Should We Care if the Case Digest Disappears?:
A Retrospective Analysis and the Future of Legal Research Instruction

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At one time, in order to learn or practice law, it was considered necessary to have access to a case digest. The usefulness of such a tool was without question.¹ After all, digests served as case indexes, finding tools, and a method of learning about an unfamiliar subject area. Once a researcher had determined the area of law involved, digests quickly pointed him or her to the various rules and reasoning used by courts in the past. Digests were not the law, but the “handle to be used in picking up the law.”² Such is not the situation today. Ask any law student or recent law school graduate and half of them will have barely used a digest during their time in school. Some of them may not even be certain what a digest is.³ This is because of the ever-increasing prevalence of full-text searching which has largely supplanted the West key number digest system.

Full-text, or keyword, searching is certainly not a new phenomenon. Nor has it gone unremarked upon in recent years. The debate over full-text searching and its effect upon legal research actually dates from the mid-1980s when computer assisted legal research first spread through the legal community. Over the last twenty years, the discussion has gone in several directions, but no universal conclusions have been drawn and no unified stance has been taken by the law library community. Highly respected authors such as Berring and Bintliff have published papers arguing that digests are valuable, that the topic and key number system created shared context for legal debate and understanding, and that

¹ John B. West, Multiplicity of Reports, 2 LAW LIBR. J. 4, ¶28 (1909) available at http://www.hyperlaw.com/jbwest.htm (“The necessity of index or digest is apparent.”).
² FREDERICK C. HICKS, MATERIALS AND METHODS OF LEGAL RESEARCH 276 (3d ed. 1942).
³ Berring suggested as early as 2000 that “Law students and young lawyers do not see current events as revolutionary ... to them it is odd that anyone ever used Shepard’s in print form or that anyone actually used a digest volume at all.” Robert C. Berring, Legal Information and the Search for Cognitive Authority, 88 CAL. L. REV. 1673, 1677 (2000). I have queried fellow law librarianship students and found that most who graduated in 2001 or later have heard of case digests but either rarely or never used them.
digests act as the underpinning of our legal system. Yet others have argued the opposite; that digests were merely the best tool available at the time for legal research because full-text searching was not yet possible. 4

In the midst of this debate, another generation of lawyers has entered the profession. These lawyers have grown up with home computers and the internet; they rely on Google and are accustomed to keyword searches. However, they are not so familiar with libraries and print resources. They have never needed to rely on case digests or familiarize themselves with West subject categories or key numbers. The result is that, while law librarians and professors have been debating the merits of this issue, the legal world has voted with its feet --- and walked over to the computer terminal. 5

It is impossible (as well as undesirable) to return to a print era. However, more debate and discussion of this paradigm shift is necessary. What is the real impact of full-text searching on legal research skills and the legal profession? Does the inherent structure of case digests (especially that of the West Digest system) contribute to the legal profession in a meaningful way? Should prior tools be entirely abandoned in favor of technology? Is the new generation of lawyers disadvantaged in their education by their lack of familiarity with case digest subject categories? How has legal research instruction been impacted? As research method instructors and library professionals should we be doing anything beyond bearing silent witness to this trend?

This article seeks to address some of these questions and pose further questions to fuel continued discussion. First, it will briefly cover the history of the West key number digest system. Next, some of the prominent literature discussing the shift from case digests to full-text searching (including the sole user study on this topic) will be reviewed. Then, this article will look at how the paradigm shift is reflected in law library collections and current trends in legal research instruction. Finally, four goals for legal research instruction and a proposed user study will be outlined with the intention of fostering future discussion.

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5 I have borrowed this phrase about voting with one’s feet from Bintliff’s recent article in which she also argues that the paradigm shift has already occurred. See Barbara Bintliff, Context and Legal Research, 99 LAW LIBR. J. 249 (2007).
A Brief History of the Case Digest

For as long as there have been copious amounts of written case law, there has been some form of digest indexing those cases. After all, in the Anglo-American common law system, in order to determine what the law is, it is “necessary to generalize from numerous separate examples.”6 In England, the first known case law index was Statham’s Abridgment published circa 1490.7 This compilation was organized around an alphabetical list of headings under which each case was summarized.8 In the United States, it took a bit longer for the need for case digests to develop. By the mid-1800s the entire country still had less than a thousand volumes of case law.9 However, Benjamin Abbott and Austin Abbott created two digests in the 1860s: Abbott’s Digest of New York Statutes and Reports in 1860 and the National Digest (covering federal courts only) in 1867.10 Twenty years later, the Abbotts’ third attempt, the United States Digest, was acquired by West Publishing Company. West transformed these volumes into the American Digest System and the seven major areas of law were set.11 These seven categories --- property, contracts, torts, crimes, rights of persons, remedies, and government --- further subdivided into topics and key numbers, became the structure by which West organized the law.12

