The Post

GOOD SCHOLARSHIP FROM THE INTERNET

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INTRODUCTION

Anna Ivey[†]

As *The Post* goes to press, we write with heavy hearts on hearing the news of Dan Markel's passing. Since its inception, *The Post* has been proud to feature pieces from *PrawfsBlawg*, Dan's brainchild and labor of love. A pioneer in legal blogging, he provided an example to all who followed, and he was a good friend to *The Post* and our mission. We owe a great debt to Dan's example, his scholarship, and his kindness. Our world, like that of all his friends, students, and colleagues, will be poorer without him. We say a prayer for Dan and those he left behind, and we mourn for his two young sons and the rest of his family. RIP

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FROM: THE FACULTY LOUNGE

LAW PROFESSORS, LAW STUDENTS AND DEPRESSION . . .

A STORY OF COMING OUT

Brian S. Clarke[†]

PART 1

Back in January, CNN ran a piece[1] entitled "Why Are Lawyers Killing Themselves." In general, the piece focused on a spate of lawyer suicides in Kentucky and other states over the last several years. Most of the suicides (15 since 2010) in Kentucky were seemingly successful lawyers. One was a relatively young (37) and popular adjunct professor at NKU's Chase College of Law.

Outside of Kentucky, another prominent lawyer suicide was Mark Levy, the chair of Kilpatrick Stockton's Supreme Court and Appellate Litigation Practice in D.C. Mr. Levy was a top Supreme Court advocate, having argued 16 times before the Court and, in January 2009, won a 9-0 victory for DuPont in an important ERISA case (Kennedy v. Plan Administrator,[2] 555 U.S. 285 (2009)). However, in April 2009, as the economy tanked, Kilpatrick Stockton informed Mr. Levy that his services were no longer needed. So, Mr.

[†] Assistant Professor of Law, Charlotte School of Law. Originals at www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html (Mar. 31, 2014), www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html (Apr. 2, 2014), and www.thefacultylounge.org/2014/04/the-coming-out-trilogy-part-3.html (Apr. 7, 2014) (all vis. July 28, 2014).

[1] www.cnn.com/2014/01/19/us/lawyer-suicides/.

[2] www.law.cornell.edu/supct/html/07-636.ZS.html.

Levy came to work on April 30, 2009, sat down at his desk, activated the "out of office" auto-reply feature on his email account and shot himself in the head. Chillingly, the "out of office" message Mr. Levy activated that morning was as follows: "*As of April 30, 2009, I can no longer be reached. If your message relates to a firm matter, please contact my secretary. If it concerns a personal matter, please contact my wife.*" (*See* Richard B. Schmitt, "A Death in the Office," ABA Journal, Nov. 2009, at 30-31[3]).

Here in North Carolina, one of the founders of King & Spalding's Charlotte office, who was profoundly successful; a prominent litigator in McGuireWood's Raleigh, N.C. office; and numerous quietly successful small town lawyers have committed suicide in recent years.

The common thread running through most of these suicides? Clinical Depression (a/k/a "major depressive disorder").

According to the American Psychiatric Association and numerous other sources, depression is the most likely trigger for suicide. Lawyers, as a group, are 3.6 times more likely to suffer from depression than the average person. Of 104 occupations, lawyers were the most likely to suffer depression. (Both of these statistics are from a Johns Hopkins University study to which I cannot find a link).

Further, according to a two-year study completed in 1997, suicide accounted for 10.8% of all deaths among lawyers in the United States and Canada and was the ***third leading cause of death***. Of more importance was the suicide rate among lawyers, which was 69.3 suicide deaths per 100,000 individuals, as compared to 10 to 14 suicide deaths per 100,000 individuals in the general population. In short, the rate of death by suicide for lawyers was nearly ***six times*** the suicide rate in the general population.

A quality of life survey by the North Carolina Bar Association in the early 1990s, revealed that almost 26% of respondents exhibited symptoms of clinical depression, and almost 12% said they contemplated suicide at least once a month. Studies in other states have found similar results. In recent years, several states have been averaging one lawyer suicide a month.

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[3] www.abajournal.com/magazine/article/a_death_in_the_office/.

What is worse is the state of our students. According to a study by Prof. Andy Benjamin[4] (U. Wash.), by the spring of their 1L year, 32% of law students are clinically depressed, despite being no more depressed than the general public (about 8%) when they entered law school. By graduation, this number had risen to 40%. While this percentage dropped to 17% two years after graduation, the rate of depression was still double that of the general public. (See http://www.lawyerswithdepression.com/law-school-depression/).

These statistics, which likely have not improved in recent years, are terrifying.

In the months since CNN ran its story, I have (unsuccessfully) tried to shake the feeling that we (as lawyers, law professors and the mentors of a generation of law students) missed out on a valuable opportunity to more fully address an issue that is critical to the legal profession. So, when the opportunity to post here came along, I decided to revisit this issue and to do so in a personal way.

I will admit to being a bit nervous about even raising this topic. (Given the nature of many anonymous internet commenters, I think most people would be hesitant to bare even a minute portion of their souls online and attempt to engage with a very serious subject, only to be subject to snarky or mean-spirited attacks.) Plus, mental illness and suicide are not comfortable subjects for most people. There remains a very real stigma attached to mental illness. Many people believe that suffering from clinical depression, anxiety disorder, bipolar disorder, or a host of other mental illnesses is a character flaw or a weakness. Having one of these diseases has been seen as something of which the sufferer should be ashamed. This attitude has been in place for too long for people to easily change their perceptions and opinions.

However, as lawyers and law professors, we must to do more. It is clear that our students need us to do more. When you are depressed, you feel so terribly alone. You feel different. You feel ashamed. You feel weak. You feel like you will never feel better and that you can never be the person you want to be.

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[4] www.law.fsu.edu/academic_programs/humanizing_lawschool/images/benjamin.pdf.

If 40% of our students feel this way, we must do more. They look up to us. They see us as role models and mentors. They see us as strong and successful and confident. They need to see that suffering from depression or anxiety or bipolar disorder will not curse them for all time and destroy their lives. These are treatable diseases, not character flaws. They need us to be brave and be honest.

A few law professors have publically "come out" (so to speak) about their struggles with mental illnesses: Prof. Elyn Saks at Southern Cal[5] (schizophrenia, via *The Center Cannot Hold: My Journey Through Madness*[6] (2007)); Prof. Lisa McElroy at Drexel[7] (anxiety disorder, via an article on Slate[8]); and Prof. James Jones at Louisville[9] (bipolar disorder, via an article in Journal of Legal Ed.[10]). They were all tenured when they did so.

And then there is me: an untenured, assistant professor with five kids, who left a generally successful practice career to teach at Charlotte School of Law. So, anonymous internet commentators be damned . . .

My name is Brian Clarke. I am a father, a husband, a lawyer and a law professor. And I suffer from major depressive disorder and generalized anxiety disorder.

So there you have it. While I have been "out" at Charlotte Law and have spoken publicly about my disease, this is the most wide-open forum in which I have come out.

In my next post, I will share my story (a piece of public soul baring that you should not miss!). In the third (and mercifully final) post in this little serial adventure, I will discuss the role my struggles with depression and anxiety have played (and continue to play) in the classroom.

[FYI, as this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.]

