

Boston College Law School
Digital Commons @ Boston College Law School

Boston College Law School Faculty Papers

6-1-2005

Elevating Form above Substance

Joan Shear

Boston College Law Library, joan.shear@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/lspf>

 Part of the [Legal Education Commons](#), [Legal Writing and Research Commons](#), and the [Library and Information Science Commons](#)

Recommended Citation

Joan Shear. "Elevating Form above Substance." *AALL Spectrum* 9, no.8 (2005): 10-15.

This Article is brought to you for free and open access by Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law School Faculty Papers by an authorized administrator of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

Elevating Form above Substance

A reply to Jim Milles and his assumptions about approaches to teaching legal research



I agree with the assertion that Jim Milles makes in his February 2005 *AALL Spectrum* article, “Out of the Jungle: How to get beyond the digital v. print debate—and deal with the fact that digital won.” Online versions have won the research war. But that’s where we part company. Let’s look at some of the assumptions that Milles presumes the rest of us have made.

Assumption One: Most Law Librarians Retain a Strong Preference for Book Research

The fact that most law librarians believe that print is better for some types of research does not equal a “preference for books.” Just like our students, we need a compelling reason to get out of our chairs and venture into the stacks to quickly and easily find a bit of information that we are having

“Even when told that the specific piece of information they are looking for is easier to find in print, many students today refuse to believe that it isn’t all out there electronically.”

trouble locating electronically. We enjoy the flexibility and precision available from online resources. But we also have the experience to know when online searching will not be as effective as consulting a print source. That’s not a preference for book research; it is an ability to research efficiently.

Milles writes, “My own discussions with current law students suggest that they are much more comfortable than previous generations with reading and using online texts.” But there is a great deal of difference between reading and using online texts and doing legal research. The fact that the current generation has an intimate familiarity with digital information does not make them immune from poor searches. Familiarity with hyperlinks doesn’t mean you know how to organize information or get to where you need to go without running around in circles. Online databases and search engines are only as smart as the searches they are asked to perform.

Many years ago I had a student who couldn’t wait to tell me how successful her research had been in her first summer job. Whenever faced with a new research

by Joan Shear

challenge she asked herself, where is this indexed? Milles reminds us, “Online sources are increasingly incorporating all the structural elements and tools of print.” Would most current law students even consider using an index database? How many of them will continue to run unsuccessful search after search in a full-text database rather than approach the research problem from a different angle?

Even when told that the specific piece of information they are looking for is easier to find in print, many students today refuse to believe that it isn’t all out there electronically. They continue with the method that fails to get them the results they could easily attain by just getting out of their chairs. How many students have asked you why they can’t find some 1954 law review article on Lexis or Westlaw? Using paper resources when they are the only source of information being sought is not a preference; it is a necessity.

Assumption Two: We Teach Print Sources First because They Were Developed First and We Learned Them First

Milles suggests that it makes as much sense to insist on teaching print research first as to “insist on teaching legal writing by starting with quill pens.” While I wouldn’t insist on that, I might insist that all students know the alphabet and how to read and write before I attempt to teach them legal writing or legal research. I don’t teach print first because it was developed first or because I learned it first. I teach it first because it makes the inherent structure of the information more evident than a searchable full-text database does.

Intimate familiarity with digital information doesn’t necessarily mean familiarity with information that has had a structure applied to it. In my experience, the Google generation by and large doesn’t know about controlled vocabulary, hierarchy of information, or even the difference between a table of contents and an index. Milles writes, “they find print aids, like tables of contents, less intuitive than we do. The benefits of print that seem self-evident to trained law librarians are not so to the coming generation of law students.” My own experience in teaching computer-savvy law students leads me to conclude that the

“print aids” that were necessary to organize print information and the research methods we had to learn in order to get *any* result using print research are still needed in the digital age. We need them to get *meaningful* results from online databases. If structuring information is “less intuitive” to our students, then this concept cries out for more such instruction, not less.

