Land Law in the Northern Mariana Islands [2023-10]

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Using Active Learning Techniques to Implement PSLRC Learning Outcomes in Legal Research Class Exercises [2023-11]

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Law Library Journal* (ISSN 0023-9283) is published quarterly by the American Association of Law Libraries, 230 W. Monroe St., Suite 2650, Chicago, IL 60606. Telephone: 312.939.4764; fax: 312.431.1097; email: aallhq@aall.org.

Advertising Representatives: Innovative Media Solutions, 320 W. Chestnut Street, PO Box 399, Oneida, IL 61467. Telephone: 309.483.6467; fax: 309.483.2371; email: bill@innovativemediasolutions.com.

All correspondence regarding editorial matters should be sent to Heather Haemker, Director of Marketing & Communications, AALL, 230 W. Monroe St., Suite 2650, Chicago, IL 60606. Telephone: 312.205.8038; email: hhaemker@aall.org.

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Land Law in the Northern Mariana Islands*

Chris Todd**

The Northern Mariana Islands have a 500-year history of colonial occupation and foreign regulation of land rights. These laws were largely introduced as a means of social control over the indigenous Chamorro and Carolinian populations. This piece collates and analyzes recorded land law issued throughout the archipelago from 1521 to present.

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Introduction

¶1 This article examines the laws that impacted land tenure in the Northern Mariana Islands from 1521 to present. Today, the Northern Marianas are a commonwealth of the United States, but several nations have claimed legal authority throughout the centuries. Land policy has formed a central theme in colonial regulation of the islands and in the indigenous reclamation of the legal system.

¶2 Research on colonial land law and indigenous land tenure systems in the Northern Marianas is severely limited. Published research often focuses on a single foreign administration or briefly covers land regulation within a broad legal or colonial
This article presents a holistic view of land law throughout the archipelago’s recorded history, juxtaposing the traditional uses of land with colonial notions of ownership and control.

This piece analyzes and collates land policies from all periods of Northern Marianas history. As traditional Micronesian concepts of land ownership were communicated orally, the first written land laws in the region are those of colonial empires. These laws were issued by Spain (1521–1898), Germany (1899–1914), Japan (1914–1944), the United States (1944–1986), and finally the Commonwealth of the Northern Mariana Islands (CNMI) (1986–present).

The international and historical scope of this piece is limited to surviving records with English translations. Many of these documents are housed at academic and archival institutions throughout the Pacific region or reprinted in published collections. In general, the research presented here cites to the earliest written version of a law, citing published reproductions only if the original is unavailable or known to be destroyed.

Many legal documents related to the occupation of the Northern Marianas remain untranslated in government repositories or microfilm collections. The National Archives of Japan owns several record sets related to the Japanese occupation of the Northern Marianas. Some of these records are housed at the National Diet Library in Tokyo, though many such records are available online through the Japan Center for Asian Historic Records. Original colonial records from the Spanish empire are housed in the General Archive of the Indies in Seville. Other known sources of Spanish-language records include the microfilm collection Spanish Government Records Relating to the Mariana Islands compiled by Augusto De Viana and Carlos Madrid. A similar set of microfilmed German language records are available at the CNMI Archives in Saipan. Any land policies solely published within these untranslated collections fall outside the scope of this analysis.

1. See Dorothy Elizabeth Richard, United States Naval Administration of the Trust Territory of the Pacific Islands (1957); Mark R. Peattie, Nan’yō: The Rise and Fall of the Japanese in Micronesia, 1885–1945 (1988); Francis X. Hezel, From Conquest to Colonization: Spain in the Mariana Islands (1989); Helen A. Robbins, Both Sword and Shield: The Strategic Use of Customary Law in the Commonwealth of the Northern Mariana Islands (2001); Dirk H.R. Spennemann, Edge of Empire: The German Colonial Period in the Northern Mariana Islands (2007); Keith L. Camacho, Cultures of Commemoration: The Politics of War, Memory, and History in the Mariana Islands (2011).


Micronesia. This modern political map of the Micronesian region shows the former Trust Territory districts. Note the division between Guam and the Northern Marianas, reflecting the colonial partition of the archipelago in 1898. (Source: Center for Pacific Islands Studies, University of Hawai‘i. Reprinted with permission.)
Northern Mariana Islands. The 14 islands of the modern Commonwealth of the Northern Mariana Islands.
(Source: CIA Factbook.)
Terminology

§6 The analysis presented here uses the following definitions:

- Mariana Islands or Marianas—Refers to the physical archipelago of islands inclusive of Guam (which shares the Chamorro language and culture but has a separate colonial and political history). At times this island chain was called Islas Ladrones or Ladrones by the Spanish and other early colonial administrations.
- Northern Marianas—The 14 northernmost islands of the Marianas archipelago exclusive of Guam. This partition was established in 1898 by the Treaty of Paris following the Spanish-American war.
- Commonwealth of the Northern Mariana Islands (CNMI)—The modern political name of the Northern Marianas.
- Chamorro—The principal indigenous group in the Marianas. The Chamorro language shares Austronesian roots with other linguistic groups in Micronesia. Chamorros have been present in the Marianas from 2000 BC onward.
- Carolinian—A Pacific Islander ethnic group from the Caroline Archipelago (modern-day Federated States of Micronesia) who resettled to the Marianas in the early 19th century and is recognized as being “of Northern Marianas descent” under the CNMI Constitution.
- Indigenous land tenure—Land systems practiced by Chamorros and Carolinians prior to the introduction of European legal and cadastral systems.
- Postcolonial land law—Land policies introduced by the self-determined Chamorro and Carolinian government.
- Trust Territory of the Pacific Islands (TTPI)—A temporary U.N. trusteeship following World War II; this administrative region included the modern-day sovereign nations of the Republic of Palau, the Federated States of Micronesia, the Republic of the Marshall Islands, and the U.S. Commonwealth of the Northern Mariana Islands.

Indigenous Land Tenure

§7 Prior to foreign land regulation, complex systems of indigenous land tenure were practiced throughout the Marianas. These were largely based on matrilineal clan affiliation and bear strong resemblance to other Austronesian systems of landholding in the region. Many of these customs were systematically dismantled through the introduction of foreign land law in the Northern Marianas.

§8 Individual land ownership was not traditionally practiced; rather, extended family groups jointly owned plots of land that held incredible social and spiritual significance. These lands provided sustenance through foraging, farming, and access to the sea. The size and location of one's land communicated kinship and status to the community.

¶9 The most important use of land by ancient Chamorros was for the veneration of ancestors. Interred in family land, these ancestors were revered as *manganiti*, benevolent spirits who influenced daily life. Continuous occupation of ancestral land was crucial to sustaining these cultural practices. Many of these customs were interrupted or destroyed by displacement, invasion, and colonial land theft.

¶10 In many cases, the land laws examined here were introduced as a weapon of occupation. An example of these forced changes can be seen in the Spanish regulation of land inheritance in the Northern Marianas. The long-standing right of female elders to distribute land was dismantled by the Spanish *partido* system of patrilineal descent of property and surnames. While nominally a land regulation, this law fundamentally altered the way land and power was shared in Chamorro communities. Similarly, each colonial administration would use land law to further its hegemonic goals in the Northern Marianas.

**Spain**

¶11 *Terra nullius*, “land of no one” in Latin, has long been the justification for foreign land seizures in the Northern Marianas. In a colonial context, this maxim legitimizes the nationalization of unoccupied and unused land when no clear owner was present. Seeing no recognizable European towns or social structures, the Spanish quickly claimed vast areas of the Northern Marianas as “unoccupied,” despite ancient systems of Chamorro and Carolinian landownership.

¶12 Ruling the islands for over three centuries, Spain introduced land policies that mandated small villages organized around Jesuit missions. Spanish land regulation resulted in forced urbanization of the indigenous people and island depopulation through the brutal practice of *reducción* or “Indian reduction.”

¶13 The Marianas were claimed by Spanish conquistador Ferdinand Magellan in 1521. The expansionary voyage that brought him to Micronesia was fueled by a 1493 papal decree, the Inter Caetera, that authorized widespread seizure of unoccupied land in the Pacific. Stating “all islands and mainlands found and to be found, discovered and to be discovered” shall be “assigned to you and your heirs forever.” The only restriction Pope Alexander VI placed on this process was that “none of the islands be in the possession of a Christian king or prince,” allowing for the Spanish annexation of any indigenously held land. The twin doctrines of *terra nullius* and the Inter Caetera gave the expanding Spanish empire justification to seize any island in Micronesia, unpopulated or populated.

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¶14 In return for undertaking a personally financed expedition to the Marianas, Spanish colonist Miguel López de Legazpi was appointed captain general and governor of the Ladrones in 1569. When conferring this lifetime appointment to Legazpi, King Phillip II instructed him to continue to explore and colonize the islands “in our name, and at your own cost.”

¶15 The following year, Phillip II issued the first colonial land policies in the Marianas. Legazpi was instructed to establish towns and acquire arable land for Spanish settlers. This 1570 decree included several land protections for the native Chamorros now subject to Spanish law. The governor was told “not to occupy or take possession of any private property of the indians” and that “thorough good treatment should be shown to them.”

¶16 The Spanish goal of religious conquest was deeply intertwined with the land laws introduced in the Marianas. Phillip II’s decree brought the Spanish land policy of reducción to the region. A common tool of Spanish colonial control, reducciónes were the forced relocation of entire native populations into urban settlements operated by Jesuit missionaries. Practiced widely throughout the Spanish empire, Indian reductions were committed in Peru, Northern Mexico, the Philippines, and throughout the American Southwest.

¶17 The reducción of the Northern Marianas eradicated much of the native system of land tenure and resulted in a hundred-year depopulation of the archipelago. Landless Chamorros were forced from their ancestral lands and assigned to one of the six mission-controlled villages on Guam. Here these captives were forced to participate in plantation agriculture and religious conversion under the supervision of priests, lay ministers, Spanish soldiers, and converted Chamorros.

¶18 The Jesuit missionary wing of the Spanish empire became a major source of land policy in the Northern Marianas. Mission leadership strictly controlled the native relationship with the land, enforcing the island depopulation and urban resettlement programs central to the Marianas reducción. Within the cloistered mission villages, the Austronesian culture of the Chamorros was incrementally deconstructed through the imposition of Spanish customs and religious practices. This period of land alienation and forced conversion resulted in dramatic cultural change. The Chamorro language, spiritual beliefs, sexual practices, patterns of food production, and traditional system of land tenure were permanently altered by mission policies.

¶19 Due to conflict with Spanish authorities and the dwindling numbers of incarcerated Chamorros, King Carlos III expelled the Jesuits from the Marianas in 1769. As the Marianas mission collapsed, indigenous survivors repatriated the northern islands in defiance of the Spanish policy of removal.

Germany

¶20 Gaining control of the Marianas north of Guam by treaty in 1899, the German empire was the first to lay claim to the artificially partitioned “Northern” Marianas. Through a series of international agreements, European powers split the Chamorro homeland between separate foreign empires. The political and social divisions between the Chamorros of Guam and those of the northern archipelago continue today.

¶21 Occupying the Northern Marianas for 15 years, the comparatively brief German administration introduced laws that significantly altered the local land system. Germany’s primary interest in the region was to establish a copra economy in the Pacific, exporting dried coconut kernels to Europe. The laws presented here demonstrate how these goals were accomplished through encouraging, and later mandating native participation in a cash economy and agricultural production.

¶22 The 1898 Treaty of Paris transferred ownership of several Spanish colonial possessions to the United States. While the United States claimed Guam, the largest and most populous of the Marianas, Spain was allowed to keep the 14 northernmost islands. This partition of the Marianas divided the native Chamorro people between two colonial empires. Guam and the Northern Marianas would eventually become separately governed U.S. territories in 1950 and 1976 respectively. Their initial establishment as two separate political entities can be traced back to this 1898 treaty.

¶23 In 1899, Spain sold its remaining Pacific colonies “the Carolines, Pelews, and Ladrones [Marianas], except the island of Guam,” to the expanding German empire. These island groups constitute the modern-day nations of the Federated States of Micronesia, Republic of Palau, and the U.S. Commonwealth of the Northern Mariana Islands. While transferring “full sovereignty” to Germany, the treaty makes no mention of the Chamorro and Carolinian inhabitants or their traditional land rights.

¶24 From Berlin, Emperor Wilhelm II issued a decree declaring the Northern Marianas a German protectorate. Formalizing the process of terra nullius into German colonial law, this declaration states “unoccupied and otherwise unused land is the prerogative

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of the German administration. All other regulations are herewith repealed.”  20  Spanish
disease and removal to Guam had decimated the population of the Northern Marianas,
leaving much of their ancestral land vacant and subject to German nationalization
under this law. These German state lands were later passed on to, and expanded by,
future colonizers of the Northern Marianas.

¶25 A 1900 declaration by the German colonial government forbid any European
from owning land in the occupied Northern Marianas.  21  Except for periods of Japanese
and U.S. martial law during World War II, some version of this land alienation protec-
 tion has been in place in the Northern Marianas to present day.  22  In the postcolonial
era, indigenous legislatures throughout Micronesia have introduced similar laws limit-
ing land ownership to the carefully defined natives of each archipelago.

¶26 The original German law forbidding European land ownership was likely an
effort to maximize the available state-owned arable land for copra production. However,
modern legislatures have reintroduced updated versions of this law as a land alienation
protection, reclaiming it from its colonial origins.

¶27 German administrator Georg Fritz issued a 1903 regulation to stimulate local
production of copra.  23  As part of a homesteading program, this law required each indig-
enous landholder to produce “a contiguous area of at least ¼ hectare of land with food
crops.” Any natives who did not comply were taxed or subjected to forced labor on
government farms. Through agricultural quotas and state control, this German law
sought to fundamentally alter the way local people interacted with the land.

Japan

¶28 In 1914, the first year of World War I, Germany surrendered the Northern
Marianas without resistance to a Japanese naval detachment. Their possession of the
islands was contested until the 1919 Treaty of Versailles gave Japan a mandate to rule
islands taken from Germany during the war. Occupying the Northern Marianas for
three decades, Japan introduced laws that fundamentally altered traditional patterns of
land use. As its colonial priorities shifted from sugar production to war, Japan intro-
duced legal restrictions that gave the occupation government incredible power over
how land was used and who could own it.

20. Wilhelm II, Supreme Law Regarding the Proclamation of Protection over the Caroline’s, Palau, and
the Marianas, July 18, 1899, in Dirk H.R. Spennemann, Aurora Australis: The German Period in the
Mariana Islands, 1899–1914, 6 (2000).
21. Südsee [South Seas], An Annotated Bibliography of German Language Sources on
c.c/2D2X-UZFD].
22. See Off. of the Deputy High Comm’r, Trust Territory Policy Letter P-1 §§ 19–20 (1947); 57 T.T.C.
§ 201 (1966); N. Mar. I. Const. art. XII, § 4(a); 1 N. Mar. I. Code § 3803.
23. Regulation by the District Administrator in Saipan Concerning the Cultivation of Private Property
edu.au/CNMI/CNMIBIB/0323.pdf [https://perma.cc/5YNZ-77KL].
¶29 The signatories of the Treaty of Versailles described the former German colonies of Micronesia as “inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world.” These areas were “entrusted to advanced nations” in the neocolonial League of Nations Mandate system. This international agreement authorized Japan to formally annex its Micronesian territories, including the Northern Marianas. Japan would retain political and military control of the Northern Marianas and much of Micronesia until the end of World War II.

¶30 Japan was given a “Class C” mandate to administer the islands of German Micronesia under Japanese law. This is the first law presented here that includes formal protections for the Chamorros and Carolinians living under foreign occupation. The Government of Japan was not allowed to restrict freedom of religion and could not impose forced labor or obligatory military service on indigenous subjects. The League required Japan to submit annual reports demonstrating its compliance with the terms of the Mandate. These reports, written in English, provide a detailed record of the land policies introduced by the Japanese colonial government.

¶31 From 1920 to 1937, Japan submitted annual reports to the League of Nations detailing its administration of the nanyō (南洋) or “south seas” region. Like Spain and Germany, Japan used terra nullius as a justification for nationalizing land throughout the Northern Marianas. In 1922, Japan claimed all unoccupied land in its Mandate territories as property of the state. Citing the prior German land consolidations, Japan reported, “All lands which, in accordance with old custom, do not belong to any natives or native communities are considered as belonging to the state.” A sample tenancy agreement reported to the League of Nations in 1923 shows how this state-annexed land was subleased to Japanese citizens for sugarcane production.

¶32 Policies regarding native land transactions evolved several times throughout the 30-year Japanese administration of the Northern Marianas. Japan initially upheld the German policy of forbidding land sales between indigenous landholders and foreign citizens. In 1931, Japan began permitting natives to rent their lands to foreigners for up to 10 years with approval from a Japanese official. This rule changed again in 1935, when Japan allowed the colonial government to directly purchase land from indigenous landowners. Reporting to the League of Nations, Japan described these legal

27. Gov’t of Japan, Annual Report to the League of Nations on the Administration of the South Sea Islands under Japanese Mandate 15 (1922).
29. Gov’t of Japan, Annual Report to the League of Nations on the Administration of the South Sea Islands under Japanese Mandate 99 (1931).
changes, succinctly stating “elasticity has been introduced into the system.”\textsuperscript{30} Japanese reports state these exchanges were transacted fairly, but oral histories of indigenous survivors of World War II contradict many of these claims.\textsuperscript{31}

**United States**

\textsuperscript{¶}33 The U.S. occupation of the Northern Mariana Islands began with the June 15, 1944, amphibious invasion of the Japanese-held archipelago. Early U.S. land policies in the Northern Marianas were introduced as military orders, though some basic land restrictions were issued before the invasion took place. The chaos of war left the islands in ruin, further fracturing the local systems of land ownership and occupancy.

