Do's, Don'ts, and Maybes: Legal Writing

Do's—Part I

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Harness Racing and New York’s Ethics Laws

How politicians’ interest in the harness tracks gave New York its ethics laws.

by Bennett Liebman

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Do’s, Don’ts, and Maybes: Legal Writing Do’s — Part I

To create a legal document, you must know your audience, the purpose of your document, how to organize, and when to stop researching and start writing. You must follow deadlines. You must comply with court and ethics rules. You must edit your work and have pride in it. That’s the writing process.

Once you’ve perfected the process you can focus on the final product. The way to create a good final product is to know legal writing’s do’s, don’ts, and maybes. This column and the next offer the Legal Writer’s top 26 do’s — a double baker’s dozen. Following these two columns will be two columns on legal writing’s don’ts. The Legal Writer will then continue with columns on grammar errors, punctuation issues, and legal-writing controversies. Together this series of columns covers legal writing’s do’s, don’ts, and maybes.

There’s no one way to write it right. Good writers do things differently. But writers and readers always agree about whether a document is written well. Despite the controversies about some legal-writing details, there’s a consensus about what’s important: accuracy, brevity, clarity, and honesty. Here’s the consensus — the things writers should love.

1. Love the Right Tone. Tone helps determine whether readers will accept what you write. To get your tone right, ascertain whom you’re writing for. Anticipate the reader’s concerns. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don’t be objective, not argumentative. Write about real people and real events. Your client isn’t a wooden figure, although your adversary’s client might be. Bring your client to life. The way you refer to people affects how readers perceive them. Use your client’s real name. If you represent the defendant in a criminal case, describe the crime blandly or generally. If you represent the prosecution, invoke the victim’s perspective and describe the crime in detail. A key place for per-


ducing facts witness by witness won’t engage the reader.

2. Love Perspective. To persuade, make your reader identify with your client. Write about real people and real events. Your client isn’t a wooden figure, although your adversary’s client might be. Bring your client to life. The way you refer to people affects how readers perceive them. Use your client’s real name. If you represent the defendant in a criminal case, describe the crime blandly or generally. If you represent the prosecution, invoke the victim’s perspective and describe the crime in detail. A key place for perspective is when you write the facts. Telling a revealing and vivid story will engage the reader and help the reader remember what you wrote.

3. Love Theme. Every persuasive legal document must have a theme. Without a theme, a document won’t be persuasive. A theme works if it appeals to a smart high-school student. Themes involve right and wrong, good and bad. Theme is about what’s just and moral. To create a theme, imagine you’re in a jurisdiction with no laws, a jurisdiction in which all that counts is justice and morality. Tell the reader you’re right, not because some law says this or that, but because if you lose the bad will prosper and the good will suffer. Think about your adversary’s theme. Once you find a theme, weave it from the beginning to the end of your writing. Include every important and helpful authority, fact, and issue that supports your theme or contradicts your adversary’s theme. Exclude all else.

4. Love Good Facts. Organization, perspective, and theme are essential to writing facts. How you present facts determines whether the story is effective. Organize facts chronologically. Reciting facts witness by witness won’t engage the reader.

A brief’s Statement of the Case or Counterstatement section or an office memorandum’s Facts section, should contain only facts, not argument. Don’t explain the significance of the facts. Save the argument for the brief’s Argument section or office memorandum’s Discussion section.

In a brief, present facts favorable to your position first. Readers will prejudge the case and rationalize later inconsistent facts because of what they already believe is true. Example: A man you’ve already described as a pillar of the community walks into a bar and spills beer on someone. The reader will infer that the spilling was accidental. When you later argue it was accidental, the reader will agree. Example: A man you’ve already described as dishonest and vile walks into a bar and spills beer on someone. The reader will
infer that the spilling was intentional. When you later argue it was intentional, the reader will agree. Surround unfavorable facts with favorable facts for a halo effect. Emphasize favorable facts and de-emphasize unfavorable ones. In a brief, never let two sentences pass without letting the reader know which side you represent.

In an office memorandum, present the facts neutrally and objectively, with no intention to persuade the reader. The reader shouldn’t know from the facts what you’ll ultimately recommend or predict.

In a brief’s Argument section or an office memorandum’s Discussion section, apply only those facts mentioned in your facts. In your facts, use only those facts you’ll apply in the Argument or Discussion section. Review your facts after preparing the Argument or Discussion sections to confirm that you’ve included all necessary facts. Eliminate irrelevant dates, facts, people, and places. The record must support every assertion of fact, which comes from pleadings, affidavits, and deposition, hearing, and trial transcripts. Always cite the record for facts mentioned anywhere in a brief or office memorandum.

The brief’s Statement of the Case or Counterstatement should begin with something about the person you want the reader to identify with or hate. Start from that person’s perspective. End the Statement of the Case or Counterstatement with procedural history. The office memorandum’s Facts section should begin with procedural history.

5. Love Clarity. Jewelers say that the better the clarity, the better the quality. The same applies to legal writing. Omit unnecessary fact, law, and procedure. In sentences, paragraphs, and sections, put essential things first. Assume that the reader knows nothing about your case. Write directly, not indirectly. Example: “Justice is an important concept.” Becomes: “This court should reverse the conviction.” State clearly and repeatedly why you’re writing. What do you want? What relief are you seeking? Go from general to specific, but don’t generalize. Raise the issue before you explain it. Give the rule before you give the exception. Give rules and exceptions in separate sentences. Lay a foundation before you discuss something: Don’t discuss the terms of a contract before you establish that the parties have a contract. Familiarize readers with a case before you analogize or distinguish it. Introduce characters before you talk about them.

6. Love Getting to the Point Fast. State your point in the first paragraph on page one of your document or, in a brief, in the Argument section. Putting your main point up front gives your readers the conclusion in case they don’t read further. It tempts readers to continue and puts everything in context. Consider the shape of a funnel or inverted pyramid: give the conclusion (the big picture), then detail. Stating your point immediately in a brief means including a thesis paragraph after each point heading. The thesis paragraph is the roadmap, the organization to your argument. In the topic sentence — first sentence — of the thesis paragraph, state your conclusion on the issue. Then explain how you’ve reached that conclusion: why you should win. Conclude the thesis paragraph with a thesis sentence: what you want the court to do. In an office memorandum, begin the thesis paragraph with a topic sentence: a statement of your issue. Then state the law objectively on the issue from your topic sentence. Conclude the thesis paragraph with a recommendation or prediction.

7. Love Succinctness. Readers have short attention spans. Don’t repeat yourself: Say it once, all in one place. Don’t dwell on givens. Don’t give the entire procedural history unless doing so advances your argument or proves necessary in context. Include only legally significant facts, apply only relevant law to those facts, and tell your readers only what they need to know. Include only facts that advance your theme and help good arguments get noticed. Cite only to legal authority that’s helpful to your argument. Unless you want to analogize or distinguish your case from the authority you’re citing, don’t analyze the authority in depth or give its facts. Don’t add unnecessary text by defining and qualifying.

8. Love Concision. Use only necessary words: the fewest words without losing precision in language, because precision is more important than concise. Make every word count. If the last line of a paragraph has only a few words, cut words out of the paragraph to save a line. Deleting unnecessary words will make your writing tighter and your document shorter. This technique lets you come within the page limit. Obliterate the obvious. Incorrect: “If respondent is evicted, he will have to leave his apartment.” Replace coordinating conjunctions (“and,” “but,” “for,” “nor,” “or,” “so,” “yet”) with a period. Then start a new sentence. Transfer to a second sentence most parenthetical expressions, also called embedded clauses — an internal word group that has its own subject and verb. Doing so shortens your sentence and thus is concise, even though it might add text. Example: “The judge’s chambers, which has a view of the Empire State Building, is on the ninth floor.” Becomes: “The judge’s chambers is on the ninth floor. It has a view of the Empire State Building.” Delete “as” and “to be,” if possible. Examples: “Some consider cigarette smoking as a crime.” Or: “Some consider cigarette smoking to be a crime.” Becomes: “Some consider cigarette smoking a crime.” Don’t begin sentences with “in that” or use “in that” in an internal clause: “In that the judge’s cousin was a litigant, the judge recused herself.” Becomes: “The judge recused herself because her cousin was a litigant.” Delete “being.” Example: “The attorney was regarded as being a good writer.” Becomes: “The attorney was regarded as a good writer.” Wipe out “of” and “as of.” Delete the following: “in fact,” “in point of fact,” “as a matter of fact,”
“The man is very tall.”

Examples:

Adjectives and adverbs sparingly.

Verbs to adverbs and adjectives. Use pref- fer concrete nouns and vigorous verbs, see, smell, taste, and touch your ideas.

Vivid. Write so that readers will hear, feel, taste, and smell your ideas.

Show the particular and concrete, not the abstract and vague.

Inept expressions.

Pleonasms. They’re unnecessarily full of words and phrases.

Examples:

1. In order for
2. In an attempt to
3. In an effort to
4. In order to
5. As to
6. Unto
7. With a view to
8. With the object being
9. In order for
10. Becomes

“Is authorized to” becomes “may.”

“With respect to” becomes “about.”

Eliminate pleonasms. They’re unnecessarily full expressions.

Examples:

1. The judge, who e-mailed me, he likes me.
2. The judge, who e-mailed me, likes me.


Don’t just tell your readers something: Show them what you mean. Show by describing people, places, and things. Abstract conclusions don’t help readers understand the problem. Turn the general and vague into the particular and vivid.

Write so that readers will hear, see, smell, taste, and touch your ideas.

Prefer concrete nouns and vigorous verbs to adverbs and adjectives. Use adjectives and adverbs sparingly.

Poor examples: “The man is tall.” Or: “The man is very tall.”

Good example: “The man is seven feet, three inches tall.”

10. Love Memorable Rhetoric.

Rhetoric is the art of marshaling and expressing argument. Embrace rhetorical strategies by using metaphors, similes, parallelism, and antithesis. Metaphors, which compare unlike things that have something in common, make abstract concepts concrete.

Examples: “You don’t get a second bite from the apple.” Property rights are a bundle of sticks.” “The court must suppress the fruit of the poisonous tree.” A simile is a comparison using “as,” “as if,” “as though,” or “like.” Examples: “A judge is like an umpire at a baseball game.” “Judges are like funnels: an important case in which you must preserve the record for appeal. State your main point within 90 seconds.

Recite facts chronologically. Add detail to tell a memorable story.

In a brief, use separate sentences to create a statement-statement-question format for each Question Presented. Starting your question with “whether” and writing one long, convoluted sentence is superficial and ineffective.

The first two sentences in this statement-statement-question format present the legal controversy and introduce relevant facts. The last sentence is a question that goes to the heart of the issue. Write the question so that the answer is yes. The answers to the Questions Presented are found in your point headings.

In an office memorandum, write the Issues Presented as a question, one sentence long, that addresses the issues. To prevent a long, intricate question, write the Issues Presented in a statement-statement-question format. After the Issues Presented, include an Answer section — answer the Issues Presented with a “yes,” “no,” or “maybe” and the concise reasons for your answer, without repeating the question and without using “because.”

First argue the issue that has the greatest likelihood of success. If all claims have the same likelihood of success, discuss the claim that’s likely to affect the litigation most. In a criminal appeal in which you represent the defendant, for example, discuss whether the court should grant your client a new trial before you discuss whether the court should reduce your client’s sentence.

Exceptions: Your first issue should be a dispositional threshold issue — jurisdiction or statute of limitations — if you have one. Move logically
Putting your main point up front gives your readers the conclusion in case they don’t read further.

through statutory or common-law tests. Discuss your issues in the order in which the statute or case laid out a multi-factor test. When the answer to one issue depends on the answer to an earlier question, resolve the first issue first. Discussing claims and issues in the order they arose facilitates understanding if the claims and issues arose chronologically. Resolve issues by a hierarchy of authority: constitutional issues first, then statutory issues, then common-law issues.

In opposition papers, don’t copy the way your adversary ordered the issues. Tell your reader which issue you’re opposing, but order your opposing issues the way it works for your client, not your adversary.

12. Love Large-Scale Organization: Headings. Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Identify each section in your brief or office memorandum: “Question Presented” or “Issue Presented”; “Statement of the Case” (opening brief) or “Counterstatement” (replying brief) or “Facts”; “Argument” or “Discussion”; and “Conclusion.”

After you’ve figured out the issues and how to order them, divide your brief’s Argument section or office memorandum’s Discussion section into headings to tell readers where you’re going. Headings are signposts. Use roman numerals for your point headings (I., II., III.). Some writers believe that you should use all capitals for your point headings. The Legal Writer recommends capitalizing only the first letter of each word. All capitals is unreadable. For your subheadings (A., B., C.), capitalize the first letter of each word: Don’t use all capitals. For your sub-subheadings, use figures (1., 2., 3.). You can’t have a subheading (A.) or a sub-subheading (1.) on its own.

With subheadings or sub-subheadings, you need two or more subheadings (A., B.) or sub-subheadings (1., 2.). The exception is that you can have a single point heading (I.) on its own. Use a period after each heading, subheading, or sub-subheading. Single-space your headings.

All headings, subheadings, and sub-subheadings should be one sentence long, although they may contain a semicolon. They must be concise, descriptive, and short.

Point headings in a brief answer the Questions Presented. Match the number and order of your Questions Presented with your point headings. If you have one Question Presented, you should have one point heading; if you have two Questions Presented, have two point headings. If you have two or more Questions Presented, mention them in the same order in the table of contents and in the Argument section. In the office memorandum’s Discussion section, address the issues in the same order as you did in the Issues Presented.

In a brief, write headings in an affirmative, argumentative, and conclusory way — the conclusion you want after applying law to fact. The more subheadings or sub-subheadings, the more conclusory the point headings. The argument in the subheadings should add up to the argument in the point headings. The sub-subheadings should add up to the subheadings. Too many headings will break up the text too much. Your document will be disjointed and have no flow. Too few headings will make your document disorganized. To determine whether you’ve enough headings, read all the headings in the table of contents as they appear in the brief. The argument should reveal itself.

In an office memorandum, write the headings in an objective, neutral, and informative way.

Keep your subject near its predicate. Don’t interject information between your subject and predicate. Never write ambiguous headings in which “not” precedes “because.” Will the sentence mean “Not because of this, but rather because of that”? Or “Not so, and for this reason”? Or “Because of this, but for a different reason”? Use “because” before “not,” but never use “not” before “because” unless you add a second clause or sentence.

What goes in the text after the heading, subheading, and sub-subheading shouldn’t repeat the heading, subheading, and sub-subheading. Be creative. Don’t regurgitate. Don’t even paraphrase.

In the body of your document, bold your headings, subheadings, and sub-subheadings, including the roman numerals, letters, and figures that come before them. Don’t bold anything in the brief’s table of contents or use a period after each heading. Use dot leaders in your table of contents to separate your headings from their corresponding page numbers.

13. Love Large-Scale Organization: IRARC and CRARC. For a brief’s Argument section, organize each issue using the CRARC method — the Legal Writer’s patent-pending way to organize. CRARC is an IRAC variant (Issue, Rule, Analysis, and Conclusion). CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section of CRARC, state the issue and why you should prevail on it. In the Rule section, state your points from the strongest (those you’ll most likely win) to the weakest (those you’ll least likely win). After each rule, cite your authority from the strongest to the weakest and from the most binding on down. In the Analysis section, apply your rules — the law — to the facts of your case. The facts should come from the Statement of the Case or Counterstatement. In the Rebuttal and Refutation section, state the other side’s position honestly and refute it persuasively. Address adverse fact and law, even if your adversary didn’t or might not. Doing so will diffuse its impact before your reader figures out your adversary’s argument. The Rebuttal and Refutation section is placed here on purpose. The Rebuttal
and Refutation section is in the middle, not the beginning or end — places with the greatest emphasis — of the argument. You’ve begun with why you should win. You’re right because you’re right, more than because the other side is wrong. In the Rebuttal and Refutation section, don’t repeat anything you’ve written in the Rule section. In the second Conclusion section, state the relief you’re seeking on the issue.

For an objective office memorandum’s Discussion section, organize each issue using the IRARC method — the Legal Writer’s other organizational tool. IRARC, an IRAC variant, stands for the Issue, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the Issue section, state the issue objectively. In the Rule section, state the rule applicable to the issue. Then support each point with the law. In the Analysis section, apply your rules — the law — to the facts of your case. Facts come from the Facts section, which is compiled from affidavits, affirmations, and deposition, hearing, and trial transcripts. In the Rebuttal and Refutation section, create a strawman argument — the contrary argument — and then refute it. In the second Conclusion section, give your recommendation or prediction.

In the next issue, the Legal Writer will continue with a second set of 13 do’s. Following that column will be two columns on legal writing’s don’ts.

6. Sir Winston S. Churchill, 1940, on the debt due to the Royal Air Force pilots during World War II.
7. John Bartlett, Familiar Quotations 348 (15th ed. 1980) (attributing these words to Benjamin Franklin).
MEET ME IN THE CLOUD: A LEGAL RESEARCH STRATEGY THAT TRANSCENDS MEDIA

1. INTRODUCTION: THROUGH OUR EYES, OR THROUGH THEIRS?

Several years ago, I was teaching a blind student how to use LexisNexis. He was working on his laptop, using a software program that read aloud the content of each web page we accessed. At one point, I suggested that he “scroll down.” He was puzzled. Although he was hearing every bit of information on that screen, he had no frame of reference for the spatial organization that I was so accustomed to seeing with my eyes. And to him, that spatial organization was irrelevant anyway. He wasn’t accustomed to receiving information that way, and he certainly didn’t see why anyone would need to scroll down to read on. His frame of reference was so different from mine that we didn’t share a common vocabulary, at least on that particular point.

The same could be true of the next generation of lawyers and their current legal research professors. We have likely reached a point at which our frames of reference diverge sufficiently that we don’t share a common reference point for approaching the structure of legal research. Arguably, the tech-saturated millennials need a solid research foundation more than any generation before them. Yet many of them regard our legal research instruction as cumbersome or outdated. Having grown up using intuitive electronic devices, and using them to good advantage, many modern law students resist legal research methods that require rigidity, formality, or-- worst of all--a trip to a print library. Indeed, many of them are downright mistrustful both of physical libraries and of those who extol their virtues. And for our part, “bridge generation” lawyers sometimes assume that new researchers need the same foundations that we needed when we first approached the subject. But are our assumptions valid? Or do we cling to them simply because that’s how our eyes have been trained to see things?

Viewed with fresh eyes, the legal research process bears little resemblance to past paradigms. Forget for a moment what we think we know about how best to research an unfamiliar legal issue. Outside the confines of past thinking, it becomes easier to contemplate what legal research looks like to those who are seeing it for the first time in the information age. Indeed, today’s law students are “digital natives” they grew up using the Internet as their primary means of gathering information. So while the sheer volume of information may seem unwieldy to us (the digital “immigrants”), native users find nothing particularly unusual about being hit with large amounts of data at one time. And they do not view research as a linear process.

*129 As a result, many legal research paradigms can feel like proverbial “square pegs.” They don’t quite fit the knowledge “hole” that legal research teaching must fill. But with a fresh look at legal research, a new reality emerges. Paradigms anchored too firmly to specific media, sources, or linear models are becoming ineffective compasses for navigating the legal research process in the information age. In their place, a non-media-dependent approach, one focused on categorizing information rather than on gathering it, can provide a more intuitive guide for digital natives.
This Article will advocate for fresh thinking about legal research. First, it will acknowledge the challenges that new technologies bring to the legal research classroom. Next, it will consider the limitations of existing legal research paradigms, as well as some new “truths” about research in the information age. Finally, it will propose a flexible legal research paradigm that de-emphasizes the information-gathering process and focuses instead on the importance of understanding and analyzing legal authority.

II. TEACHING LEGAL RESEARCH IN THE DATA SMOG

Lexis Advance, Google Scholar, Oyez, and Justia. Paperless, wireless, hands-free, and voice-activated. Rushing to learn the “next big thing,” only to fall behind yet again. No doubt about it: information technology is marching—no, sprinting—ahead, fueled by new products that promise to revolutionize law practice and make lawyers more efficient. But at the same time, the feedback about law graduates’ research skills remains lackluster at best. Despite a literal surplus of available tools, recent law graduates generally lack the research skills employers expect.

And what does this mean to those of us trusted to teach this critical practice skill to tomorrow’s lawyers? Are we tasked with forever chasing the latest product offerings and wedging them into an already over-full curriculum? Should professors strive to stay ahead of the Millennials so that we can teach them new technologies (or forbid them to use them) before they discover them on their own?

With the information-technology stampede showing no signs of stopping, legal research pedagogy cannot be about introducing publications or platforms or about dictating an order for consulting them. Quite to the contrary, it must be about establishing a true understanding of what it is that the researcher is looking for—and what to do with this information, which has become so dangerously easy to gather. We’ve reached an important crossroads. It turns out that “modernizing” legal research instruction has little to do with databases, gadgets, or mobile apps. It has more to do with freeing our minds (and our syllabi) of unnecessary clutter. It requires a renewed focus on the more substantive aspects of legal analysis. In short, the more that students know about legal analysis, the more confidently they will approach the research process, regardless of the tools they use or the order in which they use them.

Now, none of this is to say that we need not bother becoming familiar with what’s new on the technology front. In fact, we cannot avoid the task of staying current, and we must be ever mindful of the ways in which technology is affecting the evolution of law practice. But, at the same time, we need not be reactionary, giving up control of our legal research curricula to the winds of technological change. Nor should we be intimidated by the thought of teaching legal research to students who know more about technology than we do. Ultimately, legal research has less to do with tools and platforms and more to do with understanding and analyzing the law. If we focus on teaching the latter, familiarity with the former will come more easily.

III. THE LIMITATIONS OF EXISTING LEGAL RESEARCH PARADIGMS

Much has been written about the need to fill gaps in law graduates’ legal research proficiencies. Of course, legal research has long been recognized as a core practice skill. And the Carnegie Report called upon law schools to better connect their legal-thinking pedagogy to law-practice skill development. Many commentators, both recently and nearer the advent of the electronic-research revolution, have recognized the paramount importance of legal authority and analysis as critical components of legal research proficiency. Yet there has been robust debate about the relative merits of the so-called “bibliographic” and “process-orientated” paradigms for teaching legal research. In 2011, the American Association of Law Libraries (AALL) published its Legal Research Competencies and Standards for Law Student Information Literacy, consisting of five principles aimed at identifying the core research skills that practice-ready law graduates should possess. Many scholars have published suggested paradigms and course-restructuring studies since Carnegie and the AALL information-literacy report, signaling positive movement toward better legal research skills for tomorrow’s law graduates.

But most legal research paradigms, both existing and proposed, retain a linear foundation. They dictate an order in which to consult sources, or they suggest that legal research can be reduced to a series of steps in a reasonably well-defined process. Through the eyes of the modern law student, such frameworks often appear neither intuitive nor efficient.
There are two problems with the linear paradigm. First, a framework focused on the order in which to take certain steps (or a “comprehensive” list of sources to consult) suggests to the novice researcher that legal research is yet another information-gathering endeavor. Unfortunately, most students come to law school overconfident in their research skills because they are fairly adept at the simple task of gathering information. So they often fail to appreciate that legal research is significantly more sophisticated and complex than the more-general research they have conducted in the past. And if we teach legal research with an emphasis on information gathering, then we inadvertently feed into this dangerous line of thinking.

Second, an overly rigid, “step-by-step” legal research process doesn’t resonate with most modern law students. In truth, Internet research is rarely linear, and digital natives are quite accustomed to sifting large amounts of information contemporaneously. Viewed from that perspective, a step-by-step process may not feel genuine. And if students don’t buy into the framework that we teach, then they won’t internalize a solid research foundation.

Beyond the student perspective, the very nature of current information technology calls for legal research teaching that emphasizes substance over format or formula. While legal research platforms are becoming increasingly easy to use, they are simultaneously making it more difficult for novice researchers to understand and analyze the results that they provide. Thus legal research teaching should leave the method and means of information gathering to the researcher, focusing instead on the foundational knowledge necessary to accurately categorize the information and assess its completeness.

**IV. A FEW SIMPLE TRUTHS: LEGAL RESEARCH IN THE INFORMATION AGE**

**A. It Is More Important to Known What It Is Than to Known How to Find It**

Every day, it becomes easier to locate legal information. Gone are the days of complicated search strings or telephone calls to the court for copies of the latest unpublished opinions. In fact, you don’t even need a citation to retrieve a published case these days. And beyond the obvious benefits of ease and convenience, this is excellent news for legal research professors; we no longer need to teach the nuts and bolts of navigating arcane legal sources. In fact, most electronic sources are designed to be self-taught. And because modern law students are “technological chameleons,” there’s little doubt that they’ll figure it out if they believe that it’s important.

But, as noted, the avalanche of easily accessed information can make it increasingly difficult for new researchers to know what is important and what is not. Where books put concrete corners around information, electronic sources can seem to present the same information as seamlessly connected. Quite often, Internet researchers care less about the nature of the information source than they do about its content. And even the fee-based legal research providers no longer require researchers to make source selections at the outset. Instead, Lexis Advance and WestlawNext present results from multiple sources all at once, in response to what closely resembles a Google search. Even after the researcher limits the results and focuses, for example, on case law, the results (regardless of jurisdiction, court level, or publication status) are presented as a one list, almost suggesting-- to the novice-- that they carry equal weight.

So, although finding legal information has almost become a one-click process, intelligently using it remains a difficult skill to master. To understand research and perform it well, students must be able to specifically identify a legal source when they see one-- in any medium-- and they must learn to question the nature of everything that they turn up along the way. Even more fundamentally, they must understand exactly what authority governs a particular legal issue. This is far more critical than knowing the ins and outs of navigating the various platforms.

In fact, it’s probably time we stop spending any significant class time at all showing students where to click on Lexis and Westlaw. Let the student representatives demonstrate their products outside of class. Let the online tutorials, the certification programs, the live “chat” features, and the 24-hour-customer-service lines answer their technical questions. And, as professors, let’s be fine with the fact that we don’t always know where to click or how the newest mobile app works. For one thing, those concepts are moving targets, and professors are hardly expected to be their students’ personal IT departments. Moreover, most of the mechanics that we attempt to teach them in the first year will likely be obsolete by the time they graduate. Finally, think back to the last time someone updated the look and feel of your favorite mobile application. Did you attend a live training session? Probably not. More likely, you toyed with it until you figured it out, or you “chatted”
with an online representative if you had a question. When it comes to the bells and whistles of legal research tools, let’s let students do the same.

If professors spend less time teaching tools and mechanics, then they can spend more time teaching substance. For every hour spent teaching students how to access information (in books, on the paid services, or on the open web), professors should devote many more hours to assuring that students understand legal authority and gain significant experience actually working with it. This means more than incorporating a longer lecture about court structure or the legislative process. It means significant, hands-on experience where students practice recognizing and weighing authority in the context of widely varied research hypotheticals.43

The specific format for achieving this would, of course, need to be customized to fit within an individual law school’s curriculum. But here are some representative examples to consider. First, extensive library exercises, print-instruction units, or library “treasure hunts” could be replaced with quick-turnaround research simulations where media choice is left open. Or a school might “flip” the legal research classroom, pushing the lectures about gathering legal information out to podcasts or other out-of-class media, thus freeing in-class time for hands-on practice and discussions about legal authority in a variety of contexts.44

Of course, an age-old problem may persist. The less law one knows, the harder it is to know what law to find. Developing a significant substantive law foundation takes time, and this will remain a challenge without easy answers. It probably isn’t realistic to suggest that one can gain enough experience within a first-year legal research unit to become a widely experienced researcher.45 But each additional experience is exponentially more valuable than the one to three experiences that most students get in the typical legal-writing class. Therefore, time shifted from teaching mechanics to practicing analysis will almost always be time better spent.

*137 Sure, somewhere along the line, new researchers will need to figure out where to click. And in the (unlikely) event that they are working in print, of course they’ll need to update using pocket parts and the like. But inevitably, the more platform options we have, the more personal the mechanics of legal research will become. Yet the nature of legal authority, and the law needed to answer a particular legal question, will remain far less malleable. And that’s what students need to understand. If they understand the issue and what to look for, then they will set out to find it.46

B. “Run a Search” Is Not Research47

1. Law Students Know How to Gather Information

In general, modern law students are good at digging up bits of information, but they aren’t particularly good at analyzing what they’ve found.48 Nevertheless, many of them fancy themselves to be experienced researchers.49 After all, they’ve written many “research” papers. And they do “research” on a daily basis, adeptly using electronic media to grab instant answers to virtually any question they confront. No doubt about it; these folks know how to run a search. But legal research is so much bigger and more sophisticated than most other research they’ve conducted. And, unfortunately, it can be difficult to convince them of this reality.