One key to teaching students to perform electronic legal research effectively is to give them a strong foundation in the underlying data and in how to use research tools based on structure. To be taught well, the research process needs to be broken into its component parts. One of those component parts is the data being searched, whether it is searched in its print form or online. It is important to know the structure if one is to search the data effectively. As so many of our databases have print antecedents that affect the way the data is structured, the structure of the data in many of our research tools is much more readily apparent when one uses the print version, rather than the online version.

The concepts can be taught better with strong examples, which are often easier to see in the print examples rather than the electronic searching. The structure of an index—how people (indexers) point to

“ **In my experience, the Google generation by and large doesn’t know about controlled vocabulary, hierarchy of information, or even the difference between a table of contents and an index.** ”

documents they have determined to be about a particular topic with descriptive words (subject headings)—is easy to see in print volumes and almost invisible in electronic databases. We, as information professionals and lawyers, have an

understanding of the structure of legal information behind the online tools that we use; our students do not.

Assumption Three: Legal Research Instruction has Failed because not all Law Students are Skilled Legal Researchers When They Start Their Jobs

One way to address the problem of poor legal researching would be, as Milles suggests, to wait until the second year of law school when they have more exposure to law to teach it. Milles asserts, “It is unreasonable to expect them to make sense of the tools of legal research when they are still trying to learn the difference between statutes and cases.” Maybe we have an unusual situation at Boston College, where criminal law is not a required first-year course, but if it weren’t for our legal reasoning, research, and writing course, our students wouldn’t spend any time their first year trying to learn the difference between statutes and cases.

Most of the first year of law school is spent helping students learn the common law through the interpretation of cases. This study of the general principles of tort law, contracts, and property is primarily conducted without reference to statutes (although some classes refer from time to time to the restatements) and without much concern for questions of jurisdiction and relative weight of authority. This method runs the risk that students may get too set in their ways—confusing the reasoning process itself with the universe of persuasive and binding authority that is used in real-world lawyering. Before students can effectively use the authority they find, they need to understand the concept of authority better.

Milles also suggests moving more legal research instruction to the point of need and passing more of the burden of teaching legal research on to the firm librarians. Embracing the opportunity to teach at the point of need only works when there is a strong foundation of basic understanding. One must learn to read before one learns to read Shakespeare. A law student must understand the basics of our legal system before she can begin to understand and find relevant authority.

(continued on page 14)

“Dear Jim”

Spectrum readers weigh in on the print v. digital debate with their e-mails to Jim Milles

I think your article in *Spectrum* is terrific. It is indeed time to rethink a number of “truisms” at law schools. This article served as the focus of discussion for the first of our library’s monthly staff discussion forums.

—Kenneth J. Hirsh, director of computing services and senior lecturing fellow, Duke University School of Law Library

I really like your *Spectrum* article, and I largely agree with it.

My concern—and perhaps it’s more an archivist one than a librarian or legal educator one—is: what about archival access? Even today we have problems with patrons who want to know what the law was on May 23, 1943 (or your date here). They are completely stymied when confronted with superseded statutes on microfiche. I’m sure there’s no easy answer to this problem (even with the promising point-in-time statute products from Lexis and Westlaw), but it bears keeping in mind. It is at least emblematic of some of the consequences of de-emphasizing print instruction while our historic collections (be they micro format or electronic) are based on print originals.

—Scott Matheson, reference and government documents librarian, Yale Law Library

Excellent article!!! Law librarians today find themselves at an exciting time with the opportunity to be at the forefront of technologically-driven innovations.

—Roy Balleste, associate law library director and adjunct professor of law, Nova Southeastern University Shepard Broad Law Center

I enjoyed your *Spectrum* article immensely. It is so damn honest! I’m linking to it from the University of San Diego Legal Research Center Web log, LRC Orbit, at <http://lrc-orbit.blogspot.com>.