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[5] lawweb.usc.edu/contact/contactInfo.cfm?detailID=300.

[6] www.amazon.com/The-Center-Cannot-Hold-Journey/dp/1401309445.

[7] drexel.edu/law/faculty/fulltime_fac/lisa%20mcelroy/.

[8] www.slate.com/articles/health_and_science/medical_examiner/2013/07/living_with_anxiety_and_panic_attacks_academia_needs_to_accommodate_mental.html.

[9] www.law.louisville.edu/faculty/james_jones.

[10] papers.ssrn.com/sol3/papers.cfm?abstract_id=1087129.

PART 2

In Part I of this little series,[11] I laid out some of the statistics regarding the scope of the problem of depression and anxiety among lawyers and law students. Before I tell my story, I want to spend a little time talking about why these diseases are so prevalent among lawyers.

One of the more eloquent "whys" for the high incidence of depression among lawyers was contained in an opinion piece by Patrick Krill[12] (a lawyer, clinician and board-certified counselor) that accompanied the CNN article on lawyer suicides. As Patrick put it, "lawyers are both the guardians of your most precious liberties and the butts of your harshest jokes[; i]nhabiting the unique role of both hero and villain in our cultural imagination . . . ." Patrick explained that the high incidence of depression (and substance abuse, which is another huge problem) was due to a number of factors but that "the rampant, multidimensional stress of the profession is certainly a factor." Further, "there are also some personality traits common among lawyers – self-reliance, ambition, perfectionism and competitiveness – that aren't always consistent with healthy coping skills and the type of emotional elasticity necessary to endure the unrelenting pressures and unexpected disappointments that a career in the law can bring."

Patrick's discussion of this issue really stuck a cord with me. Practicing law is hard. The law part is not that hard (that was the fun part for me), but the business side of law is a bear. Finding clients, billing time, and collecting money, are just a few aspects of the business of law of which I was not a big fan. Keeping tasks and deadlines in dozens (or hundreds) of cases straight and getting everything done well and on time is a constant challenge. The fear of letting one of those balls drop can be terrifying, especially for the type A perfectionist who is always terrified of making a mistake or doing a less than perfect job. Forget work-life balance. Forget vacations. Every day out of the office is another day you are behind.

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[11] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

[12] www.cnn.com/2014/01/20/opinion/krill-lawyers-suicide/.

Plus, as a lawyer (and especially as a litigator), no matter how good a job you do, sometimes you lose. That inevitable loss is made worse by the emotion that the lawyer often takes on from his or her client. Almost no client is excited to call her lawyer. Clients only call, of course, when they have problems. Those problems can range from the mild (for example, a traffic ticket) to the profound (like a capital murder charge). But whatever the problem, the client is counting on the lawyer to fix it. Every lawyer I know takes that expectation and responsibility very seriously. As much as you try not to get emotionally invested in your client's case or problem, you often do. When that happens, losing hurts. Letting your client down hurts. This pain leads to reliving the case and thinking about all of the things you could have done better. This then leads to increased vigilance in the next case. While this is not necessarily a bad thing, for some lawyers this leads to a constant fear of making mistakes, then a constant spike of stress hormones that, eventually, wear the lawyer down. The impact of this constant bombardment of stress hormones can be to trigger a change in brain chemistry that, over time, leads to major depression.

Depression is a subtle and insidious disease. By the time you are sick enough to recognize that you have a problem, your ability to engage in accurate self-evaluation is significantly impaired. It is a strange thing to know, deep down, that something is wrong with you but to not be able to recognize the massive changes in yourself. Helping yourself at that point is often impossible. Unfortunately, those suffering from depression become expert actors who are extremely adept at hiding their problems and building a façade of normalcy. Eventually, it takes all of your energy to maintain this façade. The façade becomes the only thing there is.

Depression is not a character flaw. It is not a weakness. It is not a moral failing. You cannot "just get over it." No amount of willpower, determination or intestinal fortitude will cure it. Depression is a disease caused (in very basic and general terms) by an imbalance and/or insufficiency of two neurotransmitters in the brain: serotonin and norepinephrine. In this way, it is biologically similar to diabetes, which is caused by the insufficiency of insulin in the body. As a dis-

ease, depression can be treated – and treated very effectively. But it takes time and it takes help – personal help and professional help.

And now we get to the personal part. Don't say I didn't warn you.

Though I likely had been depressed for a long while, I was diagnosed with severe clinical depression in late 2005. As another lawyer who helped me put it, suffering from depression is like being in the bottom of a dark hole with – as you perceive it from the bottom – no way out. The joy is sucked from everything. Quite often, you just want to end the suffering – not so much your own, but the perceived suffering of those around you. You have frequent thoughts that everyone would be better off if you were not around anymore, because, being in such misery yourself, you clearly bring only misery to those around you. When you are in the hole, suicide seems like the kindest think you can do for your family and friends, as ending your life would end their pain and misery.

While I do not remember all of the details of my decent into the hole, it was certainly rooted in trying to do it all – perfectly. After my second child was born, I was trying to be all things to all people at all times. Superstar lawyer. Superstar citizen. Superstar husband. Superstar father. Of course, this was impossible. The feeling that began to dominate my life was ***guilt***. A constant, crushing guilt. Guilt that I was not in the office enough because I was spending too much time with my family. Guilt that I was letting my family down because I was spending too much time at work. Guilt that I was letting my bosses down because I was not being the perfect lawyer to which they had become accustomed. Guilt. Guilt. Guilt. The deeper I sunk into the hole, the more energy I put into maintaining my façade of super-ness and the less energy was left for either my family or my clients. And the guiltier I felt. It was a brutal downward spiral. Eventually, it took every ounce of energy I had to maintain the façade and go through the motions of the day. The façade was all there was. Suicide seemed rational.

There were danger signs, of course, but neither I nor anyone around me recognized them for what they were. I burst into tears during a meeting with my bosses. I started taking the long way to

work in the morning and home in the evenings – often taking an hour or more to make the 5 mile trip. Eventually – after months of this – my wife asked me what was wrong and I responded, "I just don't know if I can do this anymore." She asked what "this" was. I said, "you know . . . life." And started bawling. The façade crumbled and I was utterly adrift. [I don't actually remember this conversation with my wife, but she does.]

After getting over the initial shock of my emotional collapse, my wife forced me to go to the doctor and get help. She took the initiative to find a doctor, make me an appointment and take me (which is good, because I was utterly incapable of doing any of those things). She called my firm and told them I needed FMLA leave. One of my colleagues put me in touch with the N.C. State Bar's Lawyer Assistance Program, as well as with Louis Allen (the Federal Public Defender for the M.D.N.C.) who had suffered from severe depression and recovered. With Louis's help, treatment from my doctor and the support and love of my family, I got better and better. I started taking medication and clawed my way to the top of the hole. But, for more than a year, I was sort of clinging to the edge of the hole about to plummet back down. So, I changed doctors and medications and did a lot of talk therapy. Eventually, more than 18 months later, I was finally back to some semblance of my "old self." I was happy again (mostly). I was a good father again (mostly). I was a good husband again (mostly). I enjoyed being a lawyer again (mostly). I enjoyed life again.

There have been a couple of relapses, where the hole tried to reclaim me. However, I never fell all the way back down. I will happily take medication for the rest of my life. And I will regularly see a therapist for the rest of my life. I will be forever vigilant regarding my mental state. Small prices to pay.

