

A Data Bank on Constitutional Rights?

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LANDING on the moon was, as much as anything else, one successful result of information retrieval systems. It required technological advances in many other fields as well, but without the ability to collect, store, and retrieve data on a multitude of indicators, safe liftoffs, space travel, landing, and return would have been impossible.

Surveillance of the activities of individuals on earth, especially in "political" cases,¹ may also involve electronic input, storage, and retrieval of information. Such surveillance focuses on thoughts and ideologies based on actions and associations.² Data banks are commonplace today, operated by government and private agencies to collect information on individuals—including their records in relation to peace officers on the one hand, and their habits as consumers, insureds, and debtors, on the other. County by county, and on a national level, defenders of individual constitutional rights and of the right of privacy³ are seeking safeguards against the collection of irrelevant or dated material,⁴ as well as the retrieval of personal information

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1. Defined in *Illinois v. Allen*, 397 U.S. 337, 352-56 (1970) (Douglas, J.).

2. See, e.g., *Laird v. Tatum*, 408 U.S. 1, 16 (1972) (agreed facts about U.S. Army surveillance programs described in majority and dissenting opinions). For articles on the political implications of information retrieval systems see, Ervin, *The First Amendment: A Living Thought in the Computer Age*; Davis, *Police Surveillance of Political Dissidents*, in *SURVEILLANCE, DATAVEILLANCE AND PERSONAL FREEDOMS: USE AND ABUSE OF INFORMATION TECHNOLOGY* 23 (COLUM. HUMAN RIGHTS L. REV. ed. 1973).

3. See additional protection of privacy added to CAL. CONST. art. I, § 1 in an amendment adopted Nov. 7, 1972: "Inalienable Rights. All people are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety, happiness, and *privacy*." (emphasis added).

4. For a report outlining efforts to monitor the local police retrieval system in one area, Alameda County, California, see V. Rosenberg & L. Hoffman, *Citizen Mon-*

by unauthorized persons.⁵

What use, if any, is being made of this kind of scientific know-how in the protection of "our most precious freedoms,"⁶ constitutional rights? These rights include: 1) civil liberties (protected in the bill of attainder prohibition⁷ and in the First, Ninth,⁸ and Fourteenth Amendments); 2) due process of law (protected in the ex post facto and habeas corpus provisions,⁹ and in the Fourth, Fifth, Sixth, Seventh, Eighth, and Fourteenth Amendments); and 3) civil rights (protected in the Fourteenth Amendment equal protection clause and in the Fifth Amendment due process clause.)¹⁰ Despite the fundamental character of these rights, the priorities of the legal profession, and of society as a whole, have been on other matters. Even old-fashioned methods of information retrieval and word processing have not made their way into legal research and drafting in the area of constitutional rights,¹¹

itoring of a Law Enforcement Data Bank (1974) (unpublished paper in Meiklejohn Institute, Berkeley, Cal.). *See generally*, A. WESTIN AND M. BAKER, *DATABANKS IN A FREE SOCIETY* (1972) (Quadrangle Press).

5. For information on Congressional attempts to curb dissemination of personal information to unauthorized persons, see XIII: 4 STAFF REPORT TO THE SENATE SUBCOMMITTEE ON CONSTITUTIONAL RIGHTS (Comm. Print 1973). For administrative action on this topic *see, e.g.*, several publications of Law Enforcement Assistance Administration (LEAA), Project SEARCH, including LEAA COMM. ON SECURITY & PRIVACY, MODEL ADMINISTRATIVE REGULATIONS FOR CRIMINAL OFFENDER RECORD INFORMATION (Technical Memorandum No. 3, 1971). LEAA COMM. ON SECURITY & PRIVACY, CONSIDERATIONS IN CRIMINAL HISTORY INFORMATION SYSTEMS (Technical Report, No. 2, 1970); LEAA COMM. ON SECURITY & PRIVACY, A MODEL ACT FOR CRIMINAL OFFENDER RECORD INFORMATION, (Technical Memorandum No. 3, 1971). For an individual state's response to the threat of unauthorized use of personal records, see Criminal Offender Record Information System Act, MASS. GEN. LAWS ANN., ch. 6 §§ 167-78 (Supp. 1973). *See also*, Ervin, *The Computer v. Our Constitution*, 1 BARRISTER 14 (1974). Additional problems in commercial law are discussed in Bernacchi and Larsen, *Philosophy, Data Processing and the Rules of Evidence*, 1 BARRISTER 35 (1974).

6. NAACP v. Button, 371 U.S. 415, 438 (1963).

7. U.S. CONST. art. I, § 9.

8. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965).

9. U.S. CONST., art. I, § 9.

10. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

11. At least this is true on the side of criminal defendants and class suit plaintiffs. On the government side, the situation is somewhat different. *E.g.*, the United States Attorney's office in San Francisco has just completed an index file for each pretrial and appellate brief in three of its four divisions (tax, lands, and criminal; the civil division uses materials collected in the Washington, D.C. office). Briefs are noted by court action number and by subject matter (such as insufficiency of evidence). Conversation with James Browning, United States Attorney for the Northern District of California, in San Francisco Mar. 20, 1974 [hereinafter cited as Browning Conversation]. *See text infra*, at note 87.

so that transition from present methods to data banks is impossible at this time. There are not even plans for providing constitutional litigants with the traditional services available in property-related fields of law.