\textsuperscript{¶}34 In the immediate postwar years, land policies were issued by various governmental agencies in charge of the insular region. This included the U.S. Naval Command, followed by the Department of the Interior, and finally a U.S.-appointed Trust Territory administrator. Under the terms of the U.N. International Trusteeship System, the people of the Northern Marianas formed an interim government, participated in a sovereignty referendum, and negotiated commonwealth status with the U.S. government. Many of the land laws established by the indigenous Congress of Micronesia were later codified into the Northern Mariana Islands Commonwealth Code and remain in effect today.

\textsuperscript{¶}35 An order, given by U.S. Naval Command one month prior to the June 15 invasion of Saipan, instructed Marine Corps Civil Affairs staff to “remove natives, and where practicable, their belongings, from combat zones to places of relative safety.”\textsuperscript{32} With no advance plan for the management of noncombatant natives, the U.S. military detained all Chamorro and Carolinian survivors in the hastily constructed Camp Susupe.\textsuperscript{33} Removed from ancestral lands and confined to a prison village, native survivors of the war were incarcerated by the U.S. military for an entire year. This policy of indigenous removal and internment in Camp Susupe bore similarities to the Spanish reducción to the missions of Guam four centuries earlier.

\textsuperscript{¶}36 The indigenous people of the Northern Marianas were released from this internment on July 4, 1945, celebrated annually as Liberation Day (not as the Fourth of

\textsuperscript{30.} Gov’t of Japan, Annual Report to the League of Nations on the Administration of the South Seas Islands under Japanese Mandate 80 (1937).

\textsuperscript{31.} See Howard P. Willens & Deanne C. Siemer, Oral Histories of the Northern Mariana Islands Political Life and Developments (2004); Bruce M. Petty, Saipan: Oral Histories of the Pacific War (2002); Northern Marianas Oral History Collection, Commonwealth of the Northern Mariana Islands Archives, Saipan.

\textsuperscript{32.} CinCPOA Memo, May 8, 1944, in Dorothy Elizabeth Richard, United States Naval Administration of the Trust Territory of the Pacific Islands 432–33 (1957).

July). Land rights were slowly returned to the local people through Title Determination
Hearings and Homesteading Agreements over the next several decades. These post-
war land distribution programs are the basis for most modern land titles in the CNMI.

¶37 Much like the 1920 League of Nations Covenant, the 1945 U.N. Charter also
formalized the annexation of the Northern Marianas by a foreign government. A key
difference between these annexations was the Charter’s emphasis on self-determination
and decolonization. The U.N. Charter mandates the establishment of an indigenous gov-
ernment representing the people of the Northern Marianas.

¶38 This document introduces an International Trusteeship System in which non-self-
governing states are organized into “Trust Territories” to be overseen by U.N. member
states. Article 76 of the U.N. Charter makes explicit that these relationships are terminal
and intended to promote “progressive development towards self-government or
independence.”

¶39 This proved to be a slow approach to decolonization. The resultant TTPI gave
the United States near total control of the Northern Marianas until 1978. Dissolved after
the final territory gained independence in 1994, the TTPI existed as a multistate nation
under U.S. supervision for 47 years.

¶40 To administer these territories, the United Nations organized them into “strate-
gic areas,” which were grouped under broad trusteeship agreements. Security Resolution
21, issued on April 2, 1947, defined the TTPI as “the islands formerly held by Japan
under mandate in accordance with Article 22 of the Covenant of the League of Nations.”
Already in possession of these islands, the United States was designated as the adminis-
tering authority of the TTPI, which included all 14 of the Northern Marianas.

¶41 The U.N. Trusteeship Agreement gives the United States “full powers of admin-
istration, legislation, and jurisdiction over the territory” defined here as the TTPI. This new
political entity encompassed thousands of islands throughout the Micronesian
region. This agreement allowed the United States to build military bases and deploy
troops within the territory, as well as to regulate land and natural resources. The United
States was charged with guiding the districts “toward self-government or independence
as may be appropriate to the particular circumstances.”

¶42 While authorizing the U.S. occupation of the region, the United Nations also
noted the threat of indigenous land alienation, a theme that would come to define mod-
ern Northern Marianas land law.

34. See Trust Territory of the Pacific Islands Microfilm Collection, Univ. of Haw. at Mānoa.
YWH4-8QFC].
38. U.N. Security Council, Trusteeship Agreement for the Former Japanese Mandated Islands (Apr. 2,
39. S.C. Res. 21, supra note 37, ¶ 5.
40. Id., ¶ 6.
¶43 A 1947 policy letter introduced the first major set of U.S. land laws in the Northern Marianas.\footnote{Trust Territory Policy Letter P-1, December 29, 1947, in James B. Johnson, Land Ownership in the Northern Mariana Islands: An Outline History 49–55 (1969).} Policy Letter P-1 acknowledged that prewar German and Japanese \textit{terra nullius} land seizures violated “Micronesian concepts of ownership” and had dismantled the ancient system of land tenure in the islands.\footnote{Id. § 4.} Despite acknowledgment of this land theft, the interim TTPI government claimed ownership and authority over all state land.\footnote{Id. § 6.}

¶44 Policy Letter P-1 directed each district administrator to develop a thorough history of local land tenure traditions to guide upcoming title determination hearings. The Trust Territory government mandated the return of military-occupied land to pre-invasion owners or compensation to be paid in cases when title reversion was not possible. Stating unequivocally that land “owned by natives shall not be transferred to non-natives,” this policy reintroduced land alienation protections formerly established by the German administration and abandoned by the Japanese.\footnote{Id. §§ 19–20.} Policy Letter P-1 allowed for short-term leases to non-native tenants, but only with the approval of the U.S.-appointed High Commissioner of the Trust Territory.

¶45 The disarray of the postwar land system is apparent from this policy document. It closes with a call for displaced natives to help in the search for Japanese records to aid in adjudicating land disputes.

¶46 The United Nations required the United States to oversee the “development of political institutions” and to relinquish a “progressively increasing share” of administrative control to the citizens of the TTPI.\footnote{S.C. Res. 21, supra note 37, ¶ 6.} To meet these requirements, the U.S. Department of the Interior introduced a recognizably American system of representative government. Secretary of the Interior Order No. 2882 established election districts, terms of office, and parliamentary and recordkeeping procedures for the new legislature.\footnote{Trust Territory of the Pacific Islands: Legislative Authority for the Congress of Micronesia, 29 Fed. Reg. 13,613 (Oct. 3, 1964).} The resultant bicameral Congress of Micronesia (1964–1979) (COM) emerged as the first fully indigenous legislative body in the region. The COM introduced model land alienation policies that were adapted and used throughout Micronesia. The legislative output of the COM is codified in the \textit{Code of the Trust Territory of the Pacific Islands}.

¶47 While ceding legislative authority to the indigenous people of the postwar Pacific, Secretarial Order 2882 also gave broad political power to the High Commissioner. The “High Comm” held veto power over the indigenous COM and could introduce legislation on the floor at any time. The order allowed the High Commissioner to introduce and approve legislation in a single session, bypassing the elected representatives completely.
In the event that the High Commissioner has submitted to the Congress proposed legislation which he has designated as urgent, and the Congress has failed to pass the same in its original form or an amended form acceptable to the High Commissioner at the session at which was submitted the High Commissioner may himself, with the approval of the Secretary of the Interior, promulgate such legislation as law.\textsuperscript{47}

\textsuperscript{48} The \textit{Code of the Trust Territory of the Pacific Islands} is the first corpus of indigenously drafted law introduced in the Northern Marianas. Unlike the purely colonial legal systems of the past, this set of laws was enacted by Micronesian legislators elected from the citizenry of each island district. The Trust Territory Code (TTC) allowed Micronesian customs “the full force and effect of law” when not in conflict with U.S. laws. This permitted traditional Chamorro and Carolinian land practices to coexist within the Western legal system imposed by the United States.\textsuperscript{48}

\textsuperscript{49} Reclamation of native land and the prevention of future land alienation became central themes in TTPI law. The COM nullified all German and Japanese colonial laws throughout the Trust Territory, while concurrently upholding most land titles. All non-coercive land transactions in effect before December 1, 1941, “shall remain in full force” in the TTPI.\textsuperscript{49} This allowed the Trust Territory government to reclaim the state lands seized by Germany and subsequently nationalized by Japan in the Northern Marianas. The reclaimed arable land was used as the basis for numerous indigenous homesteading programs, a common mode of land redistribution in postwar Micronesia that is still practiced in the CNMI.\textsuperscript{50}

\textsuperscript{50} Title 57 restricts landownership within the TTPI to the citizens of each district, further consolidating land ownership as the exclusive right of the indigenous groups of each island chain.\textsuperscript{51} Additionally, a 1966 homesteading law allowed for “any clan, lineage, family, or group of persons who collectively possess land rights established by local custom” to participate in the land redistribution program.\textsuperscript{52} This law reestablished the Micronesian custom of collective land ownership by family groups, a practice outlawed under the Spanish system of land tenure.

\textbf{Postcolonial Land Policy}

\textsuperscript{51} Fractious political status negotiations led to each legislative district in the Trust Territory seeking a different arrangement with the outgoing U.S. administration.\textsuperscript{53} In 1975, the Northern Marianas electorate chose to join the United States as an unincorporated overseas commonwealth, gaining political status and \textit{jus soli} citizenship rights

\begin{itemize}
\item \textsuperscript{47} \textit{Id.} § 4.
\item \textsuperscript{48} 1 TTC § 102 (1980).
\item \textsuperscript{49} \textit{Id.} §105.
\item \textsuperscript{50} 67 TTC §§ 201–213; 2 N. Mar. I. Code § 4301.
\item \textsuperscript{51} 57 TTC § 201.
\item \textsuperscript{52} 67 TTC § 203.
\item \textsuperscript{53} At the conclusion of the UN Trusteeship, the four TTPI districts diverged into the United States Commonwealth of the Northern Mariana Islands (1976) and the sovereign nations of the Federated States of Micronesia (1986), the Republic of the Marshall Islands (1986), and the Republic of Palau (1994).
\end{itemize}
Like those of Puerto Rico, the CNMI has legislative, executive, and judicial branches of government and is subject to federal law and the U.S. Constitution.\textsuperscript{54}

§52 Increased involvement of Chamorros and Carolinians in Northern Marianas land policy has resulted in expanded protections for indigenous landowners. Throughout the postcolonial period, native legislators have introduced and refined restrictions on foreign land ownership in the Northern Marianas. Despite the many protections presented here, land alienation continues to be a prominent theme in CNMI legal and social discourse.

§53 The Covenant established a permanent political relationship between the Northern Marianas and the United States.\textsuperscript{55} Importantly, this agreement restricts land ownership to “persons of Northern Mariana Islands descent” for the next 25 years. These temporary restrictions were superseded and made permanent the following year during the 1976 CNMI Constitutional Convention. While this document notes “the importance of the ownership of land for the culture and traditions of the people of the Northern Mariana Islands,” it also authorizes the United States to buy or lease land directly from the CNMI and to invoke eminent domain as needed.\textsuperscript{56}

§54 As outlined in the Covenant, the U.S. military was allowed to retain large sections of land in the Northern Marianas. Now tenants, the United States must negotiate lease terms with the indigenous government to retain its occupancy. Under the terms of this technical agreement, the United States paid $19.5 million for a 50-year lease of land on the Northern Mariana Islands of Saipan, Tinian, and Farallon de Medinilla.\textsuperscript{57} A similar 40-year agreement was signed with the Department of Defense for $21.9 million in 2019.\textsuperscript{58}

§55 Many of the land laws applicable in the Northern Marianas today derive their authority from the CNMI Constitution (ratified on March 6, 1977).\textsuperscript{59} These constitutional land protections aim to prevent land alienation, redistribute stolen land, and protect culturally important sites from development and degradation.

§56 When introduced in 1977, Article XII of the CNMI Constitution limited land ownership to residents with “at least one quarter Northern Mariana Islands Chamorro or Northern Marianas Carolinian blood.” This was later amended by referendum in 2014 to “at least some degree of Northern Marianas Chamorro or Northern Marianas Carolinian blood.”

\textsuperscript{54} Judiciary of the Northern Mariana Islands; Northern Marianas Commonwealth Legislature; and Commonwealth of the Northern Mariana Islands Office of the Governor.


\textsuperscript{56} Id.


\textsuperscript{59} Constitution [of the Northern Mariana Islands], COMMONWEALTH L. REVISION COMM’N, https://cnmilaw.org/cons.php#gsc.tab=0 [https://perma.cc/F8E4-3PLP].
Carolinian blood or a combination thereof.\textsuperscript{60} Under these terms, freehold of land in the Northern Marianas is the exclusive right of the indigenous population.

\textsuperscript{57} The land protections established in the CNMI Constitution have been utilized and expanded by other Micronesian nations. Following the departure of the Northern Marianas, the remaining TTPI districts organized themselves as sovereign nations that also restricted land ownership to their native citizenry. In 1978, the Constitution of the Federated States of Micronesia was introduced, stating: “A noncitizen, or a corporation not wholly owned by citizens, may not acquire title to land or waters in Micronesia.”\textsuperscript{61} Introduced in 1981, the Constitution of the Republic of Palau states: “Only citizens of Palau and corporations wholly owned by citizens of Palau may acquire title to land or waters in Palau.”\textsuperscript{62} The Constitution of the Republic of Marshall Islands forbids the sale of land to non-natives, but it takes these protections further, stating that no modern laws “shall be construed to invalidate the customary law or any traditional practice concerning land tenure or any related matter in any part of the Republic of the Marshall Islands.”\textsuperscript{63}

\textsuperscript{58} To address the ongoing issue of historically alienated lands, the CNMI Constitution establishes a homesteading program to provide persons of Northern Marianas descent with residential and agricultural homesteads.\textsuperscript{64} This homesteading program can be seen as an example of constitutional decolonization. Centuries of terra nullis land seizures created a cache of state land; as each successive colonial administration claimed the islands, these state lands were specifically transferred and expanded. By redistributing this land to Chamorro and Carolinian owners, the CNMI Constitution begins to undo the centuries of land alienation caused by foreign occupation.

\textsuperscript{59} Finally, the CNMI Constitution designates several uninhabited islands as nature preserves and establishes protections for important Chamorro historical sites throughout the archipelago.\textsuperscript{65}

**Northern Mariana Islands Commonwealth Code**

\textsuperscript{60} The Commonwealth Code collects the evolving land laws in the CNMI as refined by its legislature and judiciary.\textsuperscript{66} The majority of these land laws are codified.\textsuperscript{67} Both the Commonwealth Code and CNMI Administrative Code are maintained by the Commonwealth Law Revision Commission (CLRC). Charged with “codifying Commonwealth laws of a permanent nature and publishing, in a reporter system, decisions of the Commonwealth judiciary,” the CLRC has existed since 1984 and is the main

\begin{itemize}
  \item \textsuperscript{60}  N. Mar. I. Const. art. XII, § 4(a).
  \item \textsuperscript{61}  Micr. Const. art. XIII, § 4.
  \item \textsuperscript{62}  Palau Const. art. XIII, § 8.
  \item \textsuperscript{63}  Marsh. Is. Const. art. X, § 1.
  \item \textsuperscript{64}  N. Mar. I. Const. art. XI, § 1.
  \item \textsuperscript{65}  Id. art. XIV, §§ 2–3.
  \item \textsuperscript{66}  Northern Mariana Islands Commonwealth Code, COMMONWEALTH L. REVISION COMM’N, https://www.cnmilaw.org/cmc.php#gsc.tab=0 [https://perma.cc/X7L3-KFEC].
  \item \textsuperscript{67}  2 N. Mar. I. Code § 1101-7340.
\end{itemize}
repository for CNMI legal documents. The Northern Marianas Code is also available on LexisNexis.

**Northern Mariana Islands Commonwealth Register**

¶61 Like other U.S. states and territories, the executive branch of the CNMI government contains several regulatory agencies that oversee land use and management. First published in the *Commonwealth Register*, regulations are compiled and codified in the Northern Mariana Islands Administrative Code.

**Northern Mariana Islands Administrative Code**

¶62 Several areas of the Northern Mariana Islands Administrative Code regulate how land is used in the CNMI. Titles 15 and 85 govern coastal management, land registration, forestry, and zoning throughout the commonwealth. Title 55 details the work of the CNMI Historic Preservation Office, which inventories, preserves, and oversees culturally important sites throughout the archipelago. Title 145 outlines procedures for several homesteading programs that redistribute land to those “of Northern Marianas Descent” as defined by the CNMI Constitution.

**Conclusion**

¶63 The analysis presented here demonstrates how land law in the Northern Marianas has been both a tool of colonial hegemony and a means of legislative and constitutional decolonization. When reviewed chronologically, the land laws introduced in the Northern Marianas document an incremental shift of power from foreign occupiers to the indigenous people of the archipelago. This theme is epitomized by the codification of traditional landholding practices in modern CNMI law, which legally reestablished aspects of a land tenure system that existed for centuries prior to colonial regulation.

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68. 1 N. Mar. I. Code § 3803.
Using Active Learning Techniques to Implement PSLRC Learning Outcomes in Legal Research Class Exercises*

Scott Uhl**

Active learning approaches are making their way into legal research instruction. This article discusses factors to consider when creating active learning in-class exercises. It then creates a framework for applying these factors to legal research classes and ends by modeling how these recommendations and frameworks might be applied in real-world contexts.

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Introduction

¶ 1 Instructors of legal research skills must present a huge canon of legal resources and introduce a difficult, somewhat ill-defined set of skills in a limited time. A common first step in outlining a legal research course is deciding what topics to completely omit. Instructors may ask, for example, is there time to teach students to compile a legislative history? Will students have rudimentary research skills such as producing appropriate search terms, using an index, or evaluating the relevance of a source? Must time be taken to teach the selection of search terms?

¶ 2 Add to this the growing adoption of teaching methodologies that favor learner-driven techniques, which research shows improve comprehension and the ability to apply what is learned. One cost of these methods, however, is much less certain timelines. A skilled lecturer can decide down to the word how much to present in an hour-long session. An instructor incorporating active learning techniques—such as group exercises, the Socratic method, or student presentations—faces diminished control over the pacing of material. But the tradeoff is usually more engaged students, more immediate feedback on how well they comprehend and apply the material, more positive student reviews, and better learning outcomes.