Had I not gotten help, I would not be writing this post because I would likely not be alive today. No amount of will power or determination could have helped me climb out of that hole. Only by treating my disease with medication and therapy was I able to recover, control my illness and get my life back.

Now, I don't write any of this to solicit sympathy or pity. I am

doing fine. I have five wonderful (if occasionally maddening) children and an amazing wife. I have a job that I love and am truly good at. I have the job that I was put on this earth to perform, which makes me incredibly lucky. I have wonderful students who will be outstanding lawyers. I have no complaints.

I write this because I know that when you are depressed you feel incredibly, profoundly alone. You feel that you are the only person on earth who has felt the way you do. You feel like no one out there in the world understands what you are dealing with. You feel like you will never feel "normal" again.

But you are **not** alone. You are not the only person to feel this way. There are lots of people who understand. I understand. I have been there. I got better. So can you.

So, please, if you are suffering from depression or anxiety (or both) get help. Tell your spouse. Tell your partner. Tell a colleague. **Ask for help.** Asking for help does not make you weak. It takes profound strength to ask for help. You can get better. You can get your life back.

Trust me when I say that life is so much better once you get out of – and away from – that dark hole. It is well worth the effort.

[While I'd hoped that I did not need this disclaimer regarding comments, apparently I do: *As this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.*]

PART 3

At long last, we have arrived at the third and final post of my "Coming Out Trilogy."

As promised, I want to focus this post on the role my struggles with depression and anxiety have played and continue to play in my interactions with my students, both in and out of the classroom.

My prior[13] posts[14] have covered the bleak statistics regarding depression and suicide rates among lawyers (nearly four times more

[13] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

[14] www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html.

likely to be depressed and six times more likely to commit suicide than the general public). Further, I also mentioned that many of our students are suffering from depression (32% by second semester first year and 40% by graduation). Although I have not found any specific data to support it, my guess is that an equal or (more likely) higher percentage of our students are also suffering from significant levels of anxiety.

In short, a third or more of our students are struggling with mental illnesses that are exacerbated (or triggered or caused or whatever word you most prefer) by the significant stresses of law school (and the various issues surrounding it, including – to be frank – the cost, debt loads, and job prospects).* According to the research,[15] if a person suffers a single incident of clinical depression, he has a 50% chance of experiencing another even if he takes anti-depressant medication. After 3 incidents, there is a 90% chance of recurrance.** [I, for example, had my first (undiagnosed) bout of clinical depression in college and my first bout of anxiety (diagnosed) my first year of law school.] So, there is a very good chance that the depressed law students of today will be the depressed lawyers of tomorrow.

Our students need help to better understand the challenges of the profession they are entering: the potential for dissatisfaction, disillusionment, mental illness (including depression, anxiety and substance abuse), burnout, and more. When I left practice and started teaching, I promised myself that I would be open and honest with my students about my struggles and about the realities of law practice.

Now, don't get me wrong. I love the Law and there were many, many aspects of practicing law that I loved (and at which I excelled). There were also aspects that I did not love (and tried my best to tolerate, sometimes less than successfully). I know, without reservation or qualification, that being a lawyer can be a highly rewarding career: emotionally, intellectually, and financially. If I was not honest with my students about the challenges of being a lawyer, however, I would be doing them a disservice.

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[15] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease.

Further, in my view, knowledge is power. With knowledge of the challenges and some of their causes, I figure my students will be better equipped to meet and overcome them.

In raising these issues with my students my basic goals are as follows: **(1)** to help destroy – via openness, honesty, and shamelessness – the very real stigma associated with mental illness in general and depression and anxiety in particular; **(2)** to make sure my students know that if they are struggling with depression or anxiety, they are not alone (even if they feel that way) and that there is no reason in the world for these illnesses to hold them back in any way; **(3)** to offer myself as a resource for any among them that are struggling; **(4)** to educate them about the challenges of practicing law; **(5)** to get them thinking about why they are in law school and what they want their lives in the law to be like (or if they even want a life in the law); and **(6)** to get them thinking, critically and proactively, about the different career paths, options, settings, locales and such available to those with law degrees, all of which can have a significant impact on their personal well-being.

So, what do I do? I talk openly and honestly about my struggles and experiences and I do so ***in class*** (in first year Civil Procedure). (Thanks to this series of posts, I now know I am not the only law professor in America who does this. Nancy Rapoport[16] at UNLV does the same in her Contracts classes and there are, hopefully, others out there that do something similar.)

Of course, I do not do this on the first day of class. I am not ***that*** crazy.

On the first day of Civil Procedure, I spend about 20 minutes talking about the depth of my litigation experience, the fact that I have litigated or used in practice virtually every rule and theory we will study, the places I practiced and some of the companies I represented. In short, I establish my credibility. During the semester, I build my credibility with my students by being a highly competent and effective teacher with a deep knowledge of the subject matter and a willingness to do whatever I can to help them learn the mate-

[16] www.law.unlv.edu/faculty/nancy-rapoport.html.

rial. By the time we are two-thirds of the way through the semester, my students (generally speaking) respect me and, from what I understand, are a bit intimidated by me (which is at least partly due to the fact that I somewhat physically imposing at 6'1" and 250+ pounds).

Usually about two weeks before the end of the semester – when I see the strain of writing papers and the approach of final exams beginning to take a toll – I will put the civil procedure issue of the day on hold and tell my story. I don't prepare them for this in any way, I just start class by saying, "There is something that I need to talk to y'all about today." (Although if they start googling me after this I guess that cat will be out of the bag).

The story I tell is generally that which appears in Part 2[17] of this "Coming Out Trilogy," although it is often a bit more haphazard as it is still much easier to write about this subject than talk about it. I often get choked up at least once, usually when talking about suicide (though I have managed to avoid this once or twice). I have even cried in telling my story. There are usually at least a few people with freely flowing tears by the end and many stunned looks. [*Writing this, I realize that, to some degree, I set my students up and then, intentionally, shatter their perceptions of me. While I did not set out to do this and think that establishing my bona fides at the outset of the course is pedagogically important, I do believe that it makes the discussion of my mental illness and the challenges of practicing law more impactful in an "if that can happen to Prof. Clarke, it can happen to me" sort of way.*]

I then segue into some of the statistics cited in Part 1[18] of this series and talk about the scope of the problem with depression and anxiety in the legal profession. I explain that I know many of them are having a hard time handling the stress of law school given the workload, the competitiveness, their "Type A" personalities and perfectionist tendencies, and the like. I bluntly tell them that if they think being a 1L is hard, they ain't seen nothing yet.

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[17] www.thefacultylounge.org/2014/04/in-part-i-of-this-little-series-i-laid-out-some-of-the-statistics-regarding-the-scope-of-the-problem-of-depression-and-anxie.html.

[18] www.thefacultylounge.org/2014/03/law-professors-law-students-and-depression-a-story-of-coming-out-part-1.html.