—Brian Williams, reference librarian and foreign/international law specialist, University of San Diego Legal Research Center

Excellent article—thank you! It will be useful not just for law firm and academic librarians but for many of us in small public libraries who have to show our library boards the way.

Now if only we can get the vendors to understand that we need remote access database contracts just as much as the law schools and firms do—then I’ll know that we’ve really made progress.

—Laura Orr, law librarian, Washington County Law Library

interested to know that I strongly disagree with the idea that legal research instruction should focus immediately and heavily on electronic research. I won’t go on at great length, although we can discuss it if you like, but my basic reasons are the following:

1. Basic legal research is more difficult and less efficient electronically. The problem is mainly one of format: there is a huge, and highly important, difference between looking at the portion of a case displayed on a screen and looking at the same case in a book. The book display communicates far more information of the type that is crucial to fast, targeted, and efficient legal research. You can open a case in a book and within seconds discern what the case is about, whether it is relevant to your research, where and in what context any pertinent information appears, and its significance to the overall analysis. That is simply not possible in a screen-by-screen display.

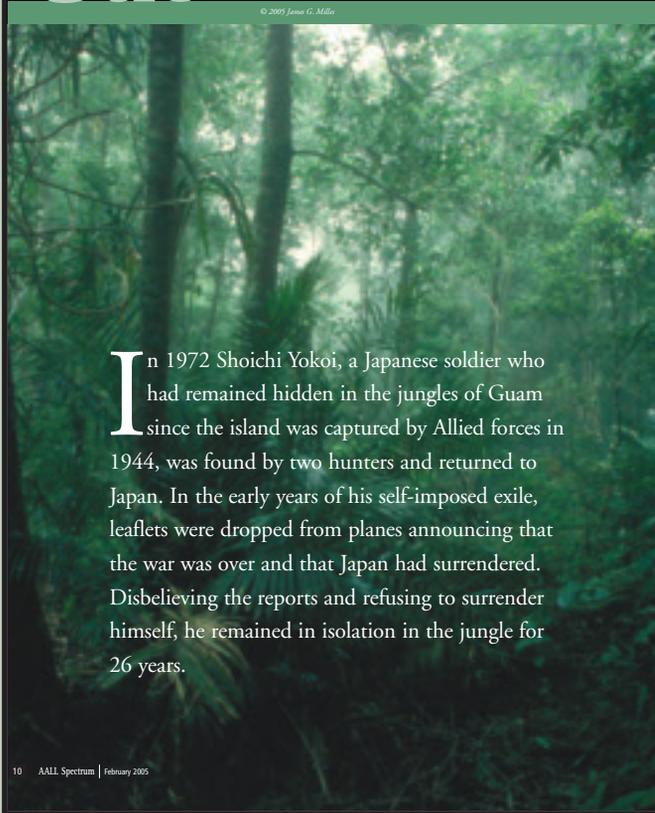
The same is true, in spades, of statutes and constitutions. When you look at a statute in a book, you can immediately discern the hierarchical relation among the provisions and the interrelationships among the various provisions. Screen-by-screen display invites students to think about statutory provisions in isolation from one another, which can be deadly to acquiring a three-dimensional understanding of the statutory scheme. In fact, electronic research is insidious, because it gives the misimpression of having a complete view of the content. Moreover, some of the most useful research resources are not, so far as I know, online. When I was in practice and had a research problem, I would go directly to *U.S. Code Annotated (USCA)*.

By flipping through the annotations, I could, in a matter of seconds, have an extremely good first impression of the lay of the land. And even if and when *USCA* or other annotated sources are put online, they will still suffer from the display/comprehension problems I mentioned above.

I do not think my view is an artifact of having been raised on print and that current law students find electronic approaches more intuitive. I teach litigation practice every year, and I can tell you that my students, who typically resist my exhortations to do paper research, find it

Out of the Jungle

© 2005 James G. Milles



In 1972 Shoichi Yokoi, a Japanese soldier who had remained hidden in the jungles of Guam since the island was captured by Allied forces in 1944, was found by two hunters and returned to Japan. In the early years of his self-imposed exile, leaflets were dropped from planes announcing that the war was over and that Japan had surrendered. Disbelieving the reports and refusing to surrender himself, he remained in isolation in the jungle for 26 years.