¶ 3 Given these benefits, a shift has occurred in the past 30 years, away from pure lecture toward active learning techniques. A sizable body of scholarship and research demonstrates the value of this approach, including within the field of legal research instruction.

¶ 4 While broad techniques and approaches have been well documented, and many instructors have shared their specific experiences and outcomes, no systematic review has been made of the considerations of crafting effective in-class exercises for legal research instruction. This is crucial because the neglected details in exercise design can have profound effects on learning outcomes and overall class management, and many considerations involve tradeoffs for the instructor to consider, such as whether the educational value of open-ended exercises is worth their higher cost in class time in a specific context.

¶ 5 This article discusses the pedagogical best practices for creating in-class exercises, as well as for applying these factors to different legal research instruction contexts. It first details the development of active learning in legal education and explores the findings and theories about what makes it more effective than passive instruction. The article then examines the content decisions an instructor makes when designing a legal research course, including creating learning outcomes based on the AALL Principles and Standards for Legal Research Competency.

¶ 6 The third section details a variety of tools and frameworks that instructors can use when designing active learning exercises, such as best practices for effective exercises, considerations drawn from the educational and psychological literature, and other factors. Finally, the article synthesizes these considerations and gives examples of how to construct exercises tailored to meet specific class needs for different topics at different stages of skill acquisition in typical legal research instructional settings.
Active Learning in Legal Education

¶7 Active learning describes a paradigm of teaching that achieves preferred educational outcomes rather than simply “delivers content.” It involves a corresponding shift in techniques away from lectures and readings alone, and toward active, dynamic interactions with students. A 1995 article by Barr and Tagg notes the following key features of the theory:1

- A transition in the understood purpose of education from improving the quality of the instruction to improving the quality of outcomes for students
- Structural changes away from a model of measuring the amount of material covered and toward the quality of “specific learning results”
- A set of changes in theory of how learning occurs, from “learning is cumulative and linear” to “learning is a nesting and interacting of frameworks”
- A transition of the role of instructors from primarily lecturers to “primarily designers of learning methods and environments”

¶8 This approach designs lessons around what students will take away rather than what instructors will present. This is inarguably an improvement, but it does create several complications for the instructor. Since it is no longer enough to merely cover materials, instructors must structure classes to take advantage of what is known about how students learn.

¶9 While many have followed Barr and Tagg in describing active learning as a paradigm shift away from passive instruction, the current state of instruction—legal research education in particular—is still in the middle of that shift.2 Scholars such as Bonwell and Sutherland acknowledge that active learning techniques are being added to passive instruction strategies to different degrees.3 Bonwell and Eison note five reasons for reluctance on the part of higher education faculty to incorporate active learning strategies:4

1. How much content can be covered is diminished.
2. Too much preparation time is required.
3. These approaches are impossible to use with large classes.
4. Materials and resources are lacking.

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5. Risks include colleagues’ perceptions of the legitimacy of active learning approaches, what effect they will have on student evaluations, and how their use might affect promotion and tenure.

¶10 Since 1991, the last point has shifted considerably as active learning has earned its place in higher education. Students now expect and demand more engaging styles of instruction, tenure committees have declined to punish those who stray from traditional lecture formats, and colleagues have either adopted active learning themselves or are on their back foot defending an old-fashioned approach to teaching.

¶11 The first four remain quite relevant, however. Active learning strategies still take more time to cover the same content as passive instruction, and class time is, if anything, scarcer. This has led many to adopt a hybrid model in which some traditional lecturing is used to ensure that students at least have passive exposure to the material, and then active learning is used to improve comprehension and engagement. While this hybrid model has several attributes to recommend it (which are discussed later), the specific rationale of using lectures to ensure “coverage” of the material in the allotted time is misguided. Despite the concerns that active learning takes too much time, it seems to be more efficient in terms of how much knowledge or skills students can acquire in a set time.

¶12 The Langdellian method has complicated the adoption of modern active learning techniques in part because it anticipated them. While other academic disciplines in higher education have relied primarily on lecture, law schools have been relying on a combination of lecture and Socratic questioning for a century, allowing instructors some of the benefits of student engagement and instant evaluation of understanding that prompted the shift to active learning in other disciplines. Because of that, and perhaps because of a relatively conservative pedagogic culture, the shift toward incorporating additional kinds of active learning techniques in legal education has been slow. While other areas of education, particularly early childhood education, were making

5. Bryan Alexander et al., Educause Horizon Report: 2019 Higher Education Edition (2019). Of colleges surveyed, 76 percent either have or are in the process of making “active learning classrooms” or classrooms with furniture layout and technology designed to aid in active learning exercises.

6. A study conducted by the University of Minnesota’s Center for Educational Evaluation compared learning outcomes between chemistry students who attended lectures with approximately 300 peers three times per week with chemistry students who met in a smaller active learning classroom once per week. Based on the literature, it is likely that the most popular paradigm for incorporating active learning in the legal research classroom is the “flipped classroom” model, where passive learning like readings and recorded lectures are assigned as homework, and active learning tools like exercises and assignments are completed in class. The active learning group watched recorded lectures outside of class and worked on problem solving in class. Despite having one-third of the class time, the second group performed at least as well on standardized tests at the end of the course. Teaching in an Active Learning Classroom (ALC), Univ. of Minn., Ctr. for Educ. Innovation, https://cei.umn.edu/teaching-active-learning-classroom-alc [https://perma.cc/Z7LS-C98V]; Paul Baepler et al., A Guide to Teaching in the Active Learning Classroom: History, Research, and Practice (2016).

the shift to active learning in the 1960s and 1970s, by the early 1980s defenders of
Langdell were only just willing to concede that law professors should acknowledge the
downsides of the culture of legal education.8 The conclusion of Steven Alan Childress's
1982 article in defense of a kinder, gentler Socratic method amounts to a rebuke of
Machiavelli, offering suggestions for softening the instructor's approach so that "the law
professor will be able to enter the search [for legal truths] as a leader who directs by
respect, rather than by fear."9

¶13 By the end of the decade, there were explicit calls to adopt some forms of active
learning in legal education.10 Critics of Langdell have pointed to the method's shortcomings in student engagement, lack of diversity in learning styles, unnecessary and counterproductive stress, unequal success with female and minority students, and other complaints. As a result, despite legal education's conservative bent and glacial rate of change, advocates have proposed and explored alternatives, including active learning.11 Advantages of active learning abound, from more engaged, less frightened students to greatly increased opportunities for casual assessment, which addresses the long-standing complaint that far too much student evaluation in legal education rests on a single exam at the end of term, putting undue stress on students and limiting their ability to adapt to feedback.

 ¶14 Another critique of the Langdellian model is that the Socratic method, with its basis in argumentation and adversarial discourse (a feature that has also been celebrated), teaches students that truth is equivalent to victory and reinforces a view of the law that sees only winners and losers while ignoring that much of the practice of law relies on collaboration.12 Setting aside normative questions about what view of legal truth instructors should seek to instill, we have better methods of achieving student understanding.

 ¶15 Scholars debated the relative merits of Langdellian instruction and newer techniques throughout the 1990s,13 but by the aughts, the conversation shifted toward

9. Id. at 354.
exploring instructors’ experiences with implementing active learning.\textsuperscript{14} Perhaps coincidentally, this is also when instructional technologies began to see wider adoption and made it easier to bring a variety of active learning techniques to the classroom.\textsuperscript{15} Based on the literature, it is likely that the most popular paradigm for incorporating active learning in the legal research classroom is the “flipped classroom” model, where passive learning such as readings and recorded lectures are assigned as homework, and active learning tools like exercises and assignments are completed in class.\textsuperscript{16}

\textsuperscript{16} By the middle of the 2010s, the conversation on legal education had almost caught up with the broader trends in higher education. Now the discussion was whether using class time to practice skills was the future of legal instruction.\textsuperscript{17} The COVID-19 pandemic has only emboldened those who want to rebuild legal instruction from the ground up.\textsuperscript{18}


Benchmarks for Learning: AALL Principles and Standards for Legal Research Competency

¶17 In designing a legal research course, an instructor must base decisions about which topics to cover, and how thoroughly to cover them, on several factors. Some of these are pedagogical concerns: choosing learning goals for the course and its individual lessons, for example, and creating benchmarks against which to measure students’ progress toward these goals. Other factors depend on external differences that vary class to class: the diversity of student needs, for example, or what resources are available to the instructor in crafting exercises and assignments.

¶18 Law librarians provide instruction on a large range of topics, from bibliographic citations, to advanced or specialized legal research, to subject-specific legal sources. Fortunately, a starting point for developing learning goals exists: the Principles and Standards for Legal Research Competency (PSLRC) adopted by the American Association of Law Libraries (AALL) in 2013 and revised in 2020. These standards aim to provide a comprehensive description of the legal research skills and knowledge needed to be competent in any form of legal practice, and therefore every instructional session with a legal research component should seek to instill or improve on at least one of the standards.

¶19 The PSLRC identifies five traits, or principles, that a successful legal researcher should demonstrate:19

I. [P]ossesses foundational knowledge of the legal system and legal information sources, including analytical tools.
II. [G]athers information through effective and efficient research strategies.
III. [C]ritically evaluates information.
IV. [A]pplies information effectively to resolve a specific issue or need.
V. [D]istinguishes between ethical and unethical uses of information, and understands the legal issues associated with the discovery, use, or application of information.

¶20 These principles graduate from basic bibliographic knowledge in Principle I to full synthesis and meta-analysis of process in Principle V. In the context of a full course of legal research instruction, such as an advanced legal research course, it often makes sense to focus on these principles chronologically over the course of a semester or school year because each principle builds to some extent on the principle before it. For example, students cannot gather information effectively and efficiently if they are completely ignorant of information sources. That said, learning is not linear, and in practice, students gather proficiency in multiple levels simultaneously. Even expert researchers

frequently improve on Principle I, as they keep up to date on changes in legal information sources, such as a recently published monograph or new commercial databases.  

¶21 Within each principle, a set of standards describes the ideal behavior of a legal researcher. Each standard is further broken down into a set of competencies, which are specific pieces of knowledge or skill that a researcher should possess to meet each standard. The principles describe at a high level what successful legal researchers do, and the competencies drill down to identify the specific things that an instructor can teach and assess. Indeed, the competencies can easily be used to generate learning outcomes for a class session or exercise.

¶22 Nicole Downing, Anupama Pal, and Theresa Tarves observe that because the principles describe different levels of cognition and skill, different methods of assessment are more suitable for each.  

As an example, assessing written research plans and logs is most effective when assessing a student under Principle II since logs and plans primarily measure the efficacy and efficiency of the strategies students choose. One can gather some information about students’ knowledge of bibliographic resources (Principle I) from a research plan, and a research log with notes may give clues as to how students evaluate the information they find (Principle III), but clearly this is an example of an assessment that provides the most insight into students’ growth in Principle II.

¶23 This is a key insight, but it can be taken further. By diving down to the level of specific competencies, instructors can focus exercises on specific pieces of Principle II that students typically struggle with or that might be neglected by research logs. Focusing on these atomized pieces of the larger goal of “gather[ing] information through effective and efficient research strategies” allows the instructor to target sticking points very effectively and in a way that is sensitive to the time constraints of a course. While an ideal legal research course would allow infinite time to instruct and practice, the reality is that even the luckiest instructors must make difficult decisions about what they can cover and in what depth. Research logs are an excellent exercise and assessment tool, but they take a lot of time to make, which limits students’ ability to improve over time.

¶24 Take as an example Standard C from Principle II: “An information-literate legal professional confirms and validates research results, incorporating existing work product and expertise.” Within this standard are four competencies:

1. Understands the necessity of validating case holdings through the use of citators or other citation-based methods of updating case law.

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20. It is worth acknowledging, too, that even completely novice legal researchers begin with some ability to evaluate ethical issues involved in the use of sources of legal information.


22. Id. at 16.

23. PSLRC, supra note 19.

24. Id.

25. Id.
2. Analyzes research results using prior knowledge and experience on the topic in particular, as well as one’s general knowledge of legal principles.

3. Recognizes the benefits of requesting assistance from knowledgeable individuals and consulting an institution’s knowledge management system.

4. Understands when to stop the research process.

One could design a course so that students could practice these competencies in a single research log exercise, but that is a lot to expect from a single, difficult-to-repeat exercise. Linking individual competencies to smaller, separate exercises gives the instructor more control over when and where the competencies are practiced and reinforced, and gives the student more for prompt feedback and correction.

For example, to help students understand the first competency, the instructor has several options. The learning outcome might be expressed as something like “the learner should be able to identify the ways to check currency on cases, statutes, and regulations.” Exercises that support that goal would include multiple-choice questions, student demonstrations, and checking currency on a list of citations. Each of these examples takes much less class time and student effort than putting together a research log, and each offers the opportunity for prompt feedback and correction.

These exercises also present an important opportunity to practice these skills in the context of different types of research questions. One of the most common questions from students—and most stressful competencies to acquire is, “understanding when to stop the research process.” This is difficult for all researchers at one point or another, but it is not equally difficult for all research questions. Assume that the legal researcher’s task is determining how a statute defines a term. The terminus is straightforward (assuming that this is the full scope of the researcher’s question). If the term is defined in the statute, then the researcher can make sure the statute is up to date and be satisfied that nothing more needs to be done. This allows the student to experience the most elementary version: successfully retrieving a known document and extracting relevant information from it. If instead the instructor jumps straight to one of the more difficult kinds of problem, such as researching case law in a legal writing problem specifically chosen for its ambiguity, students do not have a chance to develop competency over time as they tackle easy questions and then harder and harder questions. Some may be left with the impression that all legal research questions are fundamentally endless.

So, by including a quick exercise that asks students to retrieve a case and check it for currency, students get to practice several competencies in a context where the answers are relatively straightforward for beginner researchers still developing both subject and bibliographic knowledge. Either success or failure on this exercise gives the student valuable experience and instructors immediate feedback on student understanding, which can be used to modify teaching plans as needed. This approach puts students in a better position both to succeed in a larger research log assignment and to gain more from it. Having tackled the competency first through easier, individual

26. Id.
assignments, they can build on their successes and learn from their failures in understanding when to stop the research process.

¶29 Therefore, when designing exercises with the goal of helping students improve in the PSLRC, there are kinds of exercise that are particularly suitable to the different principles. But a wider set of exercise types can and should also be used to supplement these primary exercises, and an instructor should consider and select these exercises in the full context of the course.

Considerations for Improving Active Learning Exercise Design

¶30 Beyond making decisions about what material to cover, an instructor must craft and present in-class exercises that help students progress toward their learning goals. Every experienced instructor knows that some exercises work better than others, although figuring out why is not always easy. And the field of exercise creation largely occupies the domain of educational apprenticeship, with instructors informally guiding one another and drawing on their own experiences as students to determine what works best. Some research, however, does suggest factors to consider when drafting and revising in-class exercises. These considerations are related to the form the exercises might take, as well as stylistic elements that might make a difference in learning outcomes. Some elements can enhance learning, while others can help to avoid problems that make exercises less effective.

Humor

¶31 When drafting exercises, humor is often an afterthought or perhaps used spontaneously with no thought at all. But it can serve several purposes, such as helping students learn, making the class more engaging for students, and making teaching more enjoyable for the instructor.

¶32 Researchers have long investigated whether humor can improve student learning. In 1977, Robert Kaplan and Gregory Pascoe published the results of a study in which they divided 500 students into groups, with one group receiving a serious lecture and the other three receiving variations on a “humorous” lecture, covering the same content but with (1) humorous examples based on the content of the lecture, (2) humor unrelated to the content, or (3) a combination of the two types of humor. A test administered immediately after the lectures found no difference in how well students understood the material, but a retest administered after six weeks found that those students who heard the humorous lectures did slightly better. There was no significant difference between those who heard lectures that used humor related to the concepts being discussed and those where the humor was unrelated.


A similar study was conducted in 1988, with students who received the humorous versions of lectures in statistics and psychology performing better in testing than peers who heard humorless versions of the lectures. Researchers have replicated the effect in many teaching contexts, but even though many studies have found statistically significant effects, they are usually minor. The reason for the conflicting results may be due partly to how difficult it is to study humor in a classroom setting. The task is deeply subjective, and each study can report on only how a specific set of jokes worked. Furthermore, researchers have identified a plethora of types of humor and contexts in which humor can be used, and each can be well executed or poorly executed.

If an overview of the literature suggests humor provides a small but real benefit to information retention, it has much more to say about how humor improves the experience of learning. Evidence suggests that humor can lead to a more positive classroom environment, encourage student involvement, improve student attention, foster cognitive development, help manage undesirable behavior, improve self-confidence, and enhance the quality of students' and teachers' lives. Those concerns should always be important to teachers, but they may be more important in a law school context than most. Humor helps ease anxiety, which most law students have in abundance.

