deadliest attack on a gay target in the nation’s history.” Where do we go from here? I say, we go toward empathy.

Conclusion

¶28 My journey toward empathy thus has had three identifiable parts. For me, part of the equation was the nurture component. By that I mean being taught, at an early age, about empathy and compassion toward others. That is what I hoped to illustrate with my memories of my father and grandfather. Another component for me was witnessing a loved one struggle with severe difficulties like my mother’s mental illness. I continue to draw on those memories as a source of compassion. The third identifiable component for me has been personal struggle and personal pain of the type my sister and I have experienced in the past. Of course, there is no roadmap to empathy, and there is no magic pill. Nevertheless, I felt compelled to offer the world something in the aftermath of the events of June 12, 2016, in Orlando. My hope is that my journey toward empathy, one that I am still traveling, can be instructive or at least thought provoking for others.


25. Id.
Memorial: John J. McNeill (1949–2016)

“Jack Made a Lasting and Unique Impact on the Pace Law Library”

¶1 John McNeill, better known as Jack, died on January 18, 2016, after a lengthy battle with prostate cancer. Jack began working at Pace Law School (now known as Elisabeth Haub School of Law) in September 2000, where he initially served as head of reference services. Two years later, he was promoted to associate director, the position from which he retired in December 2015. He is survived by his sister and brother, two nephews, a niece, and five great-nieces and -nephews.

¶2 Jack was a native of Long Island, New York, and received a B.A. from New York University in 1982. He worked as a library assistant at New York University as an undergraduate and continued to work there as a student at New York Law School. After graduation from law school in 1987, Jack relocated to Florida, where he was the evening circulation supervisor at Florida Atlantic University. He later moved to St. Thomas University School of Law Library in Miami and earned an M.L.S. from the University of South Florida in 1994. At St. Thomas, Jack worked in several different positions—circulation/reserve librarian, faculty services coordinator, international law librarian, and webmaster. During this time, he was also running a private law practice, which enabled him to draw on his own real-life experiences when assisting patrons at the reference desk.

¶3 At Pace, Jack taught legal research in the first-year Legal Skills program. He served as liaison to the Environmental Law program, and wrote a blog (PEN-e) devoted to environmental law and related subject areas that was ranked as one of the top fifty environmental law blogs by LexisNexis in 2011. He provided coverage at the reference desk, and students knew they could ask him anything because he was very approachable; he always went out of his way to help them.

¶4 It is not an exaggeration to say that Jack’s fingerprints are all over the Pace Law Library. Jack’s mother was a gifted amateur painter, and Jack must have inherited some of her artistic talent and spatial awareness; he was able to visualize space in a way that eluded others. He played a major role during the library renovation project of 2006–2007, helping to develop a plan to reconfigure the physical plant and reorganize the collection after the architects the university had hired proved remarkably incapable of producing a workable design.

¶5 Jack’s knowledge of history and unbounded optimism about the future fueled his drive to institute the archival collections that are now housed in the Pace Law Library. He created the law school archives because he believed that the public record of the school should be preserved for the future. Jack was also concerned about preserving the legal history of the development of environmental law in New...
York State, and he secured a grant from New York State’s Documentary Heritage Program for the David Sive Environmental Law Collection. Jack supervised the administration of the grant and was proud of Pace’s role in making these archival records accessible to scholars.

¶6 Jack’s interest in art was invaluable when we visited the law school storage area and discovered a number of attractive artworks that now hang in the library; he created educational and entertaining descriptions for each piece, tracking down information about artists and provenance with tenacity. Jack applied successfully for two traveling exhibitions that were displayed at Pace Law School: “Lincoln, the Constitution and the Civil War” (Spring 2012) and “Magna Carta: Enduring Legacy 1215–2015” (Fall 2015). The Lincoln exhibit was made possible by Jack’s winning grant proposal to the National Endowment for the Humanities—Small Grants to Libraries program.

¶7 Jack was an outgoing, friendly person and enjoyed being professionally active. In 1995–1996, he served as president of the South Florida Association of Law Libraries. He served as chair of AALL’s Academic Libraries Special Interest Section in 2010–2011 and was vice chair/chair-elect the year before. Jack had a unique ability to connect with people and made friends wherever he worked; at conferences, someone was sure to inquire about Jack and ask to be remembered to him.