The Tax Model

If a client has a tax problem, as an individual or as the officer of a corporation, he or she¹² can obtain expert legal advice through a general practitioner who can refer the problem to a tax specialist or through direct retention of such a specialist. The tax lawyer does not stray from the field, and is assisted by a massive array of published materials that make the law readily accessible, including annotated statutes, annotated regulations, reported decisions at the administrative and judicial levels, several looseleaf services providing insights into developments, hornbooks for the beginner, and casebooks. In addition, there are beginning and advanced tax courses in law schools, continuing education programs for practicing attorneys, and considerable cross-fertilization through joint sessions with certified public accountants.¹³

The only requirement for plugging into the system is the cost of the services, which is not inconsiderable. However, since the subject matter of a tax case is money, the client expects to pay a fee in money for the services, and is almost certainly able to afford the payment of a such a fee.

This panoply of tools for the practitioner is not available in the constitutional rights field at any price. What little material is available may seem too expensive to the lawyer representing a client in a constitutional law case where the subject matter is not money, and the recovery of money is not the primary goal. The civil liberties client may resent or even resist paying a fee for the lawyer's services, thinking the attorney should feel well-paid in the pride derived from participating in democracy, or in fame if the case is successful. Besides, in

12. Since no ear-satisfying solution to the gender problem has yet come to my attention, in this article I have continued to use "he" to mean "he or she" when I felt the reader would remember that women were included in the pronoun "he." Where possible I have used "one" or have repeated the noun. See, Zuppan, *The Sexist Pronouns*, 4 SCHOLARLY PUBLISHING 59 (1973). It is hoped that the sex of the author, and some qualities in the text, will remind readers that both sexes are included in the pronoun "he".

13. The attorney for the taxpayer faces an attorney from the Tax Division of the United States Department of Justice who has ready access to all briefs filed by members of the division throughout the country.

practical terms most clients are unable to afford the payment of an adequate fee for the time, effort, and paper work required to be successful.

Nitty Gritty Realities

While ignorance of the law is no excuse for violations by laymen, ignorance of the law is the most common reason for the failure of lawyers to successfully protect their clients' constitutional rights by filing and defending lawsuits.

In fact, few lawyers in general practice are prepared to litigate the constitutional rights of dissident clients seeking redress of grievances. Government agencies and large private institutions have trained staffs with continuity of service and access to handy sets of pleadings and briefs used in similar cases.¹⁴ The lawyer for John Q. Public on the other side sees each case as *sui generis*. There are no handy form books in which to find pleadings or procedural guides describing the probable course of the litigation. No one in the office has ever handled a similar case. Under these circumstances, the honest and conscientious lawyer must tell the client that the costs of litigation will be very high for lawyer research and drafting time, as well as for possible trial and appellate time.¹⁵

There are almost no lawyers in private practice who can afford to specialize in constitutional litigation on a continuing basis. Hence there are few experts. One case a year may be all a firm can afford.¹⁶ By the time a similar case arises, years may have elapsed, so that briefs painstakingly prepared in the past may be of little value in the current case.¹⁷ While some organizations can provide legal services as

14. The method actually used by most of the ninety lawyers in the San Francisco office of the California Attorney General is to ask everyone who has handled a similar issue recently, and to go to the individual files of that attorney, where copies of pleadings and briefs may be found. Lawyers keep their own materials for this purpose, rather than sending them to the central file because filing is quite far behind. Conversation with David Bowie, formerly with the San Francisco office of the California Attorney General, on Mar. 19, 1974 [hereinafter cited as Bowie Conversation].

15. *See, e.g.*, statistics on the length of constitutional litigation described in 8 CIV. LIB. DOCK. 1, Highlights (1962).

16. *E.g.*, Walter H. Pollak, who argued for incorporation of the Bill of Rights in the due process clause of the 14th Amendment as early as *Gitlow v. New York*, 268 U.S. 652 (1925), tried to take one public law case each year while continuing his partnership work in a leading small New York firm, hoping the case would consume no more than one month.

17. *See* the experience of Leonard Boudin, who won a remand in *Coplon v. United States*, 191 F.2d 749 (D.C. Cir. 1951), due to wiretapping of conversations be-

public advocates¹⁸ and a few firms have established small divisions to do work pro bono publico,¹⁹ they exist mainly in urban centers and cannot begin to meet the requests that pour in.²⁰

If legal services are to be provided on a large scale²¹ in the constitutional law field, it must become possible for general practitioners to handle such cases at relatively low cost so that the lawyers can collect adequate retainers and litigation costs from their clients at the outset. The chances of winning are not high, and it is likely that there will be a long wait before recovery of any fees.²² In addition, a core of specialists must be developed with the time and funding to assist newcomers in smaller constitutional cases and at the early stages in cases which specialists may take over at trial or appellate levels.

tween lawyer and client, and won dismissal of the indictment in *Russo, Ellsberg v. United States*, No. 9373-CD-WMB (C.D. Cal. May 11, 1973) 23 years later for similar reasons (among other examples of government over-reaching).