10 AALL Spectrum | February 2005

Just finished reading your well-written article, “How to get beyond the digital v. print debate ...” and felt compelled to drop you a note to tell you thanks for saying what had to be said.

—John C. Michaud, reference and faculty services librarian, Thomas M. Cooley Law School Library

Thanks for distributing your piece from the *AALL Spectrum*, which I read with interest. I know this won’t hold much water with a guy who is surgically connected to his palm pilot, but I thought you might be

extremely burdensome to do research that is actually thorough. As a result, they generally do a half-assed job. They are able to find cases, but they don't know how to scour an area of law, and electronic research certainly does nothing to equip them to make conceptual connections between areas that are not already linked for them. In fact, I think electronic research encourages a kind of literal-mindedness and inflexibility that is inimical to really effective advocacy.

In my view, electronic research is good at two points in the process: at the very inception of a project about which one knows nothing, and at the conclusion of one's research, for the purpose of assuring one hasn't overlooked anything. For those purposes, it is an exceptional tool.

2. The other problem with emphasizing electronic research is that we thereby facilitate the goal of the major providers to make our students e-research addicts. Lexis and Westlaw are very expensive in the real world, and many of our graduates will not have the opportunity to spend hours online doing thorough research, even if they know how.

Their firms may not be able to afford the resource, or clients may lack the ability to pay for it. The library, on the other hand, is free.

These students are disserved by a heavy emphasis on electronic methods.

—James A. Gardner, Professor of Law, State University of New York-University at Buffalo School of Law

I wanted to let you know how much I enjoyed your recent article in *AALL Spectrum*. It's great to raise these issues about how we teach legal research. I appreciate your providing an interesting springboard to further discussions on this topic.

—Renee Y. Rastorfer, law librarian-research services, University of Southern California Law Library

Thank you for saying what you did in the *AALL Spectrum* article. I thought you did a great job pointing out the improvements in online systems and calling everyone to wake up and realize the new environment we are in.

Great Job!!

—Kevin Miles, librarian, Fulbright Jaworski



Out of the Jungle ... and into *Duck Soup*

by Michael Ginsborg

In his article, “Out of the Jungle,” James Milles recommends that “[i]n teaching legal research, we ought to favor electronic resources, unless there is demonstrable and significant benefit to using print.” He has three reasons for his proposal. First, “the most heavily used research sources”—primary law materials—“will

be used almost exclusively in electronic format.” Second, the two primary providers, LexisNexis and Westlaw, increasingly offer not only book-based finding aids to online treatises, but also unique research tools. Finally,

current law students, having been raised on “digital information,” will feel more comfortable using online formats.

Milles’ reasons for a war on print, or something like it, remind me of Groucho Marx’s warlike logic in *Duck Soup*. Groucho can’t prevent war with neighboring Sylvania: “We’ve got guns, they’ve got guns, all God’s chillun got guns,” and “I’ve already paid a month’s rent on the battlefield.” Similarly, LexisNexis and Westlaw have armed all law school students. These warriors will naturally prefer to engage their legal research battles online; and we’ve already paid the rent on commercial online services. So we now have no rational choice, according to Milles, but to give online content overriding deference.

Unfortunately, the online rent of commercial services, and the contractual terms of access, often determine whether we have a “demonstrable and significant benefit” to using print—at least whenever we can choose between print and online formats of the same resource. Milles appears to overestimate the cost-effectiveness of commercially online alternatives to print.

