Shortcomings of Technology

The Corruption of Legal Research

by Scott P. Stolley

> A lawyer without books would be like a workman without tools.
>
> —Thomas Jefferson

I have this dream—a nightmare really—like one of those dreams where you're trapped in an embarrassing or compromising position. In this dream, I walk into my law firm's library, and the shelves and books are gone. Instead, I see rows of keyboards and gleaming cathode ray tubes. The computers have staged a *coup d'etat*.

The Genesis

The young associates in my firm provide the genesis for this dream. They arrive from law school, factory-fresh, eager to work, and we immediately assign them research projects, because new lawyers (understandably) aren't qualified to do much else. Inevitably, the first thing they want to know is how to access our computer system. Forget the books. Keyboarding—like snowboarding—is *the* thing to do among the younger generation.

Keyboarding is so prevalent that our library is nearly always empty. When I am researching in the library, I feel as lonely as the Maytag repairman. It's as though our library has become a sort of chapel—a reverential place for dust to gather. The real action is on some motherboard deep in the bowels of the firm.

To combat this keyboarding epidemic, I have learned to detour new associates away from the keyboard and to the bookshelves. On my projects, I usually ask that they go to the books first and to the computer only secondarily. Unfortunately, I often find that this detour doesn't produce the desired result.

You see, I have found that our computer-educated law graduates generally lack basic research skills. In their computer dependence, many of them are curiously unable to find law that I know is in the books. They have been seduced into a computer mindset, without learning either basic legal research skills or the limitations of computerized legal research.

An example is a recent incident in which I expressed my surprise to an associate who told me that she had not found a case supporting a legal proposition that I wanted to assert. In response to my surprise, she said that she would "broaden" her search. This told me all that I needed to know—she had relied solely on the computer.

Research Modes

I graduated from law school in 1981, when computerized legal research was in its infancy. Consequently, I learned traditional research skills, which I honed and polished through various clerkships and the early years of my law practice. Now, as a full-time appellate specialist, I have come to appreciate that the law library is the sun around which my practice revolves. When it comes to legal research, the gravitational pull of the library dominates.

But there are different ways to be dependent on the law library. Bryan Garner has described that brief-writers tend to follow one of two modes—what he calls the research mode and the intuitive mode. *See* Garner, *The Winning Brief* 25 (1999). Most lawyers use the research mode, where you research first and write later. As Garner describes it, the intuitive mode works in reverse:

> Some excellent brief-writers, though, work in the intuitive mode. They've worked in law for many years, typically, and know its contours pretty well. They are capable of organizing and even drafting a brief without any prior research, confident that there are cases in the books to support what they're saying. If you work in this mode, you'll conceptualize the brief and then write it, and you'll find the cases later—often tweaking what you've said about the law depending on what you find in the cases.

Id.; *see also* Posner, "How I Write," 4 *Scribes J. of Legal Writing* 45, 46–47 (1993) (describing the author's method for writing judicial opinions, which largely follows the intuitive mode).

I tend to combine the two modes. I use the research mode to find the broad outlines if the topic is unfamiliar to me and the intuitive mode to fill in the details or the subsidiary arguments. If, however, I am familiar with the topic, I work more in the intuitive mode. Either way, a first draft of one of my briefs will always lack some of the citations that I need.

Often, I'll ask an associate to find cases to support those legal propositions that lack citations in my draft brief. In every instance, I'm confident that a case is out there, or else I wouldn't have included the proposition in my draft. Having read thousands of pages of cases, headnotes, digests, annotations, treatises, hornbooks, legal encyclopedias, legal dictionaries, law-review articles, and CLE papers in nearly 22 years of law practice, I know the "contours" of the law, as Garner would say. Robert T. Sloan put it even more pointedly: "I have learned from experience that no matter how strange and fantastic is my own notion of the law, it is

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safe to assume that somewhere in the reports there will be a decision that will support it." *See* Shapiro, *The Oxford Dictionary of American Legal Quotations*, at 288 (1993).