18. *See, e.g.*, Patient Advocacy Legal Service, Washington Univ. Law School, St. Louis, Mo. 63130; Public Advocates, Inc., 433 Turk St., San Francisco, Cal. 94102. Complete addresses of organizations and publishers are provided in this article, in disregard of the rules stated in *A Uniform System of Citation*. Attorneys in private practice often find law review use of this guide a hindrance to research, rather than a help, or, perhaps more accurately, an unnecessary aggravation. Why should a lawyer be told about an obscure source and then be forced to spend time looking up the street address and zip code number of a small publishing company, organization, or other source of information, when the author of the article citing the source can supply this information at the time of writing with little extra effort and little space is required to reproduce it? Private practitioners seldom have trained librarians handy to obtain such information and, even if they do, why should such searches be necessary? I have received many long distance telephone calls from librarians who have finally discovered my phone number and address as the publisher of works by Meiklejohn Civil Liberties Institute or National Lawyers Guild cited in an article by author and publisher only. Practicing lawyers often have to give up a search for ephemeral material because it is too time-consuming under the strait jacket imposed on law review editors by the *Uniform System of Citation*.

19. *See reports in* A.B.A. SPECIAL COMM. ON PUBLIC INTEREST PRACTICE, PRO BONO REPORT (bimonthly, 1155 E. 60th St., Chicago, Ill. 60637); LAWYER'S COMM. FOR CIVIL RIGHTS UNDER LAW, COMMITTEE REPORT (irregular, 520 Woodward Building, 733 Fifteenth St., N.W., Washington, D.C. 20005).

20. *E.g.*, local offices of the American Civil Liberties Union receive innumerable calls, both on constitutional law questions and on other legal questions, usually from impecunious litigants with administrative law and criminal law problems.

21. Trade unions may be expected to seek prepaid group legal insurance in many more collective bargaining fields in the near future, due to recent amendments to the National Labor Relations Act, 29 U.S.C. § 186(c)(7-8) (1970). *See* San Francisco Examiner, Feb. 19, 1974, at 47, col. 1-6. In time, members will probably seek legal services on constitutional law problems.

22. *But see*, DERFNER, ATTORNEY'S FEES IN PRO BONO PUBLICO CASES: A COMPILATION OF FEDERAL COURT CASES (1972, Supp. 1972, Supp. 1973) (Lawyers Comm. for Civil Rights, Washington, D.C.).

No Remedy Without a Lawbook

"No wrong without a remedy" really requires a corollary if it is to state the matter accurately: "And no remedy without a form book." In our legal system, the procedure for asserting most constitutional rights is not spelled out definitively in statutes or enforced by particular administrative agencies. Therefore, most litigation must rest on precedent. Finding the precedents or analogs requires either undisturbed time to pour over the books in a well-stocked law library or easy access to someone else's research and work-product.

The significance of work-product in this field cannot be ignored. The first problem is to know the law well enough to prepare comprehensive forms to use in interviewing clients so that valuable time is not lost asking irrelevant questions or chasing down the client later to obtain essential information.²³

The next problem is to draft a complaint that can withstand a demurrer and to prepare a short memo of points and authorities that supports the party's standing to raise the issue, the presence of the jurisdictional amount, or the timeliness of the claim. The novice lawyer, probably working alone, discovers that copies of complaints and preliminary memos are not collected in traditional law libraries, and he cannot follow the procedure available to his institutional opponent of simply asking all of his colleagues if they have prepared a similar form lately. In many fields, this is not a problem because samples can be found in form books. However, commercial law book publishers have prepared few forms for use in constitutional rights litigation, and even state bar continuing education programs seldom prepare materials in these "esoteric" or "non-fee-generating" fields.²⁴ As a result, the individual attorney in private practice is left with materials prepared for his opponent,²⁵ or on occasion, materials prepared

23. The Cook County Legal Assistance Foundation is seeking to develop, for routine cases, client information forms that are so well-drawn that no lawyer time will be required to complete them. The plan is to use a computer to record the client's answers and then to direct the machine to produce the document desired, whether a will, bankruptcy petition, or complaint charging mistreatment of a consumer. (Conversation with William A. London, computer project director, Cook County Legal Assistance Foundation, Inc., in Chicago, Mar. 22, 1974). If this process proves workable, constitutional lawyers may be able to learn from it, although most constitutional cases appear to be *sui generis*. Some government lawyers are using automated forms, that is, magnetic cards, in preparing complaints, indictments, jury instructions, and some other pleadings. (Browning Conversation, *supra* note 11).

24. See, e.g., the topics covered, CALIFORNIA CONTINUING EDUCATION OF THE BAR, ANNOUNCEMENT OF NEW SUPPLEMENTS TO C.E.B. BOOKS (1974).

25. See, e.g., BNA, MANUAL OF GOVERNMENT SECURITY AND LOYALTY, the only

for OEO legal service offices²⁶ that may relate to his client's problem, but of which he is usually unaware.