I tell them about the challenges of practicing law including, among other things, taking on the emotional baggage of clients' problems; the inherent competiveness of the adversarial system; the joys of dealing with unreasonable and unprofessional opposing counsel; the fact that someone must lose in litigation; the impact losing may have on a client's life; the nature of the billable hour; the difficulty of billing 1,900+ hours a year; the unrealistic expectations many of them may have about being lawyers; the common narrative that "success" as a lawyer is dependent on having a "Big Law" job and making partner/member/shareholder and the profound unlikelihood of these happening; the lack of boundaries and the need to be "on the job" 24/7/365 (especially in a big firm); and so on.

I discuss a truth I have known for many years (and for which I now have empirical[19] support[20]), namely that making a lot of money is ultimately not the thing that, for most people or most lawyers, makes them happy in life or satisfied professionally. I caution them about the materialism that is common among lawyers and the dangers of measuring happiness by the make of your car or the size of your house (a point illustrated in an ABA Journal Online article[21] on April 5, 2014, wherein a young lawyer bemoans the fact that he drives a Chevrolet instead of a Mercedes or Audi and that he cannot buy a bigger house). I challenge them to think about why they came to law school and to identify what it is about the law that really turns them on (professionally). I encourage them to find a way to follow that passion, because they will be better lawyers and more satisfied, professionally and personally, if they do so. [*See* K. Sheldon & L. Krieger, *Service Job Lawyers Are Happier Than Money Job Lawyers, Despite Their Lower Income*, Journal of Positive Psychology, vol. 9, pp. 219-226[22] (2014).] I tell them that, for many lawyers (includ-

[19] www.tandfonline.com/doi/abs/10.1080/17439760.2014.888583?journalCode=rpos20#.U97n-lZhpz0.

[20] www.businessinsider.com/higher-pay-doesnt-make-lawyers-happy-2014-4.

[21] www.abajournal.com/news/article/us_has_1_trillion_in_student_debt_indebted_lawyer_has_chevy_lifestyle/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email.

[22] www.tandfonline.com/doi/abs/10.1080/17439760.2014.888583?journalCode=rpos20#.U9ZhYVZhpz0.

ing me), finding a balance between work and life is difficult thanks to, among other things, technology and that they must be cognizant of the dangers of always being plugged in. I talk to them about the importance of boundaries (a concept with which I still struggle).

While many of these issues are old hat to us as professors and lawyers, they come as a revelation to many students. Many still come to law school simply because they did not know what to do with their B.A. in history and have never contemplated what about the law (if anything) really interests them. [I encourage these folks to seriously reconsider whether they should be in law school]. Many have never thought that there were career paths other than one in a big law firm and many are convinced (by their peers, by popular culture, by the internet) that success as a lawyer means being a rich partner in a big firm, and nothing else. Many are shocked that they have only somewhat worse odds of winning the lottery than making equity partner/member/shareholder in a big law firm.

I answer questions and let the conversation go where the students lead it for about an hour. Then we wipe our eyes, blow our noses and get back to civ pro.

I have done this little song-and-dance at least ten times now and every time I do it, it has a *significant* impact. I have had many students (looking sort of shell shocked) tell me that they had no idea that anyone else had felt or thought the things they had felt and thought, but which I articulated during class. I have had students come see me a semester later or even years later and tell me that by talking about my issues, it gave them the strength to get help for their own depression or anxiety issues. I have had several students seek me out in times of crisis and ask me for help, which I have willingly provided (via moral support and referrals to various professional mental health resources). Many students have sought me out to talk about career paths and even whether they should stay in law school. The bottom line, however, is that every single student I have ever talked to about these issues has appreciated – above all else – my openness and honesty, not only about my illness, but about the challenges of being a lawyer. And not a single one thought less of me or lost any respect for me as a result. On the contrary,

my openness and honesty increased their respect for me as a person and as a teacher.

Beyond this in-class discussion and the one-on-one discussions that flow from it, I also participate in a number of student events each year dealing with mental health, career paths, work-life balance and the like. I am active with the Lawyer Effectiveness and Quality of Life Committee of the N.C. Bar Association. And I have both planned and spoken at continuing legal education conferences about these issues.

Now, not all law professors are as messed up or as gluttons for punishment as I am. However, each of us – regardless of background – can start a dialogue with students, either in or out of class, about the importance of mental health, the dark side of being a lawyer, and the need for students to make conscious, intentional and meaningful choices regarding their futures. These discussions are critical to the long term well-being of our students. As I said in my opening post, our students need us to be brave and be honest.

Thanks for reading this series of posts. Based on the emails I have received and the comments that you have posted, at least one of my goals for this series as already been accomplished: to generate open and honest discussion of these issues. I hope these conversations will continue. If sharing these posts will help facilitate discussions with your students or colleagues or friends, please use them.

Now I will go back to contemplating factual causation standards, the impact of judicial nominations on the ideology of the federal Courts of Appeals, and the origin and troublesome role of the assumption of truth rule in modern civil procedure.

[And I have a long weekend ahead of me building a new mobile chicken coop and preparing for the arrival of about 20,000 honeybees (two hives worth) on April 10. And I have about eight soccer games to attend this weekend. Work-life balance of a sort. At last.]

NOTES:

* As fleshed out in the comments to Part 2 of this series, I do not contend that either depression or anxiety are *purely* biological as a general proposition (although there are no doubt some cases that

are). Generally, both have biological[23] and environmental[24] aspects. It is the interaction of the biological [genetic predisposition, brain chemistry, etc.] and the environmental [high stress environment, insufficient coping skills, perfectionism, etc.] that gives rise to the disease (and yes, I am sticking with that term – if it is good enough for the CDC, it is good enough for me). Plenty of diseases (or illnesses, whatever) – smoking induced lung cancer, type II diabetes, stroke, and coronary artery disease to name just a few – also have both biological and environmental aspects. And, of course, I am a lawyer not a doctor or neurologist or psychologist.

** Antidepressant medication is certainly not a panacea. Effective treatment is inherently multifaceted and may include medication, therapy, lifestyle changes, job changes, meditation exercise, and the like. However, antidepressant medication (as well as benzodiazepines for those with anxiety) is often critical to recovery.

[Once again, as this is a serious topic, I will moderate any comments to this post and delete anything I deem inappropriate or off topic.] //

[23] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease.

[24] www.psychologytoday.com/blog/evil-deeds/200809/is-depression-disease-part-2-the-great-debate.

FROM: SCOTUSBLOG

COMMENTARY: FROM THE BENCH TO THE PODIUM

Lyle Denniston[†]

In ways large and small, the idealized expectation that the Supreme Court will stay outside the political arena continues to diminish in a country with polarized partisanship and fragmented cultural values. One reason is that those on opposite sides of the divide increasingly seek to use the Court to advance their own agendas – and, increasingly, succeed at it.

Another reason, though, is that the Justices are moving regularly into the public realm, and taking their deep divisions with them. In short, they frequently move from the bench to the podium, and use public platforms to defend their judicial records – at times, to settle old scores or to stir up old wounds.

In some ways, this may be a welcome new form of transparency for an institution long known for its capacity to keep its own secrets. But it also may be an unhealthy turn toward public self-justification, a reluctance to let the judicial record speak for itself.

It is in this context that another breakthrough in public advocacy has come: retired Justice John Paul Stevens took the witness chair on Wednesday before the Senate Rules Committee – his first appearance before a Senate committee since his nomination hearings thirty-nine years ago, he noted. He was there to promote reform of campaign finance law.