*138 Consider this example. A while back, I ran into one of my Research & Writing students in the school parking lot. At the time, the class was busy conducting research for that term’s open-memo assignment. I asked him how his research was coming along, and he replied, “It was easy! I think I already have enough cases to write a memo.” Easy? “Enough” cases? He had clearly missed the point.

But, in a way, it was tough to blame him. After all, throughout undergraduate school—and perhaps even during masters’ programs—that’s the mindset: get “enough” sources to write a paper; then write “enough” pages to meet the minimum.50 Of course, experienced lawyers know that legal research isn’t about getting some finite number of cases. It’s about getting the right legal authorities and—even more fundamentally—it’s about getting the right law. It’s about understanding enough about an unfamiliar issue that one even knows what to look for. Of course, most students come to law school with a very different perspective on “research.”51 And if we focus our teaching on information-gathering methods, then we may inadvertently feed into the notion that legal research isn’t terribly different from what they’ve been doing for years in other disciplines.

Let’s contrast the overly confident student in the parking lot with another student, who was back on campus after having worked as a summer associate in a large law firm. She revealed that she had no problem transitioning over to LexisNexis after having used only WestlawNext in law school. But she nonetheless felt like a “failure” when it came to legal research. She described the first-year legal research experience as a “nice exercise” (ouch!), but she admitted that, when she received an actual research assignment at the firm, she often didn’t even understand the issue, let alone what she should be looking for to answer it. And, of course, this rendered her ability to gather information on LexisNexis pretty useless.

*139 It is therefore critical to disabuse students of the notion that legal research is easy and familiar—that it’s just a matter of gathering information. To that end, anecdotes like the ones above could be effective, especially when delivered by students or by graduates who’ve been “out there,” experiencing real research first hand. But personal “ah-hah” moments might be even more effective. For example, periodic, pop-quiz-style research simulations might help students to see that they don’t know what they don’t know about legal research. Either way, they need to understand that running searches is a means to an end.

2. Information Gathering Is Only the Beginning

Once students buy into the idea that legal research is different, we can get more specific. Real legal research has two components: locating information and deciding what to do with it. In other words, the legal researcher both gathers and analyzes. Gathering—the part with which students are familiar—is the easy part. But analyzing legal sources is a whole new animal. And that means not only that professors must devote significant time to teaching analysis, but also that students must learn to understand the difference between the two. Consider the following examples:

<table>
<thead>
<tr>
<th>Information Gathering (easy)</th>
<th>Legal Analysis (not so easy)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Running a Google search that leads to a Wikipedia article</td>
<td>Reading the cited sections in the context of the entire statutory scheme and assuring that the statute was in force in the jurisdiction at the relevant time. Considering the statute’s implications for the fact pattern and assessing the need for further research.</td>
</tr>
<tr>
<td>containing citations to potentially relevant statutes.</td>
<td>Developing a broad understanding of the legal framework for the research issue. Considering whether other legal theories might also apply. Deciding what body of primary authority governs and considering which cited primary authorities warrant deeper reading and consideration.</td>
</tr>
<tr>
<td>Using a treatise’s index to find a chapter that addresses the legal topic.</td>
<td>Carefully reading the cases from the relevant jurisdiction to understand the general rules. Assessing whether additional cases might add to the big picture. Narrowing the results by deeply considering the reasoning of the cases and the implications of that reasoning for the fact pattern.</td>
</tr>
<tr>
<td>Retrieving a list of cases with a Boolean search on LexisNexis or Westlaw.</td>
<td></td>
</tr>
</tbody>
</table>

*140 Most students are quite willing and able to do tasks like the ones in the first column. But will they push on and carefully undertake the critical thinking required by the ones in the second column? Do they understand the difference? To be successful researchers, students must learn to recognize the moment when information gathering ends and the real legal work must begin.

*141 C. With the Right Foundation, Reasoned Research Can Occur in Any Medium

No doubt about it; we are teaching a generation of students who have done no significant research (of any kind) in print.
Because other online research seems so easy, they generally underestimate the effort involved in conducting thorough legal research. Consequently, many of them come to law school saddled with a proclivity to demand quick answers and instant gratification. In fact, a good deal of research supports the idea that the Internet is making all of us not just poor researchers, but shallow thinkers and cursory readers as well. This is true not only of the technology “natives,” but also of the immigrants.

Under the circumstances, it’s no surprise that modern students’ legal research proficiency is hindered by what commentators have accurately identified as “shallow reading” and “cut-and-paste” analysis. And there is data aplenty to establish that today’s law graduates are generally inefficient researchers. But is a return to the books the only antidote? In truth, it is unlikely that we’ll beat this characteristic out of law students simply by taking away the tool that makes it easiest for them to manifest it. Instead, they must develop both the mental stamina and the knowledge base to effectively analyze the information that they find.

Traditionally, books provided a concrete framework around which to conduct this analysis. By contrast, the Internet has been aptly described as the world’s largest library with the “books” all over the floor. Of course, this is an alarming vision for those who embrace traditionalist legal research theory. But can “traditional” legal research, that which we associate with orderly libraries and neat shelves of print digests, ever be relevant to the web-native law student? Can it help bridge the gap to deeper legal thinking?

In fact, it can. Despite its print origins, traditionalist legal research theory holds important lessons for the new researcher who is still developing the knowledge base necessary to conduct thoughtful research. Traditionalist legal research theory provides a focused means of organizing information—from general background information to the specific rules that govern a particular legal issue. And organizing and categorizing legal authority are core skills that new researchers desperately need to master.

Therefore, regardless of platform, the “traditionalist” paradigm is grounded in some timeless concepts that can provide a lifeline for novice researchers. First of all, the traditional researcher gains background knowledge in secondary sources, developing a foundational understanding of the topic and identifying terms of art. Second, when searching for case law, the traditional researcher consults legal digests to connect search terms to specific, recognized legal topics. This type of search recruits the aid of more experienced researchers (the publications’ legal editors) to identify the relevant universe of authorities. While keyword searches have a role to play, a topic search helps to define the relevant universe in ways that a keyword search simply cannot. So embracing certain traditional concepts can instill a sense of confidence in the completeness of the results.

And while traditionalist theory was certainly born in the print era, it can come alive in any medium. Today, researchers can conveniently replicate this approach using both free and fee-based electronic sources. Consider the researcher interested in a federal copyright issue. By accessing Nimmer on Copyright on LexisNexis or Patry on Copyright on Westlaw, one could browse the table of contents or launch a word search for direct access to expert commentary and background information. And the attorney researching a state-law issue could find similar success within the state-specific electronic treatises and practice guides.

Even the digests, major players in traditional case law research theory, are available online. Indeed, our hypothetical researchers could use search terms uncovered in the treatises to search Westlaw’s KeySearch or LexisNexis’s Search by Topic. These services replicate the print digests, but with the added convenience of full linking between the topics and the cases that have been classified as containing a relevant headnote within the hierarchy. And, mercifully, they’ve dropped the archaic label—digest—which is beginning to sound dusty and antiquated to professors, never mind to their students. So, despite arguments to the contrary, the electronic age need not signal the death of the digest concept. It signals, at most, a name change. The value of topic-oriented searching is arguably greater than ever in a library with the books all over the floor (especially when there is no one around who remembers where they were in the first place). As Barbara Bintcliff put it, the topic outlines in the digest system provide a syndetic structure for each area of law, allowing researchers to understand the relationship, context, and hierarchy of identified rules. To use the digest, you have to think in terms that match its organization; you have to think of rules and hierarchies. The digest’s organization follows the same pattern as our legal reasoning process, and has almost come to be the physical manifestation of “thinking like a lawyer.”
Relationship. Context. Hierarchy. Bintcliff’s words describe concepts that sound anything but outmoded. Of course, there was a time (long ago) when electronic research truly was at odds with traditional views of how legal research should be conducted. First-generation, free-text search logic had nothing to do with the familiar way in which research had been conducted throughout the preceding century. Without the parameters of the West Key Number System and its topical hierarchy, early electronic-search results were at once more precise and more unwieldy.

But today, the disconnect between traditional methods and electronic media has all but disappeared. Lawyers can, and quite frequently do, conduct end-to-end “traditional” research using exclusively electronic sources. Everything the researcher needs—from treatises to digests to recent statutory enactments—is available electronically. Traditional research is very at home on modern platforms. And modern, web-dependent law students need its lessons more than ever.

*145V. RESEARCH IN THE “CLOUD”: A CREDIBLE STRATEGY THAT HOVERS (WITHOUT POINTING)

A. A Flexible Framework for a Changing World

To be sustainable beyond the first-year research unit, law students’ understanding of legal research strategy must be based on a credible framework that they actually use. It must also be broad enough to transcend the media in which they will choose to work, both now and in the future. If the proffered strategy feels inefficient or proves unwieldy in practical effect, then they will likely abandon it. And, as noted, if it is anchored directly to today’s technology, then it will probably be out of date by the time they graduate.

Moreover, modern students will better grasp the structure of legal research if the process itself is described as fluid and flexible. Because they did not grow up using books (for legal research, or for anything else), they have no print framework for research to begin with. So, as a threshold matter, it is quite unlikely that they need to “see it first in print” in order to understand the complex web of legal information that they confront electronically. And because they are accustomed to receiving an array of information contemporaneously, a linear model is unlikely to resonate sufficiently that they will internalize it as a valid means of navigating the process. Instead, a broad and flexible paradigm is a better fit.

1. If They Don’t Believe in It, They Probably Won’t Remember It.

Teaching foundational concepts in print is risky business. From the perspective of the digital native, familiarity with print material is no longer essential to understanding the process of legal research. And we lose credibility with many modern law students if we suggest that something of value can only be found in a book. Worse yet, if we insist on connecting everything back to particular sources or a rigid process, then we may miss the opportunity to truly teach students how to think through a legal problem. For example, if we strive to establish foundational understanding by first teaching the research process in the books, but then we allow students to conduct the actual research for their graded assignments electronically, we create an apparent disconnect. It almost looks as if the organized process belongs to print, while electronic legal research is, by contrast, a free for all.

And if students react to seemingly irrelevant print lessons by failing to internalize foundational concepts, then they will likely revert to old research habits when they inevitably gravitate back to electronic sources to do their actual research. In other words, if the process doesn’t carry over to the media they’re actually willing to use, then they are far less likely to actually learn the fundamental, foundational concepts that are so critical to good legal research. Instead, they may achieve mere “inert” knowledge: “the inability to apply skills and concepts in situations other than those in which they were originally learned.”

On the other hand, when students learn about legal sources as they use them, they are more likely to internalize a non-media-dependent understanding of legal authority and legal analysis. This is the foundation necessary to take with them to wherever technology’s “next big thing” leads. It’s no longer about mechanics. It’s about assuring that the research methods
we teach are connected to what the students actually do.

*1472. When It Comes to Marching Orders, Less Is More

Many volumes of pedagogical scholarship, and many pages of legal research texts, have been devoted to checklists, steps, acronyms, and flowcharts designed to give a sense of direction to the new legal researcher. No doubt, it’s important to have some structure around the daunting task of researching a legal issue. And, of course, most students are happy to cling to templates and checklists. (That way, many of them hope, they can simply plug in their legal problems and wait for the “right answer” to present itself.)

But as professors, we recognize the fine balance between offering models, on the one hand, and helping students to become independent legal thinkers, on the other. An independent legal thinker is capable of tailoring research efforts to meet the specific demands of the project at hand. So the most effective research models are broad and flexible, rather than rigid or detailed.

Flexibility has become even more critical given the rapid evolution of electronic legal research platforms. With even the most traditional electronic-research platforms looking more like Google every day, it is becoming increasingly difficult to force students to march through legal sources in a particular order. In reality, such an approach can feel inconsistent with what is becoming the primary method by which they locate and process information.

As of this writing, traditional Lexis and Westlaw were nearly phased out. So it seems that the Google-esque home screens of Lexis Advance and WestlawNext are the new “normal” when it comes to research platforms (for the time being, anyway). On these new home screens, the researcher enters any old thing into the search box, usually without first identifying a specific database. Then the screen is almost immediately populated with results from a host of sources, both primary and secondary.

So should we tell students to put their blinders on, ignoring relevant items surfaced through invisible algorithms through tools like Westlaw’s ResultsPlus? Wait to look at that information until the “right time”? Run another search later, regardless of the additional expense? This sort of rigidity likely appears wasteful and inefficient to the modern, multi-sensory, multi-tasking millennial. And it probably is wasteful and inefficient in the long run.

Ultimately, the trouble with overly detailed legal research paradigms is that they suggest that legal research is a linear process, when reality often proves this to be untrue. Moreover, most step-by-step approaches require the novice researcher to start the information-gathering process in sources that stand literally no chance of being cited in the written document. Of course, this instruction is quite understandable to the experienced legal researcher, and it is certainly based on sound principles. But the experienced information gatherer can’t help wondering, “But if I go directly to cases, might I not find the perfect case right out of the gate?”

And, if we are honest, don’t we often begin our own research with a case we have stumbled upon, and then “backdoor” into secondary authority as needed to deepen our understanding or gain context? Actual, applied legal research methodology is far more fluid than many teaching models suggest. So when teaching students a framework for understanding legal research, we must be cautious about presenting the process as rigid or template-driven. Students must understand that the steps they will undertake will flex with the circumstances, including the nature of the issue and the amount of information with which they begin. They must understand that precise marching orders are not possible. While they may crave the security of specific commands at the outset, a broader approach will serve them in the long run.

Of course, none of this is to say that students should not follow a strategy. Indeed, a reasoned strategy is a must. But, rather ironically, the more detail we provide, the less intuitive the process may become—and the more quickly it will fail students who encounter a bump in the road. Put simply, when it comes to legal research, a compass is more helpful than a list of turn-by-turn directions.

B. A Tried-and-True Foundation
The paradigm proposed here is familiar in an important way. At its foundation is a research process that stands out for its simplicity and timelessness. First articulated forty years ago by Marjorie Rombauer in her text *Legal Problem Solving*, this four- step research process was adapted slightly by Joseph Kimble and F. Georgeann Wing for use at Thomas Cooley Law School:

1. Preliminary analysis (or background research)

2. Check for codified law

3. Check for binding precedent

4. Check for persuasive precedent

This approach provides an excellent starting point for a modern research strategy, but with another gentle adaptation. Rather than depicting a step-by-step process, the strategy proposed here describes four broad categories, or “buckets,” in which to place the information that the researcher has gathered. The researcher focuses on filling each “bucket” with complete and appropriate information, rather than on following a particular set of steps. So when the linear information-gathering framework is removed from the traditional model, the focus shifts to the important work of categorizing and analyzing legal information.

**C. The Cloud-Research Model.**

As noted, the task of collecting information isn’t always amenable to sequential ordering, especially in an electronic environment. Even so, recognizing and categorizing legal authority is critically important to legal research—and to sound legal analysis. A legal research strategy focused on categorizing, rather than on sequential gathering, can provide flexible guidance.

Using a category-driven approach, the cloud researcher will build a virtual filing cabinet tailored to the specific research scenario. But instead of checking off steps or sources, the researcher focuses on filling the four categories (the “buckets”) by considering the nature of the information that they have gathered. Drawing on base knowledge about the type of authority needed to address the question, the researcher assesses how “full” (or perhaps overfull) each bucket has become, going out to collect more information as needed. Once the initial information is organized, the researcher can begin the analytic process, ever willing to go back and gather more information if any category is incomplete.

Picture all of this information hovering in a “cloud” above the researcher, who will ultimately pull down relevant items as he or she begins planning and writing the analysis. But this isn’t any old cloud. It’s a virtual filing cabinet. It’s the vehicle for connecting legal research to “cloud computing”—the world’s metaphor for conducting business (and life) in cyberspace.

The researcher’s cloud has four spaces, and each one holds the “bucket” for a particular type of legal information. The researcher will draw from this universe of material, incorporating primary-law authorities into the analysis during the drafting stage. The medium in which the “cloud” is reflected is up to the researcher. For some, it might be a list or chart on a sheet of paper. But, more likely, the cloud’s contents will be reflected in an electronic document with copied-and-pasted material and links to full-text authorities. Or it might reside on Lexis Advance, WestlawNext, or Bloomberg: in the research history, the research folders, or the “sticky” notes. It might even be in a chart on a mobile application like Evernote. But regardless of media, the researcher will organize authorities into the four broad categories and intelligently use them in drafting the legal analysis.
1. The Cloud Researcher in Action

Here is how it plays out in real life. The researcher receives an assignment and follows his or her first instinct, consulting--who else?--Google (the “Great Oz” of the information age). From there, the researcher is clicking away, probably on Wikipedia, lawyers’ websites, and other non-legal sources, like blogs and newsletters. Soon, those sources lead to primary law, including statutes and cases. Those primary-law sources may or may not be up to date, and they may or may not even be from the proper jurisdiction. Nonetheless, together with the non-legal sources, they begin to form the landscape of the initial information-gathering process.

Incidentally, it is important to recognize that, no matter what strategy we put before them, laws students are very likely to begin the process this way. So the model proposed here specifically allows for it but also instructs the researcher to begin putting information into the buckets very early on. To do this effectively, the researcher must have the substantive, foundational knowledge discussed in the preceding sections. And, admittedly, if a student has had less instruction on where to click, then the task of locating information may take a bit of trial and error. But, if that instructional time has been shifted from learning mechanics to understanding authority, as suggested above, then the student will have greater foundational knowledge. And a researcher with such knowledge is far more likely to know what to look for.

The proposed research strategy is depicted in the graphic below, followed by a brief explanation of each category.

**Background Materials.** Background research can be abundantly helpful to the novice researcher faced with an unfamiliar legal issue. Yet it’s often difficult to get students to linger here. Too often, they want to rush forth on a treasure hunt for the perfect case. Indeed, reading background material can seem like a waste of time when one is in treasure-search mode. And yet we know the truth: the less you know, the less you can usually find, particularly when researching online. But this important category of authority can come to the fore in a non-linear research strategy. Simply put, the researchers can do what they will inevitably do anyway: skip ahead and read some cases. But in doing so, they need not abandon the strategy; this strategy does not dictate which sources to read first.

Of the many things we must teach about this category of authority, a few stand out. First, in terms of categorizing information, students need to accept that non-legal sources like Wikipedia (or quasi-legal sources like lawyers’ websites or professors’ blogs) can be a springboard to research, but the only possible bucket that they can land in is this one. In other words, non-legal sources are a way to find the law; they are not law themselves.

Second, students must learn the importance of context. They must actually believe in the value of gaining a broad understanding of the legal issue before attempting to flesh out the details with more-specific authorities. The professor can help to instill this belief by demonstrating the value of expert commentary in class. For example, the professor could use an in-class exercise to show how much easier it is to navigate an unfamiliar area of law with a good secondary source than with a list of cases.

Finally, students must understand that all secondary sources are not created equal. This bucket will contain two types of information: (1) finding aids and (2) true secondary legal authority. New researchers must develop a habit of critically assessing the sources of their background information. For example, an open-web search will yield mostly finding aids: sources that lead to legal authority, but which are not credible enough to be authority on their own. On the other hand, a treatise or a law-review article is secondary authority; researchers can use the information to develop context and understanding. They could even cite these authorities to a court. This bucket is not properly filled until the researcher has a sense of context for legal issue--context that is based on credible authority.

**Codified Law.** This category emphasizes the primacy of enacted law in legal analysis. Too often, the research experience in first-year classes has the unintended consequence of downplaying the importance of a comprehensive statutory search. Professors often want to assure that students have the correct codified law before they go too far in writing the analysis. So we might discuss “the statute” in class, or we might point students toward it during conferences or question-and-answer sessions. When this happens, students may come away with the impression that finding codified law is pretty easy and that the real work is the treasure hunt for the perfect cases to include in the memo. Consequently, they are often eager to leap past this step and get to what they “really need”: the cases. Of course, this mentality impedes internalizing a proper understanding...
of the importance of codified law.

But in a carefully designed research unit, students should have opportunities to practice recognizing and analyzing codified law. Through this process, they will learn to recognize codified law when they see it, and will instinctively place any such information into this bucket, even if they have read cases before thoroughly searching for enacted law. When it comes time to assure that this bucket is properly filled, the researcher will check to see that the items here are both current and from the binding jurisdiction. The researcher might also need to assess which of the many items in this bucket actually govern the legal issue. Finally, they must assure that there aren’t additional sources of governing law, such as regulations or procedural rules. After identifying the codified items that are current, complete, binding, and relevant, the researcher should discard the rest.

**Binding Case Law.** This bucket will house a group of potentially relevant cases. Undoubtedly, the researcher will have unearthed some relevant cases while sifting through other sources. Thus, they will have information to drop into this category very early on. But when assessing the contents of this category, the researcher should initially begin sorting cases based on whether they are binding in the jurisdiction. All other cases should be moved to the persuasive authority category. This will help the researcher to focus first on articulating the main rules before considering nuances or novel arguments.

The second critical step is to use a reasoned approach to both (1) define the relevant universe (cases that belong in the bucket because they are generally on point) and (2) narrow to the most factually analogous cases (cases that will most likely make their way into the written analysis). To do this, the researcher should use a combination of topic-based (digest-style) and keyword (free-text) search methods. The topic search helps to ensure that the researcher has uncovered the broad, general rules and the current state of the law. And the keyword search can help to identify specific cases with similar facts or important nuances.

Many novice researchers are attracted to keyword searches, which seem like the most direct way to get to that “perfect” case. And, indeed, once the researcher has context, this type of search allows excellent control over the search results. But in an unfamiliar area of law, the topic-based search offers some important advantages. First, the topic-based search limits the results to cases the legal editors have identified as generally relevant to the topic. Second, the topic-based search reduces the chances of missing a key authority. When used together, the two search methods assure that the researcher can both articulate the broad, general rules and identify the most relevant authorities to use as illustrations or examples.

**Persuasive Authority:** This is the place to house any non-binding cases or any high-level secondary authority that the researcher turns up along the way. Although many assignments will not warrant additional research in this area, it is important to include this category so that the researcher develops a habit of thinking critically about the state of the law in the relevant jurisdiction. And if an exhaustive search of binding authority leaves an important question unanswered, then the researcher can draw upon persuasive cases and high-level secondary authority to craft an argument.

After assessing the contents of each bucket, the researcher can feel confident that the gathering process is complete. This will be true regardless of the order (or the media) used to gather the information.

### 2. The Research Cloud and the Writing Process

As the cloud’s buckets become even partially filled, the researcher can begin planning the written analysis. The sooner one begins planning and writing, the sooner any “gaps” or other research deficiencies will present themselves. Thus, this approach fuses research and writing in a credible way. After creating a preliminary universe of “candidates” for inclusion in the piece, the researcher stops fretting about when to stop gathering tidbits of information. Instead, they begin drafting early on, using that process as a means of synthesizing the law, identifying the best authorities, and exposing any deficiencies in the research. So the research is never “done” before the memo is. And the memo writing starts before the research is necessarily complete.

To assure that students effectively connect the research and the writing in this way, professors should incorporate pre-writing tools that probe students to reflect critically on the information gathered, as well as to assess the potential need for more. Reflective assessment has long been recognized as a critical tool for legal research instruction, and its value in a non-linear research process cannot be overstated.
An effective pre-writing model would be to require both a research log and an attack outline. The log\textsuperscript{\textsuperscript{16}} would reflect the main authorities included in each area of the research cloud. In essence, it would be a summary of the cloud’s most-critical content.\textsuperscript{\textsuperscript{17}} The attack outline\textsuperscript{\textsuperscript{18}} would provide a concrete means of connecting this content to the written analysis. As the researcher addresses the various elements of the outline, he or she should be able to pull down necessary authority from the cloud, as manifested in the log. If they cannot, then more research is likely warranted.

\textit{VI. CONCLUSION}

We must look at legal research with fresh eyes in order to effectively teach this critical skill to modern law students. It is becoming increasingly clear that students need more exposure to fundamental legal concepts than they do to platforms and mechanics. A flexible, non-linear approach is more relevant to modern law students than the more-rigid paradigms of the past. If students become efficient at intelligently organizing information around the four broad categories described here, then they will have both the solid foundation and the flexibility to conduct effective research in the real world.

\textsuperscript{158}Appendix A

The Plog

\textit{TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE}

\textsuperscript{159}Appendix B

\textbf{ATTACK OUTLINE}

\begin{enumerate}
  \item Identify any \textbf{applicable codified law}.
  \item Write a \textbf{foundation paragraph} that sets forth the general rules. Identify the best authorities to cite for these rules.
  \item Spot the specific \textbf{sub-issue(s)}. For each,
    \begin{enumerate}
      \item provide the main rule,
      \item decide which case(s) to cite for the rule, and
      \item either list the best illustrative cases, or explain why illustrations are not needed.
    \end{enumerate}
  \item Outline the \textbf{application} of each issue. State the “point” you need to make, and then name the authority and facts to support each point.
\end{enumerate}
a. Point

i. Authority (reasoning/rules)

ii. Facts

b. Point

i. Authority (reasoning/rules)

ii. Facts

c. (Continue for each point)

Footnotes

a1 © 2014, Toree Randall. All rights reserved. Associate Professor of Law, Thomas M. Cooley Law School, from 2009-2014. The Author would like to thank research assistant, Shannon King, for her excellent assistance, along with colleagues Bradley Charles and Erika Breifeld for their invaluable insights and advice.


2 The faculty and staff responsible for teaching legal research vary from law school to law school. Excellent research instruction is conducted by full-time faculty, clinical professors, legal-writing professors, law librarians, and other legal professionals. Thus, the titles “professor,” “teacher,” and “instructor” are used interchangeably here.

3 As younger professors continue to join our ranks, this may not be true of all professors responsible for teaching research. But it is nevertheless true of many of us.

4 With a solid research foundation, students will typically have more time to confidently focus on good writing and analysis. See Sarah Valentine, Legal Research as a Fundamental Skill: A Lifeboat for Students and Law Schools, 39 U. Balt. L. Rev. 173, 188-189 (2010).


See Teitcher, *supra* n. 5, at 555-556.

Gallacher, *supra* n. 6, at 164 (footnote omitted).

Suzanne Ehrenberg & Kari Aamot, *Integrating Print and Online Research Training: A Guide for the Wary*, 15 Persps. 119, 119 (Winter 2007) (The “bridge” generation “grew up on print, with indexes and tables of contents as our tools ... [t]hen, somewhere along the way, ... learned the computer.”).


For an explanation of the “data smog” concept, see generally David Shenk, *Data Smog: Surviving the Information Glut* (1st ed., Harper Edge 1997) (examining the effects of the overwhelming amount of information available on the Internet).


“The Oyez Project at Chicago-Kent is a multimedia archive devoted to the Supreme Court of the United States and its works. It aims to be a complete and authoritative source for all audio recorded in the Court since the installation of a recording system in October 1955.” Oyez, *About Oyez*, http://www.oyez.org/ (accessed Jan. 5, 2015).


See e.g. Simplifying Legal Research: Thomson Reuters Rolls Out WestlawNext at Legaltech, 27 Law.’s PC 1 (Feb. 15, 2010) (“[WestlawNext] is designed with a clean, modern interface and powerful new search functionality intended to make legal professionals more efficient. It also gives them the confidence that they’ve explored every relevant document in a search.”); Thomson Reuters, Advertisement, 91 Mich. B.J. 12, 13 (Dec. 2012).

See e.g. Paul D. Callister, *Beyond Training: Law Librarianship’s Quest for the Pedagogy of Legal Research Education*, 95 L. Lib. J. 7, 9-11 (2003) (providing historical perspective on the pervasive deficit in law graduates’ research skills); Valentine, *supra* n. 4, at 173-174 (noting that “[b]eyond laments about the lack of general lawyering skills, the bench and bar also routinely highlight the inadequacy of the legal research skills of recent law graduates” (footnote omitted)).

.Id.

See infra sec. IV(B)(2).

See MacCrate Report, supra n. 19, at 157.


Most law schools give only casual attention to teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients.

Carnegie Report, supra n. 22, at 188; see also Mark F. Kightlinger, Two and a Half Ethical Theories: Re-Examining the Foundations of the Carnegie Report, 39 Ohio N. U. L. Rev. 113, 113 (2012) (“In the past three years, the American Bar Association, several major state bar associations, the Association of American Law Schools, the New York Times, law students, and many legal educators have called for fundamental changes in the way we educate new lawyers.”).

See e.g. Callister, supra n. 17, at 38-40 (examining the use of primary, secondary, and combined legal sources in legal research); Marjorie C. Rombauer, Legal Problem Solving: Analysis, Research and Writing 134-145 (West 1983) (offering a framework of steps for legal research); Valentine, supra n. 4, at 207-208 (discussing the components of legal research). On the other hand, some have argued that instruction on the mechanics of information gathering is still essential to mastery of the legal research process. See e.g. Matthew C. Cordon, Task Mastery in Legal Research Instruction, 103 L. Lib. J. 395, 405 (2011).