¶8 Jack loved to travel and planned his trips so that he could visit as many court libraries as possible on each journey. His interest in court libraries was not limited to how they were organized or the materials in the collection—he also wanted to know about their histories and to appreciate their architecture and design. He visited a number of our national parks and also enjoyed spending time with his family at New York’s beautiful Lake George. After a colleague visited Ireland several years ago, she extolled the beauty of the country, the friendliness of the people, and the wonderful food. Shortly thereafter, Jack planned his own trip to Ireland, the only time he made a foreign trip. Jack was very proud of his Irish heritage and was moved by seeing the Book of Kells, Dublin and its stately Georgian architecture and jewel-like St. Stephen’s Green, the Ring of Kerry, and some of the places where his ancestors had lived.

¶9 Jack frequently returned to Florida, where he had a wide circle of friends. While living in Miami, Jack particularly enjoyed attending the annual SunFest, a music and arts festival; beautifully framed SunFest posters brightened Jack’s office at Pace and were a vivid reminder of a place he loved. Jack found Florida’s warm winters much more to his liking than New York’s long, dismal winters. He often spent a week in Florida during Pace’s February break and always returned to work visibly recharged. Jack eventually purchased an apartment near the beach; unfortunately, as his illness progressed, he was not able to spend much time there.

¶10 When his illness began to take a heavy toll on him, Jack was sustained by his deep religious faith. He had been devastated by his diagnosis, but did not complain about his bad luck; rather, he learned all he could about his condition and set about seeking treatment. No matter how bad things got, he would smile and say, “Not to worry. It’s all good.” His positive attitude was an inspiration.
¶11 Jack enjoyed working with Pace’s students and faculty, several of whom shared remembrances of Jack on the library’s blog and Facebook page. As Professor Peter Widulski put it in his remembrance of Jack, “I met with him many times when he was dealing with the extraordinary suffering and hardships caused by his illness. He endured this suffering with patience and courage. I never heard a word of anger or resentment cross his lips.” Walter Lake, a student, summed up the Pace community’s reaction to Jack’s death: “He was always so helpful and thoughtful. His contributions to the Pace Law Library and to the individual research capabilities of the Library’s students and alumni were significant and long-lasting. . . . [H]e was indeed a true gentleman—always gracious, caring and kind. He set a sterling example.”

¶12 Everyone who knew Jack will attest to his sweet, gentle nature, his patience, and his kindness. In every sense of the word, he was a gentleman. Jack made a lasting and unique impact on the Pace Law Library and the Pace community, and he will be missed.—Marie Stefanini Newman¹ and Vicky Gannon²

“I Miss His Wise Counsel and Sense of Humor”

¶13 Jack McNeill was a compassionate, gentle person who was easy to talk to and a true friend to everyone he came in contact with at work. His faith underpinned all his interactions. He took nothing for granted, even the prayers that we sent his way. I remember meeting him at breakfast at the AALL convention before he came to work at Pace. I felt comfortable with him immediately. He squired several of us around Orlando and happily drove us to the Morse Museum without complaint. He was a calm and steadying influence in the time leading up to our renovations. Best of all, he was always ready to listen to our problems, large and small, and interested in our lives. I miss his wise counsel and sense of humor. At his wake, we were surrounded by wonderful photos of Jack at all stages of his life. The priest reminded us that we could still confide in Jack. I like to think that he can still favor us with his peace.—Alice Pidgeon³

“Jack Loved Cars”

¶14 Jack loved cars, motorcycles, and music, and we always knew it was his cell phone ringing when we heard reggae music coming from his office. I vividly remember when he took some of the reference staff on a joy ride in his bright yellow Mustang convertible. Luckily, he did not get a speeding ticket that day, and we returned wind-blown and exhilarated.

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2. Head of Circulation/Reference Librarian, Elisabeth Haub School of Law, Pace University, White Plains, New York.
3. Head of Technical Services, Elisabeth Haub School of Law, Pace University, White Plains, New York.
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+ © Cynthia Pittson, 2016.
¶15 My favorite Jack story is one he related to me a couple of years ago when he returned from his trip to Ireland. He told me that he had a blast driving around the narrow country roads, and I asked him whether he was nervous driving in Ireland. He said of course not, that when he rented the car he made sure he bought the kind of insurance that, when he returned the car to the rental company all banged up, the agent would thank him and tell him that he was welcome to rent from them any time. I can only imagine what that rental car looked like.