[†] Lyle Denniston is a reporter for SCOTUSblog. Original at www.scotusblog.com/2014/05/commentary-from-the-bench-to-the-podium/ (May 1, 2014; vis. July 28, 2014).

There are many issues before the Court that are deeply controversial, but none is more vigorously debated in America's politics than the role that money plays in election campaigns. One side is certain that the Court is destroying democracy with recent rulings on that subject; the other side is equally certain that the Court is making democracy more open to all who want to participate.

The Court already had been drawn into that debate four years ago, when President Obama, in a State of the Union address, famously criticized the Court – to its face – for its ruling in the *Citizens United* case. And Justice Samuel A. Alito, Jr., in the audience, was offended enough to famously mutter a denial, and shake his head in disapproval.

But Justice Stevens is retired. Does that make a difference? The reality is that it probably does not. He is still very much identified with the Court; he clearly was not invited to testify merely as a revered elder statesman. He was a key part of the majority on the Court that for years prevailed in upholding sometimes rigorous campaign finance regulation – a majority that, in fact, no longer exists, replaced by a new majority deeply skeptical of restraints on campaign funding.

Stevens has not just stepped aside quietly into private life. He is, even at age ninety-four, an energetic public speaker and, notably, many of his speeches have been built on re-arguing positions he took on the Court, frequently on issues on which he had been on the losing end. He now has turned those thoughts into a book, *Six Amendments: How and Why We Should Change the Constitution*. It is no surprise that the amendments would, for the most part, rectify errors that he perceived when he was on the Court.

His prepared testimony before the Senate panel was distributed for him by the Court's staff. He no doubt had at least some help with it from a government-salaried law clerk. And they very likely did some work on it in the judicial chambers he still occupies. The remarks are clearly his own, but they have the patina of the high judicial office he held for nearly thirty-five years.

He crossed the street to become a part of a legislative hearing, dealing not with a safe topic such as the need to preserve judicial

independence or a review of the Court's annual budget, but rather focusing on a truly divisive policy issue that itself contributes importantly to continuing partisan division.

He opened his remarks by insisting that "campaign finance is not a partisan issue." But his proposal for the language of a constitutional amendment would overturn Court rulings that the Republican Party definitely has found do work to its advantage and the Democratic Party to its woe.

But, it could be said that, if a retired Justice needed some cover for taking his personal preferences out in public, he could find it in the recent podium appearances of some of the sitting Justices. Just last week, for example, Justices Ruth Bader Ginsburg and Antonin Scalia were together in Washington for a televised discussion at which they talked about cases before the Court this Term, and went over some of the differences in their approaches to the law.

There is hardly a popular broadcast talk show that has not had a sitting Justice, alone or on a panel, making the case for their own performance on the bench.

Within the Court building itself, some of this political theater now appears with some regularity as individual Justices increasingly announce orally their dissents, sometimes in impassioned tones. It is not enough, it seems, to dissent in writing; there is now a greater perceived need to let a public audience know how strongly the disappointment of losing can be felt.

There are other signs that the divisions inside the Court are apparently being taken personally, at least some of the time. Two years ago, there was a leak – almost certainly coming from inside the Court itself – about the switch in positions that Chief Justice John G. Roberts, Jr., had supposedly made in the health care decision. The leak was hardly an attempt at praise.

And one can find, with regularity, dissenting and concurring opinions that are as pointed in denunciation of the other side as an attack ad in a political campaign.

The press, of course, has some role in highlighting the perception that the Court has gone political. Seldom does a divided opinion emerge that a prominent news organization does not say what

the partisan line-up of the Justices was – that is, the political party responsible for putting each of them on the bench.

Some of these atmospherics perhaps can be exaggerated, but as they accumulate, they very likely contribute to the cynical notion that jurisprudence is deeply infused with politics of a decidedly partisan flavor. //

FROM: PRAWFSBLAWG

HARMON ON THE FRAGILITY OF KNOWLEDGE IN THE RILEY (CELLPHONE AND 4A) CASE

Rachel Harmon[†]

> Prof. Rachel Harmon from UVA[1] had an interesting post to the crimprof listserv that I thought warranted broader exposure, so with her permission I'm sharing it. (Rachel asked to also thank UVA law librarian Kent Olson for his help with the underlying research).
>
> [– Posted by Dan Markel]

In light of the likely significance of the Court's opinion in Riley v. California,[2] I may seem obsessed with the trivial, but I can't help but note the Court's odd support for one of its statements about policing, and the pathetic state of information about policing it reveals. On page 6, the Court states that "warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant." Though the proposition seems intuitively obvious, data on searches and seizures isn't easy to find, so I was curious about the Court's support.

[†] Rachel Harmon is Sullivan & Cromwell Professor of Law at the University of Virginia School of Law. Original at prawfsblawg.blogs.com/prawfsblawg/2014/06/harmon-on-the-fragility-of-knowledge-in-the-riley-cellphone-and-4a-case.html (June 27, 2014; vis. July 28, 2014).

[1] www.law.virginia.edu/lawweb/faculty.nsf/FHPbI/1170573.

[2] www.scotusblog.com/case-files/cases/riley-v-california/.

Chief Justice Roberts cited LaFave's Search and Seizure treatise, which struck me as an odd source for an empirical claim, so I looked it up. LaFave does indeed say, "While the myth persists that warrantless searches are the exception, the fact is that searches incident to arrest occur with the greatest frequency." But that sentence has appeared unchanged since the first edition of the treatise in 1978. And LaFave's support for the proposition is itself pathetic. It comes in a footnote which reads: "See T. Taylor, Two Studies in Constitutional Interpretation 48 (1969). 'Comparison of the total number of search warrants issued with the arrests made is equally illuminating. In 1966 the New York police obtained 3,897 warrants and made 171,288 arrests. It is reliably reported that in San Francisco in 1966 there were 29,084 serious crimes reported to the police, who during the same year obtained only 19 search warrants.' Model Code of Pre-Arraignment Procedure 493–94 (1975)."

Because I'm crazy, I pulled Taylor and the Model Code too.

Both sources suggest that they can't really prove the original point. Taylor says, "[M]ost law enforcement agencies have been exceedingly lax with their record-keeping in this field. But there a few offices where the records are full enough to be meaningful, and from these it is abundantly apparent that searches of persons and premises incident to an arrest outnumber manifold searches covered by warrants." He provides no further support for the claim.

The Model Code Commentary provides the numbers from 1966, but also makes it clear they are not to be taken too seriously. The New York data was apparently furnished directly to the Code's Reporters from the NYPD, and the San Francisco numbers came from a New York Times' reporter. (It was Fred Graham, the Supreme Court correspondent at the time and a lawyer.) According to a footnote to the Commentary, "Research efforts elsewhere foundered on the rocks of record-keeping failures. Law enforcement agencies do not commonly maintain statistical records pertaining to search warrants or searches and seizures generally."