Digests served as a universal subject thesaurus.13 Structural coherence was imposed forcibly the West editors. For purposes of assigning that structure, “the editors were trained to ‘normalize’ judicial opinions that used strange language or strange analysis or otherwise appeared to be anomalous, to bring them back into the orthodox

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6 HICKS, supra note 2, at 227.
7 Id. at 229.
8 Id.
10 HICKS, supra note 2, at 232.
11 Id. at 233; Robert C. Berring, Full-Text Databases and Legal Research: Backing into the Future, 1 HIGH TECH. L. J. 27, 31 (1986).
12 Bob Berring points out that these seven main categories also correspond to first-year courses at most law schools, further indoctrinating students into this conceptual framework. See Berring, Legal Information and the Search for Cognitive Authority, supra note 3, at 1693 .
13 Berring, Legal Research and Legal Concepts, supra note 9, at 25.
mainstream, to make them fit past cases and present expectations." As a result, due to the rigidity of the digest structure, if the West editors assigned a case to a certain topic and key number, a nation of lawyers also thought of that case in relation to that area of law. Furthermore, because law students and practitioners used the West key number digests to parse and understand legal precedent, the West organizational structure shaped their general thinking about law itself.

Some have argued that the West classification system lent needed structure to the American legal system. That, in effect, case digests helped shape the law by virtue of being the conceptual framework by which lawyers and judges thought about issues. Following this line of thought, it has been argued that West case digests created a shared vocabulary and context enabling the legal community to communicate effectively. Others have argued that case digests were mere tools that we used in the absence of anything better and that legal thought was previously constrained by the limitations of print.

Berring has long posited that the West case digest and key numbering system gave us “ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.” As a result, he argues, legal research instruction was permitted to fall by the wayside; instead, most of us received our legal research training “through osmosis.” However, that structured manner of analyzing case law is disappearing. The law school graduate of the last twenty years “does not think in subject categories with sharply delineated subdivisions like those

14 Berring, Full-Text Databases and Legal Research, supra note 11, at 33-34.
15 Post disparages this practice and illustrates its danger with an anecdote from when he was clerking for then-Judge Ruth Bader Ginsburg on the DC Circuit Court of Appeals. The claim was that a member of the DC police force had conducted himself in an unconstitutional manner. Later, Post was surprised to find that West had digested the case decision under “United States/Government in General/Liability of Officers and Agents” rather than under a heading of civil rights or Constitutional law. David Post, The Law is Where You Find it, XVIII AMERICAN LAWYER (Mar. 1996), available at http://www.temple.edu/lawschool/dpost/Where.html.
16 See Robert C. Berring, World of Thinkable Thoughts, 2 J. APP. PRAC. & PROCESS 305 (2000).
17 Bintliff, Context and Legal Research, supra note 5, at 249.
18 See Post, Technolog! & (Meaning /3 Life), supra note 4; Post, The Law is Where You Find it, supra note 15.
19 Bob Berring, Ring Dang Doo, 1 GREEN BAG 2D 3, 4 (1997).
20 Id.
in the Key Number system, instead they think in terms of key words and connectors."  

Although the West key number case digest system is available in electronic format on Westlaw, it does not convey a structural framework in the same way that the print format does. The digest key number headings may be browsed in table of contents format. They may also be searched by keyword. However, in its electronic format, the digest has no index which makes it more difficult to identify proper terms to search. Like other tools which depend upon full-text searching, the case digest system on Westlaw is most useful if the researcher is already familiar with the area of law in question. Also distinct from the print version, when used on Westlaw each digest entry must be looked at separately, making it more difficult to browse. Furthermore, the search function is much more simplistic than that offered in other portions of Westlaw. For example, natural language searching is not available. Also, several common Boolean tags are disregarded by the search engine. As the profession turns away from print and towards electronic resources, we should question the usability and features of the digest system on Westlaw. As it is, the electronic case digest system on Westlaw can almost be considered a separate and distinct tool from its print incarnation.