Milles might have considered frequently-used authoritative works of secondary law, such as *Nimmer on Copyright*. Depending on a patron’s deadline and objective, I generally find

it’s cheaper to see if my library has the needed volume on the shelf or to find out who else might have it. Why should I instruct a summer associate to use Lexis.com if I find that it’s cheaper and equally suited to the associate’s purpose to take the volume from the shelf? If my employer’s contract with LexisNexis

doesn’t confer a “rental” below the retail price, I might have even more financial incentive—and a duty to my employer—to disarm the summer associate and pursue the print alternative. Finally, for many firm libraries with IP practices, frequent use of *Nimmer* more than justifies the cost of multiple print

subscriptions and the cost of shelf space, even at discounted Lexis.com rates. Other librarians who must borrow a *Nimmer* volume might still find interlibrary loan cheaper than using *Nimmer* on Lexis.com, even if Lexis.com contracts give them access to *Nimmer*.

This example admits of a generalization. Milles’ “Primacy of Print” model imposes a kind of straitjacket on legal research, because legal researchers must choose between one or the other of two primary options—online or print. But shouldn’t students of legal research learn how to use *any* resource or finding aid in the most cost-effective way? Perish the thought, but they may save time to consult a librarian or a colleague. As consumers of what legal publishers sell, they also need a lesson in legal publishing economics. And they should learn the unique virtues and vices of *any* means of legal research.

At any rate, they deserve better from us than to have a dogma reinforced about the primacy of a format in content or technique. If they examined nearly any day of e-mail traffic on the AALL online discussion forum, they might quickly discover that, at least in content, online legal research has limitations.

Michael Ginsborg (mginsborg@hrice.com) is research analyst at Howard Rice Nemerovski Canady Falk and Rabkin in San Francisco.

“ **These warriors will naturally prefer to engage their legal research battles online; and we’ve already paid the rent on commercial online services.** ”

(continued from page 11)

One of my most memorable reference encounters occurred in my first year as a reference librarian. A recent alumna of the school called in with a research problem that at first I didn’t understand, simply because what I thought she was asking showed she had no understanding of what law is or where it came from. At that time I thought it impossible that a graduate of one of the top law schools in the country would have such a complete lack of understanding of what law is, much less where one would find it. She assured me that I understood her question completely. I then proceeded to spend more than an hour on the phone with her discussing the nature and structure of our government, where our laws come from, and how the various types of authority interrelate. Then we discussed the various ways in which she should look to find that authority. This is too much of a burden to put on firm librarians.

By the way, this experience also predates the prevalence of Lexis and Westlaw as the be-all and end-all of legal research. As Lexis and Westlaw get more bells and whistles and more super-search-enhancing functions, it becomes harder to teach students the basics. More and more time is spent trying to peel away some of the system enhancements and value-added features to get down to the basics of good search crafting.

Legal research instructors need to take the opportunity as early and often as possible to go over the basics of Civics 101 and the different types of authority and jurisdictions. The fact that information from a variety of sources is combined in one easy-to-access place sometimes confuses novices about basic differences in the data. I believe removing print legal research materials will exacerbate, not relieve this problem. The research basics that were inherent in the print systems still exist in the electronic systems, but our students need to learn to see these research gems and use them properly.

The research inquiry shouldn’t start with a choice between online or print; it should start with a clear research objective. Only then should the researcher begin asking, where is that data available, what are the various access points, and which one works best for me in my situation. I do teach my first-year students the differences between Boolean and natural language searching and which one works better in different types of research situations. Another important research skill I teach my students is attention to detail.

Searching for missing pocket parts and unshelved *Shepard's* volumes shouldn't be necessary in any research exercise. However, checking to make sure that they have any required pocket parts or pamphlets, or all the volumes of a *Shepard's* set, helps many of them avoid the mistake of assuming anything you find online will be up-to-date. Coverage needs to be checked in online sources as well as in print. Students are often able to see more clearly in print products the need to update subject-organized materials, where the time lag is longer. They can then transfer these skills to other subject-organized materials, such as codes, regardless of format.

