AALL/LexisNexis Call for Papers

April 2010

The Truthiness of Thinkable Thoughts Versus the Facts of Empirical Research

Contact Author

Start Your Own SelectedWorks

Notify Me of New Work

Available at: http://works.bepress.com/aallcallforpapers/4

The Universe of Thinkable Thoughts Versus the Facts of Empirical Research*

Joseph A. Custer**

Mr. Custer considers the use of "literary warrant" as it affects the usefulness of the West Digest System, and reports on the results of a survey he conducted with both legal practitioners and law faculty. He concludes that the West Digest System has some viability, but it will need to extend its literary warrant to remain a player in today's legal culture.

> Our digests and encyclopedias, though purporting to be organized according to a sound scheme of classification, are in reality constructed around more or less haphazard topical heads, selected mainly on the basis of historical accident, intuition, or editorial caprice.[1]

¶1 Bob Berring stated in a 2000 article that legal commentators have long failed to take a serious look at legal research tools.[2] The idea for this article, which is an attempt to take that serious look, grew from two distinct, but not unrelated, events. The first was a general uneasiness with a 2008 *Law Library Journal* article, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System,* by Dan Dabney[3] and the second was a series of conversations I had with two longtime mentors, Peter Schanck and Fritz Snyder, about the Dabney article and the status of the West Digest System in general.

¶2 Schanck and Snyder, in the same spirit as Bob Berring, posed the challenge of taking a serious look at the subject of legal research tools. This article is the result. It is not an attempt to recognize, comment on, or organize the literature addressing how legal research tools, or the West Digest specifically, have or have not

---

* © Joseph A. Custer 2010. This is a revised version of a winning entry in the open division of the 2009 AALL/LexisNexis Call for Papers Competition.

** Associate Director and Head of Technology Services at Wheat Law Library, University of Kansas Law School, Lawrence, Kansas. I want to thank Peter Schanck, Dick Danner, Fritz Snyder, Jim Heller, James Donovan, David Hollander, Pam Tull, Chris Steadham, and Janet Sinder for reading this and offering helpful suggestions; Marsha Tiemann for her knowledge of the *Bluebook* and excellent word processing skills; and Tammy Steinle McLain for her work on the tables. A special thanks to Peter Schanck for offering suggestions as to the type of questions specifically needed to test his contentions.

1. Charles C. Ulrich, *A Proposed Plan of Classification for the Law*, 34 Mich. L. Rev. 226, 226 (1935) (footnote omitted).

2. Robert C. Berring, *Legal Information and the Search for Cognitive Authority,* 88 Cal. L. Rev. 1673, 1676 (2000).

3. Daniel Dabney, *The Universe of Thinkable Thoughts: Literary Warrant and West's Key Number System*, 99 Law Libr. J. 229, 2007 Law Libr. J. 14.

infused the law—Dick Danner does a fine job of that in a recent article.[4] Rather, this article addresses Dabney's defense of a confined digest system created through intellectual indexing and containing a "closed list of thinkable thoughts,"[5] which he contends tells us "what ideas are important ideas and what questions are important to ask."[6] He contrasts this with an expanded, free-text system in which "every . . . word in the language becomes a potential point of access to the collection."[7]

¶3 Danner asserted that Peter Schanck's 1990 article, *Taking up Barkan's Challenge,*[8] "challenged the notions that the digest and other research tools play a role in shaping lawyers' thinking about the law"[9] and needed more discussion. "Schanck's comments suggest at least that more research is needed to demonstrate the connections between the forms and structures of legal information, and lawyers' ways of thinking."[10] In response to this challenge, I decided to empirically test Schanck's assertions with a survey of the Douglas County, Kansas Bar. The results of the survey are analyzed and related to pertinent sections of the Dabney article. My results supported Schanck's contentions about the digest, and also provide support for what I see as a possible way to improve the relevance of the West Digest System within the context of today's legal research environment.

The Universe of Thinkable Thoughts

¶4 Dabney states in *The Universe of Thinkable Thoughts* that his job is to explain the Key Number System to the "world at large,"[11] and he proposed to do this by focusing on one aspect of the system noted by Berring and others: "the extent to which the Key Number System influences the law itself."[12] Dabney's statement of his focus is a bit deceptive, in that he doesn't actually associate himself with the notion that the Key Number System influences the law. Rather, he argues that the content of the law, specifically case law, defines the contours of the Key Number System through the principle of *literary warrant.* "It is a firm principle in the creation of indexing systems that indexers do not anticipate subjects that might exist or even ought to exist, but create headings only for ideas that are actually present in the literature. This principle is called *literary warrant*."[13]

¶5 Despite what Dabney states regarding literary warrant and how the law influences the Key Number System and not the other way around, he confuses the issue when he claims:

---

4. Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law,* 99 Law Libr. J. 193, 2007 Law Libr. J. 13.
5. Dabney, *supra* note 3, at 236, ¶ 32.
6. *Id.* at 247, ¶ 86.
7. *Id.* at 236, ¶ 32.
8. Peter C. Schanck, *Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research*, 82 Law Libr. J. 1 (1990).
9. Danner, *supra* note 4, at 215, ¶ 47.
10. *Id.* at 224–25, ¶ 67.
11. Dabney, *supra* note 3, at 230, ¶ 6.
12. *Id.* at 230, ¶ 7.
13. *Id.* at 242, ¶ 59.