The bibliographic approach emphasizes understanding and categorizing legal sources, while the process-oriented approach emphasizes frameworks for approaching a legal research problem. See Callister, supra n. 17, at 8-21 (examining the debate between the “process-oriented” approach and the “bibliographic” approach).


See e.g. Joseph Kimble, I’m Ready: Learning Research and Reasoning through Audiotapes, 3 Trends L. Lib. Mgt. & Tech. 1, 1 (1990) (outlining a four-step legal research process adapted from Marjorie Rombauer, Legal Problem Solving: (1) perform background research, (2) check for codified law, (3) check for binding precedent, (4) check for persuasive precedent); Rombauer, supra n. 24, at 134-136 (describing four steps in the research process: (1) search for statute or other written law, (2) search for mandatory precedents, (3) search for persuasive precedents, (4) search for refinement of the researcher’s analysis).

See e.g. Rombauer, supra n. 24, at 134-145.
See Teitcher, supra n. 5, at 565 (referring to students as “expert finders” rather than “thinkers”).

Julie M. Jones, Not Just Key Numbers and Keywords Anymore: How User Interface Design Affects Legal Research, 101 L. Lib. J. 7, 10 (2009) (quoting Herbert Simon, Designing Organizations for an Information-Rich World, in Martin Greenberger, Computers, Communications, and the Public Interest37, 40-41 (John Hopkins Press 1971)) (“Where information is abundant, as it is for law students, access to more information is not the problem. Rather, the problem is the efficient allocation of attention to the right information: ‘What information consumes is rather obvious: it consumes the attention of its recipients. Hence a wealth of information creates a poverty of attention and a need to allocate that attention efficiently among the overabundance of information sources that might consume it.”).


For example, on WestlawNext, when the researcher merely enters a case name and jurisdiction on the home screen, it’s not terribly difficult to locate the case on the resulting list.

See e.g. WestlawNext, Getting Started with Online Research, http://lscontent.westlaw.com/images/content/WLNGettingStarted10.pdf (June 2010).

Teitcher, supra n. 5, at 565.

Ehrenberg & Aamot, supra n. 9.

See Larry Sanger, How the Internet Is Changing What We (Think We) Know, http://larrysanger.org/2008/01/how-the-internet-is-changing-what-we-think-we-know/ (Jan. 23, 2008) (criticizing the manner in which the surplus of information available on the Internet had devalued the quest for knowledge).


See Valentine, supra n. 4, at 188-190 (explaining that the proliferation of easily accessed information has actually made it more difficult to locate what is truly useful).

This concept is recognized in AALL’s information literacy report. See AALL, supra n. 26.

For example, WestlawNext and Lexis Advance had yet to be released when the May 2012 law graduates entered law school. It is unlikely that those graduates are using the mechanics of the old interfaces in their current legal work.

See e.g. Brooke J. Bowman, Researching Across the Curriculum: The Road Must Continue Beyond the First Year, 61 Okla. L. Rev. 503, 551 (2008) (emphasizing that repetition is crucial to retention of legal research skills); Ehrenberg & Aamot, supra n. 9.

The “flipped” classroom offers many pedagogical benefits. See Dan Berrett, How “Flipping” the Classroom Can Improve

Callister, supra n. 17, at 10.

Theodore A. Potter, A New Twist on an Old Plot: Legal Research Is a Strategy, Not a Format, 92 L. Lib. J. 287, 288 (2000) (noting that if students are able to assess the nature of the legal issue, then their legal research will be more effective).


See e.g. Potter, supra n. 46, at 291 (noting that “[o]nce students have printed all of the documents with the words of their searches in them, the research process stops.”); Valentine, supra n. 4, at 189 (citing Thomas Keefe, Teaching Legal Research from the Inside Out, 97 L. Lib. J. 117, 119 (2005)) (noting that “the concept of a conscious, thoughtful, articulable research process has been disrupted by the ease of typing one or two words into a search engine and being rewarded with pages of results”).

See Blair Kauffman, Information Literacy in Law: Starting Points for Improving Legal Research Competencies, 38 Intl. J. Leg. Info. 339, 345 (2010) (“The current born digital generation of students how entering law school may have a false sense of competence in their legal research skills stemming from their use [sic] seemingly simple search engines such as Google, and pulling information from sources found on their first one or two pages of search results, such as Wikipedia.” (Footnotes omitted)).

See Jones, supra n. 31, at 8 (noting that law students’ affinity for, and familiarity with, keyword searching often leads them to “[rely] upon the ‘good enough’ sources freely available on the Internet”).

Potter, supra n. 46, at 291.

Unfortunately, this experience is not uncommon. Many novice researchers haven’t confronted sufficient “ill-defined” research issues to confidently address one. See Kristin B. Gerdy, Teacher, Coach, Cheerleader, and Judge: Promoting Learning through Learner-Centered Assessment, 94 L. Lib. J. 59, 66-68 (2002).

See Potter, supra n. 46, at 291 (noting the difference between research strategies of past students (who “had to write notes in longhand to properly attribute the ideas and words they found in the library materials”) and research strategies of today’s students (who have unlimited printing and whose search is “limited to what their inexpert search strategy produces and to what they print”)).

For a good source of practice exercises, see Cassandra L. Hill & Katherine T. Vukadin, Legal Analysis: 100 Exercises for Mastery, Practice for Every Law Student (LexisNexis 2012).

These two aspects of the legal research process directly coincide with principles II and III of the AALL information-literacy standards: Principle II: “A successful legal researcher gathers information through effective and efficient research strategies,” and Principle III: “A successful legal researcher critically evaluates information.” AALL, supra n. 26, at 1.

See Callister, supra n. 17, at 33-40 (discussing analytical frameworks for research training); Cordon, supra n. 24 at 405 (noting that “finding documents is rather pointless if the researcher is unable to use the documents”); Rombauer, supra n. 24, at 134-145.

See Teitcher, supra n. 5, at 555.
See Gallacher, supra n. 6, at 167 (stating that “[t]he Internet has made it so easy to find information that students often do not know how to search for it”’ (quoting Keefe, supra n. 48, at 122).

Teitcher, supra n. 5, at 555.


Id.


See e.g. Feliu & Frazer, supra n. 27, at 550; Valentine, supra n. 4, at 174.

John Allen Paulos said, “The Internet is the world’s largest library. It’s just that all the books are on the floor.” Quote Garden, Quotations about the Internet, http://www.quotegarden.com/internet.html (last updated Oct. 29, 2014, 21:08 PDT).

See Gallacher, supra n. 6, at 160 (“The traditionalist view of legal research has, at its core, the firm conviction that book-based legal research is superior to electronic research, at least as a first step in almost any research project.”).

Id. at 161-162.

Id. at 162-163.

Id. at 161-162.

Id.

See Ehrenberg & Aamot, supra n. 9, at 119 (noting that “[a]s online databases become more complete and can be searched in multiple ways, including by index, by key number, and by tables of contents, book research offers little that cannot be replicated online”).

For example, on WestlawNext in “State Materials,” and on Lexis Advance in “States Legal--U.S.” For an example of a state-specific practice guide, see the Michigan ICLE website, available at https://www.icle.org.

See Barbara Bintliff, From Creativity to Compute: Thinking Like a Lawyer in the Computer Age, 88 L. Lib. J. 338, 341 (1996) (“For well over a hundred years, our ‘thinking like a lawyer’ skills have been shaped by-- and some would argue even determined by--the simple device of the case digest.”).

The debate about the death of digests is beyond the scope of this article. But many have observed that the ability to conduct research outside the parameters of the West system threatens to unravel traditional concepts of precedent. See e.g. Ellie Margolis, Authority Without Borders: The World Wide Web and the Delegalization of Law, 41 Seton Hall L. Rev. 909, 911 (2011) (noting that the primacy of “traditional” legal authority “is beginning to weaken and that, increasingly, nontraditional sources are being used to support legal analysis”); William R. Mills, The Decline and Fall of the Dominant Paradigm: Trustworthiness of Case Reports in the Digital Age, 53 N.Y. L. Sch. L. Rev. 917, 919-922 (2008-2009) (arguing that electronic research is eroding the impact of the West key-number system); Lee F. Peoples, The Death of the Digest and the Pitfalls of Electronic Research: What Is
the Modern Legal Researcher to Do? 97 L. Lib. J. 661 (2005) (generally describing philosophical debate about the impact of the Internet on the American common-law system); Valentine, supra n. 4, at 193 (arguing that electronic research has “affected the very structure of the law as it has been understood and taught for more than a century”). Valentine even noted that, “[t]he very act of accessing the law electronically restructures the law. It erodes the idea that one can learn the law from the scientific study of readily agreed upon precedent. As the historical understanding of law shifts, the ability to teach students to think like lawyers using the structured concepts of the legal system developed by Langdell and West begins to collapse. Valentine, supra n. 4, at 195.

Supra n. 64.

Bintliff, supra n. 72, at 343.

See e.g. Sanford N. Greenberg, Legal Research Training: Preparing Students for a Rapidly Changing Research Environment, 13 Leg. Writing 241, 246-250 (2007) (summarizing results of a 2005 survey in which attorney-respondents “overwhelmingly” reported their tendency to conduct research online, rather than in print).

Ehrenberg & Aamot, supra n. 9, at 119; Gallacher, supra n. 6, at n. 51 (Online legal databases now “have extensive secondary source databases that allow electronic researchers to conduct the same ‘secondary source first, primary source second’ research model as that advocated by paper researchers.”).

Teitcher, supra n. 5, at 556-557.

Id.

Id.; see also supra n. 42 and accompanying text (discussing rapid changes in research mechanics).

See Gallacher, supra n. 6, at 201.

Seeid. at 167 (noting that law students who are “irretrievably married to computers as their primary research tool” lack the background necessary to understand current legal research teaching).

Id. at 201-202.

But see Teitcher, supra n. 5, at 567 (recognizing that students are attracted to electronic sources that allow them to jump from one concept to another, but arguing that, as of 2007, books still played an important role in establishing context).

See e.g. Greenberg, supra n. 76, at 242.

See Teitcher, supra n. 5.

Potter, supra n. 46, at 290.

See Valentine, supra n. 4, at 175 (noting that the disconnect between teaching methods and actual electronic research “places the first-year law student in a situation where how she is taught legal analysis and reasoning does not comport with what she finds when she researches the law herself”).
See Bowman, supra n. 43, at 551 (noting that repetition and making mistakes reinforces research skills); Gerdy, supra n. 52, at 66 (noting that ineffective legal research instruction can create “‘inert’ knowledge—the inability to apply skills and concepts in situations other than those in which they were originally learned” (footnote omitted)).

Gerdy, supra n. 52, at 66.

See generally Feliu & Frazer, supra n. 27, at 547-550 (reviewing several legal research titles that present a variety of paradigms and processes).

But while students welcome forms and templates, they must use them with great caution. Terry Jean Seligmann, Why Is a Legal Memorandum Like an Onion?—A Student’s Guide to Reviewing and Editing, 56 Mercer L. Rev. 729, 730-731 (2005) (“Any guideline or checklist should not be viewed as setting up rules applicable to all situations, or formulas that must be slavishly followed whether or not the legal analysis for the case fits the formula.”).

See Kristin B. Gerdy et al., Expanding Our Classroom Walls: Enhancing Teaching and Learning through Technology, 11 Leg. Writing 263, 278 (2005) (describing a database of sample memoranda as an instructional resource used for teaching legal research).

See Terry Jean Seligmann, Beyond “Bingo!”: Educating Legal Researchers as Problem Solvers, 26 Wm. Mitchell L. Rev. 179, 183 (2000) (“Qualities characterizing an accomplished legal researcher might include competence, accuracy, judgment, thoroughness, efficiency, confidence and knowledge.”).


Wheeler, supra n. 38, at 360.


Wheeler, supra n. 38, at 361.

This could be inadvertent, but that is still how students see it.

Although students cite mostly primary law in their legal memoranda, most research paradigms appropriately suggest that the researcher begin with background research in secondary sources. See e.g. Kimble, supra n. 28, at 1.

See Gallacher, supra n. 6, at 161-62 (referring to secondary resources as the first step in a linear research process); Teitcher, supra n. 5, at 556-557.

This is particularly true of millennials, who often exhibit contradictory characteristics: a desire for freedom to use the media of their choice paired with a desire for specific directions guaranteed to produce the desired grade. See Aliza B. Kaplan & Kathleen Darvil, Think (and Practice) Like a Lawyer: Legal Research for the New Millennials, 8 JALWD 153, 175 (2011) (“[Millennials] want freedom and flexibility, but they also want rules and responsibilities to be spelled out explicitly. They want to play by the rules, but there is a hesitance to think outside the box.”).

Feliu & Frazer, supra n. 27, at 548. Vicenç Feliú & Helen Frazer recently explained and praised Rombauer’s work: The methodology and underlying pedagogy of Rombauer’s process approach to legal research instruction are similar to those...
advocated in the Carnegie Report. Students are introduced to model documents characteristic of professional trial practice. They are coached in how to analyze law, perform research and produce similar legal documents. Concepts are reiterated with every assignment as students move from simple case briefs for classroom preparation through analysis of a published casenote and preparation of trial and appellate documents. In other words, the Rombauer method and its progeny appear to anticipate the pedagogical techniques advocated in the Carnegie Report, including modeling, coaching, scaffolding, and fading. Rombauer’s course book includes the most detailed and sophisticated presentation of legal analysis from precedent necessary to perform research at the professional level of practicing attorneys. It is not a book or method widely used in first year legal research and writing programs, although Rombauer’s influence is detectable in the nods to process in current research and writing texts and manuals....

Id.

Since the 1990s, Cooley has been teaching legal research using a hands-on approach founded on Rombauer’s four steps. Kimble, supra n. 28, at 1.

Id.


Rustard & D’Angelo, supra n. 95; Teitcher, supra n. 5. at 556-557.

Rustard & D’Angelo, supra n. 95; Teitcher, supra n. 5. at 556-557.

See Alena Wolotira, Googling the Law: Apprising Students of the Benefits and Flaws of Google as a Legal Research Tool, 21 Persps. 33 (Fall 2012) (“[S]tudents are likely to start the process of legal research with Google because it is what they know, it is fast and easy, and it sometimes does yield usable results.”) (available at http://info.legalsolutions.thomsonreuters.com/pdf/perspec/2012-fall/2012-fall-7.pdf).


Supra nn. 32-56 and accompanying text.

Supra nn. 32-56 and accompanying text.

See Seligmann, supra n. 94, at 190-191.

See Gallacher, supra n. 6, at 183.

See e.g. Gerdy supra n. 52, at 71 (advocating for a reflective process of assessing students’ work during legal research projects).

See app. A.

Professor Bradley Charles’s Research Plog is designed to serve as both a planning tool and a record of research results. It incorporates the same categories (buckets) as the cloud-research model proposed in this Article. However, the terms “Binding Case Law” and “Persuasive Authority” are used here to better reflect the content of this article. For the original Plog and a detailed explanation of its role in the research process, see Professor Charles’ electronic text, Reasoned Legal Research, and Bradley J. Charles, Torree Randall, and Erika Bretfeld’s text, Reasoned Legal Research (available on SSRN: http://ssrn.com/abstract=2364984
or http://dx.doi.org/10.2139/ssrn.2364984).

118 See app. B.

19 LEGWRIT 127
Paying Attention to What Judges Say: New Directions in the Study of Judicial Decision Making

Keywords

Courts and politics, motivated reasoning, judicial legitimacy, judicial crisis, rule of law

Abstract

Judges and scholars often speak about the very same subject in very different terms. Judges regularly provide written explanations of their rulings, and scholars regularly argue that the true determinants of judicial decision making lie beyond the words of the judicial opinion. This review engages lines of research that take the fact of competing judicial and scholarly accounts of judicial decision making as the subject of study. In particular, this review surveys three different bodies of work that explain the enduring divide between judges and scholars in terms of motivated reasoning, judicial crisis, and the contradictory demands placed on the judicial process. These three literatures provide ways of thinking about the rule of law in the United States without dismissing the perspectives of either judges or scholars.

Introduction

Although judges often explain their rulings at length, many scholars look beyond written judicial opinions when trying to understand the determinants of judicial decision making. Judicial attitudes (Segal & Spaeth 2002), judicial strategies (Epstein & Knight 1997), and the priorities of the governing regime (Gillman 2002; McMahon 2004, 2011) are just a few of the factors scholars have examined when searching for the true sources of judicial action.

Taken together the judicial and scholarly explanations of judicial decisions generate a “schizophrenic” account of the courts (Clayton 1999, pp. 18-20; see also Smith 1992, Hart 1994, Schedler 2004). On the one hand, judicial decision making is portrayed by judges as a matter of legal principle and impartial reason, an activity rooted in and guided by a shared set of publicly stated rules and norms. On the other hand, judicial decision making is portrayed by many academics as a matter of preference and politics, an activity largely driven by the personal beliefs and policy commitments that judges bring to the bench. One view relies on the faith that everything relevant to a court’s ruling is to be found in the judge’s own words, whereas the other view is grounded in the suspicion that important reasons for a court’s ruling are often left unsaid.

There are figures on either side of this Janus-faced discussion of judicial decision making who simply reject opposing views. One can find judges who consider empirical academic studies of judicial decision making to be seriously misguided (Edwards & Livermore 2009), and one can find scholars who dismiss judicial explanations as benighted refusals to acknowledge that the emperor has no clothes (Shapiro & Sweet 2002).
The aim of this review article is not to dispense with one account of judicial decision making or the other but rather to assess lines of research that take the fact of competing descriptions as the subject of analysis. The methodologically diverse scholarship in this area is united by a general question: How should the coexistence of contradictory judicial and scholarly representations of the courts be understood?

This article proceeds in four sections. In the first section, I survey and describe the divide between academic and judicial views. Although there is some convergence among social scientists and legal scholars on a broadly shared understanding of judicial decision making, the divergence in how the bench and segments of the academy explain judicial behavior remains real and significant.

In the second section, I discuss studies that assess the enduring division between judges and scholars in terms of motivated reasoning. According to this research, judicial discussions of impartiality and principle persist in the teeth of academic studies of policy preference because judges are, under certain circumstances, unconsciously predisposed to support those legal arguments that match judicially preferred outcomes. In this way, judges can consistently claim to be following the law, while scholars continue to document the impact of politics on judicial decision making.

In the third section, I consider work that situates the divide between scholarly and judicial views in the context of judicial crisis. These scholars claim that judicial professions of impartiality will progressively lose credibility with the public as the evidence of political influence accumulates, ultimately leading to a state where the courts will no longer be accepted as authoritative arbiters. The arguments in this literature mirror the research on motivated reasoning by asserting that judges sometimes give undue credit to law as the determining factor in decisions. But the judicial crisis scholarship otherwise departs from the work on motivated reasoning (a) by underscoring the negative structural consequences that flow from conflicting explanations of judicial decision making and (b) by holding out the possibility that such negative consequences might be managed by conscious judicial effort. In the final section, I discuss research that interprets the contending claims of judges and scholars as a feature of the legal order’s ordinary operation. Like the judicial crisis scholarship, this last body of work not only accepts the notion that judicial decisions may result from motivated reasoning but also attends to the structural effects of court rulings that appear to be driven by something other than the reasons given in judicial opinions. Unlike the judicial crisis scholarship, however, this line of research does not conclude that judicial legitimacy is being fatally undermined nor does it call for a new kind of judicial behavior. On the contrary, this research considers the contradictory representations of judicial decision making as an expression of underlying dynamics that produce a durable rule of law.

THE GREAT DIVIDE

The distance between law schools and social science departments has sometimes been called a “great divide” (Rosenberg 2000). Legal academics and social scientists may study the same subjects, but they inhabit different institutional worlds, and in many instances they rely on different analytical methods. As a result, the two groups of scholars have historically produced separate literatures on judicial decision making, and this separation has in turn led to critical tensions between the two camps. Rosenberg (2000, p. 269) tartly expressed some of this tension in his evaluation of the legal professoriate’s approach to research: “Legal academics love abstractions. They would rather play with principles than engage in the painstaking and time-consuming research necessary to discover what actually happens in the world.”

Whether or not one accepts Rosenberg’s particular critique of law professors, there are indications that the gulf he identified between law schools and social science departments has diminished. There are now a substantial number of law faculty with advanced social science training: In their study of the 26 most highly ranked law schools, Hersch & Viscusi (2011) found that 20% of the professors have PhDs in social science disciplines. Law schools also now house new empirically oriented academic journals, such as the Journal of Empirical Legal Studies, that regularly feature work by social scientists. And, in the larger universe of law review literature, empirical scholarship is frequently published and is on the rise (Diamond & Mueller 2010).

Amid such signs of convergence, commentators have begun to find common ground between law school and social science studies of judicial decision making (Keck 2007, Knight 2009). Most recently, Geyh (2011b) has organized an edited volume with contributions from more than a dozen legal academics and political scientists, all of whom are engaged in a collaborative discussion about the best ways to understand the courts. As Geyh (2011a, p. 13) writes, “Gone are the eras of malign and benign interdisciplinary neglect, and fading fast are unproductive efforts to pit law against politics in a kind of
death match for control of the judicial heart and mind, as if coexistence is not an option.”

If the great divide between legal academics and social scientists is in some ways less pronounced than it used to be, a yawning chasm between the bench and segments of the academy still remains. Of course, one can find judicial claims that appear to resonate with the scholarly description of judicial action as ideological decision making (see, for example, Peretti 1999). For instance, a number of judges agree—as comments by judges in the Geyh volume suggest—that judicial decision making is not a purely mechanical process with law and logic inexorably dictating every step from premise to conclusion (Barker 2011, Sullivan 2011, Vaidik 2011; see also Hutchens 1929, McKee 2007). And one can find individual opinions in which judges themselves complain about the distorting effects of law’s formal language and call for a discussion of the real motives behind a ruling (see, for example, DeShaney v. Winnebago Cty. Dep. Soc. Servs. 1989, Blackmun dissent; Lawrence v. Texas 2003, Scalia dissent).

Nonetheless, the fact of the matter is that judges do not officially display their decision making as political. Judicial opinions speak entirely in terms of legal reasoning, and judges write as if they are using legal rules to plan and *72 guide their actions. Judges move within law, appealing to principle and impartial reason as standards for their decisions and as grounds for criticizing those with whom they disagree (Bybee 2010). This is the way that any given judge expresses an “attitude of shared acceptance” of legal norms, communicating in a “language of one assessing a situation by reference to rules which he in common with others acknowledges as appropriate for this purpose” (Hart 1994, p. 102; see also Carter & Burke 2007). Whatever political factors may be at work in judicial decision making, the typical judicial opinion presents itself as a declaration of what the law is. The vast majority of judges simply do not publicly describe or justify their decisions with political reasons. Judges do not say, “I was put on this court because I am a liberal person who believes abortion services should be preserved and that is what I intend to do.” Instead, they say, “A woman’s right to choose is protected by the Constitution.” Judges lay claims to impartiality, neutrality, independence, and legal principle to demonstrate that they have weighed the arguments and evidence without regard to politics, not to indicate that judicial decision making is somehow informed by politics (Kahn 1999).

Judges also rely on their specific legal idiom to define and describe the kind of institution that a court is (Bybee & Narasimhan 2010). The institutional portrait painted by judges bears little resemblance to the renderings produced by standard academic studies. Consider, for example, the case of the United States Supreme Court. In his classic work The American Supreme Court, the political scientist Robert McCloskey (1960; see also McCloskey 2010) related the high bench’s history in almost biographical terms, focusing on the Court’s genesis and growth over the course of American history. McCloskey examined highs and lows across the long span of the Court’s existence, and he argued that the Court had learned how to behave as a “flexible and nondogmatic institution fully alive to such realities as the drift in public opinion and the distribution of power in the American republic” (McCloskey 1960, p. 223). Thus McCloskey argued the central lesson of the Court’s experience was that its “greatest successes have been achieved when it has operated near the margins rather than in the center of political controversy, when it has nurtured and gently tugged the nation, instead of trying to rule it” (p. 229).

McCloskey’s account contrasts sharply with the ways in which the members of the Court discuss the institution in which they serve. McCloskey hewed closely to the historical record of the Court’s life, addressing in turn the different contexts, organized groups, individuals, and objectives that distinguished specific phases of Court growth (many social scientists have continued to work along similar lines—see, for example, Silverstein 2009). By contrast, the justices tend to portray the Court in synchronous terms when speaking about their own institutional home. They do not usually present the early periods of the Court’s existence as being any different from later periods or from the current day. For the justices, the Court’s life is, as Miles (1995, p. 12) noted in a different context, “simultaneous to itself.” Every decision of the Court, regardless of when it was rendered, is available to the current members of the high bench, and any opinion within the canon of the Court’s decisions may be used to comment on any other (LaCroix 2010). This is true of majority opinions as well as of concurrences and dissents; the same perspective applies even to those decisions that have been explicitly repudiated. Dred Scott v. Sandford (1857), Plessy v. Ferguson (1896), and Lochner v. New York (1905) all retain significant power as negative examples, cautionary tales that the sitting justices regularly invoke as they describe the essential characteristics of the Court.

The synchronous form of the Court’s existence is yoked to the judiciary’s singular reliance on law: The justices present the Court as a body constituted by its commitment to reason and legal principle, not as an entity defined by any particular time, place, party, or personalities. This overriding commitment to reason and principle is clear in the Court’s understanding of what makes any given issue amenable *73 to adjudication. The justices insist that issues are justiciable only where “judicially
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discernible and manageable standards” exist (Baker v. Carr 1962, p. 217), a requirement that members of the Court have taken to mean that “law pronounced by the courts must be principled, rational, and based on reasoned distinctions” (Vieth v. Jubelirer 2004, p. 278). The Court may only proceed as a court where identifiable legal principles can be found—principles that may be subjected to a reasoned process and used to decide the case at hand as well as to create a framework for rationally deciding future cases. Without being limited to and guided by principle and reason, the Court enters a trackless expanse where there is no clear line between proper judicial decision making and arbitrary judgments about policy (Allen v. Wright 1984, Lujan v. Defenders of Wildlife 1992).

Of course, this is not to say that Supreme Court justices (or any other set of judges) always agree with one another. In fact, the level of discord on the Court has skyrocketed over time (Gerber & Park 1997, Caldeira & Zorn 1998, Wood et al. 1998, Epstein et al. 2001, Post 2001, Henderson 2007), and scholars have argued that the decline in consensus provided the initial impetus for studying the Court’s decision making as an essentially political enterprise (Walker et al. 1988, p. 362). The justices are clearly aware of the levels of disagreement, and some have criticized the tone in which spirited arguments have been expressed (Ginsburg 1992). Yet the justices do not present their differences as expressions of political conflict. The high incidence of splintered decisions does not mean the Court is, from the justices’ perspective, a fractious political body squabbling over governance of the legal system. Arguments over law can be contentious and still be legal arguments: Conflicting political commitments pervade constitutional discourse and yet “no constitutional interpreter in the American system ever asserts that her answer to a constitutional question is a political as opposed to a legal one” (Powell 2008, p. 68). In spite of the closely divided opinions and stinging dissents, the justices continue to portray the Court as an impartial arbiter resolving disputes by interpreting fixed principles of law.

The judicial talk of principle and reason persists even in the most divisive and politically charged circumstances (Bybee 2010). In Bush v. Gore (2000), for instance, the five most conservative members of the Court stopped the recount process and handed the presidency to the conservative Republican candidate George W. Bush. The Court majority based its ruling on a novel constitutional claim that seemed to have been invented solely for the purposes of the case at hand—a fact that only heightened the appearance of partisanship (Gillman 2001). The day after the Court decided Bush v. Gore, Justice Clarence Thomas, a member of the five-member majority, met with a group of high school students touring the Court building and announced that he had “yet to hear any discussion, in nine years, of partisan politics” among the justices (Greenhouse 2000). Justice Thomas continued, “I plead with you that, whatever you do, don’t try to apply the rules of the political world to this institution; they do not apply. The last political act we engage in is confirmation” (Greenhouse 2000).

MOTIVATED REASONING

What can be made of the fact that judges portray judicial decision making so differently from the way in which many scholars do? As I noted at the outset of this article, one response is simply to declare one depiction or the other to be wrong. Such a response is understandable: When confronted with a contradiction between ideas, the natural tendency is to resolve it in favor of one side or the other (Bybee 2011a). Yet, if our goal is to examine the fact of the contradiction itself, how should we proceed?

One place to begin is with the professional training that judges receive. Judges often come to the bench with decades of education and experience that habituate them to account for their actions in legal terms. To the extent that the training leaves a durable mark, we should not expect judges to suddenly abandon their established modes of professional *74 self-presentation “the moment they don their robes” so that they can openly “satisfie their political appetites without regard to their views of applicable law” (Geyh 2006, p. 280). Instead, we should expect that judges will continue to point to legal principle and impartial reasoning as the determinants of their rulings even when other factors (including political preferences) are at work.