While there is no strong evidence that humor bolsters law student performance, researchers have found that it improves law student well-being. Humor is uplifting and

31. An analysis by John Ziegler of the studies that had been conducted on medical students found that some studies showed learning benefits while others did not. As a result, he concluded that humor should be only a minor consideration in that context. John B. Ziegler, Use of Humour in Medical Teaching, 20 MED. TCHR. 341 (1998).
32. See James H. Wandersee, Humor as a Teaching Strategy, 44 AM. BIOLOGY TCHR. 212 (1982); William E. Kelly, Everything You Always Wanted to Know about Using Humor in Education but Were Afraid to Laugh (1983).
34. Adele Bergin & Kenneth Pakenham, Law Student Stress: Relationships Between Academic Demands, Social Isolation, Career Pressure, Study/Life Imbalance and Adjustment Outcomes in Law Students, 22 PSYCHIATRY, PSYCHOL. & L. 388 (2015) (finding that most law students reported “moderate” to “extremely severe” symptoms of depression (53%) and anxiety (54%)); see also Stacey L. Bowers, Library Anxiety of Law Students: A Study Utilizing the Multidimensional Library Anxiety Scale (2010) (finding that law students have moderate levels of “library anxiety”). Anxiety has a complex relationship with academic performance in law students, but it is highly correlative with the high degree of mood disorders observed in law students, and it is also related to the satisfaction students have with their courses. Debra S. Austin, Killing Them Softly: Neuroscience Reveals How Brain Cells Die from Law School Stress and How Neural Self-Hacking Can Optimize Cognitive Performance, 59 LOY. L. REV. 791, 825 (2013); Paul Campos, The Crisis of American Law School, 46 U. MICH. J.L. REFORM 177, 214 (2012).
35. A study that investigated the relationship between law students’ first-year grades and their LSAT scores, undergraduate GPAs, and scoring on an anxiety inventory found that only the LSAT had statistically significant predictive value. Rolando J. Díaz, Cognition, Anxiety, and Prediction of Performance in 1st-Year Law Students, 93 J. EDUC. PSYCHOL. 420 (2001). Another study that looked at the effect of giving students
socially beneficial, and it seems to foster an environment that allows students to pay closer attention, enjoy class time, and relax enough to participate more. While humor does not cause learning, it creates an environment that promotes learning.36

¶36 As those who remember a beloved class clown might assume, humor is also a path to popularity.37 Teaching evaluations of instructors who use humor more often are higher than for those who use it more sparingly.38 Another benefit that flows to the instructor is that inserting a joke here and there breaks the tension of being the person in front of the room, and it can give feedback on how closely the class is attending to the lesson.

¶37 One big question remains: How might one incorporate humor into the classroom generally and in-class exercises in particular? One scholar’s advice is to start by slowly adding scripted jokes and feeling out how they land. As the instructor becomes more comfortable and confident in the reactions the jokes get, spontaneous jokes can be mixed in as well.39 Some natural humorists might think this advice applies only to those who are not already comfortable making jokes, but a degree of caution is prudent for us all. For a variety of reasons, some types of jokes do not work in class, thus erasing any social benefits.40

humorous exam questions versus serious ones found that those who received the humorous questions achieved slightly higher and had slightly reduced levels of anxiety, as measured by the State-Trait Anxiety Inventory. Michael A.R. Townsend & Peggy Mahoney, Humor and Anxiety: Effects on Class Test Performance, 18 Psychol. in Schools 228 (1980). Presented with a variety of humorous additions to classroom learning, a group of undergraduate students rated most as very effective or extremely effective teaching tools. Ronald Berk, Student Ratings of 10 Strategies for Using Humor in College Teaching, 7 J. Excellence in Coll. Teaching 71 (1996); see also Robert F. McMorris et al., Effects of Incorporating Humor in Test Items, 22 J. Educ. Measurement 147 (1985).


37. Harry G. Murray, Classroom Teaching Behaviors Related to College Teaching Effectiveness, in Using Research to Improve Teaching: New Directions for Teaching and Learning 21, 26 (J.G. Donald & A.M. Sullivan eds., 1985). In 1980, researchers looked closely at how humor was used in class lectures and how it effects teaching evaluations. They found that frequency of humor use was positively associated with student evaluation of teachers, but this primarily held only for male teachers, who used humor more often overall. For male teachers, more frequent use of humor was correlated with “superior delivery” and considered “more appealing.” Male teachers were rewarded for off-topic humor, while female teachers were punished slightly. Jennings Bryant et al., Relationship Between College Teachers’ Use of Humor in the Classroom and Students’ Evaluations of Their Teachers, 72 J. Educ. Psychol. 511 (1980). Subsequent research seems to show that this gender gap has improved in the intervening decades, but it is unclear how much remains. John A. Banas et al., A Review of Humor in Educational Settings: Four Decades of Research, 60 Commc’n Educ. 115, 125 (2011); Sarah E. Torok et al., Is Humor an Appreciated Teaching Tool? Perception of Professors’ Teaching Styles and Use of Humor, 52 Coll. Teaching 14, 18 (2004).


38 The jokes that were cited in the above studies were all on a spectrum between what might be called “dad jokes,” characterized by goofiness and puns, and New Yorker cartoon captions, where the intended response is more of a wry smile or a nod of appreciation. None of the humor mentioned would do well as stand-up comedy, and the lesson to take from that is that instructors should primarily use humor to create a casual atmosphere, ease tension, keep attention, and build rapport with students. The humor should never become the purpose of the instruction.

39 The most obvious caveat, but one worth reiterating, is that humor should not be offensive. It should not be at the expense of a group of people or crude or sexual in nature. A 1988 survey found that around 55 percent of law students had at least one professor who used offensive jokes in class, and some of the examples given are appalling. Academic culture has shifted significantly in the intervening 34 years with regard to issues of sex and gender, but instructors should be mindful that law school still has a reputation as an old boys club and should take every precaution against seeming to reinforce that perception.

40 Perhaps a less obvious caveat concerns the use of wordplay, particularly in exercises. This is especially true if any students in your class are not native speakers of English, who, even if they have excellent formal English, might lack familiarity with idioms or double meanings. These students might be more readily confused by ambiguous wording. When using puns, take extra precaution that the meaning of the exercise will still be clear to all. This also applies to sarcasm, certain forms of ironic speech, and metaphors, where nonliteral meaning can be difficult to parse for some students.

41 For the purposes of in-class exercises, humor can be added either in the introduction of the exercises or to the exercises themselves. If you make a joke when intro-

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42. Forms of humor that degenerate others are often called “hostile” or “aggressive” humor by researchers and are distinguished from other forms of humor including self-deprecating humor, which is seen as more appropriate. An anecdote from my law school experience adds some nuance: When I was in my second year of law school, a professor was discussing a property case in which multiple generations had died by suicide, and she made an off-handed wry remark about “bad genes.” A student took offense and voiced it during class. His objection was that it is misleading to attribute the acts to heredity and disparaging to those with relatives suffering from depression. I happened to be nearby when they continued their conversation after class, and the professor, in addition to apologizing, explained that depression runs in her family and she meant the remark as a kind of self-deprecating joke, not an attack on anyone else. In this case, both seemed to handle the conflict gracefully, but it serves as a caution against jokes that might be unintentionally seen to target others.
45. One way of incorporating humor that I have found very successful is reviewing the material in a Jeopardy! format. Graduate students considered this technique to be “highly effective.” Ronald Berk, Student
ducing the exercise, it should be made with the intention of creating a comfortable atmosphere for students as they begin working. If the humor is incorporated into the exercise itself, it should not detract from the clarity of what is being asked and should probably attempt to strike a tone of goofiness or absurdity.\textsuperscript{46} Incorporate humor with the purpose of putting students at ease, making lessons more engaging, establishing rapport, and having fun. Just be sensitive to humor that might distract from the content or undermine the relationship between instructor and students.

Gamification

\textsuperscript{42} Another popular framework for making content more engaging to students is gamification, which is the incorporation of elements of game design into nongame tasks.\textsuperscript{47} Put more straightforwardly, it is designing tasks using the same techniques that make games fun and engaging. This includes incorporating rewards for doing things right and a way to “win.” Gamification can be as simple as making in-class problems a race between groups (which may have advantages and drawbacks), and as sophisticated as creating a piece of software that mimics a video game but allows students to accomplish legal research tasks. The key is not the technology used but the gaming elements and how they are structured. Some examples of gaming elements are leaderboards, competition, collaboration, progress tracking, feedback, replay, extra challenges, rewards and badges, and game levels.\textsuperscript{48}

\textsuperscript{43} Some of these elements are related to triggering the reward centers of the brain, which improves engagement and enjoyment, while others are targeted at keeping the level of difficulty appropriate to avoid discouragement.\textsuperscript{49} All of these are core to the instructor’s goals when designing in-class exercises. Some of the elements are also social, such as collaboration and competition, which can encourage participation and group learning, which is helpful to metacognition.
¶44 A feature that is at the heart of gamification is that it is artificial.50 “Artificial conflict enables the use of abstraction and gives players permission to fail.”51 All in-class exercises, except perhaps some related to law clinics, are artificial in that they are not real legal tasks with real-world outcomes, but the level of artificiality of games is that they also do not have real consequences in the class. They are exercises with an internal reward structure, which gives students license to fail and explore. This is where “replayability” and feedback come in. In many teaching exercises, students find out they got a question wrong from the instructor, meaning that they in some sense fail without a chance to try again and succeed. If instead an in-class exercise allows students to find out whether their answer was correct and to try again if not, they have more opportunities to practice the skill, and it is more likely that they will reach the reward state that encourages them to keep going.

¶45 Another important element is game levels. This article has already talked about skill acquisition in terms of building on basic skills and then developing more sophisticated ones, but traditional exercises present skill acquisition as a ladder the class climbs together. Students who miss a rung are, at the very least, in a more difficult position as the class moves to the next one. Gamification can provide a way to allow students to “level up” at their own pace and not move on to higher levels of skill until they are ready to succeed there. It allows them to earn their “terms and connectors” badge before attempting to earn their “find a relevant case” badge.

¶46 This extends the theme already set out in the discussion of active learning, where it is not enough to cover material, when the goal is for students to master the material. Active learning is a step in that direction, where students engage actively and stand a better chance of attaining mastery, but gamification points to a further step, where the learning is also individualized, and forward progress requires skill acquisition. This self-guided skill acquisition is accomplished with tight feedback loops. While the traditional Langdellian instruction allows for feedback after being called on in class and when receiving a final grade, and traditional in-class exercises offer feedback at the end of each exercise when the instructor goes over the answer, gamified exercises should offer near instant feedback and the opportunity to attempt again.52

Challenges

¶47 Despite the theoretical promise of gamification, there are several serious challenges to consider. The first of these is upfront work. Creating gamified exercises takes a lot more time than creating traditional exercises, largely because implementing the possibility of retrying skills involves providing several variations so that students can meaningfully attempt a task again. There may also be considerable effort involved in

51. Ferguson, supra note 48, at 634.
52. Kapp, supra note 50, at 36.
setting up a system wherein students can perform the tasks with all the desired game elements.\textsuperscript{53} Another hurdle is class time. A fully gamified exercise will allow students to make repeated attempts until they master each skill, but the time that takes may vary significantly from student to student, creating issues with pacing.

\textsuperscript{48} Gamification also involves simplification, which may abstract it away from the real experience students are being trained for.\textsuperscript{54} Some have criticized this aspect, but it can also be advantageous in teaching early skills. For example, it may be useful for students to practice terms and connector searching in a simplified environment before taking on the more complicated and challenging task of doing case law search in a professional legal database. All exercises simplify and simulate to a degree, but it’s likely true that there’s a limit to how realistic a legal research game can be given practical limitations.

\textsuperscript{49} Finally, legal research skills largely rely on language skills, including reading and writing, which may not be as conducive to the more visual features of software games.\textsuperscript{55} This may detract from some of the engaging features gamification relies on, but there are plenty of examples of language-based games to draw inspiration from. Even adding some gaming elements to a legal research exercise can serve an instructor’s purpose in some contexts.

\textit{Gamified Legal Education}

\textsuperscript{50} Legal educators have been experimenting with adding elements from games to their classroom for a long time,\textsuperscript{56} and as noted, even before “gamification” became a topic in education,\textsuperscript{57} “many law degrees already incorporate such ‘games’ into value-added activities for students (such as through mooting and mock trials), with some schools also using them as assessments.”\textsuperscript{58}

\textsuperscript{51} In 1994, Perry M. Goldberg and Marci Rothman described a board game they created to give their students practice with research skills and provide more sustained context for legal research tasks than is typical for in-class exercises.\textsuperscript{59} The game was to

\textsuperscript{53} Several current options available to instructors are found here: https://academictech.uchicago.edu/2021/11/23/introduction-to-the-use-of-gamification-in-higher-education-part-1/ [https://perma.cc/XMX8-NX64]

\textsuperscript{54} Begoña Gros, Digital Games in Education: The Design of Games-Based Learning Environments, 40 J. Rsch. on Tech. Educ. 23 (2007).

\textsuperscript{55} “In most cases, language plays a secondary role in a game. On the contrary, in Law discipline language plays a very central role.” Vassiliki Bouki et al., Gamification and Legal Education: A Game Based Application for Teaching University Law Students, in 2014 International Conference on Interactive Mobile Communication Technologies and Learning 213, 214.

\textsuperscript{56} Bryan Adamson et al., Can the Professor Come Out and Play? Scholarship, Teaching, and Theories of Play, 58 J. Legal Educ. 481, 498 (2008); Ferguson, supra note 48; Jennifer L. Rosato, All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom, 45 J. Legal Educ. 568 (1995).

\textsuperscript{57} “Gamification” as a term came into wide use around 2010. See Bouki et al., supra note 55, at 216.

\textsuperscript{58} Pieter Koornhof, A Narrative-Based Game That Can Be Used as an Assessment Tool in Law Teaching, in Games, Simulations and Playful Learning in Business Education 69 (2021).

\textsuperscript{59} Perry M. Goldberg & Marci Rothman Goldberg, Putting Legal Research into Context: A
be played in a law library, and students were given one out of a set of projects: (1) defending Hidden Danger Aeronautics against a design defects claim; (2) saving the Beach Mouse habitat on behalf of the Small Furry Things Protection Association; (3) prosecuting Joe Employee’s case against Big Brother Corporation under the Employee Polygraph Protection Act; (4) helping Don Malay keep custody of his two children who have been kidnapped by their mother; or (5) representing John A. Theist in his attempt to stop a public school teacher’s proselytizing in the classroom.60

¶ 52 The projects were designed to require students to research various types of federal law and draw conclusions. Though the game predates the PSLRC, it anticipates the building nature of research skills from bibliographic knowledge through the application of skills and the creation of work products. Students received research points for completing tasks, and there was a success condition: by receiving enough points, students earned an offer of permanent employment.61

¶ 53 More recently, Nancy Vettorello undertook a similar exercise by seeking to modernize the traditional scavenger hunt exercise.62 The hunt took place over the course of the whole academic year, with specific tasks added during slower periods in students’ curriculum. Students were allowed to choose which problems they would participate in, and answers were submitted by email, like an informal assignment in practice. She found that students were highly motivated by the game, with well over half choosing to participate when it was offered as an optional activity, and with students going above and beyond what is typical for in-class exercises, including contacting government agencies to gather information.63 By presenting it as a challenge, allowing students to compete with one another, and giving students agency over how (and whether) to participate, the exercise created enthusiasm while giving students a chance to practice research skills in a number of simulated contexts.

¶ 54 Other legal educators have ambitiously adapted elements from role-playing games into the classroom. These elements include complicated storytelling, with branching logic like some video games,64 and prolonged storytelling that continues from one class period to another.65 All of these elements can be used to create an engaging and motivating environment like those created by game designers.

Emotional Design

¶ 55 Much like gamification, the concept of emotional design has made its way from product design to educational theory. Donald Norman popularized the term

Nontraditional Approach to Teaching Legal Research, 86 LAW LIBR. J. 823 (1994).

60. Id. at 824 (note also the humor embedded in each topic).

61. Id. at 825.


63. Id. at 215.

64. De Aizpurua et al., supra note 49.

“emotional design” in his 2004 book, though many of the core concepts were already being studied in an instructional design context. Research supports the positive effects of designing for emotional components within the educational context. Two reliable strategies emerge: Make media pleasant to look at, and humanize it.

In practice this means choosing pleasing colors and fonts—bright, cheerful colors and readable fonts, for example—and include graphics where appropriate that either anthropomorphize concepts or depict relevant characters in a fact pattern or example. The goal, as with humor, is to have the design of multimedia materials contribute to a calm, enjoyable environment in which to learn and to thereby decrease cognitive load and prepare students to absorb the information. Legibility is key, so avoid decorative fonts that are hard to read or color choices that could hinder sight-impaired or color blind learners. It might make sense to have someone in the library with experience making attractive graphic design items like promotional material create the templates, or this job could be outsourced to a designer outside of the library.

Humanizing elements mostly need to be added in a contextually appropriate way, but by including public domain photos or artwork to exercises, instructors can trigger parts of the brain that create social connections, thereby making the exercises more engaging. While these effects have been well documented as being statistically significant, the effect sizes are not large. Therefore, make these considerations secondary priorities that can be dispensed if resources are limited.

Mindset

A large body of research indicates that a student’s ability to learn is mediated by what Carol Dweck terms “mindset,” of which she identifies two types: growth and fixed. In the first, the student believes that performance offers an opportunity to grow; in the second, the student believes that performance measures innate ability. Mindset theory divides students, and people generally, into “incremental theorist” who believe traits such as intelligence, strength, kindness, or social acumen are fixed qualities that define who they are (fixed mindset) and incremental theorists” who believe those traits can be

69. Mayer & Estrella, supra note 68.
70. Consider the bill character from Schoolhouse Rock! and note how long that character has remained in the popular imagination.
71. See Mayer & Estrella, supra note 68.
72. Id.
73. Id.
changed (growth mindset). These mindsets fall along a spectrum, meaning people incorporate both mindsets to some degree. Few would believe, for example, that no amount of running practice could make them faster or that predispositions to a trait are nonexistent. It is also true that these mindsets are themselves flexible, and just as a willingness to help others can be affected by a subtle reminder of the concept of money, mindset can also be changed, including temporarily. For example, children who are praised for their intelligence on one problem tend to internalize the idea that the problem is a test of their innate qualities. As a result, they will do less well on the second problem than students who are praised for their effort and who have therefore received the suggestion that further effort will lead to continued success.

¶59 Mindset theory raises whether an instructor can use phrasing and presentation of exercises to affect students’ mindsets and therefore their performance. There are a variety of established suggestions for legal educators seeking to improve the mindset of students in the classroom, often framed in terms of student enthusiasm, participation, or stress reduction. Marybeth Herald gives several suggestions derived from psychology to improve the mental state of students in the classroom. These suggestions focus on teaching students about psychological research and allowing them to put the lessons into practice consciously rather than having the instructor implement the findings into the curriculum. Some suggestions are more practicable than others. For example, Herald notes that science shows that posture greatly influences mental state, hormone balance, and behavior, and suggests that educators can help students apply this by introducing the concept of power poses early in the course in the context of expectations regarding student participation. While it may be a questionable use of class time to discuss posture, it may be worth including the topic in other contexts, such as guides to succeeding in law school or discussions about interview preparation, which is one of the original contexts of “power posture” research. As Herald notes, it is also a body of research that supports the broader theme of how changing students’ contexts can have important effects. “Power poses are an example of the larger point that expectations—both our own and others’—can guide performance.”