> If an idea doesn't correspond to something in the Key Number System, it becomes an unthinkable thought. The essence of a classification scheme is to be a closed list of the salient ideas in the literature it serves, and when the system, by omitting an idea, implies that the idea is not sufficiently salient to be included, it can be an obstacle to considering the idea.[14]

¶6 In other words, I think Dabney, while not admitting it directly, does believe that the Key Number System (used interchangeably in this article for the West Digest System) influences the law. According to what he writes, law influences indexers in the sense they do not consider any legal principle that they think might or ought to exist in the system—instead they create headings only for those principles actually appearing in the case law. But he goes on to state that if a holding in the case law does not correspond to a principle that is already in the Key Number System, the classifier will not include it, and it thus becomes an unthinkable thought. This idea contradicts his definition of literary warrant, which is that the Key Number System contains all of the ideas in the case law.

¶7 Thus, while Dabney states that the law influences the Key Number System and that the classifier can only make headings for principles appearing in the case law, the final decision depends on the classifiers of the Key Number System, because only ideas present in the case law and also already existing in the Key Number System can become thinkable thoughts.

¶8 This argument falls short of making Dabney's case that the law influences the Key Number System. It fails, I think, because it tries to explain the system by using a principle, literary warrant, that doesn't truly apply. The classifier is creating key numbers for those topics that exist in the case law, but he is also making determinations as to what ought to or might exist in the system depending on what is already present in the system. The ideas of "literary warrant" and "thinkable thoughts" thus appear to contradict each other, or at least introduce some level of circular reasoning: literary warrant limits the Key Number System to what is in the law; thinkable thoughts limit it to what is already in the Key Number System.

¶9 While Dabney's article does contain some minor criticism of the West Digest System, for the most part he asserts its positive influence, praising its closed system and defending it with statements such as:

> [I]f there is a conservative bias to the Key Number System, it results not from the machinations of classifiers, but is drawn from the cases themselves. By virtue of the principle of literary warrant, the Key Number System takes its shape from the body of case law it serves. Case law, as a literature based on precedent, is inherently backward looking. So, any conservative bias in the Key Number System is derived from the law itself.[15]

¶10 Dabney's definition of "thinkable thoughts," where "[i]f an idea doesn't correspond to something in the Key Number System, it becomes an unthinkable thought,"[16] is contradicted by notable writers of early law library literature, including John B. West himself, who said that the West Digest System needed to change as

---

14. *Id.* at 236, ¶ 31.
15. *Id.* at 243, ¶ 65.
16. *Id.* at 236, ¶ 31.

the law did.[17] And though Dabney states that the digests are infused with the law, others have argued that the digest's role has been exaggerated. Sabrina Sondhi in a recent article says that scholars have "argued that case digests were mere tools that we used in the absence of anything better and that legal thought was previously constrained by the limitations of print."[18]

¶11 In arguing against Dabney's contentions regarding literary warrant and thinkable thoughts, I am not claiming that the West Digest is not a good legal research tool. On the contrary, I believe it is one of the most significant research tools ever created for finding the law. However, case law can be garnered and accessed in different ways,[19] perhaps in ways that will keep its classifiers from becoming, as Pierre Schlag puts it, "increasingly insular and divorced from other enterprises, so that when a reality principle is finally encountered, it is in the form of a crisis."[20]

¶12 In his article, Dabney also addresses what he believes are the weaknesses of a free-text system compared to that of the Key Number System. A main argument of his against free-text searching is that, "there is a gulf between the individual words and the ideas of interest to the searcher."[21] Lawyers, however, are expected to take diverse information and formulate and classify that information to fit their particular needs or the case they are working on. Frederick Hicks in a 1938 article may have stated it best:

> If you find what you want, no matter what heading it is under, you appropriate it and reclassify it to serve your particular purpose. All thinking is a process of classification and reclassification. Whenever we weave a series of legal ideas into a new pattern, to apply them to a case, we are classifying them. You want a new classification for each case, but this is the lawyer's task.[22]

¶13 Law offers the lawyer what I think of as "thick reality,"[23] following anthropologist Clifford Geertz's argument that law needs to be understood within the locality, practices, languages, images, and symbols that constitute a legal society.[24] To understand what something means in a culture, it must be placed within its context. As the context changes, so do the locality, practices, languages, images, and symbols that make meaning of the society, or, in this case, legal society. For legal researchers to tap into the possible networks of meanings that comprise the law in a culture, they must be open to the variance in meanings that may exist. They must

---

17. John B. West, *Multiplicity of Reports*, 2 Law Libr. J. 4, 7 (1909).

18. Sabrina Sondhi, *Should We Care If the Case Digest Disappears? A Retrospective Analysis and the Future of Legal Research Instruction,* 27 Legal Reference Services Q. 263, 266 (2008).

19. Some other ways that case law can be researched are included *infra* in my discussion of the survey I conducted.

20. Pierre Schlag, Commentary, *The Aesthetics of American Law*, 115 Harv. L. Rev. 1047, 1065 (2002).

21. Dabney, *supra* note 3, at 237, ¶ 35.

22. Frederick C. Hicks, *Technique of Legal Research for the Practicing Lawyer*, 31 Law Libr. J. 1, 8 (1938).

23. This term is based on Clifford Geertz's "thick description." *See* Clifford Geertz, *Thick Description: Toward an Interpretive Theory of Culture*, *in* The Interpretation of Cultures 3 (1973).