Claims about the importance of professional training have recently been advanced and refined by research on motivated reasoning. In the leading work in this area, Braman (2009) begins by noting that judges do not write about their decisions in anything other than legal terms: Judges “never say they are dismissing claims because of how they feel about particular litigants or alternative issues; instead, they explain their decisions through the neutral analysis of doctrine relating to the threshold question. [This] suggests that judges themselves believe they are making threshold determinations based on objective analysis of legal authority bearing on threshold questions” (Braman 2009, p. 4, emphasis original). And yet many empirical studies indicate that judges often do vote for outcomes that reflect their policy preferences. Motivated
reasoning--defined as “a biased decision process where decision makers are predisposed to find authority consistent with their attitudes more convincing than cited authority that goes against desired outcomes” (Braman 2009, pp. 4-5)--provides a way of understanding how the competing judicial and scholarly accounts may coexist (see also Feldman 2005, Posner 2010).

To develop her application of motivated reasoning, Braman (2009) focuses on two important goals in the judicial decision-making process. First, she suggests that judges are seriously interested in legal accuracy. As judges “have been subject to strong socialization emphasizing the importance of stylized legal rules of legal reasoning,” they usually care deeply about achieving “legal accuracy within the confines of accepted decisional norms” (p. 20). At the same time, Braman argues that judges are also interested in directional policy goals. Judges may often have sincere preferences for specific political outcomes, and these preferences “can influence legal reasoning processes in subtle ways such that decision makers themselves may be unaware of their influence” (p. 20).

With these factors in mind, Braman conducts a qualitative analysis of Supreme Court doctrine, and she also performs a series of experiments, providing law students and undergraduates with case materials purposefully manipulated to tease out judgments about precedent and about separate issues in the same litigation. Braman finds that the different interests in legal accuracy and policy direction are dynamically expressed. For example, in instances where the principles and arguments in cited precedent are close to those of the case at hand, decision makers tend to agree that the precedent is relevant regardless of their policy preferences. And in instances where the facts of cited precedent clearly differ from those of the case at hand, all decision makers, again regardless of their policy preferences, agree that the precedent should be distinguished. It is in the middle range, where the distance between precedent and the instant case is ambiguous, that motivated reasoning may surface and decision makers may “judge cases with outcomes that support their preferences in pending litigation as more similar to current case facts than cases that do not support their preferences” (Braman 2009, p. 86). Given the frequency of such ambiguous cases (especially on appellate dockets), motivated reasoning can be considered an important feature of judicial decision making. There is often more law available than is used, and legal actors will rely on a variety of motives and skills to determine which part of the available law is to matter in a given instance (Silbey & Bittner 1982).

Braman does not tell us exactly which mode of motivated reasoning is at work on the bench. Some of Braman’s findings suggest, for example, that the specific process of motivated reasoning in ambiguous cases may be top-down in the sense that judges decide upon outcomes first and then select supporting legal claims later, with the result that “legal reasoning is *75 more rationalization than deliberation” (Braman 2009, p. 34). Other findings suggest that the process may be bottom-up with policy preferences acting as “information filters exercising their influence by affecting microdecisions that occur in the process of legal reasoning” (Braman 2009, p. 34). Based on the evidence she gathers, Braman is unable to discriminate between these different modalities.

Yet, whichever kind of motivated reasoning may be at work, Braman argues that policy choices are always demarcated and constrained by commitments to legal accuracy. The overriding urge for judges is to conform to standards of appropriate judicial behavior; as a consequence, judges working under conditions in which motivated reasoning is possible do not abandon legal claims in order to speak directly about their desired political outcomes. Judicial perceptions of precedents and the current dispute may enable policy choices under certain conditions, but judges nonetheless remain committed to the idea that they are consistently applying the same reasoning process across all cases. Judges are, like everyone else, motivated “to believe that they are constant in their own thinking and reasoning processes” (Braman 2009, p. 75), and this motivation means that judges will talk law even when they are doing politics.

**JUDICIAL CRISIS**

Theories of motivated reasoning explain how judges may unfailingly and sincerely claim to be reasoning on the basis of legal principle, while at the same time scholars may continue to demonstrate that a significant portion of judicial decisions are driven by policy preferences. As a matter of individual psychology, there is no overt dissonance between legal principle and political preference to be resolved because judges seamlessly integrate both as they go about deciding different cases.

But to argue that judges do not consciously experience a conflict between law and politics is not to say that a conflict does not exist. If we think of the rule of law as a matter of requiring people to “look outside [their] own will for criteria of judgment” (Carter & Burke 2007, p. 147), then the perception that judges may be deciding cases on the basis of personal political convictions raises questions about the legitimacy of the system. Where the public confronts a judicial process that
always speaks in terms of legal principle and yet is sometimes governed by policy preference, suspicions of judicial hypocrisy may easily arise, fueling the belief that judges are willfully affecting an air of legal impartiality in order to disguise their pursuit of political goals.

There is a substantial amount of evidence indicating that the public does indeed suspect judges of relying on political considerations. Thirteen separate surveys of public opinion about state courts (conducted from 1989 to 2009) show significant majorities of Americans consistently agreeing with the idea that politics influences state-level judicial decision making (Bybee 2010, p. 8; see also Hensler 1999, Rottman 2000, Tarr 2007). Public suspicion is evident at the federal level as well. A large portion of the public believes that the Supreme Court operates with too little regard for legal principle: National surveys regularly find a near majority of respondents agreeing that the Court is too mixed up in politics (Scheb & Lyons 2001, Gibson et al. 2003, Gibson et al. 2005, Gibson 2007, Gibson & Caldeira 2009a). With the Court widely viewed as a political institution, the public often rates the high bench in ideological terms (Gibson 2011), and large majorities believe that the Court favors some groups more than others (McGuire 2007). In fact, only a little more than 7% of Americans think that the partisan background of judges has no influence at all on court decisions (Bybee 2011b).

In view of such beliefs, it is perhaps unsurprising to find that many Americans express skepticism about the reasons judges give for their rulings (Bybee 2007a; Bybee 2010, pp. 20-21). In 2005, the Maxwell Poll asked a representative sample of Americans whether they agreed or disagreed with the following statement: “Judges always say that their decisions are based on the law and the Constitution, but in many *76 cases judges are really basing their decisions on their own personal beliefs.” A solid majority of respondents agreed. Moreover, this view was shared by majorities in a wide range of different groups: Democrats (60%) and Republicans (59%), those who generally trust public officials to do the right thing (55%) and those who generally distrust public officials (59%), those who always vote (58%) and those who never vote (60%), those who approve of the president (60%) as well as those who disapprove of the president (58%). All these groups agreed that even though judges may consistently invoke high legal principle, judicial decisions are often derived from more mundane preferences. This same question about the influence of personal beliefs in judging was included in panel surveys in 2005 and 2006 (Gibson & Caldeira 2011) and again in a national survey in 2011 (Bybee 2011b). In every instance, a significant majority of respondents agreed that judicial decisions are influenced by personal politics, indicating widespread doubt about the description that judges offer of their own decision making.

These public assessments of the courts are largely based on general perception and appearance. Thus it is the case that without more direct information about how particular judges decide particular cases, one cannot say whether popular suspicions of hypocrisy accurately identify judges who instrumentally deploy legal principles or whether these suspicions misread judges who sincerely grapple with competing legal commitments. Still, one can say that public opinion mirrors the general findings of the motivated reasoning literature and reflects the empirically grounded notion that judges sometime rule on the basis of policy preferences.

Moreover, even though surveys tell us little about the decision-making practices of any one judge, popular judgments about overall judicial appearances are significant. Support for the judiciary depends on the ability of judges to convey the impression that their decisions are driven by the impersonal requirements of legal principle (Gibson et al. 1998, Ferejohn 2002, Brown & Wise 2004, Geyh 2007). The avoidance of actual judicial improprieties is necessary to secure judicial legitimacy, but it is not sufficient; judges must also visibly appear to play the role of neutral arbiter in order to reduce the probability of actual bias and to maintain popular support. Appearances may be fleeting, but they do matter. And when large numbers of people perceive politics to be at work in the judicial process, it would seem that the courts and the rule of law must be headed toward crisis.

A number of commentators have reached this very conclusion (Tamanaha 2006, Lewis 2007, Popkin 2007, Powell 2008, Kahan 2011). The external projection of judicial authority has historically depended on the belief that the judge is a technical expert schooled in the certainties of law. The perception of politically informed judicial decision making transforms judges from expert oracles of law into biased sources of law, placing the bench on par with other policymakers. This is a development that breeds cynicism within the legal profession as the demand that lawyers accept the ad hoc rationalizations offered by judges weakens the legal profession’s commitment to legal rules. “Perhaps the profession is strong enough to remain unhappy with a lie and preserve its own integrity,” Popkin (2007, p. 173) writes, “but it is difficult to sustain an institution over the long haul when its members know that it rests on a fiction, especially in a pluralistic and democratic society that values respect for inclusive public deliberation.” Cynicism in the profession threatens to spill over into the public...
sphere, eroding respect for judicial independence among elites and raising the specter of the party boss calling judges in order to dictate rulings (Lewis 2007). And the more that individuals are encouraged to shape and control judicial decisions to suit their own political ends, the more rapidly the rule of law devolves into the rule of men. Indeed, some scholars suggest that American society is already at the threshold of something like a legally sanctioned struggle of all against all. Without a shared belief that the judiciary serves a common purpose or is limited by fixed principle, law is becoming “little more than the spoils that go to winners in contests among private interests who, by *77 their victory, secure the prize of enlisting the coercive power of the legal apparatus to enforce their agenda” (Tamanaha 2006, p. 225). Those who end up on the losing side of this bleak system will comply only because of fear of punishment and “out of the hope that they might prevail in future contests to take their turn to wield the law” (Tamanaha 2006, p. 225).

According to several of the scholars writing in this vein, there is hope that the trend toward crisis and dissolution can be reversed. Recovery will not happen, however, by recapturing a sense that judicial decision making proceeds without regard to politics. Judges explain their rulings in terms of impartial reasoning and legal principle, but there is no chance that others can be persuaded that judging is strictly a matter of interpreting law. The bell announcing the influence of preference and policy cannot be unrung (Powell 2008). Instead, some scholars argue that judges should become more conscious of the various factors influencing their decisions and should explicitly communicate these factors in their written opinions. This means that judges should include open acknowledgments of complexity in their rulings, steering away from the current modes of judicial argument that render issues unproblematical and judgments unequivocal (Kahan 2011). Moreover, intellectual candor should be accompanied by a suite of additional virtues: Judges should exhibit “[c]onfidence in the possibility of dialogue, recognition of the inescapability of judgment, humility in the imposition of one’s own opinions, [and] acquiescence in decisions that seem wrong to one’s own judgment but have persuaded others” (Powell 2008, p. 101). It is by recognizing and working with the suspicion of political influence that judges will most likely be able to assuage the public and maintain legitimacy. “If judicial law has lost the certainty associated with the myth of static, apolitical legal principle,” Popkin (2007, p. 126) writes, “then litigants, the legal profession, and (perhaps) the public will be more reconciled to what courts do if they perceive a process in which judges openly appear to debate the results. When people know that the law is uncertain, a façade of certainty is an affront to the audience’s intelligence and sense of fair play.”

CONTRADICTIONS AND THE RULE OF LAW

The judicial crisis literature complicates the scholarship on motivated reasoning first by placing the study of judicial decision making in the context of judicial legitimacy and then by raising concerns about the destructive impact of political influence on the judiciary’s public standing. The judicial crisis literature may in turn be complicated by expanding the discussion of legitimacy even further.

To begin, consider that the anticipated crisis in judicial legitimacy has yet to materialize. Indeed, many of the same surveys that register widespread public belief in politically motivated judicial decision making also indicate a broad public faith in the impartiality of courts. For example, the same 13 surveys of public opinion showing significant majorities of Americans agreeing that politics influences state judges also show large majorities of Americans agreeing that state judges are impartial (Bybee 2010, p. 8; see also Hensler 1999, Rottman 2000). In all different parts of the country and across significant periods of time, Americans consistently believe in the fairness and honesty of state judges, even as they doubt the degree to which state judicial decisions can be explained simply by pointing to the law.

Faith in the judiciary is found at the federal level as well. Polls indicate that large majorities of Americans expect federal judges to apply the law impartially and distrust federal judges who advance narrow ideological interests (Scheb & Lyons 2001, Russonello 2004, Gibson & Caldeira 2009a). Particular groups appear to have an especially strong belief in the federal courts’ capacity to meet popular expectations. As we might expect given the influence of legal training (Geyh 2006, Braman 2009), many attorneys consider courts to be institutions of principle: Eighty percent of lawyers admitted to practice in either the US Supreme Court or a *78 US court of appeals agreed with the statement “Most of the time the Supreme Court Justices closely follow the Constitution, the law, and the precedents in deciding cases” (McGuire 2007, p. 202). More broadly, studies have shown that the Supreme Court has received a good deal of public goodwill because it is generally thought to be an even-handed guarantor of basic democratic values for all (Gibson et al. 2003, Gibson 2007, Gibson & Caldeira 2009a). Sixty-four percent of those surveyed in 2006, for example, trusted the Supreme Court to operate in the best interests of the American people either a “great deal” or “a fair amount” (Annenberg Public Policy Cent. 2006; see also McGuire 2007). When asked whether federal judges should be subject to greater political control by elected officials, more than two-thirds of
those surveyed said no (CNN 2006).

Public faith in the courts is also evident in the polls that most directly measure public suspicions about the unstated political motivations behind judicial decision making (Bybee 2010, p. 17). Seventy-three percent of those surveyed in the 2005 Maxwell Poll agreed that judges should continue to be shielded from outside pressure and allowed to make decisions based on their own independent reading of the law. This majority in favor of shielding judges from politics held straight across party lines: Three-quarters or more of Democrats and Republicans agreed that the courts should continue to be independent. The same was true of self-described liberals, moderates, and conservatives. The results were also no different when responses were broken down according to frequency of church attendance. Americans who go to church several times a week supported maintaining the ideal of judicial independence in the same large numbers as Americans who never attend church at all. Even among those respondents who disagreed with the statement “You can generally trust public officials to do the right thing,” the idea that judges should continue to be insulated from outside pressure received a high level of support. Subsequent iterations of the same poll not only showed similar results, but also indicated that the level of public trust in judges is one and one-half times higher than trust in the president and five times higher than trust in members of Congress (Bybee 2011b).

The fact that a judicial crisis has not yet manifested itself in public opinion might be understood as an indication of limited public understanding. After all, there are many surveys that show most people have little detailed knowledge about the judiciary. For example, one-half of all Americans, including nearly one-third of college graduates, erroneously believe that Supreme Court cases decided by 5-4 votes are “too close to carry legal force and require subsequent review by either the lower courts or the Congress” (McGuire 2007, p. 199). Indeed, most Americans appear to be more familiar with the names of Snow White’s seven dwarfs than they are with the names of the justices serving on the Supreme Court (UPI 2006). The public’s lack of detailed information about the courts is also evident at the state level. In Colorado, for instance, where there is a well-established judicial performance evaluation system designed to inform citizens about the records of sitting judges, more than one-half of those voting in judicial elections nonetheless consider themselves to be uninformed about their own choices. Among this large body of uninformed voters, the most popular voting strategy is simply to vote to retain all judges seeking reelection; the second most popular voting strategy is to vote for or against judges completely at random (Inst. Adv. Am. Leg. Syst. & Leag. Women Voters 2007). Perhaps the imperfect state of public knowledge about the courts has prevented most people from fully appreciating the degree to which perceptions of political influence should, theoretically, undermine judicial legitimacy.

Yet there is reason to hesitate before accepting such a conclusion. Scholars who study American elections have found that voters’ lack of comprehensive factual knowledge about candidates tells us less about the quality of voter judgments than it does about the small incentives voters have to amass detailed information (Popkin 1994). Gathering information about candidates is costly and, in view of these costs, citizens are likely to rely on the most readily available information (as opposed to most detailed information) as a guide. Reasoning along these lines, one could argue that people are able to make meaningful judgments about the courts even if they do not have a fine-grained understanding of the judicial process. Indeed, when scholars specifically change question wording so as to not presuppose that the public’s knowledge of the courts is highly detailed, respondents demonstrate that they do know a number of things about the judiciary (Gibson & Caldeira 2009b). And we might expect that public knowledge will only continue to increase as the courts continue to grapple with high-profile issues such as healthcare reform.

All of this suggests that the failure to see a judicial crisis may be less a matter of the public’s poor information than a matter of the public’s genuine ambivalence: Most people view judicial decision making as a combination of conflicting legal and political components. This conflicted view of the courts mirrors the conflicting accounts of judicial decision making provided by judges and scholars, and it also reflects the mixed messages that the public receives on a regular basis. Individuals gather impressions of the courts not only from conventional news sources but also from experience (including encounters with the architecture of court buildings and with the rituals of court proceedings) and from popular culture (including movies, novels, “reality” courtroom television shows, and wall-to-wall tabloid coverage of “trials of the century”). This broad constellation of popular impressions reliably projects conflicting images of the courts as institutions of principle and as arenas of bias (Mather 2005, Bandes 2007, Bybee 2011c, Mulcahy 2011, Resnik & Curtis 2011). As a consequence, we might expect people to think about the judiciary in contradictory ways.

A half-law-half-politics portrait of the courts is further supported by the research on popular legal consciousness performed by Ewick & Silbey (1998). Based on a series of in-depth interviews with 430 individuals, Ewick & Silbey’s work...
demonstrates that ordinary Americans typically define, use, and understand law in conflicting ways: On one hand, law “is imagined and treated as an objective realm of disinterested action ... operating by known and fixed rules,” and on the other hand, law “is depicted as a game, a terrain for tactical encounters through which people marshal a variety of social resources to achieve strategic goals” (Ewick & Silbey 1998, p. 28). The same people hold these contradictory conceptions at the same time. Law is popularly understood to be “both sacred and profane, God and gimmick, interested and disinterested” all at once (Ewick & Silbey 1998, p. 223).

Although judicial crisis scholars see this as an unstable and delegitimizing mix, other scholars argue that contradictory perceptions of law and the courts reveal dynamics that actually help sustain the rule of law (Arnold 1935, Shklar 1964, Shklar 1984, Post 1987, Ewick & Silbey 1998, Kang 2003, Silbey & Barclay 2008, Bybee 2010, Bybee 2011a). There are differences between individual works, but a shared concern in this line of research is to explain how judges and other legal professionals may appear to be motivated by something other than the law and, at the same time, remain legitimate legal actors. Shklar (1964) identifies a broadly held expectation that courts should perform contradictory functions as the root issue. People often insist that “the impartiality of judges and of the legal process as a whole requires a dispassionate, literal pursuit of rules carved in spiritual marble” (Shklar 1964, p. x). This insistence on legal principle “may seem ridiculous” because “most thoughtful citizens know that the courts act decisively in creating rules that promote political ends” (p. x). Yet the mix of political and legal factors is “not at all socially or psychologically indefensible. Indeed, if we value flexibility and accept a degree of contradiction, this paradox may even seem highly functional and appropriate” (p. x). The courts operate on two conflicting planes at the same time because individuals have both an interest in advancing their own particular ends and a desire to believe *80 that they are living up to impartial standards. The system endures not in spite of the contradiction between instrumental action and impersonal principle, but because this contradiction suits law to the people who are governed by it.

In general, the scholars contributing to this literature do not argue that the public suspicions generated by the appearance of politically motivated judicial rulings are entirely harmless. Nor do they argue that justice is necessarily produced by allowing individuals to drape their interests in the mantle of legal principle. Instead, the central argument is that law, in order to be a language of dispute management for everyone, must be open to those honestly seeking impartial adjudication of principle as well as to those who wish to dress up their personal preferences in formal legal language in the hope that this will allow their cause to look better than it actually is (Bybee 2010). The presence of poses in the system naturally leads the public to suspect that the judicial process is subject to instrumental manipulation. Yet even though such suspicions may chip away at judicial legitimacy, they also point to the very mechanism that attracts people to the courts. In order to make use of law, individuals are neither required to abandon their partisan passions at the courthouse door nor asked to realize significant-yet-ordinarily-unobtainable ideals of impartiality and fairness; on the contrary, they must agree only to couch their conflict in legal terms. Such an arrangement has the advantage of making dispute management possible when the cacophony of competing interests in the community would otherwise preclude civil peace. Everyone, including judges, is given the chance to clothe their claims in law’s independent tests and procedures, lending their views an appearance of importance and impartiality that may not have much of a connection to underlying substance. It is the possibility of hypocrisy that at once threatens public support for the judiciary and makes the courts appealing. On this view, the conflict between judicial and scholarly explanations of court rulings is just another expression of how the rule of law operates and persists.

CONCLUSION

Judges and scholars speak about the same subject in very different terms. Judges routinely provide written explanations for their decisions, providing step-by-step accounts of how court rulings derive from law, fact, and reason. Many scholars routinely look past judicial explanations, relying on the suspicion that many of the most significant determinants of court rulings cannot be found in the judges’ words. Judges present their decision making in its own special temporal framework disconnected from any particular set of circumstances or personalities. Scholars present the courts as firmly embedded in specific periods and clearly influenced by the political pressures and preferences of each particular era.

As I noted at the outset, the aim of this article is to examine lines of research that take the fact of conflicting judicial and scholarly accounts as the subject of study. I began with work on motivated reasoning that explores how, under certain circumstances, judges are unconsciously predisposed to favor legal outcomes that match their preferred policy choices. Motivated reasoning research thus shows how judges can sincerely point to legal principle and impartial reason as the basis of their decision-making process, while scholars find that preference and politics are the central drivers. I then turned to
scholars who situate motivated judicial reasoning in the context of judicial legitimacy. Although individual judges may not consciously experience the influence of their political commitments, large segments of the public perceive the impact of political considerations, and this perception raises questions about the survival of courts as authoritative arbiters. In the final section of the article, I considered the work of scholars who question whether the predicted crisis of judicial legitimacy will ever arise. This line of work argues that the contradictory elements in the judicial process actually feed into (even as they continue to generate concerns about) the existing system. Rather than being a harbinger of imminent institutional collapse, the conflict between how judges and scholars explain judicial decision making is part of a dynamic that sustains the status quo.

The scholarship reviewed in this article collectively makes the case for paying attention to what judges say. An exclusive focus on the importance of politics and preferences on the bench encourages us either to downplay the content of judicial talk or to reject judicial talk as a kind of willful conspiracy to obscure the truth. The work I have discussed calls for a different approach, taking seriously both the explanatory arguments in judicial opinions and the extralegal determinants of judicial decision making. If we recognize that judicial decision making often operates on some basis other than law and yet consistently presents itself as part of a legitimate legal process, then we can begin to better understand the rule of law in all of its dimensions.

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Footnotes

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THE COST OF JUDICIAL CITATION: AN EMPIRICAL INVESTIGATION OF CITATION PRACTICES IN THE FEDERAL APPELLATE COURTS

Abstract

Since the early 1960s, computerized legal research technology has enabled judges and their law clerks to access legal information quickly and comprehensively. Particularly for appellate judges, who rely on wide-ranging legal research when writing opinions, this technological change has had special resonance. This Article attempts to quantify the effects of computer-assisted legal research on the federal judiciary by empirically analyzing citation patterns over the past fifty years. The results of this analysis suggest that the digitization of legal research has had statistically significant effects on the amount and style of citation in judicial opinions. Although the average number of cases cited in opinions has doubled between 1957 and 2007, the number of cases cited only in string citations has decreased by nearly the same percentage. This Article argues that such results can be explained by a basic economic theory of judicial citation in which judges respond to the decreasing cost of opinion production by discarding string citation for more effective communicative techniques.

I. Introduction

It has long been suspected that computer-assisted legal research, by substantially altering the cost structure of the legal research process, has fundamentally changed the way lawyers and judges use precedent. In 1960, reflecting on the future of early electronic data retrieval systems, one commentator predicted that “the day will surely come when the judge . . . [can] devote a greater part of his working time to the professional function of analyzing and applying the law, and much less of it to the slow, laborious and expensive process of gathering the materials.” Later commentators, less optimistic, blamed electronic searching methods for obscuring relevant authority by allowing litigants (and courts) to use “string citations to great gobs of cases” rather than “finding a relevant precedent or two and exploring the universe of cases around them.” Similarly, others have asserted that “electronic research . . . introduces new temptations to motivated researchers (readily available moribund cases, low costs for conducting frolics and detours to identify marginally supportive authority, immediate access to ambiguous case text, a temptation to false confidence in electronically located research results)” that result in more convoluted but less enlightening legal documents.

Nonetheless, while many have speculated on the effect of the digitization of precedent, few have attempted to quantify it. Commentators have proposed that the effects of technological innovations in searching precedent should be visible in judicial citation, but no studies have utilized the large data sets or sophisticated statistical techniques necessary to confirm expansive hypotheses about the shifting nature of citation technique. In some cases, these failings were temporally imposed: the early
citations that appeared in the 1970s and 1980s, for example, did not have the historical data necessary to draw conclusions about the recent advent of computerized legal research. In other cases, technological restraints limited feasibility: several later analyses explicitly aimed to isolate the effect of computer databases on citation practices but none had the requisite database size to draw statistically significant conclusions about the widely-suspected correlation. It is only recently, after the introduction of more advanced case analyses by the online commercial legal databases, that a systematic study of judicial citation practices has become methodologically feasible.

This Article is the first to exploit these novel methodological options in an attempt to fill the existing empirical gap. Specifically, this Article analyzes the quantitative and stylistic change in citation practices in the federal appellate courts over the past fifty years, finding that judicial citation in these courts has changed dramatically over that time period. This analysis utilizes two datasets: first, a collection of 1200 U.S. Circuit Courts of Appeals opinions from 1957 to 2007 in ten-year intervals; and second, a compilation of 688 cases written by two of the longest-serving federal appellate judges. The second dataset is employed primarily to buttress the first: specifically, to demonstrate that the results found in the main dataset are not primarily influenced by the changing composition of the federal judiciary. Accordingly, the results of the analysis can be seen to approximate the effect of the dramatic change in the cost of producing judicial opinions created by the onset of computer-assisted legal research.

This empirical analysis produced several remarkable conclusions. In contrast to the generally accepted hypothesis—that the use of string cites would increase as computer-assisted research techniques and massive legal databases reduced the costs of search—this analysis indicates that the opposite has occurred. Rather than simply increasing string citation, federal appellate judges have instead expanded their qualitative analysis of cited cases—leading to significantly longer opinions with more meticulous discussion of each cited case. In empirical terms, the average percentage of cases cited only in string citations has declined from above 24 percent in 1957 opinions to only 8 percent in 2007 opinions. Likewise, the percentage of cases cited in depth over the same period has increased from approximately 9 percent in 1957 opinions to 23 percent in 2007 opinions. More remarkably, most of the decrease in the percentage of unique string-cited cases and much of the increase in the amount of cases cited in depth occurs between 1977 and 1987, which parallels the proliferation of cost-effective computer-assisted legal research in law firms and courts. Specifically, the average percentage of unique string-cited cases in 1987 is only slightly over half that of 1977, and the average percentage of cases cited in depth nearly doubles over the same decade. This result is also borne out in the opinions of two individual judges over the same period, indicating that the decline in string citation is not attributable to a changing judicial workforce.

In general, this empirical analysis of judicial citation indicates that the citation style of judicial opinions can be conceived in simple microeconomic terms. As the costs of producing a judicial opinion decline, judges will be able to produce more both on a quantitative and qualitative level. More specifically, the analysis indicates that string citation is probably an inferior good—as the costs of creating a string citation decline, judges are less likely to use them to support legal analysis. Thus, the evidence suggests that, contrary to previous assumptions, the rise of computerized legal research probably has had a significant role in reducing the prevalence of string citation by limiting the string citation’s communicative value.

This Article proceeds in several parts. Part II discusses the technological transformation beginning in the late 1950s that considerably reduced the cost of writing federal appellate opinions, and hypothesizes about possible effects on citation styles over that period. Parts III and IV present evidence for these microeconomic hypotheses—analyzing data from an aggregate sample of federal courts of appeals cases between 1957 and 2007 and from two specific samples of appellate opinions by long-serving circuit court judges to argue that the cost of an opinion is largely determinative of its style. Finally, Part V concludes, arguing that the availability of digital precedent has actually reduced the attractiveness of string citation in legal practice.

II. The Historical Experiment: Computerized Research And The Cost of Judicial Citation

If judicial opinions represent merely the product of a number of economic inputs, the revolutionary change in the cost of one input (citation) brought about by the advent of computer-assisted legal research should have a measurable effect on the amount (or perhaps form) of judicial output. Matching the change in output to the historical development of electronic research devices, however, would be impossible without a general outline of the rate and type of technological advances most likely to affect judicial productivity. This Part, therefore, attempts to sketch the historical situation in which judicial production operated: Part II.A gives a general historical overview of the rise of computer-assisted legal research; Part II.B.
focuses more specifically at the judicial recognition and use of these alternative production methods; and Part II.C. outlines a microeconomic theory of judicial citation practices that may explain some of the historical variation in citation style.