¶60 Herald’s other suggestions include teaching students to frame nervousness as excitement. Psychologists have noted that physiologically, nervousness, and excitement are extremely similar, and perhaps the primary difference between them is the narrative overlay we put on the same set of emotional responses. If a student is preparing to speak


77. Id. at 745; Dana R. Carney et al., Power Posing: Brief Nonverbal Displays Affect Neuroendocrine Levels and Risk Tolerance, 21 Psychol. Sci. 1363, 1366 (2010); Amy J.C. Cuddy et al., Preparatory Power Posing Affects Nonverbal Presence and Job Interview Outcomes, 100 J. Applied Psychol. 1286 (2015).

78. Herald, supra note 76, at 745.
in front of class and feels butterflies in her stomach because of the adrenaline her body is releasing, her ability to perform well may depend on whether she tells herself that she is feeling fear at the possibility of failure or excitement at the prospect of performing a new task. The fight or flight response is physically the same up to the point of the mind deciding which option to take, and the difference between stage fright may depend in large part on self-talk.

¶62 A growth mindset is fundamentally an attitude where abilities are mostly determined by effort, and they can be improved to a significant degree through practice and training. In contrast, a fixed mindset holds that abilities are primarily innate, and performance on a task reflects a fixed characteristic. Students with fixed mindsets take mistakes as personal failings that indicate low potential. They tend to be less likely to seek out challenges or participate in situations that could result in failure, particularly public failure. A fixed mindset is also associated with depression\(^79\) and impostor syndrome\(^80\), both of which are common in law students.\(^81\)

¶63 Clearly, then, there is strong reason to prefer a growth mindset, and there are several aspects of this that can be addressed in a classroom. First, it is effective to directly teach students that effort is rewarded. This can be done by describing the nearly universal progression from unsophisticated legal researcher who struggles to find relevant cases to experienced researcher who can (usually) master a new area of law confidently. Managing students’ expectations about their own skills and the process of acquiring new skills implicitly supports a growth mindset. It is also effective to describe growth and fixed mindsets, tell students about the relative characteristics of both, and reassure them that mindset is plastic. In a sense, this produces a growth mindset with regards to mindset.

¶64 It is also useful to address tangential aspects of mindset, and this is a tactic Herald advocates. One recommendation is to teach students to embrace mistakes.\(^82\) This is both an attitude typical of growth mindset and a necessary skill for anyone endeavoring to master a difficult skill. By seeing mistakes as evidence of effort and opportunities for growth, students will try harder, be more likely to participate, and be less likely to interpret mistakes as evidence of their own lack of aptitude.

¶65 A final suggestion from Herald is to reassure students that their failures are not being judged nearly as harshly by their peers as they fear, which is a fact confirmed by

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The Langdellian method of legal instruction has been hotly discussed since its invention, and there are many who speak of its virtues, including the idea that Socratic questioning of a law student in front of her peers is training for performing under similar scrutiny in front of a courtroom. Whatever the merits of that high-pressure, highly scrutinized classroom experience, it is also true that it can impede learning until the student learns to suppress the spotlight effect, which results from our innate tendency to falsely project the level of attention we pay to ourselves onto other people, making us estimate that they pay us a great deal more attention than is accurate.

The spotlight effect is not directly associated with mindset, but it can certainly exacerbate the stress of a student in a fixed mindset. Not only do they believe mistakes are being noticed and remembered, they might imagine they are also being used as a basis for judging innate ability. Reassure students that neither their instructors not their peers are inspecting their performance for signs of predestined professional outcomes. Help them recognize the degree to which others forget their mistakes, which can liberate them to apply themselves openly and thrive.

In addition to these valuable suggestions, it is worth exploring how the precise way legal research instructors present exercises might carry implications for students that prime them for certain outcomes. An exercise that is presented as trivial, which it may be to the librarian teaching it, might lead to distress for a student who struggles with it. The amount of time allotted to students to complete an exercise can similarly signal how an instructor expects students to perform. Introductory clauses like “see whether you can find . . .” or “see whether the database had . . .” provide subtle signals as to the purpose of the exercise, with the former emphasizing the element of student evaluation and the latter emphasizing the exploratory nature of the exercise.

Surprisingly little empirical scholarship examines the precise formulation of homework and in-class exercises. While researchers have devoted great energy to mapping the topography of the content to be taught, modeling of how learning occurs, and inventing general techniques for helping students acquire knowledge and skill, it is generally left to instructors to draft the specifics with little technical guidance, despite the evidence suggesting that the minutiae of implementation can have important effects on how students learn. It is understandable that scholars have focused on higher-level modeling since they apply more generally to the tasks teachers undertake, but it is unfortunate that there has not been a more systematic attempt to guide the implementation of these theories.


Priming

¶69 Researchers have demonstrated many examples of how small, seemingly trivial changes in how questions are presented can significantly change the responses they receive. An important concept in this research is priming, which refers to our mind’s predisposition to think in one direction or another based on whatever stimulation it has recently received, without being consciously aware of the influence. Priming can take many forms, and in psychology there is an intricate taxonomy of classes and subclasses of priming effects. A few are particularly relevant in educational design. The two major categories of relevance here are positive and negative priming, which refer to primes that result in faster and slower mental processing, respectively. A positive prime is one that enables subjects to complete a cognitive task, such as word matching or pattern recognition, faster than they would without the prime. This is thought to be caused by activating relevant associations or memories, making them more accessible for cognition. Negative priming slows cognitive tasks below what the subject would experience without any priming, and it is usually explained as resulting from activating confusing or confounding associations or memories. While the foundational research on priming typically involves simple, easily measurable tasks like word association or logical problem solving, it can be extrapolated to much more complicated cognitive tasks such as those that students are asked to complete in a legal research setting.

¶70 One illustrative thread that is particularly sobering is related to stereotype threat, or the phenomenon of succumbing to a stereotype concerning a group to which one belongs or fearing to succumb to it. Students who are reminded of their membership to groups with positive or negative stereotypes for academic achievement tend to see their performance change to correspond to that stereotype. If you include a set of checkboxes at the top of a test asking students to identify their ethnic background, Black students will be negatively primed and perform significantly worse on the test than they would otherwise, apparently because their expectations of their own abilities are undermined by the reminder of group stereotypes.

¶71 If researchers give a math test to two randomly selected groups of Asian girls, and tell one group that they are studying the performance of Asians on math tests and the other group that they are interested in how well female students perform, the group that believes it is being tested as “Asian” will be positively primed and do better than a control group, and the group that believes it is being tested by its gender will be negatively primed and do worse.

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86. Margaret Shih et al., Stereotype Susceptibility: Identity Salience and Shifts in Quantitative Performance, 10 Psychol. Sci. 80 (1999). But see Sapna Cheryan & Galen V. Bodenhausen, When Positive Stereotypes Threaten Intellectual Performance: The Psychological Hazards of “Model Minority” Status, 11 Psychol. Sci. 399 (2000) (finding that if positive stereotypes are primed in a way to increase pressure on students, it can lead to a counterproductive choking effect).
Primes do not need to be this explicit, either. Subjects asked to answer a set of hypothetical questions about moral decisions while in the same room as a computer with a picture of money as the screensaver will be less likely to say that they would go out of their way to help others (or to ask for help themselves). Merely being in the same room as an image of money changes people’s moral reasoning by a measurable degree.\(^{87}\)

Priming effects could have implications for instructional design.\(^{88}\) Children who are introduced to a complicated toy interact with it in very different ways depending on what they are told about it. Children who are simply given a toy with many features explore it until they have discovered the range of things it can do, whereas children who are told of one of the features of the toy tend to focus on that feature to the exclusion of others.\(^{89}\) College students who are shown a photograph of The Thinker by Rodin performed better on a learning task than those who didn’t,\(^{90}\) and adults who were shown a photo of a woman running in a race before attempting to unscramble the words in a sentence performed the task faster than those who didn’t.

One might reasonably question whether there are differences between the way preschoolers interact with a toy and the way law students interact with complicated legal databases. In fact, researchers have found that the effective strategies for engaging creativity in learners becomes more sophisticated as learners age, developing from a pure play mode to a cognitive apprenticeship model,\(^{91}\) where the learner’s exploration is loosely guided by the instructor while allowing room for independent discovery. Nevertheless, the core negative relationship between instruction and exploration holds true. Students of all ages explore a wider variety of features of a toy or tool when left to discover without guidance than they do after instruction. The price of free discovery is inefficiency, which is a dear cost indeed in a classroom setting with limited time and a complex set of cognitive skills to master.

The other major consideration is that classroom instruction is not the only, or even the most important, impression affecting law students’ understandings and expectations regarding legal research. Many come into the classroom with preconceived notions of what legal research entails, how databases function, and what they expect to find, which means that their exploratory drive is already curtailed by out-of-class experiences. An instructor whose teaching strategy includes exploratory learning might be able to overcome this by giving general instructions to see what a database does or a broad mandate to catalog functions, but it is necessary to frame the exercise in a way that takes preconditioning into account. Further, exploratory learning at the level of law

89. Elizabeth Bonawitz et al., The Double-Edged Sword of Pedagogy: Instruction Limits Spontaneous Exploration and Discovery, 120 COGNITION 322 (2011).
students carries the risk that students will be overwhelmed by the plethora of options, particularly since they are operating in the high-stress environment of law school, or that they will simply not have the time necessary to explore sufficiently.

¶ 76 One somewhat related approach designed to balance these factors is the gamification of legal education. Gamification is not at all synonymous with the pure play model of education that refers to play undirected by an instructor, but it relies on adopting elements of game design in the curriculum, and one prominent feature of game design is an element of exploration. The exploration is curtailed by other elements, such as identified goals, competitive framing, and point systems.

Test Question and Survey Validation

¶ 77 Some fields outside of law have moved toward more empirical and precise theories of drafting and validation of tools to measure an audiences’ understanding. Two particularly relevant areas are the development of test questions for assessing learning and the design of surveys for assessing opinion, knowledge, and sentiment. In both fields, researchers have produced a robust science concerning how questions are constructed.

¶ 78 Much rides on the outcome of standardized tests, including school funding, college placement for students, and professional credentialing, the latter of which carries massive personal implications for test takers, whose livelihoods depend on passing tests. Society as well depends on these tests to ensure that the doctors who treat us, the engineers who design our bridges, and the lawyers who defend our interests are qualified to do so. As a result of these stakes, the precise form of standardized tests has been scrutinized by a variety of stakeholders, from school officials, to scholars concerned with bias, to students who question how well testing records their abilities.

¶ 79 Survey research is expensive to carry out, and the quality of the resulting data matters greatly to those who commission it. Consumer surveys are used to direct huge amounts of corporate spending on product development, production, and advertisement, and miscalculations can lead to disastrous business outcomes. Political surveys affect candidate selection and determine how enormous amounts of campaign dollars are spent, and the results of that spending have dramatic consequences for many stakeholders. Scientific surveys are closely scrutinized by peer-review boards, and lack of rigor can lead to failure to publish or even failure to complete doctoral programs.


95. Id.
Standardized Test Question Validation

¶80 While standardized tests and surveys have somewhat different goals than class exercises, they also have considerable overlap. In all cases, for example, accuracy and clarity are strongly emphasized. Studying what is known about test and survey validation teaches us a great deal about how to create effective exercises for legal research courses.96

¶81 It is disastrous if a standardized test question that has been put to millions of students turns out to be ambiguous or incorrect. Scholars and activists have scrutinized standardized tests for decades, pointing out cultural biases in the test, such as this infamous example:97

RUNNER: MARATHON
(a) envoy: embassy
(b) martyr: massacre
(c) oarsman: regatta
(d) horse: stable

¶82 Students who belong to demographics unlikely to take an interest in boating sports are less likely to know what a “regatta” is, and are therefore less likely to know that (c) is the correct answer. Test designers must also be concerned with avoiding ambiguity, such as implicit double negatives. Ambiguity can impair the ability of an exercise to help measure student understanding by confusing students who do understand the material. For example, consider the following survey question:98

Please tell me whether you agree or disagree with the following statement about teachers in the public schools:
Teachers should not be required to supervise students in the halls, the lunchroom, and school parking lots.
AGREE DISAGREE

¶83 This may seem like a perfectly clear question. It contains no grammatical errors, and the meaning of each sentence is reasonably plain. The problem emerges when considering the response. If you agree with the statement, the answer is straightforward. If you disagree, the sentiment you are being asked to produce is “I don’t think that teachers should not be required to supervise students in the halls, the lunchroom, and school parking lots.”

¶84 This is still a formally parsable question with a logically correct meaning, but the negative answer no longer seems plain and easy to understand. Now it takes a form that will confuse some test takers, thus producing inaccurate data. The lesson of this example, that one should avoid constructions with implicit double negatives, applies equally well to in-class exercise drafting (unless the exercise is intended to train

98. JEAN CONVERSE & STANLEY PRESSER, SURVEY QUESTIONS 13 (1986).
students to avoid that construction, such as in a class about drafting contracts or interpreting poorly constructed statutes). In this example, an instructor would need to consider not just the text of the question but also the sentence that each answer implies. Double negatives are only one sort of ambiguity. Designers of exercises must also look for words with ambiguous meanings. Two categories to know are homonyms, or similar words with divergent meanings, and polysemes, which are words with multiple, related meanings.99 These sorts of questions may fail to measure comprehension because they (accidentally) measure proficiency with the language or the ability to infer intended meaning from unclear language.

¶85 There is a robust literature on designing and validating survey assessments, which are known at the level of the individual question as “test items.” While not all in-class exercises are used for formal assessment, the research and theory behind developing high-quality test items apply in several respects. In-class exercises may share many goals, limitations, and other considerations with test items, even if their purpose is primarily pedagogic rather than evaluative. Both are typically meant to meaningfully represent a unit of knowledge to students and invite an active response.100 This means that both are deeply concerned with clarity of communication. An exercise is less effective if presented in a confusing way, just as a test item will not accurately measure knowledge if the correct answer is selected due to the ambiguity of the prompt.

¶86 Both are also concerned with fairness and bias, though this concern is manifested in slightly different ways. Evaluators seek to design test items that measure only the relevant knowledge or cognitive ability, and that are not affected by irrelevant differences among test takers, such as cultural background and disabilities. Instructors take similar considerations into account when designing exercises but can go further in proactively looking for ways to ensure that exercises are tailored not only to prevent students of different circumstances from being disadvantaged in evaluation but to actively account for those circumstances to improve learning outcomes.

¶87 There are concerns that do not overlap, however. Exercises have pedagogical concerns that test items do not, and test items have evaluative concerns that exercises do not. One major manifestation of this is that a good test item is designed to measure something discrete, ideally a “single type of content and a single type of cognitive behavior.”101 This makes it easier to create a valid evaluative tool since it removes the need to disambiguate between reasons for failure. A test item that requires too many concepts and cognitive tasks to reach a successful answer tells the assessor only whether all those conditions were met. It can make it difficult to identify points of failure or to distinguish between a test taker who made a trivial error and one who failed at many points. On the other hand, exercises may be designed to focus on one task, but they can

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often effectively include the synthesis of several tasks, particularly in-class exercises where an instructor is at hand to provide immediate feedback and guidance. If a student fails at an exercise, the point of failure can be disambiguated on the spot, and this process serves a pedagogical purpose as well.

¶88 Test items are divided into two sorts: selected-response and constructed-response, and exercises can be divided the same way. Selected-response test items include multiple-choice and true-or-false questions, where the correct response is provided as an option, and the test taker’s task is to select it. Constructed-response items cover all the variety of test items that require the test taker to produce a response spontaneously, including simple fill-in-the-blank, short-answer, essays, and skills performances. Constructed-response test items are sometimes referred to as open-ended, performance, authentic, and completion test items.102

¶89 All test items have three essential components: instructions, conditions for performance, and a scoring rule. In multiple-choice questions, there is an additional breakdown of individual items into stems, which is the statement of the problem, and alternatives, which are the provided answers the test taker can select from. Validity is “the degree to which evidence and theory support the interpretations of test scores entailed by proposed uses of tests.”103 A complementary definition can be extrapolated to hold that validity for exercises depends on the degree to which evidence and theory support the format of exercises in the context of desired learning outcomes.

¶90 There are many competing standards and guidelines for writing test items. Helpfully, Thomas Haladyna and colleagues compared 31 standards put forth by 27 sources to derive a consensus taxonomy for writing multiple-choice test items. These have been divided into topical groups, and those most relevant to exercise creation are discussed here.104 The first topical group is content-related, and several of these are useful considerations for exercises.

¶91 Each item should represent specific content and a specific mental behavior.105 It should also be tailored to learning outcomes written into the lesson plan.106 Applied to exercises, this rule can be tailored to stand for the proposition that each exercise ought to be designed to help students practice an identified skill. In addition, each item should be based on an important skill.107 Test questions should not focus on trivia, and neither should exercises. In the case of assessment, it is unfair to overly weigh materials that are of relatively small importance, and in the case of in-class exercises, it is a waste of time.

¶92 Test items should not reuse language used in lectures, readings, or demonstrations. Asking students to simply replicate what they have seen tests memory rather than

102. Id at 63.
103. AM. EDUC. RSCH. ASS’N, STANDARDS FOR EDUCATIONAL AND PSYCHOLOGICAL TESTING 9 (2014).
105. Id. at 312.
106. Id.
107. Id.
skill. Ideally, exercises should follow novel fact patterns. Trick questions and items based on opinion are counterproductive. These standards were both included in only a fraction of the sources surveyed, perhaps because they were considered obvious. But it is easy to default to increasing the difficulty by using confusing language or relying on a technicality, which is appropriate only if the technicality is an important, identified learning outcome that the exercise is designed to teach. Legal research often results in interpretive questions, such as how case law properly applies to a fact pattern, which reasonable lawyers can disagree on, and it is unfair to students to design exercises around one presumed interpretation. It may be appropriate to ask students explicitly to form their own opinion as an exercise in interpretation, but instructors should be careful in those cases that subsequent exercises do not depend on the instructor’s interpretation.