A Review of the Discussion to Date

Neither case digests nor full-text searching are the perfect legal research tool; they each have pros and cons. Although he defends the structure of case digests in many articles, Berring has also posited that by letting go of the binding structure of case digests and West key numbers, we are freeing ourselves to re-conceptualize the law. Rather than be constrained by the limitations of our “subject thesaurus” lawyers may now organize legal doctrine to suit their individual needs. This is particularly

\[21\text{Id. at 5.}\]

\[22\text{For a more detailed discussion of these pros and cons see Penny A. Hazelton, Integrating Manual and Computer Legal Research, in THE SPIRIT OF LAW LIBRARIANSHIP: A READER 225, 233-244 (Roy M. Mersky & Richard A. Leiter eds. 1991).}\]

\[23\text{See Berring, Legal Research and Legal Concepts, supra note 9, at 26-27.}\]

\[24\text{See Id.}\]
necessary with new or developing fields of law which historically have not been incorporated into print materials in a timely fashion.\textsuperscript{25}

Conversely, Delgado and Stefancic argue that computerized full-text searching discourages creativity in the law since it only rewards searches which rely upon particular known words and expressions.\textsuperscript{26} The legal researcher is rewarded for re-using existing ideas and arguments.\textsuperscript{27} Instead, they suggest that browsing and analogical reasoning, such as necessitated by case digests, is the best way to bring about innovation and law reform.\textsuperscript{28} As print case digests reflect a clear conceptual structure of the law, external to the lawyer’s internal thought process, Delgado and Stefancic argue that it is easier to turn the whole system on its side and think about what is missing.\textsuperscript{29} When researchers are constrained by searching for keywords only, their assumption is that the legal universe is complete and that \textit{nothing} is missing.

The common assumption that a full-text search results in a quick and comprehensive answer to one’s research needs is a dangerous habit for law students and practitioners to adopt. Commentators have largely focused on two main shortcomings of Boolean searching.\textsuperscript{30} First, case law is rife with synonymous words. Judges can and do refer to persons and things in many different ways, \textit{e.g.} child/infant/minor. This problem may be overcome somewhat by using multiple synonyms with the “or” connector, provided the researcher is familiar enough with the area of law to realize that this is a problem in the first place. However, even if the

\textsuperscript{25} For example, the 1952 Patent Act created the requirement that a patentable object had to be “non-obvious.” Although this concept of “non-obviousness” was discussed by many courts, the term did not appear in indexes of legal research materials until the mid-1960s. \textit{See} Hazelton, \textit{supra} note 22, at 241-242.


\textsuperscript{27} Delgado & Stefancic, \textit{supra} note 26, at 222.

\textsuperscript{28} \textit{Id.} at 221.

\textsuperscript{29} \textit{Id.} at 224.

search “child OR infant OR minor” is used, it will not retrieve cases in which the court refers to the child only as “plaintiff,” “juvenile,” or “girl.”

The second difficulty for full-text searching is that lawyers and judges frequently refer to certain concepts and ideas which are not wedded to any particular words or phrase. Dabney’s example, the question of whether a person who waives his right to trial by jury in one trial can still demand a jury in a subsequent new trial of the same matter, is nearly impossible to answer via full-text searching. The relevant terms are too commonplace in case law and the question itself may be phrased in several different ways. Likewise, a key judicial opinion dealing with a concept such as “civil disobedience” or “battered women’s syndrome” may not even refer to that concept by name.

Beyond their use as research tools, several authors have discussed the broader effect the paradigm shift from case digest to full-text searching is having on the legal profession. In 1996, Bintliff scrutinized the process by which lawyers find, analyze, and apply the law --- what she called “thinking like a lawyer.” She outlined four steps to this process:

1. We start with an identification of the facts of a situation. Using those facts,
2. we identify the area of law involved and legal rules that are suggested by the situation, most commonly by searching for case law.
3. We analyze the rules and then apply them to our facts to predict an outcome.

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31 Dabney, supra note 30, at 18-19; Berring, Full-Text Databases and Legal Research, supra note 11, at 47.

32 Dabney supra note 30, at 19. Bintliff’s example is just as impossible to answer with only full-text searching: “[When] finding cases discussing a basic concept like ‘burden of proof’ … how do you account for variations such as ‘plaintiff has the burden of proving’ or ‘plaintiff must prove’ or ‘plaintiff is required to show’ or any of the numerous other ways in which that common concept can be expressed?” Bintliff, From Creativity to Computerese, supra note 30, at 346.

33 Delgado & Stefancic, supra note 26, at 220.

34 Bintliff, From Creativity to Computerese, supra note 30, at 338. I have chosen Bintliff’s process as an example only; several other legal research processes exist and function just as well. For a comparison of the processes espoused by several major legal research texts, see Hazelton, supra note 22, at 231.
4. We then look for cases with similar factual situations that have applied these rules in order to see if the outcome we have predicted is reasonable.\textsuperscript{35}

Bintliff argued that this process allows legal researchers to explore possible solutions to a client’s problems within the framework of legal rules and concepts imposed by the West case digest system of topics and key numbers.\textsuperscript{36} By virtue of the case digest structure, “lawyers were able to identify and evaluate differences in the language and wording of opinions, and be flexible and creative in drawing parallels and distinctions.”\textsuperscript{37} As opposed to full-text searches where the goal is to retrieve cases “on point,” Bintliff argues that the case digest system forced researchers to see the “big picture” and to gain “a better understanding of the context and nature of the rules.”\textsuperscript{38} Conversely, when full-text searches are used for legal research, researchers “neither start with, nor reliably retrieve, a coherent statement of applicable rules.”\textsuperscript{39} By attempting to match fact patterns in cases, we end up with a thought process that emphasizes facts as opposed to legal rules and principles.\textsuperscript{40} Inexperienced researchers can readily lose sight of \textit{why} the cases were decided the way they were.