A. The Historical Experiment

Although it is tempting to characterize the advance of computer-assisted legal research as an instantaneous change in the cost structure of opinion production—in which even the earliest computers “could scan the legal wisdom of the ages in instants, green glyphs etching precedents across the screen to suit any need,” the actual story is one of slow progression from print to digital searching. Primarily due to physical constraints, the first computer research systems were only able to query a small universe of statutory materials manually preprogrammed into an accompanying database. In these early manifestations, programmers converted each relevant statute into punch-card form and then entered these into the computer’s database, which compiled the information to create an alphabetical list of every statutory word. In order to locate relevant materials, a legal researcher would input a list of words (or combinations of words), and the computer would print a list of statutes containing those words. The print-out would contain the names of the statutes and the number referent of each term searched, and could also reproduce the full-text of each statute. Of course, these early systems had a number of significant drawbacks: they were “wholly incapable, without specific instructions, of dealing with language difficulties such as those posed by ambiguities or synonyms”; were severely limited in searching scope; and were extremely slow and expensive.

Due to these limitations, it was not until the mid-1970s, nearly fifteen years after the first computerized research systems were introduced, that computer-assisted legal research became commercialized nationally. LEXIS was introduced in April of 1973, and was marketed primarily to major New York law firms. Westlaw followed shortly thereafter, and acquired its first subscriber in April of 1975. These early commercial efforts were both limited and expensive. LEXIS, for example, originally had a minimum use cost of $36,000 per year, and did not provide access to a large volume of information. Although the system provided content such as the U.S. Code, Supreme Court cases, federal appellate and district cases, as well as decisions in certain specialized legal fields, by 1980 only the cases of eleven states were available for research. Likewise, for several years Westlaw provided researchers with only the West headnotes rather than the full text of cases—it was not until as late as 1976 that Westlaw offered a substantial full-text database. Even though the LEXIS minimum charge was reduced to $18,000 in 1975 and then was waived in 1976, moderate usage during that time period was estimated to cost between $20,000 and $25,000 per year.

Because of the expenses and technical complexities of the commercial computer research systems, widespread commercial usage of LEXIS and Westlaw did not appear until nearly a decade later. The LEXIS system in the late 1970s and early 1980s required the use of a dedicated computer terminal connected via telephone line to the LEXIS main computer in Dayton, Ohio. When using the system, the user would connect from his terminal to the LEXIS mainframe to conduct the searches—the results of which would be displayed on the office terminal. Training attorneys and paralegals on the technical complexities of these terminals was rather expensive: Westlaw estimated the cost of user education in the early 1980s at “approximately $100 per day”—and around $2700 total to train an average-sized law firm. Law firms’ typical searches were also quite costly. In 1976, using the LEXIS system required expenditures of around $100 per hour—primarily due to LEXIS costs of inputting and storing its vast conglomeration of legal information—and the searches were often rather slow. Even by 1983, the estimated cost of such computerized queries for a law firm was between $2 and $4 a minute. Accordingly, most law firms were slow to adopt the service. LEXIS, for example, had slightly less than two hundred subscribers in 1976. Even by 1983, observers reported only intermittent use at law firms.

Business usage increased substantially in the late-1980s after several technological improvements augmented search scope and efficiency on LEXIS and Westlaw. Both commercial services introduced a larger variety of search terms throughout the 1980s: for example, by 1986, both systems offered the universal character and the root expander to enable searches for partial words. Additional new search queries permitted users to not only search a single library of cases, but the entire federal case database or the entire state law database. Users were also able to search these new massive databases topically for specific areas of law. Both services also offered further infrastructure options: Westlaw began selling dedicated terminals, and LEXIS enabled access through non-proprietary computers (as Westlaw had for several years). Subscribers responded positively to these search improvements. By 1988, analysts were predicting growth for each commercial service of between 20 and 30 percent a year; by 1989, the one millionth LEXIS user identification code was issued; and by 1990, over 100,000 searches were conducted on LEXIS in a single day.
As has been noted elsewhere, much of the explosive growth in computerized legal research in the late 1980s and early 1990s can be attributed to the success of the commercial services’ aggressive grassroots marketing campaign. When LEXIS and Westlaw began to compete for users, each attempted to gain long-term subscribers by subsidizing the costs of student use.\textsuperscript{43} Both bestowed free-access passwords on student users and provided law school libraries with subsidized computer equipment—beginning with terminals and continuing with dedicated printers and personal computers.\textsuperscript{44} Accordingly, students began to use the online systems more often and more exclusively in law school and later, in law practice. As one commentator noted in 1994, “for many American law students the only common research training experience they receive is the training provided by LEXIS and Westlaw, a training experience that will follow the student into practice if he or she works in a large law firm environment.”\textsuperscript{58} External and internal technological improvements in the 1990s further refined the commercial systems’ usability. One such advancement was the personal computer, which permitted LEXIS and Westlaw users to operate the electronic legal research program in tandem with a word processing program.\textsuperscript{59} Researchers could copy and paste paragraphs of text from the research program into the word processing program—significantly decreasing the editorial demands of legal research.\textsuperscript{45}

Access to the Internet also increased general usability: in 1996, LEXIS subscribers were able to research online through the LexisNexis Office software suite.\textsuperscript{46} Both LEXIS and Westlaw also began to provide more comprehensive user assistance. In the early 1990s, the commercial systems began offering twenty-four hour telephone assistance with trained researchers providing research tips and advice.\textsuperscript{49} Later during that decade, LEXIS introduced pay-per-use access as an alternative to subscription service for smaller firms and solo practitioners.\textsuperscript{50} These varied technological developments encouraged research growth. By 1998, LEXIS was processing over 600,000 searches and adding over twelve million documents to its online service every day.\textsuperscript{51}

Although this explosive growth did not continue unabated to the present day, several substantial additions to the online commercial databases after the turn of the century have significantly increased the availability of legal research materials. First, both systems began to publish a greater number of cases—including cases not published within the federal reporters. Second, Westlaw in particular began to make available a larger variety of legal materials, including briefs and other trial documents.\textsuperscript{52} In fact, Westlaw recently enabled new queries that allow researchers to explore over 1.4 million federal and state briefs and 2.75 million trial documents.\textsuperscript{53} Access to such briefs enables users to use prior research to find analogous cases more efficiently. Perhaps due to these new services, usage continued to increase after the 1990s. Now, each service processes hundreds of thousands of searches per day and adds over 1.2 million cases per year.\textsuperscript{54}

In sum, the growth of computer-assisted legal research is best divided into three periods. The first period, between 1960 and around 1977, saw the introduction and (limited) use of primitive legal research systems as a viable alternative to manual research. The second period, between 1977 and around 1993, witnessed the proliferation of the commercial research systems and vast technological improvements in the structural architecture and interfaces of such systems. The final period, between 1993 and the present, exhibits slow but steady growth in both the type of content available on the commercial systems and the number of users, but not the same significant technological advancements of the second period. Thus, if the cost of research is reflected in legal citation practices, the imprint of these three eras of computerized legal research should be reflected in the style of judicial opinions written within those periods.

B. Computerized Research Systems in the Federal Courts

Early in the development of computer-assisted legal research, federal judges recognized the time-saving function of digitized precedent. In 1961, Judge John R. Brown of the Fifth Circuit wrote an article describing the advantages of computer research.\textsuperscript{55} Presciently, Brown claimed that computers could solve the increasing problem of storing and accessing relevant precedent.\textsuperscript{56} Although recognizing that the current print-focused organization system was innovative, Brown concluded that the system’s requisite rigidity “makes search a time-consuming and expensive proposition.”\textsuperscript{57} Computers, he thought, would “save precious professional time in the routine low-order search which finally uncovers the few pieces calling for close study and lawyer-like judgment.”\textsuperscript{58}

Occasionally, as in First National Bank of Birmingham, Alabama v. United States,\textsuperscript{59} federal judges explicitly mentioned computerized research in their opinions. In First National Bank, for example, Judge Brown specially concurred in order to “focus professional attention on another effective use of the marvels of electronic machines in the vastly expanding
business of litigation and its disposition." In that case, a question arose over whether the facts of the tax case under appeal consisted of “an isolated case of an isolated set of taxpayers in an isolated non-repetitive setting, or [whether it was] one of those test cases so often tenderly coveted by tax counsel, private and government." The Fifth Circuit utilized an IRS computerized data system to establish that “the appeal really involves no true question of estate tax law,” and thus could be decided on state rather than federal grounds. Other early mentions were less grandiose. In Holcomb v. United States, for example, the Seventh Circuit noted the ineffectiveness of the LEXIS system in finding an unknown case citation.

Despite these professed uses of computerized legal research, an early study of actual federal court research methods indicates that computer consultation was the exception rather than the norm before the late 1970s. A Federal Judicial Center study shows that between January 1 and May 31, 1976, use of computer-assisted research systems by federal appellate law clerks ranged from 0.26 to 7.33 hours per month. Usage rates for district court clerks were even less—ranging from 0.00 to 3.15 hours per month. For the appellate sample, these hours of use translates to an average of between 1.00 and 16.20 research sessions per month. Although the caseload of circuit court judges was not at that time nearly as substantial as current levels, this amount of computer-assisted research seems almost negligible by today’s standards. For example, assuming that law clerks spend only 10 percent of their work hours researching and that most law clerks endure a forty-hour work week (both rather conservative assumptions), today’s clerks would spend at least four hours a week researching on computerized research systems—a fourfold increase from the 1970s average. (Interestingly, anecdotal evidence suggests that in the late 1970s, appellate clerks were significantly more likely to rely exclusively on appellate briefs as a source for the relevant research.) Moreover, late-1970s usage levels between judges varied remarkably: on the D.C. Circuit, for example, clerks for one appellate judge were over twenty times more likely to employ computer-assisted legal research than the clerks of another appellate judge. This variance suggests that many appellate judges and clerks had not yet adopted computerized research as a consistent research method.

Access is an important factor explaining the computerized research usage levels of appellate courts in the late-1970s. At this time LEXIS, the more widely available commercial service, required a dedicated terminal in order to access its databases--and accordingly only judges “on-site” at the terminal’s location had access. Even after May of 1976, when “call-in centers” were installed in the Fifth and Ninth Circuits, enabling appellate judges to telephone from non-terminal locations to use the computerized research systems, appellate judges exhibited some reticence over taking advantage of their access to the terminals. Between July and December of 1976, for example, Fifth Circuit judges utilized the call-in center only eighty-six total times: an average of only five times per judge, and only 0.8 times per judge per month. Although the Ninth Circuit experiment was more successful, it too failed to encourage widespread adoption of computer-assisted legal research. Specifically, between June 1 and November 30, 1976, appellate judges in the circuit used the system a total of 170 times. This translates into an average of around 10.6 uses per judge in the sample time period, or only 1.8 uses per judge per month. Anecdotally, these low usage numbers are probably best explained by judges’ lack of familiarity with the terminal system and the frequent technical glitches in early operation. At the time, one Ninth Circuit judge noted that the call-in system was “sometimes tied up for days which precludes our use of [the system] for short-term ‘rush’ projects.”

Another remarked that his “clerks simply have not developed the habit of [using the call-in system].” A helpful proxy in determining the attitudes of the federal courts to computerized legal research is the judicial mention of such research as part of “reasonable attorney’s fees” under cost-shifting statutes. Beginning in the later 1970s, several courts began to note (and even laud) the use of computerized research as part of a reasonable fee recovery. In Pitchford Scientific Instruments Corp. v. PEPI, Inc., for example, the court noted that although “[d]efendants object to the charge for the use of Lexis computer service, describing it as ‘an impermissible anthromorphism’,” the cost was reasonable since “[t]his service . . . replaces by instantaneous and supposedly infallible retrieval, many hours which would be billable if performed by human talent.” Likewise, the District Court of Rhode Island, in 1983, concluded that although it was “unable to find any authority directly in point anent the recoverability of computer charges for the use of computer-aided legal research systems, this Court believes that such charges should be recoverable in certain cases” since ruling otherwise “would be an open invitation to law firms to use high-priced attorney time to perform routine research tasks that can be accomplished quicker and more economically with Lexis.” The Third Circuit, in an earlier case, declared that “use of computer-aided legal research such as LEXIS, or WESTLAW, or similar systems, is certainly reasonable, if not essential, in contemporary legal practice.” Although such statements are almost nonexistent before 1977, they are found in increasing quantity afterwards.

Thus, while computer-assisted legal research is unlikely, before at least the late 1970s, to have widely altered the research or citation practices of most judges on the federal appellate courts, evidence from early surveys indicate that judges had a
remarkably positive attitude toward such systems and their further proliferation. In fact, judges in the late 1970s were not primarily concerned about the efficiency or reliability of computerized research systems but instead with their cost-effectiveness. Judges responding to a Federal Judicial Center inquiry about computer-assisted legal research nearly uniformly cited cost-effectiveness as the only remaining barrier to adoption. One judge found the computerized research system “generally to be a very effective efficient and easy system of legal research especially useful for certain types of work,” but worried, “I have no idea of the cost charged, however, and therefore cannot state that it is more economical than traditional ‘book’ research.” Another judge responded that computer-assisted legal research “is extremely useful--but, in terms of cost, it doesn’t do the job of another clerk, or even half a clerk.” Other judges, however, were less worried about the cost. One judge, for example, reported that computerized legal research was “a great time saver” and that his office “has come to rely on it substantially.”

It was not until the early 1980s that judges would wholeheartedly adopt these electronic researching mechanisms. By 1982, computerized research had proliferated to an extent that one federal court felt confident concluding, “[t]he bulk and complexity of legal resources have grown to such an extent that even experienced lawyers cannot function efficiently today without the support of special tools, such as the computer research systems of FLITE, JURIS, LEXIS and WESTLAW.” By 1985, the commercial systems had become so integrated into the research patterns of the federal courts that one judge used the phrase “sitting hunched over a LEXIS or WESTLAW terminal” as a metaphor for legal research.

Although the process was rather laborious, the ultimate result of integrating computer-assisted legal research into the judicial system was a significant reduction in the costs of research. While no studies have yet estimated the actual reduction in costs over the entire period between the early 1960s and the present brought about by the computerized research revolution, an early survey conducted by the Federal Judicial Center in federal appellate courts supports the traditional story hypothesizing substantial time savings created by computer-assisted legal research. In 1976, only three years after the commercial introduction of computerized legal research systems, appellate judges and their clerks participating in a pilot testing project of such systems estimated that the systems could save between 4.1 and 4.4 hours of legal research time per week of use if used regularly. Since these users also estimated that they spent between 21.6 and 25 hours per week conducting legal research before the introduction of the computerized systems, even the very early research systems had the potential to save a substantial amount of time--around 17-19% of total research time. Once the computer systems became more common and more sophisticated, this reduction in research time would seem to produce substantial cost savings for federal courts--especially in the domain of judicial citation.

C. A Simple Microeconomic Theory of Citation

The production of judicial citation is an especially labor-intensive task. Although in many cases the vast majority of this labor is borne by the appellant and appellee, who must provide thoroughly-researched briefs to the appellate court, a judge must also research separately in order to find strands of precedent the parties may have missed or to buttress a decision not directly aligned with the argumentation in the briefs. Especially in the era before computerized research systems, legal research was one of the most time-consuming aspects of a judge’s work: one early study estimates that over 30 percent of an appellate judge’s time was spent on finding and verifying applicable precedent.

In this sense, appellate judges are not only producers, but consumers of citation, constrained in their consumption of opinion inputs by budgetary (primarily temporal) restraints. According to this simple microeconomic model, each federal appellate judge has a fixed amount of wealth (time) with which he can purchase inputs for an opinion. Although with an unlimited income a judge would consume citation until the marginal value of the next citation is negative, physical constraints inhibit a judge’s ability to muster precedent flippantly. Thus, like consumers, judges must allocate limited resources among a variety of products--including, perhaps, court administration, pro bono work, and even moonlighting or leisure. A change in judicial income should accordingly create interesting effects on judicial consumption, since a judge must reevaluate his consumption patterns in lieu of his newfound windfall.

When the cost of legal research declines, consumer theory predicts two potential effects: an income effect, and a substitution effect. The reduced cost of research essentially creates a positive shift in a judge’s budget constraint--he can now consume more of any number of goods (including leisure, for example). This is the income effect, whereby a judge will consume more total citations (or perhaps more pro-bono work or leisure). Notably, the decreasing cost of legal research may also produce a substitution effect. As the cost of some types of citation decline relative to other types of citation, a
judge may reallocate consumption between the two types of citation (or even more generally between two types of activities, such as opinion-writing and leisure).

Moreover, increasing aggregate judicial purchasing power might have the effect of altering the relative demand for different types of citation. For example, if expository citation (in which a judge details the reasons for citing a case in paragraph form) becomes less expensive relative to string-citation (in which cases cited for a proposition are merely listed, without explanation), perhaps the demand for expository citation will rise, and the demand for string citation will fall. Depending on the levels of consumption after the budgetary constraint is lifted, it may be possible to characterize certain types of citation as either normal or inferior goods. While commentators speculating on the effects of technology on judicial citation have generally assumed that citation is a normal good, and thus that the use of citation will rise as the cost of creating the citation falls, the empirical evidence, detailed in the next Part, indicates that not all types of citation can be construed in this manner.

III. Citation Practices In The Federal Appellate Courts, 1957-2007

In order to investigate the effects of technological advancement on judicial citation, this Article conducts an empirical analysis on federal appellate cases from 1957 to 2007. Part III.A establishes the empirical methodology. The following part, III.B, surveys the increases in total citation over the past fifty years and correlates these significant increases to the technological milieu in which they occurred. Then, Part III.C analyzes the incidence of string citation in opinions over the relevant time period, concluding that the changes in string citation can be directly correlated with the technological advancements detailed in Parts II.A and II.B. Finally, Part III.D investigates the broader stylistic variances that gave rise to the string citation effects, and concludes that these too can be explained predominantly through the microeconomic framework.

A. Data and Methodology

This empirical analysis uses data from 1200 federal courts of appeals cases decided in the fifty years between 1957 and 2007. Specifically, twelve sets of one hundred circuit court cases were gathered: 600 published opinions in which one judge concurred and wrote a separate opinion, and 600 published opinions in which one judge dissented and wrote separately. These opinions were collected at ten-year intervals. Thus, the complete data set consisted of one hundred concurring and dissenting opinions for 1957, 1967, 1977, 1987, 1997, and 2007. In some cases, due to a dearth of concurring or dissenting federal circuit court opinions in the year allotted, additional opinions were compiled from the preceding year in order to create a consistent set of one hundred opinions.

Each set of opinions in the main data set was analyzed by counting the number of unique case citations within both the majority and concurring (or dissenting) opinion. This was accomplished by means of Westlaw’s “Table of Authorities” feature, which compiles an exhaustive list of the cases cited in a judicial opinion. Even if a case is cited more than once in the opinion, the case appears only once in the Table of Authorities, and thus is only counted once in the final calculation. Notably, because multiple citations to a single case are not necessarily indicative of the amount of research used in creating an opinion, the resulting number of “unique” cases cited in an opinion probably better approximates the cost of the opinion than a measure of raw citations. In every dissenting opinion, but not in every concurring opinion, the number of unique dissenting case citations (those appearing only in the dissenting opinion, and not in the affiliated majority opinion) was also computed. The final dataset of 1200 appellate opinions contained 27,490 case citations.

For purposes of further analysis, the case citations in each relevant opinion were divided into four classes that approximate the analysis each case received in the opinion. This was accomplished by using Westlaw’s “depth-of-treatment” rating, which divides cited authorities into four categories. The first category, “one-star” authorities, indicates cited authorities that are cited only in a string citation--cases this Article classifies as “unique string-cited cases.” The second category, denoted by a depth-of-treatment rating of two stars, includes cases cited as the primary authority for a proposition in at least one point in the majority or concurring/dissenting opinions.

The three-star category includes cases cited several times within an opinion, usually accompanied by at least a paragraph of textual analysis in the opinion. The final category, four-star cases, designates only those cases that are considered in a significant amount of depth--usually accompanied by several paragraphs of analysis when cited.
Finally, to determine the overall depth-of-citation percentages within each sample, the mean of the percentage of cases cited in each depth classification within the sample was calculated. There are a number of advantages to this percentage-based approach that are not present in a simple citation count. Since this is an attempt to measure the somewhat ephemeral notion of judicial citation “style,” merely counting the number of unique string-cited cases and calculating the mean number of such citations per opinion would not illuminate differences in the percentage of string citation, since the amount of cases cited in the mean opinion has escalated dramatically in the last fifty years. Thus, while in some cases the mean number of unique string-cited cases may rise slightly in the later samples, this is not necessarily indicative of an increase in “junk” citations; instead, the increase in the total number of cited cases may overwhelm (at least in percentage terms) the increase in the raw number of string citations.

The result of this analysis is to yield, perhaps for the first time, a quantifiable measure of judicial citation style. Previous citation studies have debated, more specifically in the context of the average age of cited opinions, whether a judge’s method of citation is more closely correlated to personal “taste” or external considerations. The differences in the mean number of cases cited, the percentage of string citation, and the percentage of expository citation identified below support the external economic account of judicial citation. Namely, the results indicate that external factors--most distinctively the costs of legal research--have nearly determinative influences on most aspects of judicial citation style.

B. Total Citation, 1957-2007

Perhaps the most obvious indicator of external coercion on judicial citation style is the number of cases cited within an opinion. If, as is suggested by the history of computerized legal research, appellate judges are able to more cost-effectively research applicable precedent, their purchasing power has concomitantly increased. In effect, computer-assisted legal research allows judges to consume more utility-producing activities. Although, as Judge Posner’s judicial utility function suggests, judges might allocate this increased purchasing power across a variety of products—including leisure, moonlighting, and other utility-generating activities—one important avenue for consumption is opinion-writing. Likewise, if judicial clerks are driving the citation process, their increased ability to consume citations should also have an important effect on the citation style of their judicial employer.

It is not surprising, given the tremendous research advantages conferred by computerized research systems, to find that judicial consumption of citations has increased radically in the last five decades. More specifically, there have been two remarkable modifications in the mean number of unique cases cited in the federal appellate opinions since 1957. First, in the decade between 1967 and 1977, the mean number of cases cited per opinion jumps substantially: from 17.85 in 1967 to 23.94 in 1977, an increase of over 6 cases (over 34 percent) per opinion. The second statistically significant increase occurs between 1997 and 2007, when the mean number of cases cited per opinion swells from 24.19 to 31.14—an increase of nearly seven cases (nearly 29 percent) per opinion.

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
<th>Year-10 Concur to Year Concur</th>
<th>Year-10 Dissent to Year Dissent</th>
<th>Year-10 Total to Year Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>15.66 (13.14)/1.82</td>
<td>15.64 (14.87)/2.91</td>
<td>15.67 (11.23)/2.20</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
</tr>
<tr>
<td>1967</td>
<td>17.85 (13.36)/1.85</td>
<td>16.86 (14.20)/2.78</td>
<td>18.84 (12.46)/2.44</td>
<td>1.22</td>
<td>5.79 ***</td>
<td>6.09 ***</td>
</tr>
<tr>
<td>1977</td>
<td>23.94 (18.15)/2.52</td>
<td>22.65 (17.41)/3.41</td>
<td>25.22 (18.87)/3.70</td>
<td>3.17 *</td>
<td>6.38 ***</td>
<td>6.69 ***</td>
</tr>
<tr>
<td>1987</td>
<td>24.69 (19.82)/2.75</td>
<td>24.22 (22.52)/4.41</td>
<td>25.16 (16.79)/3.29</td>
<td>1.57</td>
<td>-0.06</td>
<td>0.76</td>
</tr>
<tr>
<td>1997</td>
<td>24.19 (15.07)/2.09</td>
<td>23.88 (12.10)/2.37</td>
<td>24.49 (17.60)/3.45</td>
<td>-0.34</td>
<td>-0.67</td>
<td>-0.51</td>
</tr>
<tr>
<td>2007</td>
<td>31.14 (20.01)/2.77</td>
<td>29.05 (19.01)/3.73</td>
<td>33.22 (20.84)/4.09</td>
<td>5.17 **</td>
<td>8.73 ***</td>
<td>6.95 ***</td>
</tr>
</tbody>
</table>
These findings confirm the results of previous citation studies estimating the mean number of cases cited over the same period. A study by Judge Posner in 1985, for example, found that the average federal appellate opinion in 1960 contained 12.4 citations, and that the average 1983 opinion contained 24.7 citations—both findings remarkably close to this Article’s results. Whether these increases are due specifically to technological advances, however, is open to question. Prior studies of citation indicate that the mean number of cited cases per opinion began to increase dramatically beginning as early as the 1940s, perhaps because an increasing stock of precedent created more opportunities for citation, or because changes in judicial staffing levels increased opinion production capacity.

Interestingly, this analysis did not uncover a significant discrepancy between the mean number of cases cited in concurring and dissenting opinions within any single sample year. Although in both 1977 and 2007, where the most significant growth in mean cases cited is observed, the measured difference between the mean cases cited in concurring and dissenting opinions is larger than in any other sampled year; these differences are not statistically significant. This suggests that the income effect observed in Table 1, in which judges consume more citations as their income increases, does not engender a significant substitution effect between raw citations in concurring and dissenting opinions. Instead, citation increases in both types of opinions, and judges allocate relatively similar amounts of research time to concurring and dissenting opinions before and after their purchasing power increases.

More importantly, however, the data in Table 1 suggest that a technological explanation cannot fully account for the observed increases in mean number of cited cases. For example, one major increase in total citation occurred between 1967 and 1977, before the widespread adoption of computerized legal research systems in the federal courts and private practice. Likewise, the second major increase occurs between the 1997 and 2007 samples, although no major computer-assisted research developments transpired during that decade.

One alternative to the technological explanation deserves mention: some commentators have suggested that the increase in the number of available law clerks for each court of appeals judge is directly responsible for the recent increase in citation. Federal circuit judges received one law clerk in 1930. This number was doubled in 1970, when circuit judges were given a salary allowance that enabled them to hire more clerks. Although circuit judges received enough money to hire three clerks since 1974, this was not commonly done before 1980, when a congressional enactment that increased staff salary allowances enabled federal judges to hire three clerks at normal pay levels. Shortly thereafter, in the early 1990s, judges were given the option of employing four clerks and one secretary instead of three clerks and two secretaries. Notably, these changes in potential staffing levels only roughly correspond to Table 1’s findings: between 1967 and 1977, when potential clerk levels doubled, the total number of cited cases increased most dramatically (by slightly over 34 percent). The second major increase in mean total citation, however, fails to correspond to the increased staffing levels: the increase from two to four clerks occurred before 1997, but the second major increase in case citations (around 29 percent) did not appear until after the 1997 sample. Moreover, even if clerking levels may roughly approximate the changes in total citation, they are much less helpful in rationalizing the discrepancies in string citation over the same period.

C. String Citation, 1957-2007

Judges have often derided excessive string citation, characterizing the practice as needlessly justificatory and occasionally harmful. Judge Posner castigates law clerks’ writing style as making “an ostentatious display of the apparatus of legal scholarship--string citations, copious footnotes, abundant references to secondary literature.” Judge Posner finds law clerk’s reliance on string citations “superfluous” and often “inaccurate.” Other judges have railed against the practice in appellate briefs. According to Judge Harry Pregerson of the Ninth Circuit, for example, using string citation is “the third sin” of appellate brief writing, since such cites “are rarely useful or impressive.” Despite these misgivings, however, the data shows that string citation has actually fallen out of favor in appellate opinions over the last fifty years--becoming nearly a novelty in recent years.

Two measures of string citation are informative for temporally assessing the influence of economic factors on such citation. First, the percentage of cases in an opinion cited only within a string citation, and not further analyzed, might respond
significantly to changes in the cost of legal research or legal writing: if the cost of either declines, judges would have more time to analyze each case in further depth and present their findings in expository fashion. *73 Likewise, the average number of cases cited uniquely in string citations within an opinion generates a similar approximation of the costs of legal citation. Accordingly, both measures were analyzed to determine whether significant patterns arose over time.

The striking results of this analysis of unique string-cited cases are found below in Table 2, which displays the number of string-cited cases in an average federal appellate opinion as a percentage of the total number of cases cited in the average opinion. Specifically, the first column reports, in ten-year increments, the mean percentage of unique string-cited cases in the total sample of opinions analyzed in each sample year. The two following columns display the same data for the relevant samples of concurring and dissenting opinions, and the final two columns show the same results for dissenting opinions in which the ideology of the majority opinion- (as measured by party of appointing President) was either the same or the opposite of the dissenting judge.