24. *See* Clifford Geertz, *Local Knowledge: Fact and Law in Comparative Perspective, in* Local Knowledge: Further Essays in Interpretive Anthropology 218–19 (1983).

understand the law as being "thick," in the sense that there usually exists an additional layer or layers down below the surface meaning of a particular legal word or phrase that can generate further interpretation and research. Rather than thinking of only one intellectually fixed term or phrase existing for each subject, it is much preferable to have a free-text system that allows for flexibility and fullness, permitting a more interpretive research that can deal with the multiple layers of our legal culture. Fitting law into a grid of key numbers does not allow for this type of deeper, interpretive research.

¶14 Dabney's first example in his attempt to prove the superiority of the Key Number System over free-text searching involves a mangy dog. He imagines someone buying a dog that proved later, upon arrival at the new owner's home, to be "mangy." Dabney explains the case to be one of contract law, stating that an "implied warranty of merchantability" argument would spring to the minds of attorneys confronted with this hypothetical.[25] Dabney says that the attorney, knowing the basic framework of law, would use topical analysis in order to choose to research the West Digest System under the main topic "Sales," looking under the key numbers for "Warranties."[26]

¶15 However, when I thought about this issue, the first digest-related topic[27] that came to my own mind was "dogs."[28] I knew that the "fact," in this case a mangy dog, would be too narrow to be a main topic, but I figured it might send me to the right main topic and help me determine what to search. The Descriptive Word Index did just this. It didn't take long to get to Animals 1.5(4): *Animals as property; status: Dogs,* which produced some pertinent case law. Dabney stated that "dog law" had no place in the West Digest literary warrant, and that the term owed its popularity to free-text electronic research.[29] As Dabney put it, "Free text makes dog law possible,"[30] stating that Mary Randolph's Nolo Press publication called *Dog Law*[31] likely owed, "a substantial debt to the availability of free text."[32] Yet, a quick search of Westlaw found a 1927 A.L.R. annotation, *Constitutionality of "Dog Laws."*[33] This annotation points to case, statutory, and municipal law regarding the term "dog law," and has been supplemented over the years. Contrary to Dabney's assertion that free text makes dog law possible, "dog law" seems to have been around for over a century: "In earlier law books it was said that 'dog law' was as hard to define as was 'dog Latin.' But that day has passed, and dogs have now a distinct and well-

25. *See* Dabney, *supra* note 3, at 232, ¶ 14.

26. *Id.* at 232, ¶ 15.

27. West Digests weren't the first legal research tool, and certainly not the first thought, that came to my mind when confronted with the mangy dog scenario.

28. My first thought was to search for **dog /s sale and defective**, which generated over thirty hits on Westlaw in the ALLCASES database. After adding the suggested synonyms "unfit," "substandard," and "faulty," the number of hits grew to 134.

29. Dabney, s*upra* note 3, at 238, ¶ 38.

30. *Id.* at 238, ¶ 39.

31. Mary Randolph, Dog Law (1st ed. 1988). The current edition is Mary Randolph, Every Dog's Legal Guide: A Must Have Book for Your Owner (5th ed. 2005).

32. Dabney, s*upra* note 3, at 238, ¶ 38.

33. Annotation, *Constitutionality of "Dog Laws,"* 49 A.L.R. 847 (1927).

established status in the eyes of the law."[34] Many other law books and law journals over the decades have dealt with "dog law."[35] Because these law books and articles were published before 1980, it is doubtful that any of them were influenced by free-text searching.

¶16 Dabney states that many fundamental terms, important legal terms, that are part of the intellectual indexing and the literary warrant of the digest system, would disappear in a free-text system that coalesced around every distinctive word to the point of incoherence.[36] He says that with free-text searching, one and two word terms like "dog law" have replaced time-honored old-fashioned terms like "chattel" that have been part of the West digest classification scheme for decades:[37]

> [T]here are an almost unlimited number of words that might, in context, carry the concept of chattel. It is beyond expectation that even the most assiduous searcher could write a query that would list more than a tiny fraction of the words that represent the concept. Thus, the concept of chattel cannot be used as part of the logic of a free-text query.[38]

In fact, a quick free-text search on Westlaw retrieved more than 10,000 hits for the term "chattel" in the database ALLCASES;[39] searching for the term "chattel" in the ten most recent years resulted in over 5000 hits.[40]

¶17 Dabney continues, saying that the phrase "chattel sales" is an appropriate one for his example, and that it is an important legal phrase—a part of intellectual indexing and unavailable in free-text searching. Indeed, when searched in ALLCASES, "chattel sales" appeared only six times.[41] However, had Dabney used the phrase "sale of chattel" he would have found almost 3000 documents in ALLCASES.[42]

¶18 Dabney contends that the "virtue of artificial languages is that they can be crafted to serve the needs of searchers without regard to limitations imposed by accidents of natural language."[43] His examples of "dog law," "chattel," and "chattel sales," all seem to point to an opposite finding: that the virtue of free-text natural

---

34. B.A. Milburn, Curious Cases: A Collection of American and English Decisions 315 (1902).

35. The following books can be found on OCLC when searching for "dog law": A.B. Alexander, Wisconsin's Revised Dog Law (1921); Sime Dingley & Oliver Goldsmith, Strictures on the Maine Dog Law of 1877 (Maine, n.p., 1877); William Marshall Freeman, The Law Affecting Dogs and Their Owners (1909); Edward H. Greene, The Law and Your Dog (1969); Frederick Lupton, The Law Relating to Dogs (London, Stevens and Sons 1888); Edward Manson, The Law Relating to Dogs (London, W. Clowes & Sons 1893); The Pennsylvania Dog Law: With Opinions of the Department of the Attorney General of the Commonwealth of Pennsylvania (1918); Patrice Solberg, North Carolina Dog Law Manual (1978); in addition there are over eighty pre-1980 law review articles specifically using the term "dog law."