Partial Answers

When there is a clear constitutional need and government approval, all of the elements of the legal profession rise to the occasion and produce the necessary materials, as they did in the field of civil rights. After the Supreme Court decision in *Brown v. Board of Education*,²⁷ the Vanderbilt University School of Law became the home for the Race Relations Law Reporter [RRLR], a publication costing only five dollars per year, and ultimately containing verbatim copies of all known case law on race relations (whether officially reported or not); of statutes passed in the several states, in Congress, and sometimes even at the local level; and of many regulations. In addition, the RRLR contained thoughtful articles on emerging legal issues. The careful reader could often find, in the opinions, verbatim copies of the complaints on which the litigation was based, useable as models.

The increased interest in civil rights also spawned the Southern Education Reporting Service, which clipped periodicals and built up useful files on almost all subjects related to race relations, and published a monthly newsletter.²⁸

It was also possible to receive the NAACP Legal Defense and Education Fund monthly docket reports which, though always far behind in reporting events, ultimately described the status of the organization's cases, and gave the names of the attorneys. A persistent person could then contact the lawyer handling a particular case for up-to-date information. Other organizations developed legal defense groups²⁹ and each one ultimately published material of value to lawyers. This kind of material was never expensive—often it was free. The problem was to discover its existence and to get on the mailing list.

This machinery stopped functioning when funding ceased.³⁰

commercial service on cases raising many First and Fifth Amendment problems plaguing lawyers in the so-called McCarthy era.

26. See, e.g., NATIONAL CLEARINGHOUSE REVIEW (Northwestern University School of Law, 710 N. Lake Shore Drive, Chicago, Ill. 60611).

27. 347 U.S. 483 (1954).

28. SOUTHERN SCHOOL NEWS (Sept. 1954-June 1965).

29. See Ginger, *Special Purpose Defense Organizations*, 17 LAW. GUILD REV. 141 (1957) (describing some of the problems encountered during the Cold War-McCarthyism period).

30. 1-12 RACE RELATIONS L. RPTR., Feb. 1956-Winter 1967, succeeded by 1-3 RACE RELATIONS L. SURVEY, May 1969-March 1972.

Some large foundations left the civil rights area for other fields considered more urgent at the moment (including prisoners' rights and public television). As a result no single ongoing source of case reports, legislation, or administrative regulations on civil rights exists, although newer publications cover some fields contained in the old Race Relations Law Reporter.³¹

The same saga was repeated in other fields of intense temporary interest. The rise and demise of the California-based Prison Law Project³² and of the National Lawyers Guild Grand Jury Project³³ provide two recent examples.

The Big Cases

Side by side with long-range organizational efforts on constitutional law issues, defense committees develop and flower around specific major cases for relatively short periods during pretrial and trial. Examples are easy to recall: the Chicago Seven case,³⁴ the trial of Dr. Benjamin Spock and co-conspirators,³⁵ the Angela Davis case,³⁶ and the Ellsberg-Russo case.³⁷ Smaller teams worked on other cases, from the Huey Newton trials in Oakland, California³⁸ to the Black Panther cases in New York³⁹ and New Haven,⁴⁰ to the Gainesville trials of the Vietnam Veterans against the War,⁴¹ to the Camden antiwar pro-

31. *E.g.*, INEQUALITY IN EDUCATION (Center for Law and Education, Harvard University ed.).

32. Case files of the Prison Law Project are now part of Meiklejohn Civil Liberties Institute, Berkeley, Cal.

33. Housed in San Francisco, the project published REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES (1974) (looseleaf manual), before it shifted its focus to electronic surveillance.

34. *United States v. Dellinger*, No. 59-CR 180 (N.D. Ill. Feb. 18, 1970), *rev'd*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973).

35. *Spock v. United States*, 416 F.2d 165 (1st Cir. 1969).

36. *People v. Davis and Magee*, No. 3744 (Marin County, Cal. Super. Ct. Dec. 21, 1970); *People v. Davis*, No. 52613, Santa Clara County, Cal. Super. Ct. June 4, 1972); *see* register of actions, docket sheets, and all documents filed and transcripts prepared during pretrial and trial in complete case collection (Meiklejohn Civil Liberties Institute) (Berkeley, Cal.).

37. *United States v. Russo and Ellsberg*, No. 9373-CD-WMB (C.D. Cal. May 11, 1973); *see* docket sheets, all documents filed and transcripts prepared during pretrial and trial in complete case collections (Meiklejohn Civil Liberties Institute) (Berkeley, Cal.).

38. *People v. Newton*, 8 Cal. App. 3d 359, 87 Cal. Rptr. 394 (1970).

39. *New York v. Shakur*, Indictment No. 1848-69 (N.Y. County Sup. Ct. May 13, 1971).

40. *People v. Seale*, Crim. No. 15844 (New Haven, Conn. Super. Ct. May 25, 1971).

41. *See* brief descriptions of motions and briefs filed in *United States v. Briggs*

test case.⁴² In each instance, an office had to be created, attorneys retained and paid, volunteer help assembled (law clerks, legal workers, investigators), briefs collected from similar cases, and a vast number of pretrial motions and supporting memos written—all within a short period of time.