¶93 Be careful to avoid wordiness when writing test questions, as the likelihood of confusion increases with sentence length. An additional reason to seek brevity in exercise prompts is legibility on a projector if the exercise is not presented in a handout.

¶94 The stem of a multiple-choice question is most analogous to an exercise prompt, and two relevant standards apply specifically to the stem. First, a reemphasis on the importance of clarity. Any potential ambiguity can confuse students and make the exercise less successful and more time consuming than necessary. Second, it is important to word the stem positively. The reason for this is discussed above, and it applies more to multiple-choice questions where alternatives drafted with negative construction will create a confusing double negative, but negative constructions are still less stylistically clear than positive constructions and should be reserved for instances when the purpose of the exercises is to identify what to avoid or what is false.

¶95 Humor is considered inappropriate for formal testing situations for a variety of reasons, including the increased likelihood of confusion and stress, but because it serves valid purposes in the classroom, it should not be broadly discouraged. Nevertheless, it is worth carefully considering what purpose the humor is intended to serve.

Survey Question Validation

¶96 Surveys share with standardized tests a need for accuracy and precision with assessments, but they have some unique requirements, some of which may be relevant to instructional design. Surveys are by their nature designed around the statistical analysis that will be drawn from the data they provide, so many survey design considerations involve population data, response rates, sample sizes, and other factors that are not relevant to the classroom. Also generally relevant are rules of construction designed to correctly parse opinions, sentiments, and public knowledge in ways that are statistically useful. Other considerations are repetitions of standards used in test item design, such as admonitions to use simple, positive constructions and to be specific and precise with language.

¶97 Standards for survey design offer unique insight in two areas. First is the precision with which they seek to avoid leading questions and framing issues, and second is
their emphasis on pretesting. The first lesson to take from surveys is to be aware of writing unintentionally leading questions. Sometimes there are pedagogical justifications, however, for leading students to the correct answer. For exercises that introduce a concept and cognitive skill, providing an easy pathway to success through a leading question can quickly give students practical experience that is developed with subsequent exercises. But avoid, for example, using relevant legal jargon in an exercise prompt when the intended learning outcome is to identify relevant legal concepts from a fact pattern. Watch, too, for framings that either lead or confuse students, such as describing fact patterns in language that raises civil law implications when the correct response to the prompt is found in criminal law.

¶ 98 The second lesson to take from surveys is the usefulness of pretesting. Exercises should be tested on other librarians, student teaching assistants, or other qualified researchers who can help identify issues with the construction of an exercise before it is presented to students. Similarly, exercises that are intended to be reused should be closely evaluated after being used in class to identify issues that may have arisen, so they can be remedied before the prompt is used again.

¶ 102 Nevertheless, there is a lot of value that can be refined from this process. First, there are three general principles that appear in several steps in this process. First, have others review or test your exercises whenever possible. Researchers know that human error is inevitable, and it is easy for the person who wrote the test question to miss ambiguity; after all, the author knows precisely what the intended meaning is. Second, double-check that the exercise is well tailored for the intended learning outcome. A survey question that measures something other than what the researcher cares about can be a huge waste of resources, and so too with an instructor and class time. Third, revise as necessary. It is easy to commit to an exercise that isn’t helpful for achieving a learning outcome either because of the effort already expended on creating it or failing to consider that changes are always an option. If an exercise doesn’t work one year, it doesn’t make sense to repeat it without changes the following year. Similarly, if an instructor teaches multiple sections, revision between sections is fine if it doesn’t create ethical issues related to grading fairness.

¶ 103 By eliminating some elements of the survey validation procedure that aren’t well suited to legal research instruction, and refining some of those that are, we can arrive at something like the following:

1. Have a colleague review your exercise to make sure that it has clarity in both content and construction. The available expertise will vary from institution to institution, but ideally, someone in every workplace can familiarize themselves with some basic things to look for.109 Even without specific expertise in con-

struction validation, a second reader will often spot something the author missed.

2. Have a colleague or research assistant attempt to complete the exercise. This is a valuable step for several reasons. It can reveal problems with the exercise, such as ambiguity or infeasibility, which do not make themselves obvious during the initial drafting phase, and they can help set instructor expectations for how much class time an exercise is likely to take. Typically, an expert researcher will complete an exercise significantly faster than a novice, but research assistants may be more similar to the students and knowing how long it takes an expert provides a clue as to how long it will take in class. There is no set rule, as all exercises are different, but doubling the amount of time it takes the expert is a good place to start.

3. Formally evaluate the exercise after using it in class. Note how long it took students, as well as how varied their times to completion were. Note any questions or points of confusion that came up in class and whether they were related to the learning outcome the exercise was intended to address and make note of any other impressions. These notes are both educational for the instructor for future exercises, but they are also essential if the exercise is reused because they allow for more targeted revisions.

Putting These Considerations into Practice

§104 The previous sections present considerations for exercise design and explain why they are important. The purpose of this section is to imagine what using these considerations might look like in the real world. The first step is to place these tools into an orderly process. This will make it easier to know when to consider each one and how much weight to give it. The next step is to work through that process with real-world examples.

Ordering the Considerations in Exercise Design

§105 We can create an order of operations for considering the elements presented in the previous sections to help the instructor when designing legal research exercises. I propose creating exercises by taking the considerations in this order:

1. Identify learning outcomes for each class period.
2. Determine which outcomes to support with exercises.
3. Set the amount of time to devote to each exercise.
4. Choose an exercise type that is well suited to the desired outcome and time constraints.
5. Add elements of gamification, if possible.
6. Add elements of humor and emotional design.

[https://perma.cc/KW4N-YK2L].
7. Consider how to introduce the problem to set students up for success.
8. Check the problem for clarity and suitability using the methods of test question validation.

This ordering is not a ranking of the factors by importance. There are practical reasons to place some important considerations at the end. The point of this ordering is to consider each element at the time when it is most helpful to do so. The first two steps establish the content the exercise is targeting. The third and fourth steps are structural and establish what kind of exercise makes the most sense in the context of the lesson plan. Steps 5, 6, and 7 are ways of modifying the details of the exercise to make them more effective. The final step serves as quality control. It is best done after the content of an exercise has been developed, as a way of making sure no obstacles to learning are inadvertently making the exercise less effective than it could be.

The instructor’s priority is to make sure that the exercise is well suited to support the learning outcome it is supposed to address. Those learning outcomes will be based on the curriculum. The instructor can then identify which competencies from the PSLRC are relevant and what stage of knowledge students need to improve on in relation to those competencies.

The next priority, almost as important for in-classroom exercises, is making sure that students can complete the exercise in the time allotted in the lesson plan. An excellent exercise that takes up the entire class period won’t work if there is more material that needs to be covered. Duration is mostly a function of exercise type. If only a little time is available to devote to a specific learning outcome or evaluation, selecting exercises like polls or “spot the lie” questions can be time-efficient options. If the exercise supports all the intended learning outcomes of the class session, such as broad pretest review or synthesis of a series of research steps, then a longer exercise can be an excellent way to fill time effectively. Examples include a request for research and analysis of a question or a full round of Jeopardy! to review material before a test.

After these structural elements are addressed, the next step is to think more about the form of the content. The actual substance depends on the learning outcome, which can be anything from becoming familiar with sources of legal information to skills at identifying relevant legal authority. With that in place, my suggestion is to think about elements of gamification next.

First consider adding elements of gamification that are appropriate to the type of exercise selected. Not every exercise needs to be fully gamified, but the elements of games exist specifically because they work well to encourage engagement and reward desired behavior, and there is a strong body of research to support their efficacy. Next, consider adding humor and elements of emotional design. Both are helpful in several ways, particularly in creating an environment conducive to learning and long-term retention, but evidence suggests they will have a smaller impact than the gamification.

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110. A modification of the classic icebreaker, this is a quiz format in which the instructor presents three statements about the content of the lesson, and students try to identify the lie, either by trying to first answer or by taking a poll.
At this stage, if you have time, consider how you can introduce the exercises in such a way as to prime students to do well and encourage a growth mindset. The research does not support subtlety as a strategy here. Remind students that everyone struggles and learning these skills is a process. If there is concern that the exercise will be too hard, you can include introductory language that reminds them about the sorts of sources they should consult.

Questions that lack clarity and direct connection to what is intended to be taught can make an exercise fail entirely or, at least, cause confusion and waste class time, so running through the protocols for test question validation must be a high priority. This step appears last in the sequence not because it matters less but because it is important to look for confusing phrasing and poorly targeted structure after things like humor have been added.

For example, an instructor teaching a single session designed to help first-year students learn how to search for case law in professional legal databases will probably target learning outcomes from specific parts of the PSLRC, specifically Principles I and II, “possess[ing] foundational knowledge of the legal system and legal information sources, including analytical tools” and “gather[ing] information through effective and efficient research strategies.” The legal research instructor will need to decide how much the students can be expected to accomplish on their own before class and how much can be left to other writing instructors to supply after the session.

One way to structure this is to start with an in-class exercise with tight time constraints that tests recall of jurisdictional criteria, terms and connectors, sources of information, and citators, all of which are part of the first PSLRC legal competency relevant to students’ assignment. If this can be done as a preclass quiz, that will save valuable classroom time, but this sort of exercise can also be useful as review and as a warmup for later exercises.

Examples of Exercise Development

To demonstrate how to put this protocol into practice, I will take an exercise we have used at the University of Minnesota and go through the development protocol. This exercise was developed for a first-year session integrated into the legal writing program. The 50-minute class had a general goal of introducing students to case law research for the first time. Our strategy was to use a flipped classroom model, meaning that students were expected to arrive to class having read assigned chapters from a legal research textbook related to introductory legal research concepts and case law research. They had also watched a short, recorded lecture describing the research they would be expected to do for their upcoming legal writing assignments. In addition, the major

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111. PLSRC, supra note 19.
113. These are all based on real exercises I have used in class, but some have been modified slightly to make the development process clearer.
legal research vendors had already conducted trainings, so we expected students to have basic navigation skills with Westlaw, Lexis Plus, and Bloomberg Law.

¶116 Step one was to establish the outcomes we were targeting for the class. As is often the case, because we had a limited amount of time with students and a lot of material to cover, we were attempting to fit more outcomes into one class session than is optimal. We therefore had to prioritize some over others, and each exercise needed to support more than one outcome for the sake of efficiency. The primary learning outcomes we wanted students to achieve were as follows.

Students should be able to:

1. Read a fact pattern and identify relevant key terms for case law searching.
2. Identify relevant jurisdiction and time frame for case law research.
3. Be familiar with secondary sources to consult when attempting to find relevant case law.
4. Distinguish between persuasive and binding authority.

¶117 Other classroom goals included establishing a rapport with students, evaluating how comfortable they were with the platforms, and identifying areas of confusion from the reading. Again, in an ideal teaching situation, an instructor would be able to use more than 50 minutes to work on these goals, but few colleagues would probably find this amount of class time surprising.

¶118 When structuring the lesson plan, we decided to devote about 10 minutes at the start of class to an exercise that asked students to regurgitate materials from the reading so we could assess how well they had retained the crucial information. The other goals were to allow students to review this information to improve long-term retention, make sure everyone had the information fresh in their minds for the next exercises in class, and give us a chance to interact with students to establish familiarity and a friendly teaching environment.

¶119 The exercise format we chose was an in-class poll. The reason for this is that polls are relatively time efficient, good for assessing basic information retention (as opposed to skills or metacognition), and conducive to instructor-student interaction, which facilitated our secondary goals related to relationship building and establishing a conducive learning environment. Having established the structural parameters and goals for the exercise, here are some of the questions we drafted:

1. In what Federal Circuit does the state of Minnesota reside?
   - 1st Circuit
   - Federal Circuit
   - 8th Circuit
   - The Minnesota Supreme Court

2. True or False: Unpublished cases have no precedential value and cannot be cited like published cases in briefs and memos.
   - True
   - False
3. Which two of the following legal issues were addressed in *Miles v. City Council of Augusta, Ga.*, 710 F.2d 1542 (11th Cir. 1983)?
   - Does the Bill of Rights protect talking cats?
   - Was the cat’s message to passersby considered “commercial speech”?
   - Was the city of Augusta’s business ordinance vague and overbroad?
   - Are cats subject to the federal Posse Comitatus Act?

¶120 With some draft questions in place, the next step is to think about whether it is appropriate to add elements of gamification to add value. In this case, there is already some inherent gamification, including instant feedback, low judgment participation, and serialized challenges. Consider the elements that could be added. We could have created a leaderboard to introduce competition. To reduce the sense of judgment or performance anxiety, the leaderboard could be anonymous screennames. Alternatively, it could use students’ actual names, which could increase competitiveness and allow the instructor to identify students who might need extra help. The version we settled on allowed students to see both the correct answer to each question and the percentage of their peers that selected each option, which provided some feedback on how their performance compared to the group, without breaking anonymity or creating discouraging penalties.

¶121 Another useful gamification tool is adding replayability. If we had planned to assign this quiz to be completed before class, we likely would have allowed students to take it more than once until they got the score they wanted. Replayability provides more opportunity for review and helps emphasize that the reward is in getting to the right answer, not performance on the first try. Since this exercise was designed for in-class use, we decided it would take too much time to allow students to go through it more than once.

¶122 Another popular element of gamification is a reward structure. Sometimes it is useful to have material rewards, like treats or small objects that are awarded to the winner, but frequently, it is sufficient to build in praise. We added automatic feedback to the poll, so that upon revealing the correct answer, those who got the question right were congratulated (and those who got it wrong were consoled and encouraged to keep trying). As instructors, we also tried to incorporate a lot of praise into our presentation of each question. We also limited criticism and emphasized how common it is for students to be confused about the topics we were covering.

¶123 Next, we considered how we could incorporate humor and emotional design into the exercise. In the initial drafting process, our sense of humor had already found its way into question three, with two of the answers being “does the Bill of Rights protect talking cats?” and “are cats subject to the federal Posse Comitatus Act?” Since the question called for identifying which two of the four options were correct, and these two were absurd, the question loses its value as an informal assessment tool since most students would correctly rule out the joke answers without being able to retrieve the case at all, much less establishing that they understood how to parse the holdings. Whether that tradeoff is worth it, essentially sacrificing one question for the opportunity to lower the stakes of the exercise with humor and establish a welcoming learning environment, is up to the instructor’s discretion. Since we were so limited on time, we
decided to replace the joke answers with more plausible false answers and incorporated the humor into the classroom script instead.

¶124 At this point we also took some time to think about emotional design, and we selected a gentle (but still high-contrast) color scheme and an informal (but legible) sans serif font. Again, these design considerations are thought to give a small benefit to the learning environment by creating a tone of informality and low judgment. There isn’t good reason to think the effects will be profound, so if your teaching tools or design guidelines limit how much consideration you can give to these elements, it shouldn’t be a cause for concern. Since we had control of the design decisions and had sufficient time to prepare, we tried to incorporate them.

¶125 At this stage, we had our exercises drafted and modified to incorporate elements that could improve their classroom success. The next stage was to edit them for potential issues that could undermine them. We did three rounds of editing for this stage. The first was simple copyediting to ensure proper grammar, correct spelling, and clearly written constructions.

¶126 The second stage looked at the questions from the perspective of survey design. We discovered here that question two had an implicit double negative issue. If “Unpublished cases have no precedential value and cannot be cited like published cases in briefs and memos” is false, then the statement students are being asked to mentally produce is “Unpublished cases do not have no precedential value and it is untrue that they cannot be cited like published cases in briefs and memos,” which is a mouthful. This construction also included some ambiguity since unpublished cases can be cited, as can published cases, but they carry persuasive authority at best.

¶127 We rewrote the question as “True or False: Unpublished cases have precedential value and can be cited just like published cases in briefs and memos,” which fixes the implicit double negative, but preserves some of the ambiguity, allowing us to discuss that ambiguity in class. This would be unfair on a formal assessment but can be helpful when students are first working through a concept where tricky scenarios are helpful at teasing out nuance.

¶128 The final editing step looked for language that might be difficult for some students to parse, particularly those who are not native English speakers or who have issues understanding nonliteral language. This is a sensitive issue for an instructor because metaphor and other nonliteral language can be useful for aiding many students’ understanding, but it is important not to further disadvantage those students who have difficulty with it. An important first question is whether any students in the class need special consideration. Sometimes an instructor will know specifically how many non-native English speakers will be in class from the time of registration. Sometimes as a course progresses, one-on-one instruction in class can give an instructor a good sense of each student’s strengths and weaknesses. In this case, it was our first session with this class, and so we looked at the questions with the assumption that the questions should be drafted for a wide range of students.

¶129 We decided that the phrasing of the first question, “In what Federal Circuit does the state of Minnesota reside?” could conceivably confuse a non-native speaker of
English because the word “reside” is somewhat metaphorical. The rephrased question, “Minnesota belongs to which Federal Circuit?,” was clearer. This is a marginal difference, but the exercise is a good one because it encourages instructors to maximize clarity for all students.

¶130 At this point, all the considerations suggested in this article have been incorporated. If the resources are available, it is worthwhile to have a colleague or research assistant complete the exercise and provide feedback about any unresolved issues and to test whether the exercise will take the amount of class time expected. At this point, the exercise is ready to use in the classroom.