36. Dabney, *supra* note 3, at 238, ¶ 41.

37. *Id.* at 238, ¶¶ 38–39.

38. *Id.* at 237, ¶ 37.

39. The search **chattel** was run in Westlaw ALLCASES database on Feb. 24, 2009.

40. The search **chattel & da(> 1998)** was run in Westlaw ALLCASES database on Feb. 24, 2009.

41. The search **chattel sales** was run in Westlaw ALLCASES database on Feb. 24, 2009.

42. The search **sale of chattel** was run in Westlaw ALLCASES database on Feb. 24, 2009.

43. Dabney, *supra* note 3, at 247, ¶ 87.

language is that it can be crafted to serve the needs of searchers without the limitations imposed by the confining intellectual indexing of the West Digest System.

¶19 I do agree with Dabney that it is good for a classification system to make use of literary warrant.[44] Literary warrant is the conglomeration of subject terms that a particular classifier uses in constructing an index to a subject. I also agree with him that the West Digest classification system is backward looking, indexing only those terms appearing in case law, but I disagree that the law thrives under this classification of the past. To me, the notion that "[n]ew ideas seem less risky if they can be drawn out of old texts,"[45] is problematic. Classifying only those ideas that have already appeared in the system or are related to existing ideas, perpetuates a closed system. And, as Dabney concedes: "Real innovation in the law is forward looking."[46] Expanding the concept of literary warrant to include those ideas not related to laws already classed in the system or not steeped in precedent would be helpful.[47]

¶20 Dabney mentions that while the Key Number System does not anticipate subjects in the law, because the system does retain ideas that have "fallen into disuse," it is possible for these to be revived at a later date.[48] The cynical reader may be tempted to satirize this assertion and imagine witnessing some old, outmoded laws from old texts actually "spring[ing] back to life."[49]

¶21 On the other hand, Dabney also says:

> At the time the Key Number System was introduced in 1908, the reasonable fear was not, I believe, that the scope of the system was too narrow, but that it was impossibly broad. Who would have believed that you could index all of the cases from all forty-six American states in a single scheme?[50]

If the index is impossibly broad, why make it even broader with tired, outdated headnotes and key numbers? John West certainly did not envision this backward-looking approach of leaving out-of-date and outmoded classifications in the digest:

> Perhaps nothing has done more to prevent the permanency of digests than the false theory that cases and propositions dealing with changing conditions may be made to fit a rigid classification system instead of permitting the classification to change gradually with the growth of the case law. The classification of today will be as inadequate in the future as the classification of the past is at this time. We no longer need such titles as Piracy, and our forefathers did not require such titles as Street Railways, Electricity, Telegraphs and Telephones, etc., etc.
>
> Law is at all times an approximation of the ideals of justice then predominant. Each year has its peculiar public problems, and the current law is the solution which each year

---

44. "Literary warrant" means that a "heading is warranted only when a literature . . . has been shown to exist, and the test of the validity of a heading is the degree of accuracy with which it describes the area of subject matter common to the class." E. Wyndham Hulme, Principles of Book Classification 447 (1911).

45. Dabney, *supra* note 3 at 242, ¶ 63.

46. *Id.* at 242, ¶ 64.

47. *See infra* ¶ 22.

48. Dabney, *supra* note 3, at 242, ¶ 60–61.

49. *Id.* at 242, ¶ 62.

50. *Id.* at 245–46, ¶ 81.

> finds thereto. The next year finds new problems and new solutions of the old ones. A rigid permanent classification scheme is as impossible of attainment as the universal code.
>
> The digester bound to a fixed classification soon finds himself sorely pressed to make certain cases "fit the classification."[51]

¶22 In reaction to detractors who judge the West Digest System to be too conservative, Dabney offered a possible way of extending the West Digest System's literary warrant—by expanding the system to include law reviews.[52] The idea of connecting law reviews with the digest system is not a new one,[53] and provides the possibility of continuing the digest system as a viable research tool in the years to come. The results of my survey, discussed below, showed law reviews to be one of the two most used legal research tools. By extending the West Digest System to include law reviews, West could significantly expand its "literary warrant," helping bring the digest system into the "now," and allowing for more multilayered interpretive research.

Challenging the Predominance of the West Digest System

¶23 Peter Schanck made four important assertions in his article, which I used as the basis for the survey I conducted.[54] His assertions support his argument that "key numbers, headnotes, indexes, and so forth have had little or no impact on either the content of our law or our understanding of the legal system."[55] This is the antithesis of Dabney's argument that "the Key Number System[] matter[s] to the law itself . . . telling us what ideas are important ideas and what questions are important to ask."[56]

¶24 Schanck's four contentions were as follows:

1. "[W]hen conducting their research, attorneys tend to use more than one system, and often several . . . . expos[ing] the researcher to a variety of nondigest classifications."[57]
2. A "number of lawyers . . . claim never to use digests."[58]
3. "[L]awyers tend to concentrate more on the facts . . . than on abstract doctrines. In so doing, they prefer searching descriptive word indexes over topical analyses, and they search the indexes as much for factual terms as for legal concepts."[59]
4. Even if lawyers use the West Digest exclusively they "tend to scan all or most of the cases under several key numbers and, in the process, pay little attention to the designations assigned to the categories. . . . By this final stage, the West structure is long forgotten and its effects negligible."[60]

---

51. West, *supra* note 17, at 7.
52. Dabney, *supra* note 3, at 243–44, ¶¶ 67–69.
53. *See* Arthur S. Beardsley, *Law Books and Law Publishers*, 28 Law Libr. J. 51, 59 (1935).
54. He also helped me formulate some of the questions for the survey.
55. Schanck, *supra* note 8, at 17.
56. Dabney, *supra* note 3, at 247, ¶ 86.
57. Schanck, *supra* note 8, at 17–18.
58. *Id.* at 18.
59. *Id.* at 18–19.
60. *Id.* at 19.