Table 2
Unique String-cited Cases as a Percentage of Total Cited Cases in Federal Appellate Opinions, by Year of Decision and by Type of Opinion

<table>
<thead>
<tr>
<th>Year</th>
<th>Total</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
<th>SME Dissenting Opinions</th>
<th>OPP Dissenting Opinions</th>
<th>Change from Year-10 Total to Year Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1957</td>
<td>0.242 (0.189)0.026</td>
<td>0.248 (0.202)0.039</td>
<td>0.236 (0.177)0.035</td>
<td>0.236 (0.154)0.044</td>
<td>0.235 (0.197)0.054</td>
<td>N/A</td>
</tr>
<tr>
<td>1967</td>
<td>0.248 (0.165)0.023</td>
<td>0.239 (0.173)0.034</td>
<td>0.257 (0.156)0.031</td>
<td>0.271 (0.161)0.043</td>
<td>0.241 (0.151)0.044</td>
<td>0.006</td>
</tr>
<tr>
<td>1977</td>
<td>0.251 (0.147)0.020</td>
<td>0.237 (0.154)0.030</td>
<td>0.266 (0.140)0.027</td>
<td>0.264 (0.143)0.038</td>
<td>0.268 (0.138)0.040</td>
<td>0.003</td>
</tr>
<tr>
<td>1987</td>
<td>0.149 (0.122)0.017</td>
<td>0.146 (0.119)0.023</td>
<td>0.151 (0.127)0.027</td>
<td>0.143 (0.108)0.036</td>
<td>0.156 (0.136)0.033</td>
<td>-0.103 ***</td>
</tr>
<tr>
<td>1997</td>
<td>0.097 (0.094)0.013</td>
<td>0.102 (0.092)0.018</td>
<td>0.091 (0.095)0.019</td>
<td>0.101 (0.094)0.027</td>
<td>0.083 (0.096)0.026</td>
<td>-0.052 ***</td>
</tr>
<tr>
<td>2007</td>
<td>0.082 (0.091)0.013</td>
<td>0.094 (0.098)0.019</td>
<td>0.069 (0.081)0.016</td>
<td>0.089 (0.106)0.030</td>
<td>0.057 (0.059)0.015</td>
<td>-0.015 *</td>
</tr>
</tbody>
</table>

Note: All numbers are means. The standard deviation is in parentheses, and the confidence interval (at the 5 percent level) is in italics. * denotes difference significant at 10 percent level, ** denotes difference significant at 5 percent level, and *** denotes difference significant at 1 percent level. SME Dissenting Opinions refers to the group of dissenting opinions in which the dissenter and the majority-opinion writer are appointed by presidents of the same political party; OPP Dissenting Opinions refers to the group of dissenting opinions in which the dissenter and the majority-opinion writer are appointed by presidents of the opposite political party.

*74 At first glance, several interesting trends emerge. A comparison of the columns reporting string-citing concurring and dissenting opinions reveals that only minimal (and non-significant) differences exist between the mean percentage of unique string-cited cases in the concurring and dissenting sample opinions within the sample years. For example, the greatest difference between these two samples in a given year is only 2.9 percent, between the 1977 dissenting opinions and the 1977 concurring opinions. There is a dramatic difference, however, between the percentage of unique string-cited cases in 1957 and in 2007. In the case of concurring opinions, the mean percentage drops from nearly 25 percent in 1957 to below 10 percent in 2007; and in the dissenting opinion samples, the percentage drops nearly as radically, from over 23 percent in 1957 to slightly under 7 percent in 2007. Even more interesting is the nature of this change: in the first two decades considered in the sample, the total percentage of unique string-cited cases varies almost imperceptibly—indeed, the changes from 1957 to 1977 are not statistically significant. In the twenty-year period between 1977 and 1997, however, the mean percentage of string-cited cases drops precipitously; declining by over 15 percent in those years.

The large standard deviations in each measured sample indicate, of course, that these results are not necessarily predictive of any single opinion within the sample. Although, as noted above, opinions from 1957 are generally distinguishable from contemporary opinions, the wide variance in individual cases creates some ambiguity.129 These variations are most likely the result of two factors. First, a large number of opinions in each sample were simply not long enough to include string cites. In fact, 24 percent of the opinions in the 1957 concurring opinions sample, and 25 percent of the 2007 concurring opinions, did not employ string cites. These are predominately those opinions that are only a few pages long and contained only a few cases that were cited expository. Second, judges within the samples generally revealed divergent citation styles. Thus, while the sample as a whole demonstrated a general coherence, individual literary styles created large discrepancies within the
individual opinions. The macro-level changes, nevertheless, are remarkable.

Figure 1 Percentage of Unique String-Cited Cases by Year and by Type of Opinion

In particular, Figure 1’s graphical representation of the mean percentage of unique string-cited cases demonstrates the suddenness of the 1977-1997 decline. The mean percentage of unique string-cited cases is relatively constant both before and after the large drop in that twenty-year period, suggesting that the cause of the drop was confined to a significant external change within those two decades. Notably, the decrease in the percentage of string citation directly parallels the increased proliferation of computerized research systems: there is no significant change in string citation until the 1980s, after computer-assisted legal research was widely adopted, and the decrease tapers off after 1997 when new advancements in computer-assisted legal research and word processing were not as revolutionary.

In contrast to the change in the total number of cases cited over the five decade period, these changes in the mean percentage of string citation are more amenable to this technological explanation. Law clerk allotments, for example, cannot explain the observed changes in string citation. Since the single largest percentage increase in clerk staffing levels arose in 1969, when the permissible number of law clerks was doubled, a “law clerk” influence should significantly affect the 1977 sample. In contrast, however, the 1977 sample showed no statistical difference from either the 1967 or 1957 sample, suggesting that the number of law clerks does not have a determinative influence on the percentage of string citation employed in federal appellate opinions.

In sum, these results imply a significant change in the costs of the inputs of opinion production between 1977 and 1997. Specifically, judges appear to produce much less string citation in the 1997 opinions, in both percentage and real numbers. More importantly, as is shown below in Part III.D, judges were not only engaging in fewer string citations, but also analyzing cited cases in significantly greater depth. In effect, computerized research appears to create a substitution effect in judicial citation consumption: as income increases, judges consume less string citation, and more expository citation. This suggests that string citation is an inferior good—one that judges consume less as income rises.

D. Depth of Citation, 1957-2007

Although this analysis of string citation suggests that string citation practices correlate closely with the use of computer-assisted legal research, whether the observed decrease in string citation is meaningful depends to an extent on the nature of the citation substituted for it. If, for example, judges write single-sentence descriptions of each cited case rather than conglomerate these cases into a string citation, the change in string citation might be significant, but not meaningful. In contrast, if judges are substituting paragraph-long descriptions of cited cases for string citation, it would appear that judicial style has changed in a meaningful fashion.

In an attempt to measure the import of the substitution effect tangentially observed in the string citation data, the same sample of cases was analyzed to approximate the amount of legal analysis accompanying each citation. Accordingly, each cited case was coded according to the depth of its accompanying analysis, in four increments. Depth I cases represent those cited cases cited only within string citations; Depth II represent those cases cited more directly for a given proposition; and Depth III and IV cases signify those cases cited and discussed “expository” within the opinion. In contrast to a change from Depth I to Depth II citation, which may represent only a marginal change in judicial style, a substitution of expository citation for Depth I citation represents a significant transformation in style—from string citation to cases discussed over at
least a paragraph.

As depicted in Table 3, the increase in expository citation almost directly *77 parallels the decrease in string citation displayed in Tables 1 and 2, with some noteworthy exceptions. Specifically, the greatest change in expository citation occurred between the 1977 and 1987 samples, paralleling the most significant drop in string citation. Numerically, the total percentage of Depth III cases increased 5 percentage points—from 11.5 percent in 1977 to 16.5 percent ten years later. Likewise, Depth IV citations also increased substantially, growing from just over 2 percent of the total citations in 1977 to well over 5 percent of the total citations over the next decade. Taken together, these changes represent an 8.5 percent increase in total expository citation over that period—a change that nearly directly corresponds to the 10.3 percent decrease in unique string citations from 1977 to 1987. Notably, however, there is no similar parallelism between the 1997 results: while the percentage of string citation declined sizably between 1987 and 1997 (by slightly over 5 percent*78); the percentage of cases cited expository did not change significantly over the same period (a net loss of only 0.1 percent). Yet, expository citation shows a statistically significant change in the decade prior to 1977. Between 1967 and 1977, the percentage of such citation increased a statistically significant 3.3 percent (2.3 percent in Depth III citations, and 1 percent in Depth IV citations).

Table 3

<table>
<thead>
<tr>
<th>Opinion Type</th>
<th>Year</th>
<th>Total</th>
<th>Concurring Opinions</th>
<th>Dissenting Opinions</th>
<th>Change from Year-Tot</th>
<th>N/A</th>
<th>N/A</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>0.004</td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td>0.003</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: All numbers are means. The standard deviation is in parentheses, and the confidence interval (at the 5 percent level) is in italics. * denotes difference significant at 10 percent level, ** denotes difference significant at 5 percent level, and *** denotes difference significant at 1 percent level. Depth III refers to cases categorized as “discussed” under Westlaw’s Depth of Treatment analysis. See supra note 107 and accompanying text. Depth IV refers to cases categorized as “examined” under the Depth of Treatment analysis. See supra note 108 and accompanying text.

*78 These results suggest that computerized legal research had the greatest effect on judicial citation practices between 1977 and 1987. The substitution of Depth II citation for expository citation between 1967 and 1977 is potentially the result of advances in word processing in that time period, which allowed judges to manageably increase the length of an opinion.133 Word processing fails to explain the substitution of expository citation for string citation in the 1980s, however. Specifically, the choice to include cases in a string citation is based primarily on the costs of research. Although a judge might be able to credibly appropriate a string cite from the text of another case, investigating whether the cases cited therein are especially analogous requires a substantial amount of additional research.

The decline in string citation since the 1980s is especially surprising *79 considering the dramatic increase in the federal appellate caseload over the five decades surveyed. Between 1955 and 2005, the number of cases filed in the federal appellate courts increased over 1800 percent: from 3,544 cases in 1955134 to 68,473 cases in 2005.135 Although the number of judgeships also increased over the same time span, from 68 in 1955136 to 179 in 2005,137 these additional judges did not offset the caseload explosion. Specifically, there were an average of 52.1 cases filed per appellate judge in 1955, and 382.5 per judge in 2005 (an increase of over 630 percent). Despite the overwhelming nature of the caseload increase however, judges continued to write longer, more expositive opinions between 1957 and 2007.138 Additionally, as is demonstrated by Part IV, these stylistic changes are not unique to the aggregate sample of federal appellate opinions, but also appear within the citation patterns of individual judges.
IV. Individual Citation Practices of Two Federal Appellate Judges, 1961-2007

Several commentators have recognized a profound disconnect between the process of judicial decisionmaking and the act of opinion writing. Some suggest that this dichotomy is psychological—arguing that the judicial process can be bifurcated into a “process of discovery” and a “process of justification,” neither of which necessarily informs the other. Others posit a physical disconnect—proposing that although a few appellate judges derive utility from “the intrinsic pleasure of writing” and from “exercising and displaying analytical prowess or other intellectual gifts” through the publication of opinions, most judges now delegate this function almost entirely to their clerks. Both theories suggest that an analysis of the stylistic vagaries of judicial citation patterns is likely to reveal common tendencies in citation, since individual stylistic quirks are unlikely to influence actual citation practices.

Although the data from comprehensive samples of circuit court opinions arrayed in Tables 1 through 3 above demonstrate the significant effect of declining citation costs on aggregate judicial style, whether this change is indicative of alterations in individual judges’ citation practices is not entirely transparent. Indeed, several institutional accounts of the federal court system may explain the aggregate citation data. Perhaps individual judges, for example, display rather static citation patterns, and the decrease in string citation is a result of a changing judicial workforce. Likewise, perhaps judicial clerks, chosen from among a few elite law schools and generally much younger than the judges they serve, exert determinative influence on overall judicial citation patterns.

This Part attempts to answer such objections to the simple economic citation theory through an analysis of two judges over the relevant time period, concluding that although psychological idiosyncrasies might account for a portion of any one judge’s citation patterns, the changing cost structure of legal research in the 1970s and 80s had a significant effect on the persistence of such patterns. Accordingly, Part IV.A outlines the empirical methodology and reports the citation practices of two long-serving federal appellate judges. Then, Part IV.B analyzes these results, hypothesizing that while some individual judges may follow a unique citation style, the vast majority responds directly to changes in the cost of legal research.

A. Data and Methodology

The judge-specific portion of this Article examines the citation patterns of two of the longest-serving federal appellate judges to discover whether the patterns observed in the aggregate sample are also present in the practices of individual judges. Initially, the depth of citation of 291 majority opinions authored by James R. Browning, a Ninth Circuit judge, between 1961 and 2006 (a total of 6,233 citations) was evaluated to investigate individual citation patterns. Additionally, 397 majority opinions (4,393 citations) of Judge H. Emory Widener, Jr. of the Fourth Circuit were similarly analyzed. The results obtained appear to generally corroborate the inferences of the main sample, although there are certain distinctive differences.

1. Judge James R. Browning (Ninth Circuit)

Due to his remarkably long tenure on the federal appellate bench, Judge James R. Browning is a perfect test-case for evaluating the impact of technological methods on individual citation practices. Judge Browning is one of the longest-serving judges on the federal appellate bench. He began his career on the Ninth Circuit in 1961, when he was appointed by John F. Kennedy after a long and distinguished career in government and private practice. In 1976, he was appointed to the position of Chief Judge of the Ninth Circuit, where he continued to serve until 1988. He continued working as an active judge on the circuit until September 1, 2000, when he took senior status. Thus, Judge Browning served from the shaky inception to the firm establishment of computer-assisted legal research—and these external changes should be reflected in his citation patterns.

Judge Browning’s specific citation practices, detailed below in Table 4, illustrate that at least some appellate judges altered their citation practices significantly within the last five decades. For example, Judge Browning’s data indicates a steep decline in the amount of string citation over at least the last thirty years. As displayed in Table 4, Judge Browning was once a chronic string-citer: cases cited only in string citations composed more than 37 percent of his early opinions (those between 1961 and 1967). Although the percentage of unique string-cited cases in his opinions declined somewhat in the 1970s (dropping to just below 33 percent in opinions written between 1968 and 1977), the most dramatic changes occurred between 1977 and 1997, when the percentage of string-cited cases in his opinions was approximately cut in half. Specifically, this
percentage declined from 32.9 percent in the 1968-1977 opinion sample to 24.6 percent in the 1978-1987 sample; and further to only 15.2 percent in the 1988-1997 sample--significant drops that somewhat parallel the distinctions observed between the 1977, 1987, and 1997 opinions in the aggregate sample.¹⁴⁸

Table 4
Percentage of Cited Cases in the Federal Appellate Opinions of Judge James R. Browning, by Year and by Depth of Cited Cases

<table>
<thead>
<tr>
<th>Depth of Cited Cases</th>
<th>Years</th>
<th>Number of Opinions</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
<th>Change in I From Year-10 to Year</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1961-1967</td>
<td>112</td>
<td>0.370 (0.180)</td>
<td>0.332</td>
<td>0.041 (0.064)</td>
<td>0.004 (0.018)</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>1968-1977</td>
<td>69</td>
<td>0.329 (0.144)</td>
<td>0.304</td>
<td>0.079 (0.090)</td>
<td>0.012 (0.029)</td>
<td>-0.041 *</td>
</tr>
<tr>
<td></td>
<td>1978-1987</td>
<td>47</td>
<td>0.246 (0.174)</td>
<td>0.250</td>
<td>0.084 (0.097)</td>
<td>0.032 (0.076)</td>
<td>-0.083 ***</td>
</tr>
<tr>
<td></td>
<td>1988-1997</td>
<td>54</td>
<td>0.152 (0.126)</td>
<td>0.139</td>
<td>0.163 (0.111)</td>
<td>0.029 (0.039)</td>
<td>-0.094 **</td>
</tr>
<tr>
<td></td>
<td>1998-2007</td>
<td>9</td>
<td>0.077 (0.095)</td>
<td>0.062</td>
<td>0.080 (0.165)</td>
<td>0.035 (0.086)</td>
<td>-0.076 *</td>
</tr>
</tbody>
</table>

Note: All numbers are means. The standard deviation is in parentheses, and the confidence interval (at the 5 percent level) is in italics. * denotes difference significant at 10 percent level, ** denotes difference significant at 5 percent level, and *** denotes difference significant at 1 percent level. “Number of Opinions” refers only to the number of opinions analyzed for purposes of this analysis, not the total number of opinions issued by Judge Browning over the relevant period.

*82 Judge Browning’s individual citation practices, however, are not necessarily identical to the aggregate sample. His use of string citation continues to decline significantly after 1997, dropping from 15.2 percent in the 1988-1997 sample to only 7.7 percent between 1998 and 2007.¹⁴⁹ While this specific discrepancy might be attributable to the differences in temporal measurement between Judge Browning’s individual samples and the aggregate sample, it is unlikely that this distinction alone will account for all of the variations found between the two analyses. Notably, unlike the aggregate sample, Judge Browning’s use of expository citation does not consistently increase throughout his time on the bench. Instead, his use of Depth III citation climbs from around 4 percent of cases cited in his earliest opinions (1961-1967) to slightly over 16 percent in his more recent opinions (1988-1997) before suddenly declining to 8 percent after 1997.¹⁵⁰ Likewise, his use of Depth IV citation, which was virtually nonexistent in the 1960s, rises only to slightly over 3 percent of his opinions in the 1980s, but remains essentially the same over the next two decades.¹⁵¹ In contrast, the aggregate sample reports more consistent gains in both types of citation practices over the same *83 period.¹⁵²

Despite these differences, the overall trends in the citation practices of Judge Browning buttress the implications of the aggregate sample and signify a noteworthy change in the cost structure of opinion writing over the sample period. Indeed, Judge Browning’s string citation practices changed enormously between his first and last years as an active judge on the federal appellate bench--his unique string citations in the final sample, for example, were only one-fifth of those in the earliest sample. Barring a significant change in judicial ideology, such differences indicate larger economic factors were influencing the judge’s citation practices over his many years of service. Perhaps it is not coincidental that Judge Browning was among the most stalwart advocates of advancing computer technology in the Ninth Circuit--since his opinions appear to validate evidence of a changing production cost structure.¹⁵³

Figure 2 Percentage of String-Cited Cases, by Year and by Individual Opinions of Judge Browning

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

Figure 2’s graphical depiction of Judge Browning’s string citation patterns portrays the exact nature of these remarkable variations. Although the changes are somewhat subtle, the graph does illustrate the gradual waning of string citation in the judge’s opinions. Specifically, although unique string citation in Judge Browning’s 1960s opinions seem to cluster between 30 and 60 percent, after the early 1980s only one opinion contained over 50 percent *84 string citation. In fact, string citation declines continuously throughout the 1980s and 1990s--so that by the mid-1990s Judge Browning’s opinions show string citation clustering around the 10 to 15 percent levels. Remarkably, although many opinions throughout the sample contained
no string citation whatsoever, those opinions with enormous levels of string citation are almost nonexistent after the late-1970s.

2. Judge H. Emory Widener, Jr. (Fourth Circuit)

Like Judge Browning, Judge H. Emory Widener was one of the longest serving appellate judges in history. He was appointed to the federal appellate bench in 1972, by Richard Nixon, after three years on the federal district court for the Western District of Virginia. Like Judge Browning, and similar to the results of the aggregate sample, Judge Widener’s use of expository citation (especially Depth IV citation) progressively increases throughout his time on the bench. His use of Depth III citation increases from 9.4 percent in the 1972-1977 sample to over 15 percent in the 1998-2007 sample (almost exactly corresponding to the results in Part II, which found increases from around 9 to 16.1 percent over the same period). Likewise, the judge uses Depth IV citation more frequently in later years: Depth IV citation swells from less than 1 percent of cited cases to almost 5 percent of cited cases between 1972 and 2007.

Table 5
Percentage of Cited Cases in the Federal Appellate Opinions of Judge H. Emory Widener, Jr., by Year and by Depth of Cited Cases

<table>
<thead>
<tr>
<th>Depth of Cited Cases</th>
<th>Years</th>
<th>Number of Opinions</th>
<th>I</th>
<th>II</th>
<th>III</th>
<th>IV</th>
<th>Year-10 “I” to Year “I”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1972-1977</td>
<td>100</td>
<td>0.215 (0.178)</td>
<td>0.682 (0.210)</td>
<td>0.094 (0.137)</td>
<td>0.009 (0.039)0.008</td>
<td>N/A</td>
</tr>
<tr>
<td></td>
<td>1978-1987</td>
<td>100</td>
<td>0.154 (0.157)</td>
<td>0.684 (0.224)</td>
<td>0.111 (0.136)</td>
<td>0.051 (0.144)0.028</td>
<td>-0.061 ***</td>
</tr>
<tr>
<td></td>
<td>1988-1997</td>
<td>100</td>
<td>0.111 (0.125)</td>
<td>0.683 (0.218)</td>
<td>0.154 (0.184)</td>
<td>0.055 (0.123)0.024</td>
<td>-0.043 **</td>
</tr>
<tr>
<td></td>
<td>1998-2007</td>
<td>97</td>
<td>0.088 (0.107)</td>
<td>0.710 (0.171)</td>
<td>0.152 (0.134)</td>
<td>0.049 (0.090)0.018</td>
<td>-0.022</td>
</tr>
</tbody>
</table>

Note: All numbers are means. The standard deviation in parentheses, and the confidence interval (at the 5 percent level) is in italics. * denotes difference significant at 10 percent level, ** denotes difference significant at 5 percent level, and *** denotes difference significant at 1 percent level. “Number of Opinions” refers only to the number of opinions analyzed for purposes of this analysis, not the total number of opinions issued by Judge Widener over the relevant period.

Interestingly, there are also some idiosyncrasies within Judge Widener’s citation patterns that are not found in the aggregate sample. For example, Judge Widener’s use of Depth II citation does not change significantly over his years on the bench--ranging between 68 and 71 percent in all four samples. Also, his use of expository citation peaks between 1988 and 1997, and declines marginally in between 1998 and 2007 (although this may simply be the result of age effects on citation). Also, as graphically portrayed below in Figure 3, Judge Widener’s rate of string citation declines rather suddenly after 1980--quite unlike the slow decline in string citation found in Judge Browning’s opinions. Specifically, there are very few differences between Judge Widener’s mid-1980s and mid-2000s opinions--all seem to cluster between the 10 and 20 percent levels. Most of the differences between the 1978-1987 sample and subsequent samples, in fact, appear to arise from the amount of opinions without any string citation, which seem to increase substantially in the 1990s and 2000s.

Figure 3 Percentage of String-Cited Cases, by Year and by Individual Opinions of Judge Widener

TABULAR OR GRAPHIC MATERIAL SET FORTH AT THIS POINT IS NOT DISPLAYABLE

B. The Death of Individual Style?
This large amount of data on individual judges’ citation practices over the last fifty years illustrates that the cost of citation has a measurable effect on citation patterns and indeed, on judicial literary style. As Judge Posner has suggested, perhaps this is the result of the influence judicial clerks exert on the opinion-writing process. Posner argues that “[a]lthough . . . delegation of opinion drafting to law clerks may result in a change of literary style with every change of law clerks, the dominant effect is stylistic uniformity rather than variety.” While Posner attributes this to the “uniform educational experience” of law schools and the concomitant indoctrination into the ponderous writing style of law reviews, the data on citation of individual judges suggests that this “culture” is not temporally uniform, and is based to a large extent on the costs of citation. Like judicial opinions, law review articles have ballooned in both subject matter and citation over the years, as law professors have gained increased access to other legal scholarship, and technological advancements have made the editing process less onerous.

As the data demonstrates, the effects of computer-assisted legal research (and other cost-saving research and writing methods) on different judges’ citation patterns may actually be conforming. For example, consider the differences between the citation patterns of Judge Browning and Judge Widener before and after the advent of computerized legal research systems. Before 1977, Judge Browning’s Depth I and Depth II citation patterns are statistically distinct from Judge Widener’s—but afterwards both judges appear to move towards a common mean. In fact, the two judges’ citation patterns in the 1978-1987 sample show only one significant difference (in Depth I citation), and their citation patterns in the 1988-1997 sample show none. In this sense, each judge has become more similar in citation over their years on the bench. Whether this effect is beneficial or worrisome depends on its underlying causes; perhaps, for example, appellate judges simply adapt to the opinion form most accessible to their audience; or, perhaps, as Judge Posner suggests, computerized legal research has an indoctrinating effect on law clerk (and hence judicial) writing style. As Part V argues, however, this conformity might actually be beneficial, because it indicates that judges are less likely to communicate the strength of their opinions through citation, and more likely to communicate their position through direct legal analysis.

V. Confirming The Microeconomic Hypothesis

In sum, the empirical evidence appears to confirm the microeconomic hypothesis. As the cost of citation falls, judges will generally consume more of it. More importantly, the evidence indicates that string citation is not— contrary to what many commentators have suspected—a normal good. Though judges now have the ability to create long string citations cheaply, they have not done so with the frequency many would have suspected. In fact, the number of “junk” citations has declined dramatically as the cost of opinion production has fallen, indicating that string citation may in fact be an inferior good that is less frequently consumed as its price falls.

If, as the evidence suggests, string citation is an inferior good, the microeconomic approach to citation correlates nicely with the communicative theory of citation proposed by some courts and commentators, which understands citation (and opinion-writing generally) as an attempt by judges to signal to some audience both the basis and the amount of support for their decisions. One motivation for judicial citation may be to communicate \*88 doctrinal necessity and thereby guarantee public confidence. As the Supreme Court recently remarked in Rita v. United States: “Judicial decisions are reasoned decisions. Confidence in a judge’s use of reason underlies the public’s trust in the judicial institution.”

Less public-oriented communicative theories of citation, however, have also been proposed. For instance, some commentators have suggested that lower court judges use written opinions to indicate their suitability for promotion, and others have, especially in the context of dissenting opinions, argued that citations are an indicator to future judges of the strength of alternative reasoning. Whether judges are communicating to their peers, their superiors, or to the general public, however, this communication must have some inherent cost. Indeed, the cost of the communication is precisely what creates its informational value by differentiating among potential communicators.

In particular, the substitution of string citation for more expositive citation between 1977 and 1987 seems to support the communication theory of judicial citation. Specifically, the pseudo-income effect of cheap, available legal research predicts an increase in consumption of both string and expositive citation, but not necessarily a substitution between the two. One possible explanation for the substitution of expository citation for string citation is that the cost of citing a large number of cases had not only declined in absolute terms, but had declined relative to the cost of citing a lower number of cases. Notably, early computerized research systems did not make opinion writing \*89 less arduous (which would arrive only later with the advent of personal computers and sophisticated text-editing programs), but did provide law clerks with a broader array of
relevant precedential materials. Thus, judges who had once differentiated their opinions through a parade of precedent could no longer do so, since even a judge with a relatively weak position could string-cite dozens of cases at least tangentially supporting his decision. Instead, judges began to prefer expository citation, which laid bare a judge’s rationalization and revealed the exact nature of his reliance on “analogous” cases.169

Although this substitution hypothesis suggests that the reduced costs of legal research have made judicial opinions more honest (since string citation can no longer hide incongruous precedents), it is also possible that the increase in expository citation is merely conspicuous consumption by judges concerned with perceived status. Perhaps expository citation, simply because it is more costly than string citation, creates Veblen effects170 on judicial consumption of citations. Namely, because expository citation is highly visible and also quite costly (relative to string citation), judges might be attracted to such citation not because it necessarily reveals any more substantive information than string citation, but simply because it is costly and overt. Thus conceived, expository citation devolves into an arms race171 in which judges compete to have the longest and most thoroughly-cited opinions--perhaps because these serve to impress and awe other judges or the legal public through their ostentatious-ness.

Thus, whether technological advancements in legal research have served to improve or degrade judicial opinions depends in large part on whether expository citation is a more effective method of informing the public of the rationale for a decision than string citation. Unfortunately, it is beyond the scope of this Article to provide a definite answer to this question, and judges themselves appear to disagree over the answer. This Article’s contribution, however, is not in answering the question but proposing it, thereby overturning *90 long-held beliefs about the effect of computer-assisted legal research and other technological advancements on judicial citation.

VI. Conclusion

This Article proposes that a simple microeconomic approach can describe judicial citation practices over the last fifty years. It provides empirical evidence that judges use citations in part as a communication device, and that the cost of legal research is intimately connected with the effectiveness of this communication (and therefore with judicial citation patterns). The empirical results in this Article not only demonstrate the effectiveness of the microeconomic approach in describing judicial opinion style, but also provide a foundation for future research into the effects of judicial ideology on citation practices.

Footnotes

41 Law clerk, Judge Jay S. Bybee, Ninth Circuit Court of Appeals. B.A. 2005, The Ohio State University; J.D. 2008, The University of Chicago Law School. Many thanks to Tom Miles for helpful comments on this and earlier drafts.