So the Supreme Court cited a source, unchanged since 1978, which cites two sources from the late 1960s, both of which suggest that there is very little evidence for the

proposition because police record keeping is weak. I'm hardly one to criticize imperfect footnotes (since I've surely written many myself), but this one interests me. The Court is all too willing to make unsupported claims about policing, a problem I've noted before. See The Problem of Policing, 110 Mich. L. Rev. 761, 772-773 (2012). Moreover, for the Court, as well as scholars and policy-makers there is a serious problem in finding credible information about what police do. See Why Do We (Still) Lack Data on Policing?, 96 Marq. L. Rev. 1119 (2013). The Riley/Wurie citation nicely illustrates both problems, and it won't be the last to do so. //

JUDGES REVISING OPINIONS AFTER THEIR RELEASE

Peter W. Martin[†]

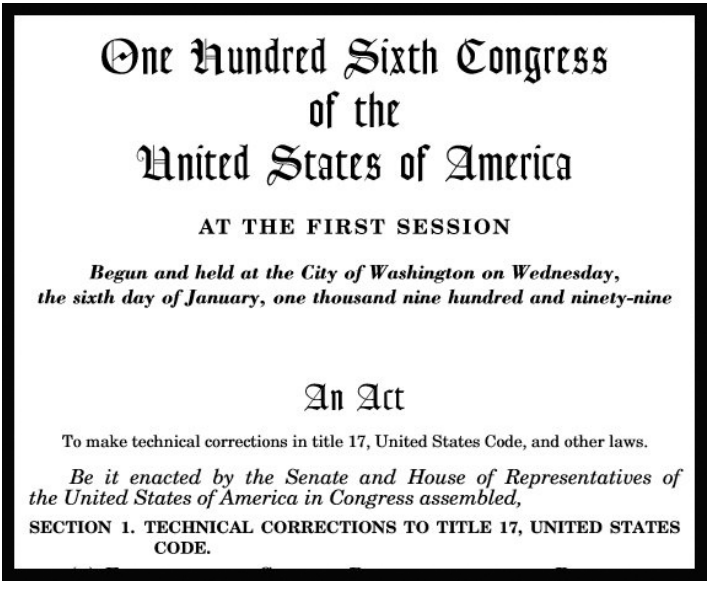
A. BACKGROUND: HOW LEGISLATURES AND AGENCIES HANDLE REVISION

1. Revision by Congress

When Congress enacts and the President signs a carelessly drafted piece of legislation it becomes the law. All must live with, puzzle over,[1] and, in some cases, find an ad hoc way to cite what Congress has done. Congress can clarify the situation or correct the error but only by employing the same formal process to amend that it previously used to enact. In October 1998, Congress passed two separate bills adding provisions to Title 17 of the U.S. Code, the Copyright Act. Both added a new section 512. Embarrassing? Perhaps. Did this pose a serious question of Congressional intent? No. Clearly, the second new 512 was not meant to overwrite the first; the two addressed very different topics. Did this pose a problem for those who wanted to cite either of the new sections? For sure, but one readily addressed either by appending a parenthetical to disambiguate a reference to 17 U.S.C. § 512 or by citing to the session law containing the pertinent 512. In time the error was resolved by a law making "technical corrections" to the Copyright Act. One of the two sections 512 was renumbered 513.

[†] Peter W. Martin is the Jane M.G. Foster Professor of Law, Emeritus, at Cornell University Law School. Original at citeblog.access-to-law.com/?p=157 (Apr. 29 & May 1 & 8, 2014; vis. July 28, 2014).

[1] scholar.google.com/scholar_case?case=18277205972058482123.



One Hundred Sixth Congress
of the
United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Wednesday, the sixth day of January, one thousand nine hundred and ninety-nine

An Act

To make technical corrections in title 17, United States Code, and other laws.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. TECHNICAL CORRECTIONS TO TITLE 17, UNITED STATES CODE.

During 2013 Congress passed four pieces of legislation that made "technical corrections" to scattered provisions of the U.S. Code. Unsurprisingly, tidying up drafting errors of this sort is not a high Congressional priority. For ten years there have been two slightly different versions of 5 U.S.C. § 3598;[2] for nearly eighteen, two completely different versions of 28 U.S.C. § 1932.[3] The Code contains cross-references to non-existent provisions[4] and myriad other typos. Some are humorous (as, for example, the definition of "non-governmental entities" that includes "organizations that provide products and services associated with … satellite imagines"[5]). The various compilers of Congress's work product do their best to note such glitches where they exist and, if possible, suggest that body's probable intention. They do not, however, view themselves as at liberty to make editorial corrections.

[2] uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title5-section3598&num=0&edition=prelim.

[3] uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title28-section1932&num=0&edition=prelim.

[4] www.law.cornell.edu/uscode/text/22/6213.

[5] www.law.cornell.edu/uscode/text/33/3507.

FEDERAL TRADE COMMISSION

16 CFR Part 312

RIN 3084–AB20

Children's Online Privacy Protection Rule

AGENCY: Federal Trade Commission.

ACTION: Correcting amendment.

SUMMARY: The Federal Trade Commission published final rule amendments to the Children's Online Privacy Protection Rule on January 17, 2013 to update the requirements set forth in the notice, parental consent, confidentiality and security, and safe harbor provisions. This document makes a technical correction in that final rule.

DATES: Effective on December 20, 2013.

2. Agency typos and omissions

Pretty much the same holds for regulations adopted by federal administrative agencies. When a final regulation contains inept language, a typo, or some other drafting error, the Office of the Federal Register publishes it "as is". The authoring agency must subsequently correct or otherwise revise by publishing an amendment, also in the *Federal Register*. Until the problem is caught and addressed through a formal amendment, the original version is "the law." In the meantime, all who must understand or apply it – agency personnel, the public, and courts – must interpret the puzzling language in light of the agency's most likely intent. The *Federal Register* is filled with regulatory filings making "correcting amendments." A search on that phrase limited to 2013 retrieves a total of eighty. For a pair of straightforward examples see 78 Fed. Reg. 76,986[6] (2013).

[6] www.gpo.gov/fdsys/pkg/FR-2013-12-20/pdf/2013-30293.pdf.

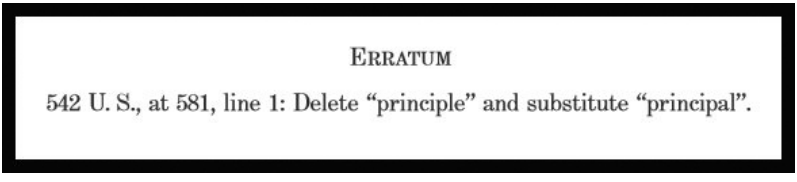
B. JUDICIAL OPINIONS – AN ALTOGETHER DIFFERENT STORY

With judicial opinions the situation is startlingly different. When judges release decisions containing similar bits of sloppiness, the process for correcting them is far less certain and, with some courts, far less transparent. What sets courts apart from other law enunciating bodies in the U.S. is their widespread practice of unannounced and unspecified revision well after the legal proceeding resulting in a decision binding on the parties has concluded. Several factors, some rooted in print era realities, are to blame.