Bintliff maintains that this is a wrong attitude; rules need to “be identified and understood before they can be applied to the facts at hand.”\textsuperscript{41} If this is not done, researchers are prone to taking their fact-based case results and attempting to devise a framework of legal rules out of them.\textsuperscript{42} This approach inevitably results in a narrow understanding, sometimes grossly unconnected to the larger body of law. When judges rely on such poorly researched rules and arguments, Bintliff fears we run

\textsuperscript{35} Id. at 339. Bintliff is not alone in this conception of legal research process. \textit{See}, e.g., J. Myron Jacobstein et al., \textit{Fundamentals of Legal Research} 15 \textit{et seq.} (7th ed. 1994).

\textsuperscript{36} Id. at 340-341.

\textsuperscript{37} Id. at 342.

\textsuperscript{38} Id.

\textsuperscript{39} Id. at 345.

\textsuperscript{40} Id.

\textsuperscript{41} Id. at 348.

\textsuperscript{42} Id.
the risk of losing the coherency and predictability of our rules-based judicial system.43

As opposed to seeing the case digest/full-text searching divide as a question of legal principles versus fact-patterns, Hanson suggests that it is due to the nature of each tool.44 He argues that the West case digest system with its topics and key numbers suggests to researchers that the law as a whole “is structured in terms of a relatively few general principles.”45 This perception of the law encourages a legal researcher to drill down into those few principles as far as possible.46 Conversely, electronic full-text searches are based on indexing; results are either returned or they are not on the basis of matches with the search query.47 This process suggests to the legal researcher that “law’s organization is shallow and loose.”48 As a result, researchers have no impetus to drill down further into their results.49 The computer either gives them an answer or it does not; whether or not it is the right answer does not become part of the process.

Recently, Bintliff followed up on this topic in her 2007 article Context and Legal Research.50 In this article she argued that the basis of law and the legal community was its ability to communicate ideas with one another. Communication, by its nature, requires each party to associate the same concepts with the same words and phrases. This does not seem to be a difficult prospect to achieve. The American legal system is full of obscure terms in other languages (“voir dire,” “pro se”), strange abbreviations (“MSJ,” “JNOV”), and other legal shorthand, yet lawyers use these terms without fear of being misunderstood by their colleagues. The

43 Id. at 350. Naysayers may argue that the judicial system appears to be functioning as well as it always has. The question is whether that level of functioning is a result of the older generation (still the majority of lawyers and judges) who have already internalized the digests’ inherent framework of law.

44 See F. Allan Hanson, From Key Numbers to Keywords: How Automation Has Transformed the Law, 94 LAW LIBR. J. 563, 584 (2002).

45 Id.

46 This idea is echoed by Bintliff when she comments on law students previously engaging “in the cyclical research of old, finding and refining principles with repeated searches.” Bintliff, Context and Legal Research, supra note 5, at 260.

47 Hanson, supra note 44, at 584.

48 Id.

49 Id.

50 Bintliff, Context and Legal Research, supra note 5, at 249.
profession itself enjoys a “common context indispensible for communication.”51 Bintliff argues that this shared context is a result of the West case digest system and the shared vocabulary it imposed.52 This framework is so ingrained in the profession that most of us do not even take notice; yet, as the saying goes, you never miss the water till the well has run dry.53

Bintliff also argues that, under the case digest structure, “although ‘the law’ was one discipline, subdivided into many subdisciplines, it was still capable of being researched as a whole.”54 This is not the case in a world which relies upon full-text searching. Under the aegis of full-text searching in the last twenty years the legal community has witnessed increasing levels of subject specialization. Lawyers develop very narrow but deep niches --- civil rights lawyers, environmental lawyers, copyright lawyers.55 Part of this trend is because we are no longer as hidebound by the seven subject areas previously dictated by the West case digest system. With full-text searching as the backbone of legal research, a practitioner with a narrow specialty can define their unique area of interest and then retrieve only those cases which apply. One side effect of this trend is the lack of general background knowledge and shared context this engenders. Can a lawyer specializing in mergers and acquisitions give any reliable advice on an employment discrimination issue? Using the digest system, she might have been able to; under full-text searching which relies upon the researcher to provide the appropriate terms of art, a correct response is much less likely.