The Real Issue

The problem with the way legal research is taught by most law schools today is the elevation of form above substance. Would the Japanese soldier still hidden in the jungle post-World War II be more likely to believe that the war was over if he heard it on the radio, rather than saw it in print? The debate between print v. online completely misses the point. We need to concentrate less on the wrapper and more on the information contained therein.

“ The research inquiry shouldn't start with a choice between online or print; it should start with a clear research objective. ”

Even more so, we need to educate students on the existing systems of organization of information to help people find legal authority that can't be easily retrieved in a word search. Searches are based on concepts and relationships, not vocabulary. The online v. print research war is over, but the battle to create competent researchers out of students with no prior experience with organized information is just beginning. ■

Joan Shear (joan.shear@bc.edu) is legal information librarian and lecturer in law at Boston College Law Library in Newton, Massachusetts.

Defining the Terms of the Debate

by David A. Westbrook

In his article, “Out of the Jungle,” my colleague Jim Milles is characteristically lucid, and his argument is, in my view, correct on its own terms. But I wonder about the terms. Since digital media makes information so available, the traditional problems for law libraries have been somewhat marginalized, if not completely solved.

Law librarians and other researchers worry about storing and then finding information. Students and practicing lawyers worry about missing information that, if found by someone else, will be embarrassing. Search engines work pretty well, however, and are likely to improve. For the retrieval of the sorts of public information on which law libraries have traditionally focused, there is decreasing need to leave one's coffeehouse table. This is not to say that there will be no role for libraries, but instead suggests that the role will change profoundly. And in some ways, the change may make the proposition that “digital won” the battle of the media far less clear.

The salient problems faced by knowledge workers today are what and how to read, not how to find text. As a professor, I find myself doing far less electronic research (much of which I delegate) and more book reading than my work as a student or lawyer required. It is not merely that I am now at leisure to worry more about substance and have less need to be up to the minute.

As Malcolm Gladwell argued a few years back in *The Social Life of Paper*, paper has certain advantages for thinking. Paper offers purchase on what is not yet decided—on thinking in progress. While I work on three separate computers, I am also surrounded by stacks of paper, including many e-mails I've printed out. Most importantly for me, printed materials can be put near other items in some, as yet unclear, relationship (i.e., stacked in heaps on which I work). In contrast, digital media relies on filing, which is a decision that allows forgetting to be reversible, a great thing but hardly active thought.

The organization of thought under conditions of excessive information is a problem not just for individuals, but also for the institutions that concern themselves with ideas—preeminently the

university. The modern university is itself a way of organizing thought that grew out of the 19th century German ideal of the university based on cumulative objective research (*Forschung*) deployed across contiguous disciplines, which would organize all knowledge into a map of the world. Knowledge would be indexed in a library, and the librarian would know how to retrieve the knowledge.

With the university's social success, however, the supply of texts has grown, the disciplines have fragmented, students have needed accreditation, technology has needed funding and markets, and various cultural authorities have waned. Due to these and other developments, the university has come to seem rather more bureaucratic than true. It has become a way of organizing professional life and so a type of social knowledge, but hardly the true map. Now we all know how to retrieve a surfeit of information and wonder if it means anything.

I am not sure what the changing status—I am tempted to say secularization—of the university means for its libraries, including law libraries. Surely storage and retrieval of information cannot serve much longer as a *raison d'être*. However, two kinds of institutions seem to suggest directions that the university library might take. The first is the archive—which stores information so particular as to be difficult to retrieve, indeed, so particular as to resist digitization. A second possible model would be the museum, which is a forum for deciding what is significant and, more particularly, showcases items that have been decided to be of talismanic power.

Sometimes it is good to leave the screen to be near a worthy original. And while I see no reason to believe that future law libraries will consist solely of collectible books, we might begin to think of the library collection in more qualitative fashion and as spaces that facilitate reading, or more broadly, textual collegialities.

David A. Westbrook (dwestbro@buffalo.edu) is professor of law at University at Buffalo Law School, State University of New York, and author of City of Gold: An Apology for Global Capitalism in a Time of Discontent.