To begin, most U.S. appellate courts began the last century with the functions of opinion writing and law reporting in separate hands.[7] Public officials, commonly called "reporters of decisions" cumulated the opinions issued by appellate courts and periodically published them in volumes, together with indices, annotations, and other editorial enhancements. Invariably, they engaged in copy editing and cite checking decision texts, as well, subject to such oversight as the judges cared to exercise. The existence of that separate office together with the long period stretching from opinion release to final publication in a bound volume induced judges to think of the opinions they filed in cases, distributed to the parties and interested others in "slip opinion" form, as drafts which they could still "correct" or otherwise improve. That mindset combined with the discursive nature of judicial texts, their attribution to individual authors, and judicial egos can produce a troubling and truly unnecessary level of post-release revision. At the extreme, judicial fiddling with the language of opinions doesn't even end with print publication. Dissenting in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), Justice Thomas wrote: "The principle 'ingredient' for 'energy in the executive' is 'unity.'" (The quoted fragments are from No. 70 of the *Federalist Papers*.[8]) That was June 2004. The sentence remained in that form in the preliminary print issued the following year and the final

[7] www.access-to-law.com/elaw/pwm/abandoning_law_rpts.pdf.
[8] www.constitution.org/fed/federa70.htm.

bound volume which appeared in 2006. Volume 550 of the *United States Reports*[9] published in 2010, however, contains an "erratum" notice that directs a change in that line of Thomas's dissent, namely the substitution of "principal" for "principle." Six years after the opinion was handed down, it is hard to understand who is to make that change and why – beyond salving the embarrassment of the author. None of the online services have altered the opinion.



ERRATUM

542 U. S., at 581, line 1: Delete "principle" and substitute "principal".

Judges, even those on the highest courts, make minor errors all the time. What they seem to have great difficulty doing is letting them lie. This seems particularly true of courts for which print still serves as the medium for final and official publication. The Kansas Judicial Branch web site[10] explains about the only version of opinions it furnishes the public:

Slip opinions are subject to motions for rehearing and petitions for review prior to issuance of the mandate. Before citing a slip opinion, determine that the opinion has become final. Slip opinions also are subject to modification orders and editorial corrections prior to publication in the official reporters. Consult the bound volumes of Kansas Reports and Kansas Court of Appeals Reports for the final, official texts of the opinions of the Kansas Supreme Court and the Kansas Court of Appeals. Attorneys are requested to call prompt attention to typographical or other formal errors; please notify Richard Ross, Reporter of Decisions ….

Since the path from slip opinion to final bound volume can stretch out for months, if not years,[11] the opportunity for revision is prolonged. Moreover, unless the court releases a conformed elec-

[9] www.supremecourt.gov/opinions/boundvolumes/550bv.pdf.
[10] www.kscourts.org/Cases-and-Opinions/opinions/.
[11] citeblog.access-to-law.com/?p=93.

tronic copy of that print volume, changes, large or small, are hard to detect. Interim versions, print or electronic, only compound the difficulty. For those who maintain case law databases and their users this can be a serious problem, one some of them finesse by not bothering to attempt to detect and make changes reflected in post-release versions.[12]

A shift to official electronic publication inescapably reduces the period for post-release revision since decisions need no longer be held for the accumulation of a full volume before final issuance. On the other hand, staffing and work flow patterns established during the print era can make it difficult to shift full editorial review, including cite, and quote checking to the period before a decision's initial release. Difficult, but not impossible – the Illinois Reporter of Decisions, Brian Ervin, who retired earlier this year,[13] appears to have achieved that goal when the state ceased publishing print law reports in 2011. Reviewing the Illinois Supreme Court's decisions of the past year using the CourtListener site in the manner described below, reveals not a single instance of post-release revision.

Procedures in some other states that have made the same shift specify a short period for possible revision, following which decisions become final. Decisions of the Oklahoma Supreme Court, for example, are not final until the chief justice has issued a mandate in the case and that does not occur until the period for a rehearing request has passed. Decisions are posted to the Oklahoma State Court Network[14] immediately upon filing, but they carry the notice: "THIS OPINION HAS NOT BEEN RELEASED FOR PUBLICATION. UNTIL RELEASED, IT IS SUBJECT TO REVISION OR WITHDRAWAL." Once the mandate has issued, a matter of weeks not months, that warning is removed and the final, official version is marked with the court's seal.[15] In New Mexico, another state in which official versions of appellate decisions are now digital, a similar short period for revision is embedded in court practice. Deci-

[12] verdict.justia.com/2014/01/20/citation-dna-whos-datas-daddy.
[13] archives.lincolndailynews.com/2014/Jan/07/News/news010714_sc.shtml.
[14] www.oscn.net/applications/oscn/start.asp.
[15] citeblog.access-to-law.com/?p=107.

sions are initially released in "slip opinion" form. "Once an opinion is selected for publication by the Court, it is assigned a vendor-neutral citation by the Chief Clerk …. [During the interim the] New Mexico Compilation Commission[16] provides editorial services such as proofreading, applying court-approved corrections and topic indices." As a result of that editorial process, most decisions receive minor revision. For a representative example, see this comparison of the slip and final versions[17] of a recent decision of the New Mexico Supreme Court (separated in time by less than a month). Once a decision can be cited, it is in final form.[18]

Typically, when legislatures and administrative agencies make revisions the changes are explicitly delineated. Most often they are expressed in a form directing the addition, deletion, or substitution of specified words to, from, or within the original text. Except in the case of post-publication errata notices, that is not the judicial norm. Even courts that are good about publicly releasing their revised decisions and designating them as "substitute"," changed", or "revised" (as many don't) rarely indicate the nature or importance of the change. So long as all versions are available in electronic form, however, the changes can be determined through a computer comparison of the document files. Such a comparison of the final bound version of *Davis v. Federal Election Commission*, 554 U.S. 724 (2008) with the slip version, for example, reveals that at page 735 the latter had erroneously referred to a "2004 Washington primary." The later version corrects that to "2004 Wisconsin primary" – simple error correction rather than significant change.

> The FEC's mootness argument also fails. This case closely resembles *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.-S. ___449 (2007). There, Wisconsin Right to Life (WRTL), a nonprofit, ideological advocacy corporation, wished to run radio and TV ads within 30 days of the 2004 ~~Washington~~Wisconsin primary, contrary to a restriction imposed by BCRA.

[16] www.nmcompcomm.us/nmcases/NMSCSlip.aspx.
[17] access-to-law.com/citation/blog_sources/Compare_NM_albuquerque_cab_co.pdf.
[18] www.nmcompcomm.us/nmcases/NMARYear.aspx?db=scv&y1=2014&y2=2014.

More disturbing, by far, are:

- the common failure to provide the same degree of public access to revised versions of decisions as to the versions originally filed, and
- the substitution of revised versions of decisions for those originally filed without flagging the switch.

Any jurisdiction which, like Kansas, still directs the public and legal profession to print for the final text of an opinion without making available a complete digital replica is guilty of the first. Less obviously this is true of courts which, like the U.S. Court of Appeals, leave distribution of their final, edited opinions to the commercial sector. Less conspicuous and, therefore, even more troubling are revisions that courts implement by substituting one digital file for another before final publication. A prior post[19] noted one example of this form of slight-of-hand at the web site of the Indiana Judicial Branch. But the Indiana Supreme Court hardly stands alone. Thanks to the meticulous record-keeping of the CourtListener online database[20] such substitutions can be detected.

