

Ring Dang Doo

Bob Berring

THE INEFFABLE Grant Gilmore once said, then wrote, “There are few things more fascinating in our jurisprudence than the organization of what comes, almost immediately, to be perceived as a new ‘field’ of law. This phenomenon takes place in response to dramatic shifts in the technological, political and cultural organization of our society.” This gemlike flame of insight still holds true. We see the whole field of intellectual property refashioning itself before us. Legal doctrines that grew from roots buried in the royal control of information are proving ill-fitted to channel the energy of borderless cybernetic entrepreneurs. How surprised can we be that the law schools are awash in courses about intellectual property? Or that we are having trouble deciding if we are talking about property or contract or something special when we talk about intellectual rights? Once again Gilmore was way ahead of us. Our problems outrun our categories.

But there are bigger stews brewing on the

legal stove. The very skeleton of the law is breaking down. It is not just a matter of concepts being reformed, it is a matter of the superstructure upon which the legal concepts are arrayed imploding. I am speaking of books in general and the West National Reporter and American Digest System in particular.

As anyone who has been paying attention has noted, the West Publishing Company was sold last year for over \$3,000,000,000 to the Thomson folks. (That is the correct number of zeros, we are talking billions.) This was not just the transfer of one publishing company’s assets to another, it was the marker for the end of an era. The West Publishing Company had occupied a unique position in American law. West stood as steward over legal information because it controlled the flow of caselaw, that brickyard from which all old theory was built. West published cases, abstracted each point of law in each case by creating headnotes, then classified the headnotes into a scheme of Topics and Key Numbers. Over the 110 years of the West era, the West System became so em-

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bedded in legal thought that it became invisible. We thought in West terms, we discussed law in West categories. As my good friend Dan Dabney once put it, West's Topics and Key Numbers provided a universe of "thinkable thoughts." When a new problem, e.g. sales of organs, came up, it had to fit into the old categories. Everything had a place, a predetermined place, and that was where it fit. Over time a new area might accumulate so much caselaw that West would rethink. They might create a new Topic, or revise an old one, but this change came very slowly, and the glacial pace fit the law's inherent conservatism quite well. Without realizing it, we all depended on West for giving us ways to think coherently about the hundreds of thousands of cases that were stuffed into the reporters.

One byproduct of this was that training in legal research has been done through osmosis. While a few schools have taken legal research training seriously, the historical record is a grim one. The rule of thumb is that the better the law school is, the worse its legal research training will be. The literature is full of articles bemoaning this situation, but precious little was ever done about it. In many schools second and third year students, with little grasp of what they were doing, trained first year law students. Many schools hired recent graduates to teach research and writing courses, without ever testing whether such folks had any research skills at all. But it did not matter so much. The whole research enterprise was built around cases and case finding, and all of law school was built around reading and using cases. The whole thing was wrapped in the West system, with Shepard's citators providing the final piece. One learned the basics of legal research by being in law school, like learning a language by living in a country. This was a crude method, but research was one integrated system, built around West's products, and the Shepard's Citators.

Of course it did not have to be like this. We

could have dealt with a much smaller base of cases if there were some filter out there. If we had trusted someone to pick the important cases, or if judges published only the valuable decisions, but that horse left the barn many decades ago. Essentially, legal information is a paranoid's enterprise. We want to see it all printed. We want to see it all run through the citators. We want to sift and sort ourselves. The joke is that we were playing on a game board designed by West, playing within rules that were written in St. Paul.

This only worked because the West Publishing Company operated in a very special fashion. West was like a band of warrior monks, totally devoted to their mission. They spared no effort to produce a true and perfect product, they cared deeply about how people perceived the quality of their product. They saw no humor in what they did and they could be tough customers if someone threatened the holy doctrine. Like religious bands everywhere they were intolerant of criticism and would gladly pummel heretics, let alone impostors. But within their own code they were very true. It was a blessed consistency.

And an incredible commitment to old ways ran very deep. I was flabbergasted to discover in the 1980s that each headnote in each case was reviewed by one of twelve people. Twelve people! Human review at this level of volume (hundreds of thousands of headnotes) was amazing. And the folks who did the review were dead serious about their mission. They knew that what they were doing was important, and they knew that most users of legal information did not understand the deep structure of the system. They were the priests.

Like many religious bands, they also grew very rich. West was privately held by senior management. This allowed for decisions to be made on bases that might have been hard sells for stockholders, and it also allowed for a certain secrecy. We used to play games guessing who had "shares" and who did not. It was only

when the company was sold that the names rolled out. Stock was given as a reward for performance and for loyalty. The one thing being certain is that a lot of money was made.