Survey on the Use of Research Tools[61]

¶25 To test Schanck's assertions, I mailed a survey to 526 Douglas County, Kansas, attorneys,[62] and received a total of 121 responses, a 23% success rate.[63]

¶26 The first question of the survey asked for a listing of the print and online legal research tools that the attorney used. The question also asked for a numerical order of preference. Unfortunately, because respondents expressed their preferences using different methods, the numerical order of preference could not be adequately categorized for analysis. Many respondents marked which tools they used, but did not indicate an order of preference. Some respondents included print and online together when applying a numerical order, and some treated print and online tools separately. Nineteen respondents adequately answered part of the survey but did not answer questions 1 or 2. There was a clear indication, however, as to which tools were used the most, and the results are shown in table 1.

Table 1

Use of Legal Research Tools

	Codes	ALR	Citators	Digests	Law Reviews	Legal Encyclopedias	Looseleafs	Treatises	Other
P-Print	50	30	12	37	32	29	27	24	9
P-Online	46	25	25	26	38	16	8	12	21
P-Both	29	7	5	16	13	5	3	3	4
P-ALL	67	48	32	47	57	40	32	33	26
F-Print	11	5	1	4	13	6	11	11	6
F-Online	14	3	6	2	17	2	2	8	15
F-Both	3	1	0	3	5	1	0	2	5
F-ALL	22	2	7	9	25	7	13	17	16
TOTAL	89	50	39	56	82	47	45	50	42

P=Practitioners F=Law Faculty N=121

61. The survey questions are included *infra* as appendix A. All results are on file with the author.

62. The attorneys came from rolls of the Douglas County Bar Association, Findlaw, Google, or Martindale Hubbell web searches, and the law faculty at the University of Kansas, School of Law. The original intent for including law faculty in the survey was to increase the number of potential respondents, not to differentiate between practitioners and law faculty survey responses, but on the suggestion of a faculty member I decided to list the results separately. The two responses that could not be identified were included as practitioner responses.

63. The University of Kansas Research Department, which approved the survey under IRB guidelines, preferred a mailed survey as opposed to an electronic one. The Research Department did agree, however, to supply a URL that would allow for Internet responses. This increased the response rate.

¶27 Attorneys in Douglas County use several research tools when performing their research. As a matter of fact, all respondents but three indicated using more than one tool when researching the law.[64] This suggests that attorneys generally approach researching the law without one rigid classification system in mind. As one respondent stated: "I research a lot of stuff, some of which is listed in the survey and some not." The responses to this question appear to support Schanck's first contention that "when conducting their research, attorneys tend to use more than one system, and often several . . . . expos[ing] the researcher to a variety of nondigest classifications."[65]

¶28 Another interesting result, not reflected directly in table 1, was that fourteen respondents used only print tools, compared to twenty-one who used only online sources, and sixty-nine who used both print and online sources. One hundred of the 121 respondents indicated they searched at least one online source.[66]

¶29 One surprise was the extensive use of law reviews. In my experience, law reviews are generally considered a tool used mainly by academics. My survey showed that while faculty do indeed favor them, practitioners do, too.[67] Because of this, Dabney's musings about placing law reviews into the literary warrant of the West Digest System may provide a solution to the closed universe of the Key Number System. Law reviews, with their emphasis on developing the law, rather than merely reflecting its current state, would allow the addition of new ideas and vocabulary to the digest.

¶30 Schanck's second contention was that a "number of lawyers . . . claim never to use digests."[68] Question 6 of my survey asked: "Do you use West Digests in your legal research?" Fifty-six (46%) of the 121 respondents checked or indicated "yes" in answering question 6, suggesting that 54% of the lawyers in Douglas County do not use the West Digest System in their research. Thus, the West Digest System can hardly be considered a system "infused with the law" as Dabney contends.[69]

¶31 Forty-four percent of the lawyers still use the digest system in print, implying that the paradigm shift from print to computer that Barbara Bintliff foretold has begun, but is far from complete.[70] In addition, thirty-five percent of the lawyers in my survey indicated they used the West Digest System online. Question 7 tried to pinpoint the actual use of West Digest System, asking, "How often do you use the West Digest?" Only those marking "yes" to question number 6 answered this.

---

64. The three respondents who indicated they used only one legal research tool were all practitioners, and the tools they indicated using were Casemaker (available for free to members of the Kansas Bar), the American Immigration Lawyers Association web site, and law reviews.

65. Schanck, *supra* note 8, at 17–18.

66. For a more detailed discussion of the tools that practicing lawyers use for research, see Patrick Meyer, *Law Firm Legal Research Requirements for New Attorneys*, 101 LAW LIBR. J. 297, 2009 LAW LIBR. J. 17.

67. Twenty-five out of thirty-one (81%) responding law faculty stated they researched law reviews; fifty-seven out of ninety (63%) responding practitioners stated they researched law reviews.