Like other case law harvesters, CourtListener regularly and systematically examines court web sites for new decision files. Unlike others it calculates and displays digital fingerprints for the files it downloads and stores the original copies for public access. When a fresh version of a previously downloaded file is substituted at the court's site, its fingerprint reveals whether the content is at all different. If the fingerprint is not the same, CourtListener downloads and stores the second file. Importantly, it retains the earlier version as well. Consequently, a CourtListener retrieval of all decisions from a court, arrayed by filing date, will show revisions by substitution as multiple entries for a single case. Applied to the decisions of the U.S. Supreme Court during calendar 2011 this technique uncovers ten instances of covert revision. Happily, none involved major changes. The spelling of "Pittsburg, California" was corrected in

[19] citeblog.access-to-law.com/?p=107.
[20] www.courtlistener.com.

a majority opinion by Justice Scalia, "petitioner" was changed to "respondent" in a majority opinion by Justice Kennedy, "polite remainder" in a Scalia dissent became "polite reminder", and so on. The perpetually troublesome "principal/principle" pair was switched in a dissent by Justice Breyer.

Most post-release opinion revisions involve no more than the correction of citations and typos like these, but the lack of transparency or any clear process permits more. And history furnishes some disturbing examples of that opportunity being exploited. Judge Douglas Woodlock describes one involving the late Chief Justice Warren Berger in a recent issue of *Green Bag*.[21] Far more recent history includes the removal of a lengthy footnote from the majority opinion in *Skilling v. United States*, 561 U.S. 358 (2010). The slip opinion file now at the Court's web site[22] carries no notice of the revision beyond the indication in the "properties" field that it was modified over two weeks after the opinion's filing date. To see the original footnote 31 one must go to the CourtListener site[23] or a collection like that of Cornell's LII[24] built on the assumption that a slip opinion distributed by the Court on day of decision will not be changed prior to its appearance in a preliminary print.

C. SOME UNSOLICITED ADVICE DIRECTED AT PUBLIC OFFICIALS WHO BEAR RESPONSIBILITY FOR DISSEMINATING CASE LAW (REPORTERS, CLERKS, JUDGES)

1. Minimize or eliminate post-release revision

In this era of immediate electronic access and widespread redistribution, courts should strive to shift all editorial review to the period before release, as Illinois has done. Judges need to learn to live with their minor drafting errors. Finally, whatever revision occurs prior to final publication, none should occur thereafter. In the pre-

[21] www.greenbag.org/v17n1/v17n1_articles_woodlock.pdf.
[22] www.supremecourt.gov/opinions/09pdf/08-1394Reissue.pdf.
[23] www.courtlistener.com/scotus/LnU/skilling-v-united-states/.
[24] www.law.cornell.edu/supct/html/08-1394.ZO.html#31.

sent age issuance of errata notices years after publication is a pointless gesture.

2. If decisions are released in both preliminary and final versions, make them equally accessible

While the final versions of U.S. Supreme Court decisions are much too slow in appearing,[25] when they do appear they are released in both print and a conformed electronic file.[26] Most U.S. courts are like those of Kansas and fail to release the final versions of their decisions electronically. Furthermore, some that do, California[27] being an example, release them in a form and subject to licensing terms that severely limit their usefulness to individual legal professionals and online database providers.

3. Label all decision revisions, as such, and if the revision is ad hoc rather than the result of a systematic editorial process, explain the nature of the change

At least twice this year the Indiana Supreme Court released opinions that omitted the name of one of the attorneys. As soon as the omission was pointed out, it promptly issued "corrected" versions. In one case[28] (but not the other[29]) the revision bears the notation that it is a corrected file, with a date. In neither case is the nature of or reason for the change explained within the second version. As noted above, too many courts, including the nation's highest, make stealth revisions, substituting one opinion text for a prior one without even signaling the change.

[25] citeblog.access-to-law.com/?p=93.
[26] www.supremecourt.gov/opinions/boundvolumes.aspx.
[27] www.lexisnexis.com/clients/CACourts/.
[28] www.in.gov/judiciary/opinions/pdf/03051301ad.pdf.
[29] indianalawblog.com/archives/2014/03/ind_decisions_t_800.html.

4. If revision goes beyond simple error correction, vacate the prior decision and issue a new one (following whatever procedure that requires)

United States v. Hayes, No. 09-12024 (11th Cir. Dec. 16, 2010),[30] discussed in a prior post,[31] provides a useful illustration of this commendable practice. *United States v. Burrage*, No. 11-3602 (8th Cir. Apr. 4, 2014),[32] falls short, for while it explicitly vacates the same panel's decision of a month before, it fails to explain the basis for the substitution.

This entry was posted on Tuesday, April 29th, 2014 at 5:56 pm and is filed under Cases, Regulations, Statutes. You can follow any responses to this entry through the RSS 2.0 feed. You can leave a response, or trackback from your own site.

2 RESPONSES TO "JUDGES REVISING OPINIONS AFTER THEIR RELEASE"

1. Peter W. Martin says: May 1, 2014 at 5:23 pm As it turned out this post proved remarkably timely. It appeared on the very day the Supreme Court released its decision in EPA v. EME Homer City Generation, L. P., accompanied by a flawed Scalia dissent, and a day before the substitution of a revised slip opinion. Because of the widespread public attention to Scalia's error and the speedy correction this could hardly be characterized as a stealth substitution. http://www.businessinsider.com/supreme-court-corrects-justice-scalias-cringeworthy-blunder-in-epa-case-2014-4 On the other hand, there is nothing at the Court's website or in the revised slip opinion to indicate that it occurred.

2. Peter W. Martin says: May 8, 2014 at 1:44 pm Further evidence of Justice Scalia's eagerness to erase all trace of his screw up in the EPA case arrived in the LII's mail earlier this week. In an un-

[30] scholar.google.com/scholar_case?case=10305481334235109035.
[31] citeblog.access-to-law.com/?p=72.
[32] scholar.google.com/scholar_case?case=12205255164806251457.

precedented letter[33] the Court's Reporter of Decisions called upon the LII and the five other subscribers to its electronic bench opinion delivery service to enter changes in their "print and electronic versions" of the Scalia dissent. The Court's web site[34] declares the following about successive versions of decisions:

> The "slip" opinion is the second version of an opinion. It is sent to the printer later in the day on which the "bench" opinion is released by the Court. Each slip opinion has the same elements as the bench opinion–majority or plurality opinion, concurrences or dissents, and a prefatory syllabus – but may contain corrections not appearing in the bench opinion. The slip opinions collected here are those issued during October Term 2013 (October 07, 2013, through October 05, 2014). These opinions are posted on the Website within minutes after the bench opinions are issued and will remain posted until the opinions for the entire Term are published in the bound volumes of the United States Reports. For further information, see Column Header Definitions and the file entitled Information About Opinions.
>
> Caution: These electronic opinions may contain computer-generated errors or other deviations from the official printed slip opinion pamphlets. Moreover, a slip opinion is replaced within a few months by a paginated version of the case in the preliminary print, and–one year after the issuance of that print–by the final version of the case in a U. S. Reports bound volume. In case of discrepancies between the print and electronic versions of a slip opinion, the print version controls. In case of discrepancies between the slip opinion and any later official version of the opinion, the later version controls.

As the initial post explains the slip opinion version is itself subject to covert replacement by an altered file. That happened swiftly in the EPA case. Now it appears that even the transitory bench opinion is subject to after-the-fact revision. Let the historic record show it never happened. //

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[33] www.access-to-law.com/citation/blog_sources/SCOTUS_reporter_ltr.pdf.
[34] www.supremecourt.gov/opinions/slipopinions.aspx?Term=13.