A Reminder

Several years ago, I allowed an exception to my general policy against computer research, and I was rewarded with a reminder about why I have that general policy. I had asked a new associate to find cases to support two propositions that I was asserting in a draft brief. The first proposition had to do with late-filed summary judgment evidence. At the summary judgment hearing, plaintiffs' counsel had objected to some evidence that my colleague had filed the day before, and the trial judge ruled that he would disregard all late-filed evidence. Yet on appeal, plaintiffs' counsel cited to some evidence that he had filed after the hearing. I wanted a case stating that plaintiffs' counsel could not get our late-filed evidence stricken and then blithely assume that *his* late-filed evidence was part of the summary judgment record.

My computer-dependent associate reported that she could not find a case. It seemed obvious to me that some case would support my argument that the plaintiffs' lawyer could not succeed with his tactic. So I went to the books, and found a suitable case in about 30 minutes. Specifically, I found a case stating that a "party cannot complain on appeal of action which he induced or allowed." *Dallas County v. Sweitzer*, 881 S.W.2d 757, 770 (Tex. App.—Dallas 1994). The point is that plaintiffs' counsel could not induce a ruling that the trial court would disregard *all* late-filed evidence, and then act as if he is exempt from the ruling he induced.

When I showed the case to my associate, she expressed shock: "How did you find that? That's crazy—to find that one sentence in the sea of cases." You would have thought that I was a sorcerer.

The second proposition that I asked my associate to research had to do with nondelegable duties. In this appeal, the plaintiffs complained that our client—a hospital—did not obtain proper informed consent for surgery. But Texas courts have held that the duty to obtain informed consent is the doctor's nondelegable duty. I wanted a case stating that our hospital could not be liable, because only the party owing the nondelegable duty can be liable for breach of that duty.

Again, my associate reported that she could find nothing. I went to the library, pulled a treatise off of the shelf, and in about 20 minutes found something close to what I wanted. Citing the case I found, I revised my brief to say: "When a duty is nondelegable, the party owing the duty cannot pass the liability to another." *MBank El Paso, N.A. v. Sanchez*, 836 S.W.2d 151, 153 (Tex. 1992).

The Shortcomings

I know that it is politically incorrect to criticize high technology, but the experience described above demonstrates at least two shortcomings of computerized legal research. First, the computer is ill-suited for finding concepts. It is great for finding discrete words or specific cases, but that's just data collection. The computer simply looks for certain combinations of zeros and ones. The law, however, is not "a series of calculating machines where definitions and answers come tumbling out when the right levers are pushed." William O. Douglas, quoted in *The Oxford Dictionary of Legal Quotations,* at 240. Law is concept-oriented, and concepts are best found in sources that are categorized by concept, such as digests.

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As Learned Hand said, "Words are not pebbles in alien juxtaposition." *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941). By that, I think he meant, in part, that word choice is paramount in communicating concepts. But when you ask the computer to find a certain combination of zeros and ones, it will often produce words in alien juxtaposition—that is, words that don't express the concept you are seeking. In law, concept is the whole ball game, but the computer can't tell a concept from a megabyte.

The second shortcoming is that computers can't think in analogies. I have found that if what I originally wanted to say isn't said exactly that way in any case, I can usually find an analogous concept that fits my need. In its search for zeros and ones, the computer won't uncover the link between analogous concepts. It takes a thinking lawyer to do that. As Frederick Wiener said: "The use of apt analogies… is the mark of a really good lawyer. Any clerk [or computer] can look up cases… but it takes an active, a trained, and above all a resourceful legal mind to search for and find persuasive analogies." *Briefing and Arguing Federal Appeals,* at 149 (1961).

Finding Haystacks

In their computer dependence, our new law graduates have difficulty with concepts and analogies. Unfortunately, they are often tied to the literalness of computer-produced research. And this trait is not peculiar to the associate in my story. I have had other computer-dependent associates tell me that they can't find a case that says something I know is out there. Some of my partners have had the same experience, and Cleveland lawyer Mark Herrmann has even written about it. He advises new associates that if they begin their research on the computer and report that they can't find anything, he will catch them by finding a case through traditional methods. *See* Mark Herrmann, "From the Partner," *Litigation,* at 8, 64 (Fall 1998) ("Most new lawyers begin their legal research by turning on a computer. This is almost inevitably wrong.").