Conclusion

¶131 This article builds toward a practical, evidence-based set of recommendations for the design of in-class exercises for teaching legal research skills. This work is deeply indebted to the law librarians who have written about their experiences and shared their wisdom, as well as the researchers who have attempted to answer important questions about how to best facilitate learning. It also suggests a starting point that can be refined as more is learned about how to help students succeed with in-class exercises.
Keeping Up with New Legal Titles*

Compiled by Chava Spivak-Birndorf** and Matt Timko***

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*** Academic Technologies and Outreach Services Librarian, Northern Illinois University College of Law, DeKalb, Illinois.
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Reviewed by Su Yi and Shen Wei*

*”Investment Arbitration and State-Driven Reform” attempts to unveil the international investment law landscape by relying on legal data and interdisciplinary legal methodologies. The book’s value lies in the statistical analysis of over 3,000 international investment agreements (IIAs), and the practicability of the so-called new generation of bilateral investment treaties (BITs) through the first wave of investor-state dispute settlement (ISDS) awards. Based on Wolfgang Alschner’s solid data and convincing methodologies, the stunning conclusion is that the new generation of BITs continues to generate traditional treaty interpretative outcomes derived from the old-generation BITs, and thus fails to achieve the purpose of rebalancing investment protection and host state sovereignty. The treaty innovations such as new norm clarifications, new exceptions to safeguard regulatory space, and removal of controversial investment protections have had little practical effect on investment arbitration cases as tribunals continue to adopt and apply old interpretative techniques when they apply treaty terms. Consequently, the United Nations Conference on Trade and Development (UNCTAD) urged states to place their emphasis on renegotiation of old-generation BITs, which impose higher litigation risks due not only to their lack of public policy safeguards but also their heightened mitigating effect on new-generation BITs.

* © Su Yi and Shen Wei, 2023. Su is a PhD candidate, Shandong University Law School, Qingdao, China. Shen is the KoGuan Distinguished Professor of Law, Shanghai Jiao Tong University KoGuan School of Law, Shanghai, China.
There is a large amount of literature on international investment law and investment arbitration. Previously, the key theme of legal scholarship and research was to describe, contextualize, and analyze the substantive and procedural terms in IIAs, mostly in the form of BITs. Now, the focus has moved toward criticism of both BITs and investment arbitration cases and potential reforms. The intensified controversy over international investment law is termed the legitimacy crisis, which refers to inconsistent awards despite similar or identical factual settings in different cases. The legitimacy crisis also refers to other perspectives of investment arbitration such as the privatization of public law disputes without sufficient institutional oversight; conflicts of interest due to the revolving roles of counsel, experts, and arbitrators; and an imbalance between the host state’s right to regulate and the investor’s interests.

Given the rising criticism over arbitrators and the doubt cast on the legitimacy of ISDS, the reform of BITs and ISDS is a pressing task for the international community. The backlash against the ISDS triggered a new generation of BITs, which include more precise and clearer terms with the aim of rebalancing investment protection and host state regulatory autonomy. To this end, the new generation of BITs include more public policy exceptions that are supposed to play out in practice when the tribunals are called upon to adjudicate the validity and legality of the host state’s regulatory measures. In that vein, the new generation BITs are taken as the main reform instruments to remedy the shortcomings of the international investment regime.

The interesting perspective offered by Alschner switches the role of host states and tribunals in both BIT-making and ISDS systems. Traditionally, the tribunals are adjudicators for ISDS, and host states are respondents defending their police power exercised over foreign investors and investments. Consequently, the host states triggered a backlash against investment arbitration when they felt aggrieved in safeguarding their police power over foreign investment. Alschner’s account instead views host states as masters and makers of BITs. Therefore, host states can be more proactive than tribunals, which are more passive adjudicators who should interpret and apply BIT terms in a constrained manner. This perspective reorients the normative development in the investment regime. Against this background, the ISDS and BIT reform is likely to be remolded to a state-driven process, shifting an investor-friendly regime to a more balanced framework that treats host states and foreign investors more equally.

Alschner’s methodological approach makes this book a valuable and perhaps even revolutionary contribution to international investment scholarship and policy-making. It fills a hole left by the misperception that new BITs or IIAs can cure the weakness in the old-generation BITs or IIAs. Path dependency theory may well explain the current ISDS’s tendency to maintain its existing patterns in adjudicating investment disputes. A normative paradigm shift requires a brand-new approach like the one Alschner offers.

Reviewed by Steven A. Mitchell*

¶6 Before 1945, the United States, Canada, and Australia were the only constitutional democracies with an operating system of judicial review, but since the end of World War II, political institutions exercising judicial review have rapidly spread across the globe. In this two-volume work, Steven Gow Calabresi seeks to answer three questions: (1) how did judicial review arise in these three common law countries?; (2) why did judicial review suddenly and rapidly spread in the twentieth century?; and (3) what varieties of judicial review do we now find globally?

¶7 Calabresi’s underlying thesis for the work argues that four main factors have influenced the emergence, development, and growth of judicial review: (1) a need for umpiring between powers in a federalist system or one with separation of powers; (2) a need to enforce rights and correct against violations of those rights; (3) the borrowing of judicial review systems from other countries; and (4) the amount of space within a political system for the power of a judiciary to grow into, relative to other institutions.

¶8 The two volumes together examine the history and practice of judicial review in 17 different jurisdictions: 14 G-20 nations, Israel, the European Union, and the Council of Europe. The first volume focuses on countries whose history includes the inheritance of Britain’s common law system, while the second focuses on those countries with a civil law or mixed legal system. (Israel is included in the first volume—despite its mixed system—because of its more recent history in the British Empire and its system of government modeled on Westminster.)

¶9 Conveniently, each volume is structured to largely stand alone, accommodating readers who are interested in only one of the legal systems covered in the series. Each volume begins with chapters which lay out the fundamental thesis of the work and provide a helpful introduction to the current conversation regarding judicial review among scholars of comparative constitutional law. In the first volume, this includes a “primitive” history of judicial review, arising from the British Empire’s common law system, into the development of judicial review as an established power of the United States judiciary.

¶10 Following the introductory chapters of each volume comes the heart of the work, as Calabresi analyzes the 17 jurisdictions systematically, each receiving their own chapter. These chapters largely follow the same arrangement: a history of the country and its political institutions; a description of the function of judicial review in that country; and concluding with an argumentative section explaining how the history and structure, when synthesized with the work’s overall thesis, have led to the development of judicial review within that country.

¶11 Though each chapter follows that general structure, there is substantial variation in the chapters’ structural details, due to elements of political structure or flashpoints of

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judicial review specific to that country. For example, the political history of Indian unity is given significantly more attention than the history of Brazil, while the chapter on France includes sections on hate speech and religious freedom. Furthermore, not all countries are treated equally in terms of the space devoted to each. Germany, which acts as the model of judicial review for jurisdictions in Volume 2, is given 76 pages, while South Korea receives only 12 pages, only two of which are devoted to the primary thesis of the work (the origins and growth of judicial review in the country). Variation in coverage of different countries is to be expected and is quite natural for a work of comparative law, where some countries may require greater discussion of peculiar deviations from the overall pattern. However, disparities as great as this cause some chapters to seem underdeveloped, mandated more by the parameters for inclusion than for the expertise of the author or their fit with the general thesis.

¶ 12 Calabresi acknowledges this in part, when he notes that for many of the countries covered in Volume 2, he has had to rely on secondary sources due to limitations of language and a lack of primary source translations. In these cases, he makes a special effort to identify major authors and sources on which he is relying. Here the heavy use of footnotes throughout both volumes is especially helpful in directing the reader to the more substantial works that the author is relying upon. It is unfortunate, however, that these seem more necessary for some jurisdictions than others.

¶ 13 Considering the global scope of the work, there is nonetheless a conciseness to the two volumes; the resulting work is thus able to simultaneously serve two purposes in a collection. First, Calabresi makes a welcome theoretical contribution to the field of comparative constitutional law, uniting ongoing conversations in the field into an overall narrative that both relates the early origins and development of judicial review in the British Empire and accounts for the global explosion of judicial review in postwar constitutional democracies. Second, the two volumes act as a handy reference work, offering the reader a general survey of judicial review in 17 jurisdictions through concise chapters that can stand on their own within the overall work and lead to other theoretical and descriptive works.


Reviewed by Noa Kaumeheiwa*

¶ 14 UCLA professor Scott Cummings has put together a solid work detailing the history of social and economic movements in Los Angeles and the struggle for justice and equality at the nexus of lawyering, labor, and local government. An Equal Place examines industrial, economic, political, and population changes in the city from the 1992 riots to the 2008 recession that combined to create tensions and opportunities for its workforce. The focus on a modern conception of social justice advocacy, deep study,
and extensive notes and references recommends it to libraries serving academics and public interest practitioners.

¶15 Cummings’s expert observations come from experience as a community economic development lawyer and his work at the UCLA David J. Epstein Program in Public Interest Law and Policy. He describes five case studies where lawyers fought to build equity for workers: (1) garment workers in sweatshops suffering under poor wages and working conditions; (2) day laborers looking to establish right-to-work protections; (3) retail workers and communities fighting to share in the rising tide of large-scale retail and entertainment development rather than be displaced by it; (4) grocery workers wanting to preserve the community fabric, their livelihood, and their unions when big box chain retailers descended on neighborhoods; and (5) truck drivers struggling to maintain their equipment to comply with environmental requirements, a burden they shouldered individually due to their classification as independent contractors rather than employees. These conflicts exemplify sites of resistance to neoliberal, business-first policies that diminished labor and worker protections.

¶16 The author focuses on the roles of lawyers in each campaign. The “equal place” of the title refers to putting underrepresented workers and communities on an equal level with those who hold power. Full empowerment requires new understandings of equality beyond equivalent wages, including opportunities to work, be safe, and become educated; access to hard and soft power; representation in city government; and ways to hold partners and adversaries accountable. Equal place also refers to giving movement lawyers decision-making powers on a level comparable with non-lawyer movement leaders. In Cummings’s view, the work of lawyers extends beyond conventional representation in litigation or bargaining. Their role includes greater participation in the process of fighting for equity, including understanding disparate stakeholders and their agendas, connecting them all, and negotiating coalitions to further a common cause. That work can help raise the underserved and rein in the powerful so they meet on a more equal plane.

¶17 The book sets out a new way of lawyering for social justice. Lawyers can work as active partners in designing solutions within and among political, economic, and cultural contexts. Successful results may be holistic solutions with layers of infrastructure, alliances, and accountability, using all mechanisms of law: litigation, codes, policy, compliance, and various forms of legal representation. When movement lawyers draft rules, deeply informed by their collaborations, the results have deft design and political viability, are defensible in every step from ratification through implementation, and can survive litigation tests.

¶18 Case after case shows how inspired solutions were found by thinking creatively. For example, lawyers drafted contracts where the city made land use approvals contingent on home improvement box stores dedicating areas where day laborers could safely seek work with contractors buying supplies. A leap of creativity found the indirect influence to protect these construction workers’ right to seek work.

¶19 Practitioner readers may find solutions that can be replicated whole cloth, such as the National Day Laborer Organizing Network land use strategy, which has spread
outside Los Angeles. Other solutions can be adapted; for example, the collective benefits agreements crafted to tame development and ensure jobs and resources in areas surrounding the Staples Center and Los Angeles International Airport have elements and strategies practitioners may borrow from or take as inspiration.

¶20 This book also serves an academic audience. The case studies’ descriptions can help students in clinics and other experiential programs find ways to approach an issue or understand how the law fits into a solution. The studies are dense and detailed and provide a roadmap for thinking about situations creatively, assessing multiple factors, and identifying the stakeholders and their roles. Students can see how others asked and answered questions about lawyers’ roles in social movements: how and where is the law in effect; what narratives, theories, and frameworks give law a foothold to enact change; and how can legal tactics and strategies operate to bring about change. Law school courses covering questions of bias, human rights, racism, wage inequality, labor organizing, local government law, and social justice generally will find rich content here. The collaboration and systemic analysis skills in Cummings’s new style of social justice lawyering could be the basis for career planning discussions and inspire a new generation of public interest advocates.


Reviewed by Lisa Lilliott Rydin*

¶21 In his book Tax and Time: On the Use and Misuse of Legal Imagination, Professor Anthony C. Infanti shows how the deceptively simple concept of time has been combined with the legal imagination1 of various skilled actors—from tax advisers to judges to legislators—to achieve powerful results throughout society. Infanti examines several tax provisions through a temporal lens.2 He not only looks at the linear timing of events but considers whether the natural progression was sped up, slowed down, suspended, or otherwise manipulated. He then evaluates the effects of the timing change on different taxpayers. While Infanti focuses on the U.S. Tax Code, he includes examples from non-U.S. jurisdictions to show that his ideas transcend jurisdictions.

¶22 The book consists of five chapters (plus an introduction and conclusion) and is written for a general, albeit law-oriented, audience. While having some familiarity with tax law will certainly help, Infanti explains concepts with clear language and relatable examples. For anyone wanting to dig deeper, there are copious endnotes with detailed citations. I selected this book for review because (1) tax law affects nearly everyone in our society; (2) social justice concerns are also prevalent; and (3) the book appeared to

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1. The term “legal imagination” describes thinking outside the doctrinal box to develop novel legal theories and strategies.
2. A “temporal lens” is a way to analyze a situation by focusing on matters of time and timing rather than treating them as peripheral considerations.
be an engaging and accessible introduction to critical tax theory (and by extension, critical legal studies). A wide variety of readers can find something of interest in it, provided they are not put off by the fact that it concerns tax law.

¶23 As a critical tax theorist, Infanti does not see tax codes as neutral constructions of mechanical rules. Tax codes show what a society values through the grant of tax benefits (e.g., deductions) and what a society wishes to discourage through disincentives (e.g., penalties). Tax codes are also the mechanism a society uses not just to collect revenue but also to distribute the burden of funding public goods. All these decisions and choices are political.

¶24 Infanti begins by showing how the judicial tax law substance-over-form doctrine has been used to reconfigure linear time. In situations where the same end result can be achieved in different ways, the IRS and courts can look beyond the form chosen by the taxpayer to determine what really happened. They can then apply the appropriate tax consequences based on the substance of the transaction. To illustrate this doctrine, Infanti discusses the landmark 1935 Supreme Court case *Gregory v. Helvering.* In *Helvering*, the taxpayer was denied favorable tax treatment because there was no economic substance to the corporate reorganization she claimed occurred. Infanti then examines Congress’s attempt to codify substance-over-form in Section 304 of the U.S. Tax Code (which recharacterizes certain sales of stock as redemptions, resulting in taxation at the higher rate for dividends as opposed to taxation at the lower rate for capital gains).

¶25 Although the doctrine of substance-over-form developed to achieve fairer application of the tax laws, it is not always used. Infanti argues the inconsistent application of the doctrine often results in justice denied for the less powerful and more marginalized populations in American society. For example, in the 1960s, the IRS left racial privilege largely intact by limiting the situations in which the tax-exempt status of segregated private schools could be revoked or denied (despite the fact that tax benefits are a form of federal financial assistance). The IRS again refused to apply substance-over-form principles to allow tax benefits for marriage alternatives following the 2013 Supreme Court case *United States v. Windsor* and the 2015 Supreme Court case *Obergefell v. Hodges.* Although the substance of many civil unions or domestic partnerships was likely “marriage” (depending on the state), the IRS had various reasons not to allow these relationships to retroactively benefit from the same tax treatment that benefits opposite-sex marriages.

¶26 Infanti explores taxes and time manipulation in other ways and in a variety of directions. Sometimes time is compressed (e.g., to accelerate deductions for depreciation to incentivize capital investments to boost economic growth). Other times, time is prolonged (e.g., by creating waiting periods so actions at least appear less motivated by tax avoidance). In certain situations, Infanti even sees time folded in on itself (e.g., when

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3. 293 U.S. 465.
5. 570 U.S. 744.
a single investment can be recovered twice, once by an investment tax credit and again
by an accelerated cost recovery system). At all times, a tax benefit can be obtained by
manipulating time.

¶27 It is perhaps not surprising that the more powerful and resourced actors in
society are the ones most able to manipulate time to an advantage (often but not always
their own). However, Infanti does not paint a bleak picture. Instead, he encourages the
reader to appreciate the potential that exists in using tax code provisions to correct past
injustices and advance society’s aspirations. With that view, the combination of tax and
time and legal imagination can be an integral part of finding more just solutions.
Unfortunately, Infanti did not take the next step and suggest ways this might be done. I
hope that will be forthcoming. This title would be useful for an academic law (or non-
law) library as it may spark creative ideas in unexpected directions.

Mendelson, Jason, and Alex Paul. How to Be a Lawyer: The Path from Law School to

Reviewed by Christina Boydston*

¶28 How to Be a Lawyer provides practical, insightful guidance for law students,
those new to the legal profession, or anyone considering a career in law. The authors,
Jason Mendelson and Alex Paul, are attorneys who have worked in a variety of legal and
non-legal settings. The authors state their purpose for writing the book is to provide
information that bridges the knowledge gap between law school and law practice.

¶29 How to Be a Lawyer offers coverage on a broad range of topics including getting
the most out of law school, tackling job interviews, building a professional network,
forge a career path, and finding work-life balance. The sections aimed at law students
provide guidance on choosing a law school, course selection, and other graduate
courses to consider to round out a legal education. Mendelson and Paul’s advice to new
practitioners covers an array of topics not usually seen in this type of guidebook: work-
ing efficiently, billing practices, common career pitfalls, and managing difficult people.
This information is geared toward practicing attorneys, but law students will find it
helpful as it provides a frank overview of the day-to-day work of an attorney. The book
also contains multiple articles written by a diverse array of guest author attorneys. These
narratives provide candid insight into how these legal practitioners transitioned into
their current area of practice. Law students focused on developing a trajectory into a
particular career path should find these narratives helpful.

¶30 Throughout the book, the authors emphasize the importance of taking the ini-
tiative to develop and utilize soft skills like empathy and communication, as these skills
are essential for successful client management, negotiations, and working with other
professionals in the field. Some readers may find the section on what clients want from
their lawyers less helpful, mainly because in practice there is such a variety of personali-
ties and situations at play, both in clients and their attorneys, that there is no universal

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Los Angeles, California.
answer. The book’s strength is in its coverage of the situations most law students and new attorneys may find themselves in, and the straightforward advice on making the most of the situation.

¶31 The book is clearly written, well organized, and at times humorous, which makes for enjoyable reading of what might otherwise be a dry topic. This book would fit well in collections focused on practical guidance for law students, college students on the prelaw track, or advice for new attorneys.