**Lee F. Peoples’s 2005 User Study**

Although there is a wealth of literature and debate about the paradigm shift from case digests to full-text searching, there is a paucity of user studies. Most opinions regarding the newer generation’s use (or disuse) of case digests and the effect this has (or doesn’t have) on their resultant research is anecdotal in nature. One exception is a study conducted by Lee F. Peoples and documented in his article *The Death of*...

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51 *Id.* at 254.
52 *Id.* at 251.
53 Irish proverb.
54 Bintliff, *Context and Legal Research*, supra note 5, at 258.
55 *See id.* at 264.
the Digest and the Pitfalls of Electronic Research: What is the Modern Legal Researcher to Do? However, this study alone is insufficient to answer all of the questions which need to be asked.

Peoples sought to test two main hypotheses: (1) that electronic resources were superior to print case digests for purposes of finding cases with similar fact patterns, and (2) that print case digests were superior to electronic resources for finding legal rules and principles. The subjects of his study were twenty-eight students in the Advanced Legal Research U.S. Law course at Oklahoma City University School of Law. The students were given an assessment test early in the semester to gauge their skills in legal research. Then, in the span of only one class session, they were taught how to use print digests, to use Boolean terms and connectors in full-text searching, and to use KeySearch. Each student was then given a number of questions to answer using the different types of research method; the questions were structured so as to have only one correct answer. Half of the questions sought legal rules (e.g. “Can a state prohibit the display of symbols that some citizens find offensive on automobile license plates? Find and provide a citation to a federal district court case from Maryland that answers this question with a legal rule.”) and half sought fact patterns (e.g. “You leave a briefcase full of rare coins in your hotel’s safe deposit box. The coins are subsequently stolen from the safe deposit box. Find and provide a citation to a federal district court case from Indiana with a similar fact pattern.”).

Nearly all of the students (27 of 28) using print case digests found the correct answer to a fact pattern question although only three-fourths of them (21 of 28) successfully answered a rule of law question using the same tool. The type of question had no impact on students’ accuracy when using full-text searching: 23 of 28 students found the correct answer to each question. Using KeySearch as a legal research tool resulted in a

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57 Id. at 668.
58 Twenty-six third year students and two fourth year students. Most of the students were born in the 1970s or 1980s. Id. at 668-669.
59 Id.
60 Id. KeySearch, available on Westlaw, apparently allows full-text searching bounded by topics and key numbers as chosen by the researcher. Id. at 665-666.
61 Id. at 669.
decline in accuracy when compared to the other tools. Although the results Peoples obtained are interesting, unfortunately they are largely inconclusive due to the small size of his sample group.

Peoples had also asked his students to rate the efficiency of each research method after the students had answered all the questions, but before their responses had been graded. Overwhelmingly, the students preferred using Boolean terms and connectors in full-text searching, and considered print case digests to be the least inefficient method of conducting research. This is in spite of the students being more likely overall to answer research questions correctly when using a print case digest. Based on this data, we can infer that current law students (and potentially young lawyers as well) are more comfortable using electronic full-text searching instead of print resources. Unfortunately, we can also conclude that law students and other relatively inexperienced legal researchers are inept at evaluating their own research results and choice of research tools.

Peoples’s study, although valuable for being one of the few extant on this topic and a good first effort, had a number of limitations and shortcomings. First, given his clustered results, his study sample consisting of only twenty-eight students was much too small. Although we can try to make conclusions and inferences based on the data, none of the differences are statistically significant. Neither hypothesis can be proven or disproven based solely on these findings.

In addition, the article fails to provide sufficient detail regarding the study’s methodology and the research questions used. This isolates Peoples’s results and makes the data impossible to accurately replicate. For example, although Peoples strove to make the research questions of equal difficulty, it is unclear whether he succeeded. It is also unclear how long each student spent answering each question and whether this contributed to their opinion regarding the efficiency of the research tool being used.

Finally, People’s article does not clearly indicate the extent of the legal research training these students received. It is also unknown if these students each began the study with the same amount of prior research experience. The ability to use research tools efficiently and effectively

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62 *Id.* at 670-671.
63 *Id.* at 672-673.
64 That is, we do not know if the same question was answered incorrectly by multiple students, which would suggest a flaw in the question.
depends to some small extent upon the researcher’s familiarity with the
tool. Given that the students in Peoples’s study ranged from 25 to 35 years
in age and were in their third or fourth year of law school, they most likely
had extensive experience with electronic full-text searching. This fact
makes their high accuracy with using print case digests even more
remarkable. Peoples does not indicate how much training he provided in
the use of this tool nor whether the student may have already received
such training in a prior class. Nonetheless, Peoples did find that the
students “overwhelmingly” preferred the use of full-text searching as
opposed to a tool with which they achieved a higher rate of accuracy.