Herrmann also aptly pinpoints why computerized legal research is a hindrance to new lawyers. It's because "you cannot find the needle without first finding the haystack." *Id.* To find the right haystack, you have to go to the books, and to learn proper use of the books, you must read lots of them. You have to read enough to learn the contours of the law. You won't get that kind of experience—you won't develop the necessary base of knowledge—sitting at a computer screen. If you learn only what your computer searches reveal, you will be overwhelmed by the number of haystacks. And traditional researchers will seem like magicians when they find law that you never dreamed existed.

The Seduction

I find fewer and fewer young lawyers who have any training in book research—let alone adequate training. So how did our new lawyers become so ill-advisedly computer dependent? It obviously starts in law school, where Westlaw, LEXIS, and other vendors give them free computer time. They are seduced, much like our children are seduced by cereal and toy commercials during Saturday morning cartoons. They're told that it's easier and faster to use the

computer. Being innocent babes, they don't know any better. And what they're told is validated by the ubiquitous assumption that high technology is our savior. It's further validated when they attend CLE courses, all of which now seem to have an obligatory presentation on technology.

Law schools, law librarians (both at law schools and in law firms), and law firm administrators also promote the seduction. It reduces book-purchase budgets and saves valuable shelf space—and hence cost—if they can shift information to the computer. It's also easier to teach computerized methods than traditional research methods. Even better, Westlaw and other vendors will send representatives to do the teaching. At my firm, these vendors come once a week to offer instruction and free computer time. So law students become subtly addicted to computerized legal research.

It's only human nature to seek the easy way out, and that's what the computer purports to offer. But easier doesn't necessarily mean more effective. Moreover, that supposed ease comes at a price. Most computer services are quite pricey, and clients sometimes balk at the cost. At my firm, we have written off a lot of computer charges over the years.

Textbook Heresy

Textbooks promote the seduction too. One textbook claims that "[c]omputer assisted legal research is not so different from traditional research." Kunz, *The Process of Legal Research*, at 207 (1986). At best, this statement is only half correct. Like traditional research methods, computerized legal research requires you to engage in "anticipatory" thinking. *See* Wren & Wren, *The Legal Research Manual*, at 135 & n.50 (2d ed. 1986).

Using traditional methods, you must anticipate the classifications that digesters have selected for certain concepts. While using the computer, you must anticipate the words that judges have selected to express those same concepts. *See id.*; Kunz, *The Process of Legal Research*, at 207–08. Beyond that, there is little similarity between computer research and traditional research.

Another textbook claims that computers make legal research faster. As the Wrens state: "The computer simply speeds up the process," and "the computer can't make you smarter, just faster." *The Legal Research Manual*, at 133, 135. That statement, too, is only partially true. The computer is faster for some tasks—like when you need to Shepardize or update case law, or when you have a discrete search for a certain word or phrase, or when you want to find opinions written by a particular judge. But for finding cases expressing the right concept—especially subtle concepts that don't lend themselves to easy word searches—book research is faster. That, at least, has been my experience.

I've sometimes thought about holding a contest—sort of a jurisprudential scavenger hunt—to see who can most quickly find a case standing for a given proposition. Will it be me through traditional book research, or a new associate through the computer? I think about the old adage that mature cunning will overcome youthful energy.

A Caution

Even when the computer finds the right case, a prudent lawyer must exercise caution—for several reasons. First, unless you use Westlaw's .pdf option for printing cases, computer-printed opinions are much harder to read than opinion printed in a West reporter. Although the computer services have improved their typography, the bound reporters remain more reader-friendly. More annoying, a computer-printed case is never paginated the same as in the reporter, requiring a frustrating hunt through the computer printout for the actual page number. The reporters are also clearer about disclosing when the court is quoting from another source. Computer-printed cases often lack the proper quotation marks or indentations that set quotations apart from the text. Even worse, the computer services sometimes do not print the italics that appear in reported opinions. Also, the computer services have never developed the knack for putting footnotes in a readable format.