The scope of these undertakings may be suggested by a few figures: in the Ellsberg-Russo case, the defense produced approximately two file drawers of pretrial and trial motions, memos, exhibits, and briefs.⁴³ Similar papers in the Angela Davis case,⁴⁴ together with all transcripts of pretrial and trial days, came to 25,000 pages. Yet in neither case did the defense staff rise to the fifteen to twenty-five people necessary for the efficient use of any of the word-processing systems described in a recent effort to encourage modernizing law office operation.⁴⁵ Nor could such a system have been installed and operated efficiently within the short time available to criminal defendants and impecunious plaintiffs⁴⁶ in constitutional litigation.

When these cases ended, the offices were dismantled, and the work-product and transcripts were tucked into the files of various participating attorneys, with no permanent repository, no system for meeting future requests for specific documents or information, no method for taking the new forms, arguments, or exhibits and adding them to an existing data bank for national use.

An Example of the Problem

Many examples can be provided of the types of constitutional law problems that would benefit from access to computer research techniques. A single one should suffice. During the defense of federal criminal charges against Native Americans arising out of the occupation of Wounded Knee, South Dakota in early 1973, an election was held for tribal chief of the Oglala Sioux on the Pine Ridge Reservation. Russell Means, a leader of the American Indian Movement

(also known as the Gainesville 8 conspiracy case), and in the affirmative suit filed by the defendants to stay the subpoenas, in *DOCKET REPORT*, 1973, at 1-4 (Center for Constitutional Rights ed.) (853 Broadway, 14th floor, New York City, New York 10003).

42. *United States v. Anderson*, Indictment No. 602-71 (D.N.J. May 20, 1973). Jury instructions summarized in 5 *MEIKLEJOHN LIBRARY ACQUISITIONS* 17 (1973).

43. See note 37 *supra*.

44. See note 36 *supra*.

45. Swett, *Word Processing*, 60 *A.B.A.J.* 55, 64 (1974).

46. Since many members of any defense staff are volunteers or are working at less than their customary pay rates, use of word-processing systems could create additional problems as to role-playing. See notes 61 and 62 *infra*.

(AIM), was defeated by Richard Wilson by a vote of 1714 to 1514. Forty members of the tribe prepared affidavits alleging many fraudulent acts in connection with the election. Criminal defense lawyers filed a complaint⁴⁷ in federal court challenging the election results and seeking injunctive relief, that is, impoundment of the ballots and other election documents pending trial. Federal Judge Bogue granted a temporary restraining order and plaintiffs' counsel announced his intention of filing an amended complaint.

Where should a District of Columbia criminal lawyer, temporarily in Sioux Falls, South Dakota, go for legal assistance in preparing an amended complaint in a civil suit and find points and authorities for a memorandum?

A Piece of the Answer

In the cases arising from the Wounded Knee occupation, as in many other major cases arising from activities of organizations seeking social change, a series of lawyers and legal workers from around the country were handling the work, recruited by the National Lawyers Guild and the National Association of Criminal Defense Lawyers. Volunteers stayed from two to six weeks, learning to exchange ideas quickly. One of the lawyers from California who was working on some of the 175 federal criminal charges⁴⁸ suggested that the lawyer working on the election challenge try the Meiklejohn Civil Liberties Institute, a public interest law library in Berkeley to which he had turned in the past.⁴⁹

The Institute was created in 1965 to provide a unified, efficient, permanent method of assisting legal teams engaged in constitutional litigation on civil liberties, due process of law, and civil rights. Its work touches each branch of the legal field and its services, though limited by its small staff and insufficient funding, include those of a law library, brief bank, model case collection, lawyer referral service, archive, legal publishing company, and mail order book distributor.

47. *Means v. Wilson*, No. 74-5010 (D.S.D. filed Feb. 11, 1974).

48. *United States v. Baker and Decora*, Cr. No. 73-5021 (D.S.D. 1973).

49. See Res. of the American Association of Law Libraries, 1972 annual meeting, to "commend the efforts of the staff of the Meiklejohn Civil Liberties Library to collect and preserve materials of importance to intellectual freedom and that A.A.L.L. urge government agencies, philanthropic foundations, and others in a position to provide financial assistance to support the Meiklejohn Library." (The name of the organization was changed from Library to Institute in 1973 to reflect more accurately its several functions.)

A long distance call⁵⁰ to the Institute provided some leads. Could the tribal election be analogized to an election for trade union officers? If so, a San Francisco attorney who had recently won a federal court challenge to a trade union election⁵¹ probably would be happy to share his pleadings and briefs. Was the election similar to elections of board members to run community action programs in the war on poverty? If so, California Rural Legal Assistance lawyers might know of some cases.⁵² What about the successful challenges to elections by the Mississippi Freedom Democratic Party?⁵³ The Institute could supply copies of complaints, memos, briefs, and citations in some such cases.⁵⁴

As in all research, only a few of these leads proved fruitful. At the very least, the Washington lawyer felt less isolated geographically, and saw relevant parallels to his problem; in return he offered to enrich the Institute collection with copies of useful work-product prepared in Sioux Falls.