The Effect of the Paradigm Shift on Law Libraries and Legal
Education

In 2005, four law librarians sent informal surveys to library email
lists enquiring about the status of print digests in libraries. They
wanted to know whether librarians still saw a need to teach students and patrons
how to use digests and whether libraries had cancelled any of their print
digests. In light of the literature on this topic, the general response to
these surveys was not surprising. Without dissent, the responding law
librarians felt that print digests were invaluable for legal research. One
law librarian argued that digests were essential for “big picture thinking”
and that, “[w]ithout this picture, which the digests force a lawyer to take,
legal research becomes a matter of fact patterns and key words instead of
legal principles. The quality of the research, and consequently of the
lawyering, decreases.” Nonetheless, this same group of librarians
acknowledged that their primary patrons largely did not share this
sentiment. All types of law libraries --- academic, state, and firm ---
reported that print digests were being cancelled. Worse yet, the libraries’
patrons did not seem to notice or miss the absent volumes. Although one
librarian noted that “[s]easoned attorneys are aware that information can
easily be missed by using only electronic resources,” there was no
acknowledgment that law students or those inexperienced in legal
research had any such awareness of the limitations of keyword searching.

65 Judy Meadows & Kay Todd, Our Question—Your Answers, 13 PERSPECTIVES: TEACHING
LEGAL RESEARCH AND WRITING 113 (Winter 2005).
66 Id., quoting Kreig Kitts of Troutman Sanders in Atlanta, Georgia.
67 Id. at 115.
68 Id. at 113, quoting Kay Newman, state law librarian of Washington in Olympia.
This survey of law libraries focused on print digests only—therefore cost and space considerations no doubt also played a role in the volumes’ cancellation. The West key number digest system is still available to researchers electronically through Westlaw. However, most commentators do not consider digests’ print or electronic nature to be their limiting factor. Instead, most commentators focus on digests’ content and overall concept of organization.

David Post has celebrated digests’ displacement, finding that “online full-text searching for legal precedent ... represents at least something of an advance over previously-available methods.” Bintliff’s definition of “lawyerly thought,” discussed supra, is that a legal researcher begins with facts, identifies the applicable legal principles, and applies those principles to the facts before comparing her process to that undertaken by various courts. Conversely, Post has argued that, when presented with facts, “the most useful piece of information we can find is information on how the legal system has dealt with analogous constellations of facts in the past.” Indeed, Post considers it a shortcoming that case digests were able to index only legal propositions and not facts themselves.

Although Peoples (in his discussion of his case study results) does not blatantly eschew Bintliff’s concept of “lawyerly thought process,” he also considers case digests a relic of the past. While he acknowledges that full-text searching for facts has some “shortcomings,” he does not suggest teaching the use of case digests in either print or electronic format. Instead, he advocates that law students use treatises, hornbooks, and nutshells to gain the “big picture” needed to supplement full-text searching. Similarly, Honigsberg, author of Legal Research, Writing, & Analysis (published by Thomson in its popular line of Gilbert Law Summaries books), presumes that case digests have little value for either finding cases or providing context.

69 Post, Technolog! & (Meaning /3 Life), supra note 4.
70 Post, The Law is Where You Find it, supra note 15.
71 Id.
72 Peoples, supra note 56, at 679.
73 Id. at 678.
74 Peter Jan Honigsberg, Legal Research, Writing & Analysis 53 (10th ed. 2006) (“If all you are looking for is a case to back up your point of law, you may want to use a digest. For a general understanding of the law, use a treatise or encyclopedia; a digest will not help you much.”) (emphasis added).
Legal research textbooks are also moving away from teaching the use of case digests. One popular textbook, *Where the Law Is: An Introduction to Advanced Legal Research*, begins its chapter on identifying case law with full-text searching. Admittedly, its authors warn that beginning researchers engage in full-text searching “at their peril” because of the twin dangers of ... becoming either overwhelmed by the amount of decisional law, or overly charmed by the apparent suitability of a retrieved case.” Nonetheless, Armstrong and Knott clearly acknowledge the “allure” of full-text searching and presume that law students will rely on it regardless of any warnings their instructors may offer.

Similarly, Berring and Edinger’s twelfth edition of *Finding the Law* begins its chapter on finding cases with full-text searching. As the authors admit, “as realists, we recognize that [Westlaw and Lexis] are the tools that most researchers, certainly most who read this book, will be using.” Nonetheless, they tell their readers, “we will discuss the digest systems in some detail because you should understand the structure upon which the new systems are built.” Likewise although Sloan advocates the use of both print resources and electronic resources in her textbook *Basic Legal Research: Tools and Strategies*, her focus on beginning the legal research process by generating a “list of search terms” predisposes her audience to full-text searching. This is exacerbated by her examples of search terms being very fact-oriented in nature.