¶16 RIP, Jack.—Cynthia Pittson

“It’s All Good”

¶17 When Jack McNeill first came to Pace Law Library, I was the one who was asked to assist and accompany him in finding his first home in Westchester. I remember Jack as seeming quiet and nervous; perhaps it was because he was so unfamiliar with his new surroundings or probably because he had to spend a lot of time in a car with a very rambunctious and animated Italian woman—not quite sure which. I remember looking at him and thinking, “What a nice and gentle soul.”

¶18 Jack was a very courageous and religious man with a huge heart, a sweet smile, and a very witty sense of humor who always seemed to find laughter and peace in dealing with the many different circumstances of life. His eyes and expressions automatically had a way of communicating his kindness and compassion, and his sincere devotion and determination to follow his beliefs and to assist, aid, and support others endurably had a way of putting one at ease.

¶19 Jack’s conviction and commitment to supply individuals with a life of hope, care, and recognition were what drove him to be the voice, the strength, and the defender of the many less fortunate. He was involved in organizations and events that helped to educate people of the horrific turmoil, struggles, and suffering that are taking place all over our world, and his messages of urgency can be found resonating through the many facets of multimedia.

¶20 Jack was a fighter, and he didn’t want others to worry as he became more and more ill. Jack’s efforts to soothe and instill optimism and reassurance, by which he maintained the phrase, “It’s all good,” was his way of instilling in us his faith, admiration, and love for God.

¶21 Jack’s inspiration to stimulate laughter and fun was always evident. He would continually repeat the words, “Are we all happy?” as he walked by or into a room, and his announcement of funny lines like, “What—no cookies?” as he approached an empty desk or table were unfailingly successful in circulating a sense of fun and encouragement for his fellow coworkers. Jack so loved to joke around, and his amusing disposition never failed either him or us.—Maria Cuccurullo

4. Head of Reference Services, Elisabeth Haub School of Law, Pace University, White Plains, New York.
* © Maria Cuccurullo, 2016.
5. Technical Services Assistant, Elisabeth Haub School of Law, Pace University, White Plains, New York.
“We Shared a Very Special Bond”

¶22 I first met Jack McNeill in July 2005, when I joined Pace Law Library. His sweet smile will be permanently imbedded in my head. Jack was one of the kindest people I will ever know. He was sweet, gentle, and understanding. Jack was not just my colleague but also my friend, and we shared a very special bond. He always supported me and always advised me to never stop and to keep going after my dreams.

¶23 I miss Jack McNeill every day. Jack was a true fighter and never ever complained. Jack will be missed here at Pace, and his words, “Don’t worry about a thing, it’s going to be all right, be happy,” belonged to a favorite song of his. When he would ask me, “How you doing?,” and I would tell him I was trying to hang in there, his helpful words, “Come on, stop hanging and get on up there,” would always make me feel better. Jack gave me and so many others the strength to keep going and never look back.—Pamela Harcharan*

“Willingness to Take on New Challenges”

¶24 I first met John McNeill in my interview with the librarians at St. Thomas University. I quickly learned that no one called him John—he was just Jack. I had the great pleasure of working with Jack at St. Thomas University. I remember Jack arriving to work on his motorcycle, commuting from Palm Beach County. I think that one of the things that had attracted him to South Florida was the ability to ride his motorcycle throughout the year. He was quiet and unassuming, but as I got to know him, I was struck by the depth of his experience and his willingness to take on new challenges. He had a charm that endeared him to the law students and faculty at St. Thomas, and though a quiet and thoughtful librarian, I learned that he was much more: a great friend, willing to take on new challenges and to engage in change from a young director with a lot of ideas. I treasure the chance meetings at conferences as we both moved on in our careers. These meetings often ended in us having lunch together, and I always enjoyed the chance to catch up, reminisce, and enjoy each other’s company.—Gordon Russell**

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* © Pamela Harcharan, 2016.

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