A Comprehensive Plan

One may approach problems in constitutional litigation from the lofty heights of modern computer methods used in other fields. One may ponder the possibilities suggested by the response of a Meiklejohn Institute to a Wounded Knee. Or one may merely look up from a desk piled high with unread advance sheets and lists of "research to do" slips. Wherever one is coming from, one tends to pause and dream of what might be.

Law Office Libraries

One can envisage a significant improvement in the quality of law practice if lawyers and law office librarians ever become committed to the theory that well-written complaints, motions, affidavits, memos, briefs, and other documents should not remain hidden in the files of the lawyer who handled a significant case, to be borrowed and copied

50. Problems inherent in long distance legal research are many: it is difficult to elicit exactly what information is wanted, it is difficult to ask more specific questions once research begins; and it precludes any cogitation over the problem.

51. *Casey v. Clem*, No. C 73-0641-AJZ, (N.D. Cal. May 21, 1973).

52. They did not.

53. *E.g.*, *Hamer v. Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966).

54. Catalogued under Equal Protection: Racial Language Discrimination, by states, including trial court materials in *Bell v. Southwell*, 376 F.2d 659 (5th Cir. 1967); *Moses v. Katzenbach*, 342 F.2d 931 (D.C. Cir. 1965). For a description of the Meiklejohn Classification System, see text accompanying note 76 *infra*.

only occasionally by colleagues who happen to know what points were covered and where the lawyer is currently located.⁵⁵ Such a commitment does not seem to be in the offing, even for one of the largest firms in San Francisco that handles primarily commercial work and has a trained library staff.⁵⁶ There, as elsewhere, only appellate briefs are collected and housed in the library. While these briefs are indexed by subject matter in a typical card catalog, files containing the lawyers' work product are not shelved in a central repository for easy access through a catalog system.

Integrated Collections of Materials

One dreams of libraries in law offices in which brief banks, ephemeral material,⁵⁷ and case files⁵⁸ are integrated with the reported opinions, form books, looseleaf services, and traditional law books now commonly housed in areas called libraries.⁵⁹

Form Files

Under an effective system, file clerks would become library conscious. Before they sent a file to the dead storage area, they would make copies of all forms and pleadings that might be useful in the

55. See text accompanying note 86 *infra*.

56. Interview with head librarian Mar. 19, 1974, who asked that her name and the firm name be omitted.

57. The librarian's phrase to describe loose notes, booklets, clippings from periodicals, and reports.

58. The lawyer's phrase to describe many things encased in file folders, including pleadings, briefs, correspondence, and the material mentioned in note 57.

59. One medium-sized San Francisco commercial firm (which asked not to be identified) created a Legal Opinions File (LOF) to preserve work-product and legal information that may help in future research. It is designed as a point of departure, and the accompanying card index covers memoranda, bibliographies, and other miscellaneous work-product produced both in the firm and outside it. An LOF card is placed in the card catalog to alert users to the existence of a file. However, briefs, memos, and pleadings are not included and there is no access by case name or code section. Perhaps for this reason, very few lawyers use the system without librarian's help. The Library of Congress Classification System is used. When an LOF is opened, it is assigned the appropriate KF number, usually corresponding to the classification number assigned book materials on the same subject. The folder is also assigned a subject heading from ELLINGER'S SUBJECT HEADINGS FOR THE LITERATURE OF LAW AND INTERNATIONAL LAW. The firm tries to avoid creating its own headings, but must do so occasionally to describe adequately some materials. Several file cards are prepared and filed both in classification number order and by subject.

"See also" references are included on the subject cards. Since the library does almost all of the research for the firm, the system works well, and the law student researchers do use the system with a fairly high degree of success. (From letter dated Feb. 26, 1974 to the author, in her file.)

firm library, first deleting names and other identifying facts to preserve confidentiality.

Easily Accessible Materials

Double entry record keeping is as essential in intellectual as in financial matters. Extensive cross-referencing is obviously required to help lawyers, secretaries, clerks, and legal workers find materials quickly. These "tracings"⁶⁰ can be placed on case title cards showing the substantive issues dealt with in the case (for example, electronic surveillance) and the peripheral points also briefed (for example, pre-trial objection to a gag rule). Such an approach is necessary because the lawyer who drafted a complaint two years ago in a civil rights suit under 42 U.S.C. § 1983 wants to see that complaint now as he starts work on a somewhat similar case. Unfortunately, he cannot remember the name of the case and the girl⁶¹ who worked on it has since quit.⁶²

Brief Banks

In addition to the present practice of saving appellate briefs, one wishes that memos of points and authorities might be stored in the same place and catalogued in the same manner. Many cases are determined without an appeal and often without a trial. The research and briefs prepared for these actions can be as valuable as the appellate materials.