In short, except for .pdf-formatted cases, computer-printed cases don't track the reported opinions. This can be more than a little aggravating to a lawyer who is intent on accuracy.

Regarding accuracy, I am reminded of a story attributed to U.S. Supreme Court Justice Robert H. Jackson. As a young lawyer, he handed an upstate New York judge a case out of the advance sheets. The judge handed it back in disgust, saying "I don't take no law from no magazines." Shapiro, *The Oxford Dictionary of Legal Quotations*, at 288. When an associate brings me a computer-printed case, I'm tempted to say, "I don't take no law from no computer." It seems to me that the reporters should remain the most authoritative source for caselaw.

The Wrong Focus

By this point, I may have left the impression that I'm a Luddite. But I'm not opposed to technology. I'm just concerned that the educational focus on technology is eroding lawyers' research skills. Our computer-dependent young lawyers aren't learning to find cases through the concepts inherent in the key number system. They're not learning how to find the ALR annotation or the law review article that shortcuts their research. They're not learning how to mine *Words and Phrases* for helpful caselaw. They don't find the nuggets buried in encyclopedias like *C.J.S.* or *Am. Jur.* or in dictionaries like *Black's*. They don't think to look at annotations to statutes and rules. They don't find the insights available in fine treatises like Wright & Miller on federal practice. They give up too easily if the computer doesn't spit out an immediate answer.

They also don't experience the lively banter of lawyers who are hunkered down in the library, quizzing each other as they tease the law out of the books. Perhaps worst of all, they miss the musty smell of history wafting from a 100-year-old West Reporter. Staring at a sterile computer screen, they don't get a sense of the law's development—the sense that the law "stands as a monument slowly raised, like a coral reef, from the minute accretions of past individuals, of whom each built upon the relics which his predecessors left." Learned Hand, *quoted in* Frost-Knappman & Shrager, *The Quotable Lawyer,* at 55 (rev. ed. 1998). Instead, when I walk past associate offices, they appear to be in a trance as they stare at their computer screens.

Perhaps my fears are overblown—born out of my lack of technical training. But I do know this: Anglo-American law has a long, deep tradition that is worth preserving. As Oliver Wendell Holmes, Jr. remarked: "The law, wherein, as in a magic mirror, we see reflected, not only our own lives, but the lives of all men that have been! When I think on this majestic theme, my eyes dazzle." Shapiro, *The Oxford Dictionary of Legal Quotations*, at 243.

In the rush to embrace technology, our society is shedding tradition. Although there is no avoiding that some traditions will die as technology changes how we practice law, I

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have doubts about whether all of the changes will be for the better.

Corruption Completed

So, will my nightmare come true? When this new century ends, will we still have law books? Will we be like Thomas Jefferson's hypothetical lawyer—bereft of the tools of our trade? Will there be any lawyers who can still write in the intuitive mode? Or will lawyers be shackled to computers—dependent on what the computers find for them rather than what they know from years of book learning? If it comes to that, the corruption will be complete, and the law—I fear—will be impoverished. FD

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ject of distortion by the plaintiffs. Where the state legislature has established statutory fines for comparable conduct, defendants should remind courts that the purpose of this guidepost is to "accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue." *Gore*, 517 U.S. at 583. Indeed, this factor is a recognition by the Supreme Court that legislatures are in an inherently better position than courts or juries to make the broad policy judgments about the desirable range of punishment for particular misconduct. See also *McCleskey v. Kemp*, 481 U.S. 279, 300 (1987) (noting that first among the "objective indicia that reflect the public attitude toward a given sanction… are the decisions of state legislatures" (quotations omitted)).

Conclusion

State Farm gives defendants powerful new arguments for challenging arbitrary and excessive punitive damage awards on appeal. The decision does not resolve every issue, and plaintiffs' lawyers are parsing every word of the decision looking for loopholes. Nonetheless, the Supreme Court has established clear limits and principles which, if applied correctly, should go a long way towards eliminating the kind of outlandish verdicts that can shake the public's faith in the civil justice system. FD