68. Schanck, *supra* note 8, at 18.

69. *See* Dabney, *supra* note 3, at 247, ¶ 86.

70. *See* Barbara Bintliff, *Content and Legal Research, 99* LAW LIBR. J. 249, 249, 2007 LAW LIBR. J. 15, ¶ 1.

Thirteen practitioners and four law faculty answered "Frequently" and thirty-five practitioners and four law faculty answered "Only Occasionally." Out of 121 respondents, only seventeen attorneys (14%) used the West Digest System frequently.

¶32 Schanck's third contention was that lawyers tend to "concentrate more on the facts . . . than on abstract doctrine. In so doing, they prefer searching descriptive word indexes over topical analyses, and they search the indexes as much for factual terms as for legal concepts."[71] Questions 8 and 9 were designed to test this assertion. Question 8 asked, "Do you use descriptive word indexes over topical analysis?" Of the fifty-six who answered, thirty practitioners and one faculty member indicated that they used both descriptive word indexes and topical analysis. Seventeen practitioners and three law faculty answered that they preferred descriptive word indexes to topical analysis, while only two practitioners and three law faculty stated that they preferred topical analysis over descriptive word indexes. These results, shown in table 2, indicate an overall preference for using both descriptive word indexes and topical analysis followed by a lesser preference for using the descriptive word index alone, with only a small number preferring to just search using topical analysis.

Table 2

Preference for Descriptive Word Index or Topical Analysis

Source Used	No. of Respondents (%) N=56
Descriptive Word Index	20 (36%)
Topical Analysis	5 (9%)
Both Descriptive Word Index & Topical Analysis	31 (55%)

¶33 Question 9 followed up on this: "Only answer if you use the *Descriptive Word Index*. Do you search the index as much for factual terms as you do for legal concepts?" Twenty practitioners and three law faculty indicated they used the *Descriptive Word Index* (DWI) for finding both factual terms and legal concepts. Three practitioners and two law faculty said they use the DWI for factual terms while one practitioner and no law faculty indicated they use the DWI for legal concepts. Table 3 illustrates these preferences.

Table 3

Use of Factual Terms and Legal Concepts

Type of Search Used	No. of Respondents (%) N=28
Factual Terms	4 (14%)
Legal Concepts	1 (4%)
Both Factual Terms & Legal Concepts	23 (82%)

71. Schanck, *supra* note 8, at 18–19.

¶34 For the smaller number of respondents who indicated they use the West Digest frequently, nine practitioners and one faculty member indicated they use the DWI to find both factual terms and legal concepts; three practitioners and no faculty stated they use the DWI to just find factual terms; and one practitioner and one faculty member used only the DWI to find legal concepts.

¶35 When applying the above analysis of Schanck's third contention to Dabney's article, we need look no further than his "mangy dog" example. Dabney describes a buyer who purchases a dog that turns out to be "mangy." The buyer goes back to the seller to get his money back, but the seller refuses. The buyer threatens to sue. The buyer asks his lawyer brother-in-law for advice. Lawyer brother-in-law thinks in the framework of the law and conjures the abstract doctrine, *implied warranty of merchantability,* which falls under the topic "Sales." Dabney states that by using topical analysis, lawyers realize that "dog" is not what is important, but rather "sales."

¶36 The survey results suggest that there is a preference for using the DWI rather than topical analysis, although most attorneys indicated they like to use both of these methods. In addition, for those attorneys using the DWI, their preference is to use it to find both factual terms and legal concepts. Thus, I believe that Schanck's third contention is correct.

¶37 Schanck's fourth contention was that even if lawyers use the West Digest exclusively they "will tend to scan all or most of the cases under several key numbers and, in the process, pay little attention to the designations assigned to the categories," and that by the "final stage, the West structure is long forgotten and its effects negligible."[72]

¶38 It might be easiest to just accept this assertion, since in my study only three attorneys indicated they use only one source exclusively, and none used the West Digest exclusively. But the results of Questions 4, 5, 10, and 11, which were written with the intention of testing this assertion, provide additional support. Questions 4 and 5 dealt with whether attorneys are conducting free-text searching. Question 4 asked: "If you research online, do you use free-text searching?" Fifty-nine of the 101 responding attorneys stated they conduct free-text searching frequently. Thirty indicated they use free-text searching only occasionally and twelve stated they never use free-text searching.

¶39 Question 5 asked; "If you search Westlaw for case law, which of the following research methods do you use?" Ninety-one attorneys responded to question 5. Fifty-two (57%) stated they used free-text searching on Westlaw. The other thirty-nine (43%) stated they used some other method to search Westlaw. By analyzing question 1 along with question 6, the findings show that of the fifty-six attorneys who stated they use the West Digest System, only twenty-five attorneys search it online. Of the thirty nine who did not use free-text searching, twenty-five attorneys searched Westlaw via the West Digest System.[73] Table 4 illustrates that the majority

72. Schanck, *supra* note 8, at 19.

73. Thirty-one of the fifty-six attorneys indicated they use the West Digest System only in print. This suggests the West Digest System is losing significant influence as a research tool as attorneys increasingly move toward electronic research.

of attorneys used free-text searching on Westlaw to find cases. This finding supports the fourth contention that lawyers just want to read the cases and not necessarily use the West Digest structure to find them.