But that is all over now. West has been sold to an entity whose stock is publicly traded. The old monks are to a man (and they were all men) gone. The familiar faces that those of us in the business recognized as the West leaders have all retired, sacks of cash in hand. And they went at just the right time because the old system is breaking down.

Publishing cases is now easy. They are loaded by more and more courts directly onto the internet. Speed of distribution is a problem that my 13-year-old son can solve. The value of editing, still powerful in my mind, has been set aside in the rush of enthusiasm for homemade delivery systems and snazzy search engines. Probably more crucial, there is now ten years worth of law students who have graduated with little knowledge of the Topics and Key Numbers as part of their universe, but with an irresistible desire to search with Boolean connectors, or even natural language style engines, on-line. Since in many firms it is the young lawyers who do the research, much of the research is operating with a conceptual system that is vastly different than the that of their older colleagues. The new researcher does not think in subject categories with sharply delineated subdivisions like those in the Key Number system, instead they think in terms of key words and connectors.

This change is hard to perceive for the folks involved within it. One sees the world through one's own lens, and it seems natural and inevitable, not contrived. Those who learned to conceptualize in the old West system did not think of themselves as following a particular style, they thought that they were doing what was natural. As Garrison Keillor once said when queried as to how it must have been fun to grow up amidst the weirdness of the 1950s, "We didn't realize it was the 1950s, we just

thought we were growing up." Just so with the new generation of law students, most of whom see the old systems of classification as clunky at best and bizarre at worst. They see no value in dusty old categories. Their seniors see no value in atomized word searching.

But the world belongs to the young. Two years ago I was doing a workshop on how to carry out effective legal research at a large Washington law firm. The workshop was on a Saturday, and after the partner in charge of training introduced me, he left. I was thus in a room with two dozen first and second year associates. When we reached the first break and I called for questions one associate asked the following: "It's just us here. I need to know what to do. They want us to use old-fashioned research methods here. It isn't an issue of cost, the law firm has a flat rate contract with WEST-LAW. But they think that computer research is a gimmick or a toy. I can show them that I can do better research online, but they will not listen ... what can I do?" I have heard this before and I have my answer ready, "You must wait for them to die." At the time I believed that this answer, while unsatisfying, was true. Folks who believe that one type of information is legitimate will want that kind of information. If they run the organization, they can demand what they wish. Today I am not so sure of that answer.

The decision on what information to use, on what information to trust, may be taken out of our hands. The two major publishers left standing, Thomson (owners of West, Lawyer's Co-op, Bacroft-Whitney, Clark Boardman and many others) and Reed (owner of LEXIS, Shepard's, Michie and many others) are busily moving to electronic formats. This may mean that the paper will simply become too expensive, or too idiosyncratic, in the short term. You will still read paper, but it will be printed out locally, not sent from a publisher. This will all happen quickly.

New tools are emerging. In the summer of

1997 West rolled out Key Cite, an entirely new research tool that has enormous power. The real problem is, that to use it you have to know what you are doing. My guess is that the likelihood that experienced lawyers will take the trouble to master this system, or indeed could do so if they tried, is equal to my chance of playing small forward for the Golden State Warriors next year. They have never thought about research systematically at all. But the courts may make them. Reality may force them. Or they can make a young associate or research assistant do the research for them. Key Cite is the first step on the road to the future, and for some it will be steep.

On a theoretical level it will be challenging as well. Lawyers may have to think about how they think, question assumptions that they have made for years. Subjects will need redefinition, which is why the intellectual property example from the first paragraph is so pleasing. But forms of information will need redefining too. Administrative rules, legislative enactments, municipal ordinances will all be just as accessible as cases. Forms and practice manuals will be hyperlinked to statutes and may look just as authoritative. Students al-

ready move between categories as never before. It used to be that one end of the library held cases, another held statutes, and law reviews were upstairs, now they are all interchangeable. Some serious work has to be done here, and I am not confident that our leading players, many of them wedded to the old ways of thinking and products of the old universe, can do it for us. Don't look to the law schools for help, legal research training has always lived well off main street, and the tenure track is clogged with many from the old world of information. Though I would love to see it be otherwise, my guess is that the vendors will supply the resources and impetus for the vast majority of the training that gets done. That is what happened with LEXIS and WESTLAW, and that is what will happen here. But this time, the change is even bigger. There will be no existing backdrop of the National Reporter System and Shepard's Citators to offer us comfort in the night.

Legal information is changing in a profound way, one that will touch us all. What has always been part of the furniture is now moving to the center of the room. Heads up, folks, we are in for a crazy decade. *GB*