Bintliff argues that these textbooks (Sloan’s in particular) show that legal research instruction no longer even attempts to focus on searching

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75 J.D.S. ARMSTRONG & CHRISTOPHER A. KNOTT, WHERE THE LAW IS: AN INTRODUCTION TO ADVANCED LEGAL RESEARCH 105 (2nd ed. 2006).

76 *Id*.

77 *Id*.


79 *Id*. at 87.

80 *Id*.

81 AMY E. SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 23 (3d ed. 2006).

82 *Id*. at 25. For example, when faced with the fact pattern of a robbery in a hotel restroom, Sloan suggests the search terms hotel, guest, robber, Illinois, broken wrist, and restroom, in addition to the internally contradictory terms strict liability, assumption of the risk, and contributory negligence.
for legal principles and rules. Instead, instructors have bowed to their students’ predisposition to focus on words and terms. The internet and online databases offer legal researchers a wealth of broad-ranging information at the click of a button. Now, more than ever, legal research has become a multi-disciplinary art. Full-text databases can search newspapers, medical journals, and practitioner’s guides as readily as cases and statutes. Keyword searches turn up unpublished cases and case briefs as well as materials with legal authority. The content returned by a search typically lacks structure or hierarchy; users can access bits of information, but have no way of placing those bits in context with one another. As a result, there is a fear that inexperienced researchers (such as law students) will use their full-text search results to develop and invent legal principles rather than learn and apply actual legal rules and principles. These user-built principles may have no relation to the actual state of the law and often disregard the greater context in which legal terminology and jargon are used. As a result, legal principles themselves became diluted, less authoritative. As Bintliff states, “to accomplish good legal research and to communicate the results of that research, we need shared context, not individually created contexts.”

Four Goals for Future Legal Research Instruction

In Bintliff’s opinion, the era of case digests has diminished if not ended. Given the paradigm shift that has already taken place, it would be impossible to eschew full-text searching even if that were a desirable outcome. Bintliff argues that we need to replace digests --- and the shared

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83 Bintliff, Context and Legal Research, supra note 5, at 259.

84 Related to this idea is one put forward by Judge Pierre Leval in a broader article regarding court opinions and dicta. He writes:

Determining whether a statement of law is a holding or dictum can be a time-consuming task. You must read the full opinion, understand what were the facts, what question was in dispute, how the court resolved it, and what role the proposition played in justifying the judgment. Far easier to have the magic carpet of computer research whisk you straight to the pertinent sentence of the prior opinion and to write, “In such and such a case, the court held ....”


85 Bintliff, Context and Legal Research, supra note 5, at 262.

86 Id. at 264.
structure and context they granted us --- with something entirely new and broader in scope.\textsuperscript{87} However, I disagree. Rather than replace digests, we need to change how we think about digests.

I see four goals to be implemented in future legal research instruction which were formerly served by instruction focusing on the case digest system. First, several commentators have argued that the West key number digest system created a framework or context for the law. In the wake of full-text searching, however, legal research instructors have moved away from teaching students about case digests --- and hence about that underlying framework --- at all. This is a shortsighted approach to take. The legal research instruction community should not simply substitute full-text searching for case digests in the curriculum. If there is some way in which to artificially create shared context within the legal community, law libraries and law schools will be key in bringing it about. After all, they will become the only touchstones that all lawyers have in common. We need to continue to inculcate future lawyers with some concept of law as a whole; a framework which provides context and shared vocabulary is necessary.

Second, merely exposing law students to multiple research tools is not enough; we need to give them the training necessary to be proficient in using those tools. Peoples’s 2005 case study was a good attempt to evaluate competing tools in a quantifiable manner. However, I would challenge his use of third-year and fourth-year students as an inappropriate group on which to test these types of hypotheses. After two to three years of law school these students have already had some exposure to and experience using either Lexis or Westlaw. A researcher’s efficiency and effectiveness in using a tool is largely determined by their familiarity with use of that tool.\textsuperscript{88} In today’s age of computer search engines, it is not surprising that law students find conducting legal research with print materials to have a steeper learning curve. If the students have not received commensurate levels of training in using print research materials (of any kind, not just case digests), then they are predisposed to the use of electronic research tools before the study even begins. It does not appear that Peoples made any attempt to control for this variable.

\textsuperscript{87} Id. at 264-265.