Table 4

Research Methods Using Westlaw

Method Used	No. of Respondents (%) N=91
Free Text	52 (57%)
West Digest	25 (28%)
Other	14 (15%)

¶40 Question 10 of the survey asked: "Do you pay attention to the West headnotes in a case and make use of them in your research?" Only those attorneys who indicated that they use the West Digest System were asked to answer this question. Thirty-five attorneys stated that they do pay attention to the headnotes and make use of them in their research. Additionally, the results showed that twenty-two of the twenty-five attorneys who searched the West Digest System online paid attention to the headnotes.

¶41 Question 11 asked: "Do you tend to scan all or most of the cases under several key numbers when researching in the digest?" Again, only those attorneys who indicated that they use the West Digest System were instructed to answer this question. Thirty-eight of fifty-six attorneys (68%) stated they do scan all or most of the cases under several key numbers when researching in the digest. Thirteen attorneys (23%) stated they did not. Additional findings from Question 11, however, show that fourteen out of the twenty-five attorneys who searched the West Digest System online scanned most or all of the key numbers associated with a case. Thus, the results of Question 11 largely support Schanck's contention that lawyers disregard key numbers in their research and go straight to the case opinions. Taken together, Questions 10 and 11 suggest that attorneys do pay attention to the headnotes when researching online and make use of them, but not in a way related to the structure of the digest classification system.[74]

¶42 Dabney states that the West Digest structure tells lawyers what law is important law and what questions are important to ask. However, the findings of my survey suggest this is incorrect. Instead, it suggests that attorneys are just scanning most or all of the cases (including the headnotes) under several key numbers, paying no specific attention to the structure of the West Digest System.

¶43 The remaining questions from the survey addressed some of the other assertions made by Dabney in his article. Question 3 related to Dabney's assertion that lawyers think of the names of their first-year courses when thinking about

74. Another way of explaining this is to think of attorneys reading the headnotes as if they are part of the case and taking them into consideration along with the opinion.

areas of law.[75] Dabney is suggesting that lawyers think about the law in a certain way. This way of thinking about the law leads lawyers to legal analysis of abstract doctrine, so that they think about the "implied warranty of merchantability" instead of "dog" when confronted with the sale of a mangy dog. The survey data from question 3 showed that only forty-one out of the total number of ninety-nine attorneys (41%) who answered this question think of their first-year courses in this manner. The majority of attorneys probably approach the research by thinking of their particular cases and the issues and facts involved. In my opinion, the law is too multifaceted, multilayered, and interrelated to be logically broken down into abstract classifications.

¶44 Two of my questions addressed Dabney's contention that outdated and outmoded laws should be retained in the literary warrant of the West Digest System.[76] Question 12 asked: "When revising the key number system, West rarely eliminates outmoded key numbers. Have you ever researched these latent headnotes in your research?" Only those attorneys who indicated they use the West Digest System were to answer this question. Twenty-six of the fifty-two respondents (50%) indicated they do research the latent headnotes. Question 13 states; "Have you ever used these latent headnotes in your work product?" Only five of the respondents stated that they had ever used old, latent headnotes in their work product. Thus, it appears some attorneys are looking at the latent headnotes, but few are making use of them.

¶45 The final question, number 14, was the obligatory catch-all; "Do you have any other remarks you would like to share?" A sampling of these remarks can be found in appendix B.

Limitations of the Survey Results

¶46 One of the disturbing aspects of conducting an empirical research is discovering shortcomings afterward. Starting with confidence that the proper questions were posed, reality sank in, and some shortcomings were identified. For example, more could have been learned from the results if there had been a question asking the attorneys what kind of research they were conducting, in addition to the tools they were using.[77]

¶47 There is also the possibility that some of the attorneys did not understand the various research-related terminologies used in the survey. For example, there is no way of knowing whether attorneys who noted they were using citators online were actually using the West Digest System functions available in KeySearch.[78] In

75. While Dabney does not say this explicitly, traditional first-year course subjects are roughly the same as the main categories of the West Digest System, suggesting some influence on the way that lawyers think.

76. Dabney, *supra* note 3, at 242, ¶ 62.

77. One comment from attorney who filled out the survey illustrates this: "The nature of the specific project has more to do with how it will be researched. Tax issues are usually better addressed through serial publications; contract issues do lend themselves to digest analysis. Occasionally one really has to take something forward from common law that becomes codified. Computer research does not always work, so Question 1 varies with the project and nature of the practice."

78. There is also the possibility that the number of respondents saying they use digests was actually been overrepresented because in Question 1 there was no distinction made in the survey for

addition, perhaps lawyers were using the digest in other ways without their knowledge. For example, by hyperlinking to the Custom Digest from headnotes.[79] The ultimate question, though, is whether any possible unknown use of Key Number System online is in the spirit that Dabney asserts "tell[s] us what ideas are important ideas and what questions are important to ask,"[80] and to this I think the answer is "no."

Conclusion

¶48 The results tallied in my survey supported Schanck's contentions and challenged Dabney's assertions. The data suggests that lawyers are not dependent on intellectual indexing, using a "variety of nondigest classifications"[81] to perform their research. In addition, the results implied that the West Digest System is not infused in the law, as a majority of lawyers don't even use the digest in their research. Regarding Schanck's third contention, the survey results suggest that lawyers are more likely to search in the DWI for terms such as "dogs" rather than use topical analysis. In relation to the fourth Schanck assertion, the survey results imply that the West digest structure is not being used by attorneys to discover what law is important or what are the important questions to ask, since most lawyers don't appear to be paying any attention to the structure when scanning most or all of the cases under several key numbers when researching.