Reviewed by Rebecca Chapman*

¶32 In 1994, African American advocates for women’s rights started the Reproductive Justice movement to highlight women’s issues in ways that previous advocacy did not address. Nearly 20 years later, we have a book that tackles the legal reasoning used against women in legal decisions. In Feminist Judgments: Reproductive Justice Rewritten, the writers bring a Reproductive Justice perspective to landmark Supreme Court cases and transform them. Few court opinions on reproductive issues are written by someone “capable of pregnancy” and that perspective can be vitally important to the disposition of these decisions. Moreover, the decisions on reproductive rights often negatively impact women, and those negative effects present more strongly against women of color. The cases are rewritten to consider these perspectives.

¶33 The book is organized by cases and chronology. Commentary precedes each revised case and provides additional historical context to the original language and tone of the opinion. It also summarizes and highlights the themes within each revised opinion and their place in the Reproductive Justice perspective. Essentially, the commentaries create a bridge between the original opinion, its flaws made visible under this perspective, and the new, revised opinion that places themes of Reproductive Justice into the text to find an outcome that supports justice for marginalized voices in our community.

¶34 Most of the revised opinions appear as if much of the Court considered Reproductive Justice principles as a guiding force in their decision-making. Others appear as a dissent or concurrence, and as a reminder of principles they may have forgotten or overlooked. Most of the revised cases remind the reader of institutional interference in reproductive matters and how different that interference will look based on race, ethnicity, or poverty.

¶35 Through its revised cases and commentary, the work explores the theme of bodily integrity—one’s right “to care for his own body and health in such a way as to him seems best” (p.26)—arguing that institutional justifications for impinging on that interest must be “sufficiently important to justify the invasion of” that right. Under a

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lens of Reproductive Justice, these justifications almost never rise to the required level that warrants the action being taken.

³36 Another theme examined in the revised cases is privacy. General privacy rights should not discriminate based on race, gender, ethnicity, religion, or income. Poverty, and a nebulous idea of who is deserving of support, has created a situation where the poor are often stripped of their privacy rights by public and private institutions. These rights are stripped from their homes and their bodies in the name of stamping out fraud. Consent to the removal of this privacy, in exchange for benefits, is frivolous. It suggests that a negotiation is taking place, when in truth, no poor woman in need of services is negotiating with the State or private institutions for those benefits, especially when one party (the state) in that transaction holds all the power.

³37 The work also explores the Fourteenth Amendment and a constitutional protection of the fundamental right to establish a home, reproduce, and “enjoy the benefits of raising children” (p.29). Interference with that right should require strict scrutiny. The Fourteenth Amendment promotes equality, and that should include the “constitutional protection of reproductive liberty” (p.36). No law or interpretation of law should enable reproductive oppression as a practical result for issues based on race, class, ethnicity, or religion.

³38 Overall, this book fits nicely into the Feminist Judgments series. The Feminist Judgments series of books is part of a collaboration of hundreds of feminist law professors and scholars to explore and confront caselaw that impacts women’s issues. By adding a Reproductive Justice perspective to the themes and framework of these landmark cases, the scholars featured in this work extend the analysis and arguments around that caselaw and further the discussion of women’s rights. They suggest that the right to carry a child, the right to raise a child, and the right to manage a home free of interference should be considered fundamental human rights that are respected and protected. Yet, for poor women and women of color, this is often not the case. Hence, the need for continued discourse that gives voice to those often overlooked.

³39 The work itself is useful in several areas of coursework and would be helpful reading in Women’s Studies, Constitutional Law, Family Law, or Civil Rights clinics and courses. Too often, students are provided “black letter law” and given little else to consider. They become less curious instead of more, and it impacts their ability to advocate creatively for clients. Students are not given the opportunity to hear the tales of the voiceless and how to use their new legal skills to advocate for these community members. This book, its themes, and its structure would provide a welcome set of additional ideas and perspectives to consider within that standard format of legal reasoning and advocacy.

Reviewed by Lori Strickler Corso*

¶40 *How to be a Badass Lawyer* is not a typical “how to be a tiger in the courtroom” guide. Instead, Claire E. Parsons redefines a “badass lawyer” as “one who loves, trusts, cares for and honors themselves as they serve the needs of clients” (p.3). Parsons draws upon her experience as a working mother, a law firm partner, CLE presenter, blog author, and mindfulness coach to develop a new framework for approaching the practice of law, working with clients (and others), and handling the stressors of modern life.

¶41 Though styled as a self-help guide, it should come as no surprise that a book about mindfulness is also keenly self-aware. Parsons admits that attorneys are likely to be skeptical of her advice and that the meditation practice she outlines goes against the very fabric of a lawyer’s training. Law school arms attorneys with knowledge and advocacy skills, but she argues that it often, unfortunately, strips them of their emotional awareness and the ability to live in the moment without trying to analyze what may/should/could happen two, three, or 50 steps down the road. The focus of law school is so often on case outcomes as the sole measure of an individual’s success, and while attorneys want to serve the needs of their clients to the best of their abilities, Parsons notes that what clients really want is peace of mind and that “they need to trust us (i.e., attorneys) enough to communicate their needs and desires” (p.5). The way to build that trust is through compassion, connection, and kindness—three words that rarely resonate within law school classrooms or the walls of the courtroom. In Parsons’ view, these traits are engrained in our nature as humans, but we may need to rediscover them. *How to Be a Badass Lawyer* offers a pathway to unearth these skills and rebuild them.

¶42 Parsons knows her audience and the book’s structure works to eliminate the number one excuse of any busy attorney, law student, or law librarian: that there is just *not enough time* to fit in one more thing, such as reading something that is not work or school related. *How to Be a Badass Lawyer* instructs the reader to slow down and take more than a month to finish reading it. The chapters are divided into weekly tasks, beginning with .1 hours of breath meditation per day (and yes, the time really is listed in billable hours increments). After a week of slowly building up the amount of time the reader spends in meditation, she asks that they add a body scan to that meditation and increase the time to .2 hours per day. In subsequent weeks, additional minutes are added, and the meditation practice is expanded to include joy meditation and a loving-kindness practice so that at the end of four weeks the reader will be meditating for .4 hours several days a week. The book provides space and reflective questions at the end of each week, and thus additionally serves as a journal for the reader. It is also sprinkled with humor, making it very readable and relatable even when the topic might be outside the reader’s comfort zone.

* © Lori Strickler Corso, 2023. Head of Staff Development and Legal Research Instructor, Villanova University Charles Widger School of Law, Villanova, Pennsylvania.
¶43 I admit that I selected this text in part because I am a skeptic who rarely slows down, who is always moving from one task to the next, checking off items on my to-do list in both my personal and professional life. But I also see the toll that mindset takes on me as well as on my students and others who suffer the same affliction and find myself yearning for a change. And though I’m not likely to begin burning sage and signing up for meditation retreats anytime soon, certain aspects of How to Be a Badass Lawyer really struck a chord, particularly in terms of providing tools to help students and young attorneys who may be uncertain about their place in this profession.

¶44 Parsons emphasizes that meditation practice is not easy; it takes time and a lot of practice to feel comfortable with it, and it requires embracing the difficulty and viewing learning from those challenges as the reward itself. Perfection is not attainable, and for law students and lawyers who have continually sought to “be the best” this can be a hard truth to grapple with, but finding peace with imperfections in ourselves and our work certainly creates more stability and the ability to weather adversity.

¶45 While mindfulness and compassion seem to be outside traditional law school skills training, by the end of the book the reader recognizes a familiar legal model whereby we learn a rule—treat ourselves with compassion and kindness—and then apply that rule to a different set of facts—connect with our clients, students, and others, treating them with compassion and kindness tailored to their needs based on information we have received through getting to know them and putting ourselves in their shoes. If you can be anything, be a Badass Lawyer and cultivate them wherever you go.


Reviewed by Rebecca Domm*

¶46 Laura Shin, former editor at Forbes turned crypto podcaster, reveals the human element behind the founding of Ethereum, an early cryptocurrency. This book serves as a coming-of-age story for Ethereum and its young founder, Vitalik Buterin. The initial idea for Ethereum was described in 2013 by 19-year-old Buterin in a white paper. Shin explains how he was heavily involved in the Bitcoin community as a journalist for Bitcoin Magazine. He saw new blockchains with special features being individually developed and thought there should be a common space, like an iPhone app store, where developers could openly share new applications.

¶47 In his paper, Buterin imagined a decentralized space with open source blockchains where people could create their own coins and smart contracts—“a software program, rather than a company or other intermediary, that executes the terms of an agreement between two transacting parties” (p.402). The tokens for this platform would be called Ether (ETH), and financial transactions could be conducted between two people, a person and a smart contract, or two smart contracts. Shin describes Buterin’s

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idea using the example of a decentralized ride-sharing program that deals directly with clients instead of going through an intermediary such as Uber. This new rideshare would create a new cryptocurrency and a fundraising contract using the Ethereum network. Those who hold this cryptocurrency would then pay for rides or vote for policy changes within the ride-sharing program.

¶48 The real excitement began when Buterin sent his white paper to his friends, and those friends sent the paper out to people they knew. Fairly soon, Buterin had a group behind his vision, and the initial Ethereum founding group was formed. Shin recounts the buzz and excitement as these eight personalities came together to build Ethereum. While this fellowship of founders remained united for a short time, as with many groups, division soon appeared. One major event that initiated the rift was the DAO crisis. The DAO, or the Decentralized Autonomous Organization, was a member-owned and funded community. The DAO was governed by the rules created in the smart contract. A hacker created a contract that interacted with the DAO smart contract and was able to drain the funds. The Ethereum founders disagreed about how to handle the hack, resulting in a “hard fork,” or splintering of Ethereum into Ethereum and Ethereum Classic.

¶49 Shin goes on to describe various other internal battles within Ethereum. These tensions were especially high between those who were developers and those who were business minded. She details the different visions, strong personalities, and office politics that led to the major players parting ways with Ethereum, often by being fired. On top of the internal tension, there was an ongoing legal question from the outside of how this new technology should be treated and whether the SEC would consider Ethereum a security.

¶50 This book is well researched and fact checked. It includes articles, Reddit posts, Slack messages, and other social media references; it is refreshing to have a book take these forms of communication seriously. It is also helpful that she includes a glossary at the back of the book, which is to crypto terminology what Black’s Law Dictionary is to legal terminology.

¶51 The drawback to her thorough research is that, at times, she provides an overwhelming amount of detail and information. For example, there are quite a few names mentioned throughout the book. At the start of the book, there is a list of individuals’ names and a brief description of their jobs. For the reader, having a lot of names dropped and having to look them up breaks up the book’s flow. Was it necessary to include all the names on the list? Possibly so, but it made for a less enjoyable reading experience.

¶52 Overall, the book offers insight into the founding and growth of Ethereum. It also shows Buterin’s growth as he confronted challenges and faced difficult decisions. The initial founding group included many current big names in the crypto space. Knowing their history can provide insights into what they are working on now. The conflicts and office politics, although exhausting to read about at times, humanizes an otherwise purely technical subject. This is a good book for those interested in the history and the human element behind Ethereum.

*Reviewed by Michelle Trumbo*

¶53 Nina Totenberg’s *Dinners with Ruth* is a humanizing biography which traces the links between Justice Ruth Bader Ginsburg’s life experiences, judicial temperament, and perspectives on social justice issues. It is arranged chronologically and chronicles Totenberg’s decades-long friendship with Ginsburg, serving as a double biography of the two women. Few prominent figures in the legal profession have also managed to become pop culture icons, but Justice Ginsburg indisputably achieved this feat. In addition to being the second woman appointed to the Supreme Court, her lifelong commitment to gender equality and civil rights earned her the nickname “Notorious RBG” and made her a beloved figure in American politics and culture. Totenberg is an American journalist best known for her coverage of the U.S. Supreme Court and legal affairs for National Public Radio (NPR). As a correspondent for NPR, Totenberg covered some of the most significant legal cases and issues of the past few decades, including landmark cases *Roe v. Wade, Bush v. Gore,* and *Obergefell v. Hodges.*

¶54 Each chapter of *Dinners with Ruth* chronicles a period of Justice Ginsburg’s and Totenberg’s lives, beginning with their early adulthoods. Social justice themes pervade throughout, as Totenberg’s storytelling seamlessly connects Justice Ginsburg’s life experiences—such as the early loss of her sister and mother and the open misogyny she experienced in legal education, including being fired when pregnant with her first child—to her professional passion for social equality. The book offers a glimpse into the lives of women in the 1950s and 1960s, long before Title IV, the Equal Pay Act, and many of the rights that we almost take for granted.

¶55 Totenberg capably weaves her own life story with Ginsburg’s, highlighting numerous parallels between the women. They are relatively close in age, share a religious background, and were women entering male-dominated professions during a time when they were openly unwelcome. Totenberg’s experiences also offer anecdotal insights into the practical effects of the social change to which Justice Ginsburg devoted her professional life, such as Totenberg’s attempt to obtain contraception as an unmarried woman in the mid-1960s.

¶56 The genuine friendship between the two women shines through in *Dinners with Ruth.* After meeting in 1971, their paths regularly crossed and a friendship blossomed. The book discusses the advice, support, and encouragement offered by Justice Ginsburg during Totenberg’s most difficult moments, including the passing of her first husband. In its totality, *Dinners with Ruth* reads like Totenberg’s final thank-you note to her dear friend.

¶57 The final chapter, “Farewell to My Friend,” is one of the most interesting in the book. It describes the last year or so of Ginsburg’s life, a time filled with her personal health challenges and the sweeping global changes wrought by the COVID-19 pandemic.

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During this period, Totenberg cooked weekly dinners for Ginsburg, and she touchingly describes her sorrow at watching her friend fade away. The book's epilogue ponders the aftermath of Ginsburg's passing, specifically its impact (along with the recent losses of several other long-serving justices) on the Supreme Court's decision-making, internal dynamics, and collegiality.

¶58 It's easy to see why Dinners with Ruth has become a New York Times bestseller. It is recommended for those seeking a personal account of the evolution of civil rights from the past sixty years or those with an interest in the Supreme Court, Justice Ginsburg, or legal journalism. That said, the book is neither a scholarly work nor one that adheres to traditional journalistic principles. At its core, the book is a moving description of the friendship between two women. It is a true memoir, sometimes focusing more on Totenberg's life than Justice Ginsburg's. However, it provides valuable insights into the forces and events that shaped Justice Ginsburg while capturing the women's longstanding connection.


Reviewed by Jonathan Hawkins*

¶59 In the wake of the latest report from the UN's climate change panel,7 Nomad Century is a relevant and timely book for students of public policy and for policymakers alike. Gaia Vince, an award-winning British-Australian science journalist and author, takes us on a journey through the next century, with a specific focus on the real-world implications of climate change for humans and humanity broadly. The style is conversational and clearly meant for a wide audience.

¶60 Vince paints a bleak picture: “[o]ver the next fifty years, hotter temperatures combined with more intense humidity are set to make large swathes of the globe lethal for 3.5 billion of us” (p.xi). And that’s just the fourth sentence of the introduction. Yet the book is not pessimistic in its aim or its tone. Speaking from that realistic standpoint, she describes a problem policymakers and public policy practitioners have largely ignored: where are all the people living in those large swathes of land going to go? Even in a best-case scenario there will be billions of people for whom our efforts to reverse climate change will come too late, says Vince. Starting from there, she explores that question in a thorough but accessible way, eschewing jargon and cold technical language to bring the issue home even for those who do not have degrees in climate science.

¶61 The facts as presented by Vince are an up-to-date examination of the problems as they stand now, well sourced and referenced, and the facts are brutal. Even on the most optimistic of paths scientists have examined, massive problems are going to continue to occur. Entire island nations will be forced to migrate elsewhere, oceans will rise,

extreme weather events will get much more frequent, and everywhere will be hotter. Some areas between the tropics are estimated to experience temperatures and humidity levels so high that even healthy, fit people would die without air-conditioned spaces to retreat to. The “livable band” will move toward the poles, as it has in the past. And that in particular is why the migration will be truly massive. In parts of the world, too-hot temperatures may cause crop yields to plummet. Being outside might become extremely deadly during heat waves. Vince paints a well researched and well written picture of a world as dark as it gets.

¶62 Vince is unsparing and thorough with her descriptions of what awaits us in the remaining 77 years of this century, but not in a nihilistic way, which is crucial for the narrative. Vince sees this bleak future of ours and sees a way through it. It is that optimism that we are up for a ferocious challenge that pervades the book. Not a “we are doomed” scenario but rather “things are about to get a lot more challenging, and here’s how we might deal with those challenges.” Most importantly, however, she shows us that policymakers and policy wonks have options, and more importantly, humanity has options. So, while the first half of the book is about describing the problems and their causes, the second half is a well written and thorough examination of the solutions we have available to us. Vince explores how those solutions may be implemented, along with some of what’s stacked against them.

¶63 Vince is up front about the challenges in implementing the solutions she discusses and the enormity of some of those challenges. But she tells us about the bright spots, too—things governments and organizations are doing right now to solve these problems. As just one example, we learn that seagrasses are excellent at taking carbon out of the sea and storing it. And seagrasses are far more efficient at storing carbon than planting monoculture forests of trees. The research is clear—all it takes is investment by governments in taking these kinds of steps. There are many more examples given, only very few of which I found delving a little too far into utopianism. For instance, the idea that somehow the world’s governments will agree to create a UN climate change body that could meaningfully enforce agreed-upon climate policies.

¶64 What regular everyday people are supposed to do, however, is not discussed much. How to convince owners of fossil fuels to leave those assets stranded underground is not discussed. Neither is the question of what to do about modern political movements in the United States and elsewhere who claim climate change is not happening, thus ensuring their countries’ efforts are far smaller than they need to be.

¶65 She does describe what kinds of governments we are likely to need. Namely, governments that put aside short-term national or economic gain for long-term planetary gain and governments that agree to follow UN rules on climate change control, which requires a loss of some sovereignty.

¶66 Despite these limitations, Vince’s book contributes immensely to an up-to-date understanding of climate change broadly, and more specifically its effects on human beings around the world. Nomad Century would be a great addition to any collection because it is a recent, thorough, well written, and well researched examination of what’s waiting for us and our descendants.