\textsuperscript{88} For a broader discussion of this concept, see Hazelton, supra note 22, at 234-236. See also HENRY H. PERRITT, JR., HOW TO PRACTICE LAW WITH COMPUTERS 284-306 (1988).
Third, we need to return to a pattern of cyclical legal research wherein a researcher constantly re-evaluates their own findings and conclusions. One consequence of full-text searching is that it provides only positive, not negative, results to a query. Consequently, those results are more difficult to evaluate. “Law students no longer engage in the cyclical research of old, finding and refining principles with repeated searches. One search is usually enough.” 89 Peoples advocates that law students should be encouraged to supplement their full-text searching habits with treatises, hornbooks, and nutshells so that they can gain an understanding of the “big picture” formerly provided by case digests. 90 However, this is insufficient. Legal research instructors also need to make the shortcomings of full-text searching clear to their students. 91 A generation that relies on Google has inveterate faith in the accuracy of computer search results. How many of the questions answered incorrectly in Peoples’s study using full-text searching and KeySearch were missed because the students arrived at a semi-plausible answer too soon? We need to teach law students to challenge the accuracy of results garnered via full-text searching, just as they would when using any other research tool.

Finally, legal research instructors must not forget that while full-text searching is a valuable research tool, it is not the best tool in all circumstances. As discussed supra, there are several times when even the most well-crafted search query will return over-inclusive or under-inclusive results. At times, the nature of case digests --- wherein a human indexer has identified and highlighted a specific legal concept --- can be a benefit which saves the researcher a great deal of time. Researchers need to be able to evaluate the question to be solved and the research tool for which it is best suited. In order to do so, law students must at a minimum be aware of the structure and design of various legal research tools so that they are able to evaluate the quality and arrangement of the information they provide.

Legal research instruction does not receive enough time or attention in our law schools as of late. 92 Surveys answered by practitioners deride law school graduates’ skills in legal research, but this has had little

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89 Bintliff, Context and Legal Research, supra note 5, at 260.
90 Peoples, supra note 56, at 678.
91 Another instruction goal advocated by Peoples. Id. at 678-679.
effect on law school curriculum. However, focused studies which produce quantitative results measuring students’ legal research skills will hopefully draw greater attention to this problem. With the above four goals in mind, we need to devise a new, well-balanced method of legal research instruction that has a hope of being adopted by law schools and by the current generation of law students. To this end, we should begin by conducting a number of further studies to compare research tools and to analyze user preferences. The results of these studies would be valuable, not only to confirm young lawyers’ choice of research tools and their perceived efficacy, but to help determine ways in which legal research instruction may be improved.

I propose that the next user study should focus on first-year law students. Since they will not have received any prior legal research instruction, such students are the closest we will be able to get to a tabula rasa. An ideal method of testing would be to divide an incoming law school class into three groups and spend the first semester focusing on differing methods of case law research. The first group’s research training would include an emphasis on case digests, both print and electronic. The second group’s research training would focus on full-text searching in case law databases. The third group’s research training would include both methods used in conjunction, with the instructor making a point of the shortcomings of each research method. All three groups would receive equal exposure to secondary source material and be encouraged to familiarize themselves with new areas of law using these materials at the outset of the research process.

Throughout the semester, students in all three groups should be drilled frequently so that they have a high level of familiarity with the research tools in question. At the end of the semester, the students should be tested with a wide range of fact patterns and legal queries. Unlike Peoples’s study, not all questions should be resolved with a single “right answer.” Instead, qualitative as well as quantitative data should be sought. Students should be required to note the amount of time spent on each question and relate their thinking process to some extent. Accuracy

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93 See id. at 399-400.

94 Peoples’s results suggest that current law students feel more comfortable using electronic resources as opposed to print resources. Therefore, future studies should compare the use of the West key number digest system on Westlaw to full-text searching.

95 In Peoples’s study, each question posed was designed to be answered with a specific case. Students were provided with jurisdictional clues to help lead them to the correct answer.
of answers in addition to speed should be emphasized. Assuming that one semester is sufficient time for the students to gain proficiency with the tools, these study results will provide an excellent basis for further discussion about the nature of legal research instruction.

Regardless of whether moving from print case digests to full-text searching was good in the long-term for the legal profession, trying to arrest the trend now would be like attempting to hold back the tide. Instead, the question we should be focusing on is whether the legal research training currently provided by law schools is comprehensive enough to help law students become good lawyers. If not, what should law libraries and legal research instructors be doing to supplement the curriculum? The four goals outlined above --- the underlying framework of law, familiarity with multiple research tools, challenging the accuracy of results, and evaluating tools for different circumstances --- are all valuable components of a lawyer's toolkit. By not teaching future lawyers these skills, how are we handicapping them? This is the discussion we should be having.