Acquisitions Service

Librarians are accustomed to preparing lists of books received, with brief annotations. In the California Attorney General's four offices, each brief prepared in a division is sent to each lawyer in the division for quick perusal, just as law reviews are circulated in many offices. Lawyers make mental notes of subjects covered so they can contact the particular attorney who briefed a point when they face

60. Tracings record the other entries (author, subject, etc.) under which the same item may be found.

61. See advertising by concerns manufacturing dictation and other word-processing equipment in Swett, *Word Processing*, 60 A.B.A.J. 55-80 (1974): "Your girls can check their production. And so can you"; "You can tell when one girl is overloaded and another is under . . ."

62. See *id.*, at 62-63, the advertisement for Wang Cassette Typewriter, which suggests one reason for rapid turnover in secretarial staffs, claiming that its equipment provides an answer "By letting you spend less time as an editor, proof reader, and male chauvinist dictator over a legal secretary who has better contributions to make to your firm than re-typing something 11 times . . ."

a similar issue.⁶³ Could this system be expanded and formalized so that lawyers receive annotated lists of briefs prepared each month, and perhaps even lists of significant pleadings prepared?

Meiklejohn Library Acquisitions⁶⁴ is an experiment in this direction, prepared for the bar as a whole and for law libraries. Each monthly issue describes briefs, complaints, transcripts, proposed voir dire questions, and other documents received in the library, giving a very short statement of the facts in the cases, outlining the points covered in the documents, indicating their length so that photocopies can be ordered, and giving the names and addresses of the authors. As a result, the library has received orders for copies of many good motions and briefs on common pretrial and trial problems. Each document is categorized by subject matter⁶⁵ for easy retrieval, and an index by case title and subject matter is issued periodically.⁶⁶

Public Law Libraries

Libraries for the use of the public or for bar association members have the funding and staffs required to expand the services of individual law office libraries suggested above. An aggressive local bar interested in expanding its reference and source material could urge members to contribute samples of their work-product for a more extensive collection of briefs, memos, and pleadings on constitutional subjects.

Case Collections

Since public law cases often move very rapidly, collections of official reporter services are totally inadequate for the practitioner. A useful collection of constitutional law cases must also contain material based on news stories appearing in the large number of publications issued by special interest groups.⁶⁷ The periodicals can be clipped and queries sent to court clerks and counsel mentioned, seeking up-to-date information on the status of the cases and asking for contributions of pleadings and briefs.⁶⁸ A timely request for a pleading or

63. Bowie Conversation, *supra* note 14.

64. Published monthly since Dec. 1968.

65. The Classification Scheme is available from the Meiklejohn Institute, Box 673, Berkeley, Cal. 94701.

66. MEIKLEJOHN LIBRARY ACQUISITIONS INDEX (Vols. I-IV, A. Ginger ed. 1973).

67. See HUMAN RIGHTS ORGANIZATIONS AND PERIODICALS DIRECTORY (A. Ginger ed. 1973).

68. See, Meiklejohn Institute (collection of 9,000 cases using this procedure).

brief will be quickly acknowledged, although most offices will hesitate to dig out an old brief and go to the expense of making an additional copy when the original supply has been distributed.

Archival Services

There is a value in preserving all of the papers in an important case from the date of the incident through all of the pleadings, exhibits, and transcripts to the final opinion. This kind of material is an excellent resource for clinical law school courses and is of interest to historians and other social scientists. Parts of such a collection may be consulted by lawyers handling similar cases or issues. Since many big cases are heard in several state and federal courts before running their course, the researcher is grateful to the library that has collected all of the material in one place and that permits photocopying at lower rates than those charged by court clerks.

The experience of Meiklejohn Institute is suggestive on this point. With the cooperation of counsel in the Angela Davis case,⁶⁹ the Ellsberg-Russo case,⁷⁰ and the Free Speech Movement case,⁷¹ the Institute collected every non-privileged document concerning these cases (whether filed in court by either side, or prepared only for the defense staff), plus the transcripts. The Institute archivist catalogued and indexed the material for microfilming, and prepared a printed catalog⁷² describing all significant documents, transcript pages, pre-trial arguments, motions, and briefs. This is one of the few sources from which an over-burdened practitioner can obtain a particular document or specific pages of a transcript.

Microfilming insures that the collection will not be lost even if the original manuscripts are damaged or destroyed. It also permits scholars throughout the country to use materials without a trip to the one location where an important case collection is stored.

Library Schools

If the dreams sketched in these pages are to be realized, courses in law librarianship must be expanded to include many techniques for gathering ephemeral materials and information, including the aggres-

69. See note 36 *supra*.

70. See note 37 *supra*.

71. *California v. Savio*, No. 235 (Alameda County, Cal. Super. Ct. App. Dept.), *cert. denied*, 388 U.S. 460 (1967).

72. *ANGELA DAVIS CASE COLLECTION: ANNOTATED PROCEDURAL GUIDE AND INDEX* (A. Ginger ed. 1974).

sive use of the telephone when speed is essential.⁷³ Some such proposals have been made to librarians.⁷⁴

Law Publishers

Commercial law publishers, continuing legal education programs, and new law school journals could consider producing the series of tools needed in the constitutional law field: a reporter service, a case-finder, manuals, and form books. The first step, however, is the creation of a modern, complete classification scheme that can be used in publications and by law librarians in offices and libraries.