¶49 My research suggests that neither does the Key Number System influence the law nor does the law influence the Key Number System. In the end, the digest is a minor player in a legal culture where lawyers will go everywhere to find the law.[82] Free-text searching brings the flexibility that lawyers need to effectively research in today's legal culture. Lawyers will look at the localities, practices, languages, symbols, and images surrounding legal society to find and gain an understanding of the law. The Key Number System could help lawyers in their pursuit by extending its literary warrant to law reviews, which can expose lawyers to many more ideas that can aid in creating a deeper analysis and understanding of our complex and multilayered legal system. That literary warrant will also need to be truly applied, rather than imposing false limitations such as having classifiers only create subject headings for ideas that are already part of the digest system.

West digests compared to other digests available in the legal research market place. Examples of other digests that attorneys may have been thinking of include the *Digest of United States Supreme Court Reports, Lawyers Edition*; *A.L.R. Digests*; the *Opinions Digest* in the back of every issue of the *Journal of the Kansas Bar Association*; and various loose-leaf services, topical reporters, or other similar publications.

79. Judith Lihosit, in her recent article, *Research in the Wild: CALR and the Role of Informal Apprenticeship In Attorney Training*, 101 Law Libr. J. 157, 2009 Law Libr. J. 10, stated that "none of the attorneys I interviewed would search the West digest system the way it was taught to them in law school." *Id*. at 174, ¶ 45.

80. Dabney *supra* note 3, at 247, ¶ 86.

81. Schanck, *supra* note 8, at 18.

82. *See* Heidi W. Heller, *The Twenty-First Century Library: A Law Firm Librarian's Thoughts*, 101 Law Libr. J. 517, 522, 2009 Law Libr. J. 28, ¶ 14.

Appendix A

Survey Questions

1. Please list in numeric preference the legal research tools you use, either in print, online, or both. (Please don't fill in past the number that you actually use.)

	PRINT	ONLINE
Annotated Codes	_____	_____
A.L.R.	_____	_____
Citators	_____	_____
Digests	_____	_____
Law Review Articles	_____	_____
Legal Encyclopedias	_____	_____
Looseleaf Services	_____	_____
Treatises	_____	_____
Other	_____	_____

2. If you chose "Other" in question 1, please describe below.

3. When you think of areas of the law, do you think first of the names of the first-year courses of American law schools?

   Yes _____ No _____

4. If you research online, do you use free-text searching?

   Frequently _____ Only Occasionally _____ Never _____

5. If you search Westlaw for case law, which of the following research methods do you use?

   Free-Text Searching _____ Other _____

6. Do you use West Digests in your legal research either in print or online? If you answered "No," please skip questions 7 through 13.

   Yes _____ No _____

7. How often do you use the West Digest?

   Frequently _____ Only Occasionally _____

8. Do you use descriptive word indexes over topical analysis (the outlines that precede each legal topic)?

   Descriptive Word Index _____ Topical Analysis _____ Both _____

9. Only answer if you use the Descriptive Word Index. Do you search the index as much for factual terms as you do for legal concepts?

   Factual Terms _____ Legal Concepts _____ Both _____

10. Do you pay attention to the West headnotes in a case and make use of them in your research?

    Yes _____ No _____

11. Do you tend to scan all or most of the cases under several key numbers when researching in the digest?

    Yes _____ No _____

12. When revising the Key Number System, West rarely eliminates outmoded key numbers. Have you ever researched these latent headnotes in your legal research?

    Yes _____ No _____

13. Have you ever used these latent headnotes in your work product?

    Yes _____ No _____

14. Do you have any other remarks that you would like to share?

Appendix B

Sample of remarks in response to Question 14: Do you have any other remarks you would like to share?

Remarks are grouped as A: Pro-West Digest System; B: Anti-West Digest System; C: General research statements

Group A (Pro-West Digest System)

1. I love the West headnotes.
2. I believe that the digest stands in for our thoughts. If we're bound by precedent, and the precedent has one true organization, then we're inherently going to think in terms of that structure.
3. I primarily consult the digests when looking for another, more recent or more on-point, case applying a general concept of law. I will also use the digest to search other states' treatment of an issue when a general ALLSTATES search does not return favorable results or returns too broad results.
4. Digests and other collections are for circumstances when I do not know where to start. They "push" me in the right direction, but then the cases and their authority (Shepard's) brings me the answers.
5. I prefer print digests as you can see surrounding information more easily than online. Sometimes it's what's nearby what you thought you wanted that's more useful. I'll use headnote text given in digests both to directly identify possibly useful cases and for words to use in free-text online searches.
6. I like the West Digest in print, but then again, I'm over fifty years old.

Group B (Anti-West Digest System)

1. I have not used West Digests since law school. Online research began for me in 1997 or so.
2. I prefer Lexis to Westlaw because I dislike the headnotes.
3. West is behind the times, online searches give me more and better results.
4. West was great for the nineteenth and early twentieth century.
5. Occasionally some lawyer will cite to a headnote and the actual text is not so helpful.
6. I typically use Lexis rather than Westlaw, and I haven't used West headnotes for at least fifteen years.

Group C (select general research statements)

1. I graduated from law school in 1972. Computer research is foreign to me.
2. Use online mostly, but still like the books, especially *Kansas Statutes Annotated.*
3. I don't do a lot of legal research, what I do is statutory and case law which I research in Casemaker under my KBA membership.
4. I've practiced law since 1948 and used only print research. *Hatcher's Digest* was found to be the most useful for researching Kansas law.
5. I use both print and electronic research tools, each being useful for different types of research tasks.
6. Increasingly I use web resources other than Westlaw or Lexis.