1 Vincent P. Buinno, History of Electronic Methods for Legal Research, 2 Mod. Uses Logic L. 99, 102 (1960). Other early observers were less prophetic. See, e.g., Lee Loevinger, The Industrial Revolution in Law, 2 Mod. Uses Logic L. 56, 57-60 (1960) (hypothesizing a futuristic electronic “Law Digest Machine” with a “control panel looking something like the console of an organ” containing “an immensely intricate maze and mass of switches, relays, transistors, diodes, and printed and solid state electrical circuits” that search[es] and print[es] case law on demand). But see also Roy N. Freed, Prepare Now for Machine-assisted Legal Research, 47 A.B.A. J. 764, 766 (1961) (“Substantial advantages are in store for lawyers from the use of machines and appropriate indexing techniques to aid in legal research.... By finding relevant references faster and by reducing the percentage of irrelevance, machines will contribute real economies, unless the price for their service is out of line with their greater speed or accuracy.”); Irving Kayton, Retrieving Case Law by Computer: Fact, Fiction, and Future, 35 Geo. Wash. L. Rev. 1, 8 (1966) (describing the dual value of computerized legal research as “enabl[ing] us to obtain the relevant case law more effectively” and “cut[ting] down on the inordinate amount of time necessarily spent on legal research.”).


Although citation analysis has typically been exploited to investigate judicial influence and prestige, see, e.g., Stephen J. Choi & G. Mitu Gulati, Ranking Judges According to Citation Bias (As a Means to Reduce Bias), 82 Notre Dame L. Rev. 1279, 1288-89 (2007) (suggesting future empirical studies should analyze appellate judges' citations to opinions written by an opposite political party as a means of ranking bias amongst federal appellate judges); Stephen Choi & Mitu Gulati, A Tournament of Judges?, 92 Cal. L. Rev. 299, 299 (2004) (using citation analysis to rank judges' suitability for the Supreme Court); Stephen J. Choi & G. Mitu Gulati, Choosing the Next Supreme Court Justice: An Empirical Ranking of Judge Performance, 78 S. Cal. L. Rev. 23, 32 (2004) (mentioning how citation analysis is used to rank judges' suitability for the Supreme Court), commentators have also recognized its usefulness in assessing the impact of technology on judicial behavior. See, e.g., William M. Landes, Lawrence Lessig, & Michael E. Solimine, Judicial Influence: A Citation Analysis of Federal Courts of Appeals Judges, 27 J. Legal Stud. 271, 275?76 (1998) ( theorizing that “[c]itation practices could be extremely sensitive to the technology (and hence cost) of citation searching,” and proposing two potential consequences of technological advancement in legal research: “[f]irst, the proportion of citations in opinions supplied by the lawyers might fall, as it becomes easier for law clerks to locate other citations,” and “[s]econd, computer searches may yield a more egalitarian pattern of citation since rather than relying on influence as a tool in locating cases, the computer makes it easier to locate on point cases directly”).

See, e.g., Lawrence M. Friedman et al., State Supreme Courts: A Century of Style and Citation, 33 Stan. L. Rev. 773, 773 (1981)(discussing the style of state court opinions in relation to caseload and historical legal-philosophical movements); Charles A. Johnson, Follow-up Citations in the U.S. Supreme Court, 39 Pol. Res. Q. 538, 538 (1986) (studying Supreme Court decisions on which cases to cite in opinions); Charles A. Johnson, Citations to Authority in Supreme Court Opinions, 7 J.L. & Pol’y 509, 509 (1985) (researching Supreme Court’s citation decisions within judicial opinions); John H. Merryman, Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970, 50 S. Cal. L. Rev. 381, 381 (1977) (providing a broad empirical study of citation use within the California Supreme Court); John H. Merryman, The Authority of Authority: What the California Supreme Court Cited in 1950, 6 Stan. L. Rev. 613 (1954) [hereinafter Merryman, The Authority of Authority] (providing an early study of the nature of citation within the California Supreme Court).


Citation analysis, meanwhile, has become popularized as a method of investigating judicial psychology and behavior. James Leonard, An Analysis of Citations to Authority in Ohio Appellate Decisions Published in 1990, 86 Law Libr. J. 129, 137-139 (1994) (analyzing recent Ohio appellate opinions which indicated a statistically significant relationship between complex issues and citations to older cases, nonbinding precedents, and secondary authorities in supreme court opinions, and to secondary authorities and other courts of appeals cases in courts of appeals cases); Andrew P. Morriss, Michael Heise & Gregory C. Sisk, Signaling and Precedent in Federal District Court Opinions, 13 Sup. Ct. Econ. Rev. 63, 64 (2005) (discovering that federal district court judges are more likely to use written opinions rather than non-written dispositions “to communicate their rulings in Sentencing Guidelines cases where the potential for promotion to the circuit court of appeal [is] greater”); Frederick Schauer & Virginia J. Wise, Nonlegal Information and the Delegalization of Law, 29 J. Legal Stud. 495, 501-503 (2000) (documenting changes in judicial citation practices through an analyses of citation to non-legal information in the Supreme Court of the United States, in the Supreme Court of New Jersey, and in selected other courts); Frederick Schauer & Virginia J. Wise, Legal Positivism as Legal Information, 82 Cornell L. Rev. 1080, 1091-1102 (1997) (discussing an empirical study of legal positivism); Louis J. Sirico, Jr., & Beth A. Drew, The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis, 45 U. Miami L. Rev. 1051, 1054-56 (1991) (studying the citation practices of the United States Courts of Appeal as they pertain to the citing of legal periodicals); Emerson H. Tiller & Pablo T. Spiller, Strategic Instruments: Legal Structure and Political Games in Administrative Law, 15 J.L. Econ. & Org. 349, 354-358 (1999) (conceptualizing an economic model in which agencies occasionally choose higher-cost methods of promulgating their decisions in order to insulate such decisions from court review); David J. Walsh, On the Meaning and Pattern of Legal Citations: Evidence from State Wrongful Discharge Precedent Cases, 31 Law & Soc’y Rev. 337, 348 (1997) (examining citation data to determine if judges use citations as indicators of substantive influence on their decision making or to legitimize their decisions); Michael Abramowicz & Emerson H. Tiller, Judicial Citation to Legislative History: Contextual Theory and Empirical Analysis, at 14-25 (Northwestern University Law and Economics Research Paper Series No. 05-11, 2005)(reporting connections between panel composition and citing of legislative history); see, e.g., Steven J. Choi & G. Mitu Gulati, Bias in Judicial Citations: A Window into the Behavior of Judges?, 37 J. Legal Stud. 87, 91 (2008) (finding that federal judges are more likely to cite judges of their own political party in opinions dealing with highly-charged political issues such as individual rights and campaign finance).

See infra Table 2.
See infra Table 3.

See infra Parts II.A and I.B.

See infra Tables 4 & 5.


See F. Reed Dickerson, The Electronic Searching of Law, 47 A.B.A. J. 902, 903 (1961) (detailing the punch-card input method). According to Dickerson, the Harty-designed computer system employed “a comprehensive word concordance, an alphabetical index of the words actually used in all the statutes on the [computer’s magnetic] tape.” Id. at 903. For example, “all uses of the word ‘partnership’ were collected and each use was identified by a number representing the particular section of the statute in which it appeared.” Id.

See id.

See id. at 904 fig.1 (depicting a sample result list).

Id. at 903. Several solutions were soon proposed, however. See, e.g., William B. Eldridge & Sally F. Dennis, The Computer as a Tool for Legal Research, 28 Law & Contemp. Probs. 78, 85-94 (1963)(illustrating several alternatives to basic full-text searching); Jessica S. Melton & Robert C. Bensing, Searching Legal Literature Electronically: Results of a Test Program, 45 Minn. L. Rev. 229 (1960)(detailing a system in which syntactical codes were used to return similarly used words in full-text searches).

The Harty system, for example, initially included only state public health statutes. See Harrington, supra note 13, at 544. It was not until 1970 that the system, by then commercialized under the name Aspen Systems Corporation, contained the entire statutory output of all fifty states. J Roger Hamilton, Comment, Computer-assisted Legal Research, 51 Or. L. Rev. 665, 674 (1972). Some more ambitious projects did flourish early in the 1960s, however. See, e.g., Automating the Archives, Time, Dec. 13, 1963, at 2 (describing the Law Research Service system, which used a Univac III computer and three years of manual labor to index over a million rulings of the New York state courts). Nevertheless, it was not until 1989 that a complete library of any one state’s law was completed. LexisNexis, The LexisNexis Timeline (2003), http://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf.

See, e.g., Consulting the Computer, Time, May 4, 1970, at 68 (remarking that a fifty-state search on Harty’s Aspen system required about eight hours).

For example, the earliest machine would have cost, in 1961 dollars, around $600,000 (or about $12,000 per month to rent). Dickerson, supra note 14, at 905.

Two early noncommercial systems, FLITE (“Federal Legal Information Through Electronics”) and JURIS (“Justice Retrieval and Inquiry System”), are also relevant for this Article, since they had most of the same capabilities of LEXIS or Westlaw and provided research to government lawyers who often filed briefs before the federal appellate courts. These systems developed at approximately the same rate as the commercial systems, although there were some notable differences. FLITE, for example, which
was used primarily by the military sector, contained a much larger database of materials than LEXIS or Westlaw, but continued to use a punch-card system for searching long after other systems had adopted computer terminals. See John T. Soma & Andrea R. Stern, A Survey of Computerized Information for Lawyers: Lexis, JURIS, Westlaw, and FLITE, 9 Rutgers Computer & Tech L.J. 295, 304-10 (1983) (describing the history and capabilities of FLITE and JURIS). JURIS, developed in part by NASA and eventually operated by the Department of Justice, contained a database similar in size to the commercial systems and used the terminal system for research. Id. at 305-07. JURIS also contained a litigation support system that allocated storage of memoranda, briefs, evidentiary material, and other litigation files. Id. at 305. See also Stanley O. Croydon, Jr., JURIS: A Tool for Legal Research, in Legal and Legislative Information Processing 163 (Beth Krevitt Eres ed., 1980) (briefly describing the history, nature, and operation of JURIS).

22 Harrington, supra note 13, at 552-53. See also LexisNexis, The LexisNexis Timeline, supra note 18, at 4 (noting that LEXIS was the first computerized research system to obtain a complete library of any state’s law when it finished building its collection of Ohio law in 1989). Since LEXIS was originally developed in Ohio, several Ohio law firms were already using the system before its national introduction. See Harrington, supra note 13, at 553. Robert C. Berring, Full-Text Databases and Legal Research: Backing into the Future, 1 High Tech. L.J. 27 (1986) [hereinafter Full-Text Databases] (describing the role of LEXIS in promoting the full-text search method of computer research and giving a brief overview of the commercial services’ early history).

23 Harrington, supra note 13, at 553.


25 By 1977, these included “specialized libraries of federal tax law, federal securities law, federal patent and copyright law, federal trade regulation law, and federal and state cases construing the Delaware corporation law.” Karlyn D. Stanley, LEXIS: Legal Research and Litigation Support, in Legal and Legislative Information Processing 149, 150-51 (Beth Krevitt Eres ed., 1980).

26 Id. at 151. The states were California, Florida, Illinois, Kansas, Kentucky, Massachusetts, Missouri, New York, Ohio, Pennsylvania, and Texas. Id.

27 The West headnotes are short abstracts of particular points of law in each case. An editor assigns a specific indexing number (the Key Number) to each headnote. The Key Number designates the relationship of a particular point of law with others in the database. See Full-Text Databases, supra note 22, at 31-33 (explaining the headnote process). Thus, while the headnote-only system allowed users to correlate found cases with others in the database, it did not necessarily reduce research time or cost, since the researcher would subsequently be forced to find the case within a printed Reporter in order to obtain the full-text version. LEXIS’ early full-text system, however, also had disadvantages, since it was not indexed. See generally James A. Sprowl, Computer-assisted Legal Research—An Analysis of Full-Text Document Retrieval Systems, Particularly the LEXIS System, 1 Am. B. Found. Res. J. 175 (1976) (critiquing the non-indexed LEXIS system).

28 Harrington, supra note 13, at 553-54. Harrington also lists a number of technical glitches in the early Westlaw system, ranging from difficulties with the sequencing of search results to the unreliability of the overall system. Id.

29 Ebersole, supra note 24, at 139.

30 Sprowl, supra note 27, at 190-91.

31 Id. at 191.

32 Soma & Stern, supra note 21, at 299.
33 Sprowl, supra note 27, at 187-88. According to one commentator, given to the size of LEXIS at the time, and “[u]sing standard IBM disk storage units of the type available in 1975, it would cost over $1 million per year just to store this much data.” Id. at 188 n.28. See also Jerome S. Rubin & Robin L. Woodard, LEXIS: A Progress Report, 15 Jurimetrics J. 86, 86 (1975) (noting that by 1975 the LEXIS system consisted of around four billion characters).

34 See Harrington, supra note 13, at 551 (recalling that on early systems, “searches typically ran five minutes, often twenty or thirty minutes, and sometimes more than an hour--and still the lawyers thought the system marvelously fast”).

35 N.Y. Times Financial Desk, Computers a Boon to Lawyers, N.Y. Times, Oct. 20, 1983, at D1. Of course, these searches were still marginally less costly than the traditional alternative. While the average single search in 1986 cost between $9.66 and $207.31 on the commercialized services, a full set of case reporters bought in the same year was priced at $111,914.00. Full-Text Databases, supra note 22, at 40 n.43.

36 See Sprowl, supra note 27, at 188 n.30 (noting that costs will be better spread among users as the number of subscribers increased). See also Rubin & Woodward, supra note 33, at 86 (stating that only 100 Lexis terminals had been installed in 1974).

37 See Soma & Stern, supra note 21, at 313 (“Despite the current availability of [computer-assisted legal research], usage is low. This could be attributed to a high degree of entrenchment in the legal community that ‘cut its teeth’ on manual research.”). In many law firms, however, a few computerized research users became specialists who facilitated use for other members of the firm. See id. at 314 n.26 (“Interestingly enough, the authors have noticed in law firms, government offices and academic environments that one person in the organization becomes the ‘computer-assisted legal research’ person.”).

38 See Lynne B. Kitchens, A Thousand Days, A Billion Bytes: Computer Assisted Legal Research Revisited, 47 Ala. Law. 312, 314 (1986) (recognizing that after a user learns a few connectors, searching is fun and easy).

39 See id. (enabling users to narrow their search).

40 See id. (noting that Lexis and Westlaw were creating more convenient options for customers to use their systems).

41 See Stephen Labaton, Lawsuits over Legal Research, N.Y Times, Apr. 20, 1988, at D1 (stating that the market for research services had already reached $200 million annually).

42 LexisNexis, The LexisNexis Timeline, supra note 18.

43 Digital Information, supra note 2, at 32.

44 See id. at 32-33 (stating that in 1992, LEXIS spent $600,000 on subsidizing paper and ink at law schools).

45 Id. at 32.


47 See id. (“For the legal researcher, however, let me pose a simple example. You sign onto WESTLAW and conduct your research. The paragraph is right on point. You mark and copy that paragraph on your PC screen while connected to WESTLAW. You switch immediately to your word processor and the memo that is in preparation and insert the paragraph at the point in the text where it is relevant.”).
LexisNexis, The LexisNexis Timeline, supra note 18, at 5.

Digital Information, supra note 2, at 32.


Id.


Id.


Id. at 253 (“The lawyer’s problem is becoming increasingly like that of the scientists: It is not that we do not know; rather, we do not know what we know.”).

Id.

Id.


Id. at 631 (Brown, J., concurring).

Id. See also Hamilton, supra note 18, at 677-78 (discussing this case as an early example of court-initiated computer research).

First Nat’l Bank of Birmingham, Ala., 358 F.2d at 626. Judge Brown could not help but opine on the amazing effectiveness of computerized search methods:
The task of searching the tens of thousands of cases pending within the Internal Revenue Service and parallel court structures presenting an almost infinite number of legal issues would have been both impracticable and impossible but for the machine. The machine, suspect as it is for the supposed lack of judgmental capacity essential to adjudication, bears out again the hopes and predictions now bearing fruit in a variety of ways that it serves a useful, indeed perhaps indispensable, function in the judicial process as the world, and the people in the world, face the increasing complexities of an expanding social and economic structure. Id. at 632 (Brown, J., concurring).

See Holcomb v. United States, 543 F.2d 1185, 1188 n.1 (7th Cir. 1976) (“We put the name of this case through the entire federal tax library of the Lexis computer system and it came up with only four cases none of which had any bearing whatever here.”). See also Helms v. Jones, 621 F.2d 211, 213 n.11 (5th Cir. 1980) (“In preparing this opinion we learned first through LEXIS and then
from the Georgia Attorney General’s office that the Georgia Supreme Court decided on February 26, 1980, that in its view the questioned Georgia statute is constitutional.”); Diaz v. Weinberger, 361 F.Supp. 1, 14 n.19 (Fla. Dist. Ct. App. 1973) (“A key word computer search of all but Title 8 of the 1970 edition of the United States Code which focused on the terms ‘alien’ and ‘eligible’ and variants thereon failed to reveal the existence of any pre-1965 legislative provision then in force that links permanent residence and durational residency elements.”); Miller & Rhoades v. West, 442 F.Supp. 341, 343 (E.D. Va. 1977) (“Neither party has cited case authority construing the statute within the context of this application. After extensive research, including the use of the LEXIS computer system, the Court is satisfied that no such case exists.”); Carter v. Teletron, Inc., 452 F.Supp. 944, 989 (S.D. Tex. 1977) (“Finally, the Court used the services of LEXIS computer legal research now installed in the Southern District of Texas and searched the available federal and state court libraries for published opinions and citations which list Albert Carter as a named party.”).

64 Alan M. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Applications 77 tbl.25 (1977). Not surprisingly, the highest reported use was by clerks to Sixth Circuit judges—demonstrating perhaps that familiarity with computer-assisted legal research was an important factor in determining research levels. See id. (reporting usage rates of 5.25 and 7.33 hours per month for clerks on the Sixth Circuit). LEXIS, of course, was based in Ohio at this time. See Harrington, supra note 13, at 552-53 (describing computer usage patterns).

65 Sager, supra note 64, at 78 tbl.26.

66 Id. at 77 tbl.25.

67 In 1975, the number of cases filed in the federal appellate courts was 11,440, and by 1980, the number had increased to 16,571. See Ashlyn K. Kuersten & Donald R. Songer, Decisions on the U.S. Courts of Appeals 28 tbl.1.6 (2001) (providing a table of cases filed in the U.S. Courts of Appeals, which illustrates the increasing number of cases filed over the years: 2,525 cases were filed in 1925 compared to 51,991 cases filed in 1996). In 2007, the number of cases filed was 58,410. Administrative Office of the United States Courts, 2007 Annual Report of the Director: Judicial Business of the United States Courts 885 tbl.B (2008) [hereinafter Administrative Office Annual Report], available at http://www.uscourts.gov/judbus2007/JudicialBusinesspdfversion.pdf (last visited Nov. 24, 2008). Notably, the number of cases filed in 2007 was actually a 12.3 percent decrease from the previous year, in which 66,618 cases were filed. Id. at 13. This rare decrease in caseload could be due to a variety of factors. See id. at 17-18 (providing reasons for the decrease in appeals).

68 See Sager, supra note 64, at 76 n.1 (noting that “according to some law clerks, the briefs filed in many cases are so complete that independent research is not necessary”).

69 Id. at 76.

70 Id.

71 Id. at 88-90.

72 Id. at 90 tbl.33. Notably, usage increased after October 1976, when the terminal was able to process full-text in addition to headnote searches. See id. at 88.

73 Id. at 93 tbl.35. The number of uses from individual judges ranged from 0 to 33 in that same time span. Id.

74 Id. at 101-102.

75 Id. at 102.

77 Pitchford Scientific, 440 F.Supp. at 1178.

78 United Nuclear Corp. v. Cannon, 564 F. Supp. 581, 591-92 (D. R.I. 1983). See Independence Tube Corp. v. Copperweld Corp., 543 F. Supp. 706, 723 (N.D. Ill. 1982) (“Even without a specific showing of cost effectiveness in this case, therefore, an award of such [computerized research] costs is appropriate, and, based on the list of the subjects researched, which is contained in the plaintiff’s supplement to its bill of costs, $5,093.33 is a reasonable amount.”); Fressell v. AT&T Techs., Inc., 103 F.R.D. 111, 112-15 (N.D. Ga. 1984) (discussing computer-assisted legal research and whether the expense of computer-assisted legal research may be included in an award for attorney’s fees).


81 Westlaw search, Apr. 28, 2008. See also Fressell, 103 F.R.D. at 114-15 (citing cases almost exclusively after 1977).

82 Sager, supra note 64, at 48.

83 Id. at 49.

84 Id.


88 See generally Sager, supra note 64 (discussing the history and use of computerized legal databases).

89 See Sager, supra note 64, at 36 tbl.8.

90 Id. at 35 tbl.7.

91 A comprehensive survey of Third Circuit judges in 1974 revealed that 48% of the time judges devoted to cases (and nearly 30% of total working time) was dedicated to the creation of opinions. A 20% reduction in legal research would thus appear to have a substantial effect on a judge’s total working time. See Federal Judicial Center, Division of Research, A Summary of the Third Circuit Time Study, in Managing Appeals in Federal Courts 299, 302-03 (Federal Judicial Center ed., 1988).
92 Id.

93 See id. at 302 (reporting that judges in the Third Circuit Time Study spent 16.7% of their time on court administration).

94 See id. (reporting that judges in the Third Circuit Time Study spent 7.7% of their time on pro bono work).

95 See Richard A. Posner, What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does), 3 Sup. Ct. Econ. Rev. 1, 31-34 (1993) [hereinafter Judges and Justices Maximize] (analyzing the effect of income on leisure, including income from moonlighting, and predicting that the reduction of moonlighting income, plus the increase in judicial salaries, has increased judges’ consumption of leisure).

96 See id. at 32 (describing how a higher judicial income will affect leisure by reducing time devoted to household production and increasing the utility generated by pleasurable leisure activities).


98 In standard microeconomic theory, the type of consumption in a two-good market is illustrated by indifference curves, which measure the consumer’s willingness to substitute one of the goods for the other. Since a consumer will choose the indifference curve representing the greatest level of consumption of the goods, an increase in income allows the consumer to “jump” to an indifference curve representing higher levels of consumption. Represented graphically, this is the highest indifference curve tangent to the consumer’s budget constraint.

99 As the cost of one good declines relative to another good, the slope of the consumer’s budget constraint changes, allowing the consumer to allocate consumption along a different indifference curve (or at a different point on the same indifference curve)—which will normally cause substitution.

100 A good is normal if it has a positive income elasticity of demand, i.e. where demand increases when income increases. In contrast, a good is “inferior” when demand for that good is negatively correlated to an increase in income.

101 Only those opinions published within the Federal Reporter were included. An exception was made for several opinions in the 2007 sample for which publication in the F.3d was forthcoming.

102 Concurring opinions were gathered by searching the Westlaw Court of Appeals (“CTA”) database for the phrase “concurring opinion” within the case syllabus and within the relevant time period. The 1957 concurring opinions sample, for example, was retrieved by searching for “SY(‘concurring opinion’) & da(aft 01/01/1957 & bef 01/01/1958).” Where the search yielded greater than 100 results, the cases were selected at random intervals to create a sample representative of the entire year of federal appellate decisions. En banc decisions, per curiam decisions, decisions in which another judge wrote a dissenting opinion, and decisions in which the concurring judge concurred only in the result and did not write separately were discarded from the resulting samples. The results, categorized as “concurring opinions” below, include the combined number of citations from both the majority and concurring opinion.

103 Dissenting opinions were collected by searching the Westlaw CTA database for the phrase “dissenting” within the case syllabus and within the relevant time period. For example, the 1957 dissenting opinions were gathered by searching for “SY(‘dissenting’) & da(aft 01/01/1957 & bef 01/01/1958).” Where the search yielded greater than 100 results, the cases were selected at random intervals to create a sample representative of the entire year of federal appellate decisions. As in the case of concurring opinions, certain opinions omitted from the sample, including per curiam opinions, en banc opinions, opinions with a separate concurring judge, and opinions in which the dissenting judge did not write an opinion. Like the “concurring opinions,” the citations catalogued
from these opinions include (for purposes of Part III) the combined number from the majority and dissenting opinion.

Specifically, the 1957, 1967, 1977, 1987, 1997, and 2007 concurring samples contain opinions decided within the preceding year. This method of selecting opinions might create a small bias toward certain circuits, such as the D.C. circuit, in which there are a higher than average number of concurring or dissenting opinions. See Kuersten & Songer, supra note 67, at 169 tbl.3.9 (listing the percentage of dissenting and concurring opinions per published opinions for each circuit between 1925 and 1996, and finding that the D.C. circuit contained much larger percentages of both between 1951 and 1980).


Westlaw’s Table of Authorities feature indicates unique case citations only in dissenting opinions.

See Westlaw Research Guide, supra note 105, at 29 (using a star system to categorize citing cases).

See id. According to Westlaw, one star indicates that a case is “mentioned,” or more specifically that the opinion “contains a brief reference to the cited case, usually in a string citation.” Id.

Westlaw categorizes a case as “cited” and assigns it a depth of treatment of two stars where the opinion “contains some discussion of the cited case, usually less than a paragraph.” Id.

A case assigned three stars in Westlaw’s Depth of Treatment system is considered to be “discussed” in the opinion—meaning that the opinion “contains substantial discussion of the cited case, usually more than a paragraph but less than a printed page.” Id.

These cases are considered “examined” under the Depth of Treatment system, since the opinion citing them “contains an extended discussion of the cited case, usually more than a printed page of text.” Id. Although these categories do not always correspond exactly with the amount of coverage a given case receives within an opinion, they appear to be no less reliable than other potential coding methods. Id.

See infra Table 1.

Compare Johnson, supra note 5, at 511, 514 (finding strong relationships between the author of the opinion and total citations in U.S. Supreme Court opinions), with William M. Landes & Richard A. Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J.L. & Econ. 249, 259 (1976) (“We, of course, question the premise that citation practice is largely a matter of personal preference (and implicitly therefore not capable of being studied scientifically). The economist expects citation practices to be basically uniform across judges, just as he expects different business firms to pursue similar investment policies in the face of similar economic conditions.”).

See Judges and Justices Maximize, supra note 95, at 31.

See infra Table 1.

See infra Table 1.

See Federal Courts, supra note 87, at 72 tbl.3.6 (analyzing only majority opinions, however, whereas this study conglomerates majority opinions with their accompanying concurring and dissenting opinions).

See, e.g., Friedman et al., supra note 5, at 796 tbl.6 (calculating the use of cited authority in state supreme court opinions between
1870 and 1970, and finding that unique citation increased from a mean of 5.8 cites in 1870-1880 to 14.3 cites in 1960-1970. The latter estimate particularly is similar to this Article’s calculations, which find federal appellate courts citing an average of 17.85 unique cases in 1967 (including the accompanying concurring and dissenting opinions). See infra Table 1.

See, e.g., Federal Courts, supra note 87, at 115-116 (arguing that law clerks “are the proximate cause of the enormous increase in the federal judicial output of separate opinions, footnotes, citations, and above all words.”). Id. at 115 This is because, over the period studied by Judge Posner, there was a “fourfold increase in law-clerk and staff-attorney assistants per judge.” Id. at 119 The increase in judicial services is partially a product of supply and demand forces. Id.


Oakley & Thompson, supra note 120, at 91, n.5.110.


See Alex Kozinski, The Real Issues of Judicial Ethics, 32 Hofstra L. Rev. 1095, 1098-99 (2004) (remarking that judges often took advantage of this option when it was made available).

It is important to note that this rough approximation of law clerk staffing levels does not account for the increase in caseload over the same period. For example, between 1965 and 1975, the number of cases filed in the federal appellate courts rose from 6,597 to 16,571. Kuersten & Songer, supra note 67, at 28 tbl.1.6. The number of federal appellate judgeships over the same period grew from 78 to 97. Id. at 30 tbl.1.8, and the average number of clerks per judge increased from one to two. Thus, the approximate number of clerks increased from 78 to 194--and the average number of cases filed per clerk actually increased slightly, from 84.5 to 85.4. Staffing alone, then, does not necessarily explain the increase in mean total citation between 1967 and 1977. Likewise, between 1975 and 1985, the caseload increased from 16,571 to 33,360. Id. at 28 tbl.1.6, while the number of authorized judgeships increased from 97 to 168. Id. at 30 tbl.1.8. Since over this period the allowable number of law clerks increased from two to three, the average number of cases filed per clerk in 1985 (66.19) was much less than in 1975 (85.4). Although this differential should produce a significant change in the Table 1 data, no such change is shown--indicating that law clerks are probably not responsible for much of the change in citation levels.


See id. at 108-09.

Harry Pregerson, The Seven Sins of Appellate Brief Writing and Other Transgressions, 34 UCLA L. Rev. 431, 435-36 (1986) (“If the issue has already been decided by the Ninth Circuit, one or two recent cites from our circuit will suffice to prove black-letter law. In one recent case, counsel wasted an entire page citing fifteen cases for a very minor, well-settled point.”).

This is not necessarily the result of differences in the type of cases being considered by the courts. Analysis of a small sample of abortion cases in federal appellate courts citing Roe v. Wade, 410 U.S. 113 (1973), between 1973 and 2007 found a statistically significant difference in string citation between the 1978-1987 sample and the 1988-1997 sample. String citation declined across the samples: from 21.0 percent in the 1973-1977 sample to 17.0 percent in the 1978-1987 sample, to 9.7 percent in the 1988-1997 sample, and finally to 7.4 percent in the 1998-2007 sample. Due to the small sample size (only sixty-three cases between 1973 and 2007), the only significant drop (at the 10 percent level) was between the 1978-1987 and 1988-1997 sample. Cf. Federal Courts, supra note 87, at 117-18 (finding an enormous increase in the mean number of citations in D.C. Circuit opinions between 1960 and 1983). Judge Posner’s data shows that in 1960, the D.C. Circuit cited an average of 12.4 cases (and secondary materials) per
opinion; but in 1983, the average opinion from the same circuit cited 52.1 cases (and secondary materials). Id. at 118 tbl.4.4. This may be due in large part to the increase in complicated administrative law cases over the period. See 1 Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 1.3 (Little, Brown & Company 3d ed. 1994). However, Judge Posner argues that “th [is] growth in complexity cannot explain all or even most of the growth in the length and scholarly appurtenances of the opinions.” Federal Courts, supra note 87, at 119. Also, it is important to note that Judge Posner’s study counted average total citations, rather than the percentage of different levels of citation—which, as shown by the results in Table 1, do not necessarily correlate.

For example, the percent of unique string-cited cases in each opinion in the 1957 samples ranged from a low of 0 to a high of 68.4 percent; in the 2007 samples, the percentage ranged from 0 to 50 percent.

As discussed above, large standard deviations caution against broad generalizations about individual judges or individual cases. In several cases, the standard deviations were larger than the mean number of string citations, suggesting a wide variance in citation practices in individual cases.

See supra Table 1.

See Greenwood & Farmer, supra note 85, at 770 (discussing productivity increases due to word processing).

See Kuersten & Songer, supra note 67, at 28 tbl.1.6.

See Administrative Office Annual Report, supra note 67, at 19 tbl.1.

See Kuersten & Songer, supra note 67, at 30 tbl.1.8.

Kuersten & Songer, supra note 67, at tbl.1.

See Administrative Office Annual Report, supra note 67, at 86-89, 98 tbl.B-1 (discussing how, interestingly, the number of cases filed in federal appellate courts fell from 68,473 to 58,410 between 2005 and 2007, which might partially explain the large increase in mean total citation between 1997 and 2007).


Several previous citation studies have established idiosyncratic patterns among the amount of cases cited by judges. See, e.g., Merryman, The Authority of Authority, supra note 5, at 653, 664 (finding large disparities between the number and type of authorities cited in opinions of the judges of the California Supreme Court).

A comprehensive discussion of this point can be found in Federal Courts, supra note 87, at 102-10.

Indeed, law clerks may have been especially adept at navigating the emerging technological landscape of legal research. For
example, Seventh Circuit judge William Bauer remarked in 1989 that “[a]nother of the great advantages of having law clerks now is, of course, the familiarity the new lawyer is likely to have with the latest computer technology.” William J. Bauer, The Changing Character of Legal Clerkships, in The Federal Appellate Judiciary in the Twenty-First Century 29, 30 (Cynthia Harrison & Russell R. Wheeler, eds., 1989).

These opinions were collected by searching the Westlaw court of appeals (“cta”) database for “Browning” in the “judge” field (“JU(Browning)”). This search generated 391 results, of which those opinions with a corollary concurring or dissenting opinion, those written per curiam or en banc, and those authored by judges other than James Browning of the Ninth Circuit were discarded.

These opinions were collected by conducting four searches within the Westlaw court of appeals database for “Widener” within the judge field: the first search between the dates 01/01/1972 and 01/01/1978; the second between 01/01/1978 and 01/01/1988; the third between 01/01/1988 and 01/01/1998; and the final between 01/01/1998 and 01/01/2008. After each search, a random sample of 100 published opinions within the date ranges was assembled. All en banc opinions, per curiam opinions, and opinions with a corollary concurring or dissenting opinion were excluded from the samples.


For many years, Judge Browning promoted the use of “paperless dockets” and telecommunications as methods to streamline the administration of the unwieldy Ninth Circuit. See Schroeder, supra note 146, at 7 (recommending that Judge Browning’s “affinity for technology is immense”).
comparison to Judge Browning, Judge Widener’s use of string citation seems more variable in later years, which might indicate that Judge Widener is more likely to allow clerks to draft opinions. Cf. supra Figure 2 (showing that the amount of Judge Browning’s opinions with string cites decreased over his years as judge).

Of course, it is hard to disentangle the effects of citation cost from more idiosyncratic factors, such as age or senior status that may foster changed citation patterns—but the fact that expository citation (which requires more intensive research and drafting) is more prevalent in both Judge Browning and Judge Widener’s later opinions indicates that aging is perhaps not a significant determinant of citation patterns.


See id. (noting that most federal judicial clerks are from prestigious law schools and are members of law review). See also Diana Gribbon Motz, A Federal Judge’s View of Richard A. Posner’s The Federal Courts: Challenge and Reform, 73 Notre Dame L. Rev. 1029, 1034-36 (1998) (book review) (comparing judge-written opinions with those written by law clerks). Judge Motz claims, regarding Posner’s efforts to prove the involvement of law clerks in opinion-writing: “All one needs to do is to read the heavily footnoted, citation laden, characterless, appellate opinions prevalent today to be convinced that these are the work of intelligent and careful, but inexperienced, lawyers.” Id. at 1034.


See supra Parts III.A.1-2 (presenting data on the two judges’ citation patterns). All differences were analyzed at the 1 percent level. A Student’s t-test analysis indicated that in each subsequent sample after the 1968-1977 sample the judges’ use of Depth I, Depth II, and Depth III citation became less distinct. Notably, however, Depth IV citation became more distinct (albeit not statistically significant) in the subsequent samples.

See Walsh, supra note 7, at 357-58 (finding evidence of both information exchange and legitimation, after examining citation in state wrongful discharge cases); cf. G. Nigel Gilbert, Referencing as Persuasion, 7 Soc. Stud. Sci. 113, 116 (1977) (“A scientist is rewarded through recognition for producing results which are seen as new, important and true. But these qualities are not normally self-evident to the readers of a research paper... [a]ccordingly, authors [use citation to bolster their findings and persuade their audience of the validity of their work].”).

But see Frederick Schauer, Opinions as Rules, 62 U. Chi. L. Rev. 1455 (1995). Schauer introduces the argument that legal opinions should be used to educate the public, only to refute it in short order, id. at 1463; he maintains, instead, that judicial opinions are aimed primarily at lower courts and informed legal actors, id. at 1469-70, 1472.


Id.


panel majority are less likely to rule in a partisan manner when a judge of the opposite ideology can police the decision by filing a dissenting opinion to “identify the majority’s disobedience to doctrine”); Virginia A. Hettinger et al., Comparing Attitudinal and Strategic Accounts of Dissenting Behavior on the U.S. Courts of Appeals, 48 Am. J. Pol. Sci. 123, 123-27 (2004) (discussing the signaling function of dissent as a judicial strategy); Steven R. Van Winkle, Dissent as a Signal: Evidence from the U.S. Courts of Appeals (Aug. 29, 1997) (unpublished manuscript, on file with author) (finding that those judges with an ideological majority on the circuit were more likely to dissent to bring the majority’s reasoning to the attention of other circuit judges and perhaps induce en banc review).

169 This account is especially compelling in the context of concurring and dissenting opinions. In the pre-electronic database age, it was rather difficult for a concurring or dissenting judge to evaluate the cases cited in a majority string-cite in depth—making the string-cite an effective signal. After the advent of computer-assisted legal research, however, concurring or dissenting judges on a panel could easily locate cases within the majority’s string-cites that were not as strong, and attack these cases in their opinion. Judges thus had an especially powerful incentive in such cases to clarify the exact nature of each case in the string cite.

170 See Laurie S. Bagwell & B. Douglas Bernheim, Veblen Effects in a Theory of Conspicuous Consumption, 86 Am. Econ. Rev. 349, 349 (1996) (arguing that the “leisure class” acquire expensive goods to signal their status). See generally Thorstein Veblen, The Theory of the Leisure Class: An Economic Study of Institutions(1899) (hypothesizing that the wealthy engage in conspicuous consumption (buying high-priced and highly-visible goods) in order to increase social status by advertising their wealth and that some consumers may be willing to pay a higher price for a functionally equivalent good in order to overtly display their consumption); Richard H. McAdams, Relative Preferences, 102 Yale L.J. 1 (1992) (discussing the drive to own property to gain distinction in society).

171 First Circuit Judge Bruce M. Selya makes a variation of this argument in Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age, 55 Ohio St. L.J. 405, 408 (1994). Specifically, he hypothesizes that just as laundry machines increased the standards of cleanliness and forced the public to wash clothing more frequently, “[a]s [computer-assisted legal research makes] cases remotely on point... ever easier to find, the expectations for research rise, courts crank out more opinions, lawyers write more briefs (citing more opinions), and opinions cite more opinions. The cycle then begins anew. All too often, the judges are drained.” Id.
THE SEVEN SINS OF APPELLATE BRIEF WRITING AND OTHER TRANSGRESSIONS

The goals of this essay are to pierce the judicial veil and give you a glimpse into how the United States Court of Appeals for the Ninth Circuit operates, to expose what I regard as the “seven sins” of appellate brief writing, and to close by offering a few suggestions that might help you in oral argument. I hope this information will assist you in becoming a more effective appellate advocate.

I. A BRIEF BACKGROUND ON THE OPERATION OF THE NINTH CIRCUIT

First, let me take you backstage to review briefly a few of the events that occur about two months before a case is argued before a three-judge federal appellate panel. I will also touch on the sensitive subject of motions to continue made after a case has been fully briefed and calendared for oral argument.

A. Inventorying of Cases by Staff Attorneys

After the briefs are filed, a Ninth Circuit staff attorney in San Francisco reviews both the appellant’s and the appellee’s briefs and prepares a case inventory. The inventory includes a short summary of the nature of the case and the issues raised on appeal. To enable the court to monitor cases dealing with similar issues, a staff attorney assigns an appropriate computer code to each issue listed in the inventory. The staff attorney also assigns the case a weight based on complexity. The cases containing the simplest issues are assigned a weight of one. The cases containing many complex issues, termed “blockbusters,” are rated ten. In-between case weights are three, five, or seven. One-weight cases are usually disposed of without oral argument. Three-weight cases are assigned fifteen minutes of argument per side, and all other cases are assigned thirty minutes per side.

When you file your initial brief, you should notify the clerk if you wish to waive oral argument. Also, let the clerk know if you have any unavoidable future calendar commitments. Our computer will take these commitments into account in setting a suitable oral argument date.

B. Assignment of Cases for Argument by Clerk’s Office

Our court hears oral argument each month in San Francisco, Pasadena, and Seattle. We also hear appeals every other month in Portland, twice a year in Honolulu, and once a year in Anchorage. On occasion, we sit in San Diego and Phoenix. All sessions outside San Francisco are held during the first full week of the month. In San Francisco, oral argument is heard during the second full week of the month.

Eight weeks before oral argument is scheduled, our clerk’s office, through its computer, calendars cases for hearing before a
randomly selected panel. The briefs, the excerpts of the district court record prepared by counsel, and the staff attorney’s inventory sheets are then sent to each judge on the panel. Normally, each panel sits for five consecutive days during a particular month, and each circuit judge will serve on at least nine different panels during the year. For each day a panel sits, our computer assigns cases carrying a total weight of eighteen points—for example, six three-weight cases; or two three-weight, one five-weight, and one seven-weight case. In addition, the computer will assign to the same panel cases ready for argument presenting similar issues. Each judge hears twenty to thirty cases a month. During a year of judicial service, a judge will decide between 250 and 280 appeals.

*433 C. Preparation of Cases in Judges’ Chambers

Before oral argument, the judges study the briefs, the relevant precedent, and the pertinent portions of the record in each case. Moreover, in most instances, the judges have the benefit of bench memoranda prepared by their law clerks. The bench memoranda critically analyze the issues and arguments stated in the briefs. Generally, each judge’s staff prepares one or two bench memoranda for each day’s sitting. These memoranda are circulated among the panel members before oral argument. Although the judges on our court prepare extensively for oral argument, we rarely discuss the merits of a case with other panel members before taking the bench. When appropriate, however, panel members will exchange views before argument on whether counsel should be asked to argue specific points or to file supplemental authority on particular issues. I might add that it is appropriate for counsel to notify the court promptly if counsel wish to submit additional authorities, or if events have made the appeal or certain issues moot.

As you can see, by the time oral argument takes place, each judge has had several weeks to study and think about the cases on the calendar. Because of the time and effort spent on calendar preparation, judges are understandably reluctant to grant counsel’s request to continue a hearing beyond the week in which the panel sits. Reconvening the panel at a later date just to hear one case is rarely practical because our chambers are scattered throughout the circuit, and passing the case to a future panel is an inefficient use of judicial resources.

Now that you have some insight into how the Ninth Circuit operates, let us take a look at the seven sins of appellate advocacy as they relate to brief writing. Your brief is the heart of your appellate case.

II. THE SEVEN SINS OF APPELLATE BRIEF WRITING

A. The First Sin: Long, Boring Briefs

As we consider this sin, please bear in mind that each circuit judge hears and prepares for twenty to thirty appellate cases each month and winds up with the job of writing about one-third of the dispositions. This means that each judge is called upon to read sixty to ninety briefs each month. Each judge must also read excerpts of record, pertinent case authority, and portions of the reporters’ transcripts.

But this is just the beginning. Each judge also devotes considerable time to reviewing proposed dispositions circulated by other judges in cases previously argued and submitted and to reading innumerable petitions for rehearings and requests for hearings en banc. In addition, judges spend a significant amount of time dealing with civil and criminal motions.

Given such a demanding work load, it is not difficult to imagine our frustration when we are required to trudge through a fifty-page brief that could have presented its points effectively in fewer than twenty-five pages.

Some briefs are bloated by single-spaced, page-length quotations from reported cases in which every word is underlined for emphasis. This device inflicts cruel punishment on the reader. A concise statement of a case’s holding or a short quote from the case is preferable and more effective.

Moreover, it is not uncommon for a brief to devote four or five pages to the standard of review, when the subject could be handled by a short paragraph. In addition, many briefs are thickened by an overblown recitation of facts, when a concise statement would do nicely.
But aside from the burden placed on the reader, unnecessarily long briefs are counterproductive. They clog a good argument with excess verbiage. They tend to lose their persuasive edge as well as their credibility. Although the rules allow a fifty-page maximum length for briefs, in my view, an appeal that merits fifty pages is a rare bird.

B. The Second Sin: Incoherent, Unfocused, and Disorganized Briefs

Inconsistency is an aggravated form of incoherence. In one recent case, counsel insisted that the crucial term in the statute before us had a plain and unambiguous meaning and then attempted to support that claim by citing a half-dozen cases, each of which defined the term differently.

To avoid incoherence, you should ask someone unfamiliar with the matter to read your brief carefully for consistency, clarity, and logic. Such an independent reader can point out areas that are confusing and may make the difference between an intelligible brief and an incoherent one.

The mark of a well-organized brief is the skill with which it applies legal argument to the facts of the case. Before launching into the legal argument, however, the brief should state all the critical facts completely and free of argument.

Avoid stringing together quotations from cases, treatises, and law dictionaries. This method is guaranteed to produce an unfocused discussion and diminish the persuasive pace of your argument.

Spelling, grammatical, and Blue Book errors in the brief not only distract the reader, but also demonstrate a lack of care on the part of counsel. Careful editing easily eliminates these errors. As we all know, the key to effective writing is editing and rewriting. (Attached as an appendix is a Checklist for Editing used in my chambers.)

Another troublesome practice: instead of aiming a rifle at the bull’s-eye, it is not uncommon for counsel to fire a shotgun that scatters issues throughout the pages of the brief. These random issues are then casually discussed employing a stream of consciousness approach devoid of authority or analysis. The net result is an incoherent, poorly organized brief. A better approach, in my view, is to pick out one, two, or perhaps three critical issues and brief them thoroughly, concisely, and persuasively.

Finally, it is not uncommon for writers of disorganized briefs to underestimate the importance of the excerpts of record. For example, in appeals involving alleged evidentiary errors, prosecutorial misconduct, or insufficiency of the evidence, the judges need to read the relevant portions of the transcript to make an informed decision. Well-organized counsel will number the pages in the excerpts and refer to these page numbers in their briefs. If material is of critical significance to the case (e.g., a regulation, a jury instruction, or a contract provision), counsel should quote the material directly in their brief. Counsel should understand the importance of making available to us the evidence that helps their client.

C. The Third Sin: String Cites and Other Poor Use of Authority

String cites are rarely useful or impressive. If the issue has already been decided by the Ninth Circuit, one or two recent cites from our circuit will suffice to prove black-letter law. In one recent case, counsel wasted an entire page citing fifteen cases for a very minor, well-settled point.

String cites are generally symptomatic of a deeper problem—the failure to recognize that Ninth Circuit precedent is the most important authority to our court after Supreme Court precedent. This circuit, like every other court, makes a mighty effort to speak with a consistent voice. Given our size, this task is not always easy. We search for prior Ninth Circuit authority in every case. It wastes your time and ours if you cite a Second or Tenth Circuit case for your proposition and we later discover through a routine Lexis or Westlaw search that there is current Ninth Circuit law on point.

If only out-of-circuit authority exists, do not preface your proposition with a statement such as “It is well settled.” Instead, admit the authority is out of circuit and set forth the reasons why our court should follow it.
Remember that at oral argument the court will be familiar with the most recent law. Your case will usually be heard about two months after appellee’s brief is filed. In the interim, you should be on the lookout for recent developments in the law. Oral argument can be uncomfortable for the advocate who has not kept abreast of relevant law.

Finally, make sure you do not mischaracterize the holdings of cases you cite. We do read the cases. If you are using a case as an analogy, point that out. If, under the guise of aggressive advocacy, you misuse a case or fail to discuss an unfavorable holding, you lose credibility. And your credibility is a critical item of your stock in trade.

D. The Fourth Sin: Briefs with Abusive Language

Generally, you injure yourself and your client’s case if, in your brief or at oral argument, you vilify or belittle your opponents or their legal positions. A shrill tone in a brief diminishes its persuasive force. The reader wonders why disparagement is necessary. Is it a device to divert attention from a vulnerable position? If your position is strong and your client’s cause just, there is no need to subject the court to a barrage of abusive argument. This approach is unpleasant, ineffective, and counterproductive.

*437 Remember that the judges on the panel are looking at a cold record. We are not privy to the bad feelings that may have developed during the course of a hard-fought trial. We read the briefs and go to oral argument hoping for reasoned dialogue between well-prepared legal minds. We prefer clear, concise, coherent, and reasoned presentations. The persuasive advocate presents a temperate, reasoned argument, and adopts a “friend of the court” approach. Your brief’s primary function is to persuade the court that your client’s cause is meritorious.

E. The Fifth Sin: Briefs That Ignore the Standard of Review or Attempt to Relitigate the Facts

Many times counsel enter the appellate arena as if they were retrying the case from scratch. This wastes the time and energy of both counsel and the court. The standard of review is the keystone of appellate decision making. Many brief writers fail to realize how seriously judges take the standard of review. When I start to read the briefs, the first question I ask is “What is the standard of review?” Many briefs overlook this critical issue. To remedy this deficiency, the court has enacted a rule requiring every brief to state, with appropriate citations, the standard of review applicable to each issue appealed. Counsel must tell the court whether the standard of review is de novo, clearly erroneous, plain error, abuse of discretion, or substantial evidence.

Now, we all know that findings of fact are not reversible unless clearly erroneous. But many lawyers write their briefs as if a jury were hearing the appeal and every question of fact were still open and unresolved. Similarly, counsel often argue insufficiency of evidence claims as if the appellate court were supposed to reweigh all the evidence and find the facts anew. In an insufficiency of the evidence argument, it is not persuasive to note only the evidence favorable to your side and then argue that the finder of fact should have found for you. You must take note of all the evidence, including the evidence favorable to your opposition, and show us why that evidence was insufficient to support a finding of fact against you.

F. The Sixth Sin: Briefs That Ignore Jurisdiction

Many times lawyers forget that federal courts are courts of limited jurisdiction and that appellate courts generally review only final judgments. The issue of jurisdiction will not disappear simply because you ignore it. The court can, must, and will raise jurisdiction on its own. Indeed, the court’s staff and the judges’ law clerks screen cases for just such deficiencies and with express instructions to bring jurisdictional defects to the court’s attention immediately. Similarly, if you desire to appeal before the case has gone to final judgment in the trial court, be sure the ruling is appealable.

To forestall these problems of jurisdiction and appealability, the court has adopted a rule requiring counsel to state in the opening part of the brief the basis for district court and appellate court jurisdiction and the nature of the order appealed. If the order is not final, the brief must state the statutory or doctrinal basis for its appealability and whether the notice of appeal or petition for review is timely. The code sections most frequently invoked for appellate jurisdiction are sections 1291 and 1292 of title 28 of the United States Code. In addition, two cases particularly relevant to the appealability of decisions are Cohen v.
Beneficial Industrial Loan Corp., 377 U.S. 542 (1949), and Abney v. United States, 431 U.S. 651 (1977). Both cases summarize the principles underlying the so-called final judgment rule and its exceptions.

G. The Seventh Sin: The Last Minute Emergency Motion--Usually Filed at 4:00 p.m. on a Friday, Before a Holiday

1. Routine Motions

The Ninth Circuit has a well-established procedure for handling motions that arise while a matter is pending on appeal. Such motions are filed with the court in San Francisco and calendared before a regularly scheduled motions panel. Before the motions are presented to the panel, skilled Ninth Circuit staff attorneys carefully review the papers and research any issues requiring additional attention. Motions are handled carefully and expeditiously. The court’s motions calendar is current for both civil and criminal cases. Thus, in the normal course of events, a motion is decided by *439 the motions panel within two to four weeks from the date of filing.

2. Emergency Motions

Motions that must be decided more quickly than the circuit’s normal procedures would allow are labeled “emergency motions.” A few emergency motions require action the same day they are filed or, at the latest, the next day. All emergency motions must be filed in San Francisco, but, “same day or next day” emergency motions may be presented initially to a circuit judge outside of San Francisco. More often than not, we find that the “emergency” is caused by counsel’s delay. Under the court’s internal rules, we will refuse to treat a matter as an emergency entitled to expedited treatment when it appears that counsel have created the emergency. Do yourself, your client, and the court a favor by avoiding self-created emergencies. All of us prefer not to work under extreme pressure without adequate briefing from both sides.

Now that I have exposed the seven sins, I do not want to worry you needlessly. Few mistakes are fatal in themselves. But in many instances, a mistake represents a lost opportunity—a missed chance to persuade the court that your legal position is sound and your client’s cause is just. And this, after all is said and done, is an advocate’s primary job. Though all of us, including judges, make mistakes—at least one big one and one little one each day—it is a sin not to try to keep our transgressions to that bare minimum.

III. SOME THOUGHTS ABOUT ORAL ARGUMENT

As promised, I conclude by offering a few redeeming suggestions that may help you in oral argument.

First of all, reading a prepared speech is rarely effective. Our interest in what you say wanes as we continue to watch the top of your head. Make an outline of your key points so that you need to glance down only occasionally. A persuasive advocate talks to the panel directly, audibly, conversationally, and with conviction.

Another suggestion: Do not rehash the facts. The judges have read and studied the briefs before oral argument and are conversant with the facts. Do not be afraid to *440 use as your opening line: “Knowing that the court is familiar with the facts, I will immediately address point two in my brief—the question of . . . .” We will advise you if we want you to clarify any facts.

I also suggest that you focus on two, or at most three, issues in oral argument. The fifteen to thirty minutes provided for oral argument only allows you enough time to explore the key issues in your case. Of course, you must be prepared to answer questions on all issues raised in the briefs. You must also allow time for questions from the bench. If you have budgeted every available minute of your argument for your prepared presentation, you risk running out of time before you have made your best points.

Your primary job at oral argument is to answer the judges’ questions carefully. Do not view these questions as interruptions, but as indications of the court’s interest in a particular area. Pay careful attention to each question—there may be a hook in it or it may be the lifeline that will help you win the appeal. Do not assume that a judge is for you or against you based on the
questions asked. If you do not understand the question, ask for clarification.

Moreover, if at oral argument the court asks for additional information or authorities, counsel should comply without delay. Because each judge on the circuit hears argument in twenty to thirty cases a month, it is advisable to get the information to the judges while the case is still fresh in their memories.

Visual aids can be effective in explaining cases involving complex commercial or real estate transactions, complicated criminal matters, or cases in which the chronology of events is important. Be certain, however, that the demonstrative material is visible from the bench. It is often a good idea to provide a copy of the material, in reduced or abbreviated form, for each judge. It would also be prudent to advise the court, through the clerk’s office, that you wish to use visual aids at oral argument.

Each of you as an advocate undoubtedly has developed your own style; however, you might find it helpful to scout oral argument in other cases set before the same panel that will be hearing your case. Time thus spent could give you useful insights into how your panel conducts oral argument. *441 Our clerk’s office will advise you of the composition of your panel a week before each session.

After oral argument, the panel members retire to discuss the issues and vote on the disposition of each case. The presiding judge makes the writing assignments. The judge to whom a matter is assigned will then prepare and circulate to the other panel members a proposed written opinion, memorandum, or order. Judges strive to reach a fair and just result in each case. We are aided in this endeavor if counsel on both sides have filed well-written briefs and have made well-reasoned oral presentations.

CONCLUSION

I trust that the information and suggestions outlined in this essay will help you become a more effective appellate advocate so that you may better serve your client and our American system of justice.

Footnotes


*442 APPENDIX

CHECKLIST FOR EDITING

I. STYLE

A. Omit unnecessary words.

1. If feasible, reduce clauses to phrases and phrases to single words. See W. Strunk & E.B. White, The Elements of Style 23-24 (3d ed. 1979) (Rule 17).
2. Remove qualifiers. *Id.* at 73.

B. Minimize the use of long introductory clauses or phrases. See *id.* at 25-26 (Rule 18).

C. Use verbs rather than nouns made from verbs. For example, rather than “it was the contention of the appellant,” say “the appellant contended.”

D. Use familiar, concrete words.

E. Use short, declarative sentences.

F. Arrange sentences to keep related words together. *Id.* at 28-31 (Rule 20).

1. Put modifiers close to the word or phrase they modify.

2. Keep subjects close to verbs and verbs close to objects.

G. Use the active voice whenever possible. *Id.* at 18-19 (Rule 14).

H. Use one tense in fact statements and summaries. See *id.* at 31-32 (Rule 21).

I. Place the important or emphatic words of a sentence at the end. *Id.* at 32-33 (Rule 22).

II. GRAMMAR

A. Use “that,” not “which,” as a defining or restrictive pronoun. For example, “The lawnmower that is broken is in the garage” (tells which one), but “the lawnmower, which is broken, is in the garage.” (adds a fact about the only lawnmower in question) *Id.* at 49.

B. Use parallel construction. See *id.* at 26-28 (Rule 19).
C. Use serial commas. For example, “He opened the letter, read it, and made a note of its contents.” *Id.* at 2 (Rule 2).

D. If commas set off parenthetical expressions, never remove one comma and leave the other. *See id.* at 2 (Rule 3).

E. Check the punctuation accompanying closing quotation marks. Periods and commas should always be placed inside the quotation marks. Semicolons and colons should always be placed outside.

F. When in doubt about spelling, check the dictionary.

III. CITATION AND AUTHORITY

A. Check for common Blue Book errors.

B. Shepardize every case cited for reversals, denials, or grants of certiorari.

C. Double check quotations for accuracy.

IV. ORGANIZATION

A. Use sections and section headings effectively.

B. Make sure that your section headings, standing alone, present the gist of your argument.

V. LOGIC

A. Does each sentence, paragraph, and section say something? Is each necessary?

B. Does each thought follow from the previous one?

C. Is each thought explained or illuminated by the statements that follow?
D. Are nonobvious conclusions supported by citation or argument?