Classification Scheme

All law students learn about the West key number system, but it does not take them nearly far enough in the field of constitutional rights. Starting from the Constitutional Law heading in the Seventh Decennial Digest,⁷⁵ for example, one cannot quickly find what one is looking for under subheadings as broad as civil rights, personal civil and political rights, equal protection of laws, due process of law. Despite inadequacies in conception and in the supporting case collection, the Meiklejohn Institute classification scheme⁷⁶ has proved more serviceable in the past fifteen years, with its 291 categories. The classification scheme focuses on specific issues rather than broad categories. For example, it is probably the quickest way to find a subject such as contempt citations of persons raising First Amendment objections to answering questions before legislative investigating committees.⁷⁷

Classifications Accessible to Nonlawyers

Legal words and phrases (like "equal protection") can be translated into short index items (like "civil rights") that are clear to non-law librarians, clients, and other nonlawyers interested in constitutional

73. Lawyers and librarians learn that, if the desired information is not at hand, through a series of telephone calls to lawyers, librarians, and others, one may invariably receive the necessary information, or at least a suggestion as to who does have what is wanted.

74. See Ginger & MacLeod, *The Rights of the People and the Role of Librarians*, 19 LIBRARY TRENDS 96 (1970).

75. SEVENTH DECENNIAL DIGEST, AMERICAN DIGEST SYSTEM 1956-66 (1967).

76. See note 65 *supra*. The classifications scheme was used in CIV. LIB. DOCK. before the Institute was opened.

77. Meiklejohn Civil Liberties Institute Classification Scheme, at No. 271. Before Congressional Committees, under No. 270. Criminal Penalties for Nondisclosure, under Freedom of Expression and Association (First Amendment Liberties, and Ninth and Fourteenth Amendments).

law. This relatively simple, though time-consuming endeavor is worthwhile because it permits political science, history, and sociology teachers and students to work with legal materials, as well as lay organizations and individuals.⁷⁸

Reporter Service and Casefinder

Law publishers could produce a reporter service in the broad field of constitutional law, or limited to those areas not covered by specific services, such as Selective Service Law Reporter or Search and Seizure Bulletin. Experience indicates that such a service is essential to lawyers outside the large urban centers, but because most constitutional litigation is not fee-generating, it is not financially feasible. For example, the Civil Liberties Docket⁷⁹ published descriptions of 8,200 constitutional law cases between 1955 and its demise in 1969. Each description listed the case title, citations to official and unofficial reporters, names of courts and docket numbers for pending cases, facts, procedural and substantive issues, and names and addresses of counsel raising the constitutional issue, to encourage correspondence on pending cases.

Once a publisher is committed to provide a unified service in the area of constitutional rights, it is not difficult to prepare a compendium of cases, with periodic supplements. Such a book is extremely valuable to the researcher who needs to look in depth at cases on a particular subject and has little time for research.⁸⁰ Logical extensions of local and private collections of pleadings, memos, and briefs are form books and procedure manuals. Such services can provide the civil rights practitioner with tools comparable to those enjoyed by commercial law lawyers. Despite the small size of the bar actively practicing in this field, some services can be self-supporting.⁸¹

78. See, e.g., index to Meiklejohn Library classification scheme, 14 CIV. LIB. DOCK. 226 (1970).

79. 1-14 CIV. LIB. DOCK. (A. Ginger ed. published by National Lawyers Guild 1955-1968 and by Meiklejohn Institute 1968-1969).

80. See, e.g., HUMAN RIGHTS CASEFINDER: THE WARREN COURT ERA 1953-1969 (A. Ginger ed. 1970) (including most litigation in which the National Ass'n. for the Advancement of Colored People, American Civil Liberties Union, American Jewish Congress, Student Nonviolent Coordinating Comm., National Lawyers Guild, Center for Constitutional Rights, and Emergency Civil Liberties Comm. participated, as well as thousands of cases filed by individual lawyers and local organizations, listed by subject matter and by plaintiffs and defendants).

81. Manuals on selective service practice and voir dire have proved successful. THE NEW DRAFT LAW: A MANUAL FOR LAWYERS AND COUNSELORS (A. Ginger ed. 1967) (supplemented annually); A. GINGER, MINIMIZING RACISM IN JURY TRIALS: THE VOIR DIRE CONDUCTED BY CHARLES R. GARRY IN PEOPLE OF CALIFORNIA V. HUEY

Clinical Materials

If law publishers can combine practice materials for lawyers with teaching tools for teachers, publishing costs may not be prohibitive for either. The law teacher searching for good samples of practice materials in the constitutional rights field frequently ends up photocopying his own pleadings or those of friends, which may cost more than students could be asked to pay for a soft cover book. Commercial law publishers, however, doubt the feasibility of selling single volumes to practitioners or the likelihood that students will purchase supplements to law school books after graduation.⁸²

Law Teaching

Practice Materials in Classrooms

If the ABA Section of Legal Education and Admissions to the Bar is successful in its proclaimed goal of "merging" the "professor and practitioner,"⁸³ one can look forward to students using practice tools in the classroom. This should lead to discussions of the strengths and weaknesses in the substance, procedure, and language used in manuals and formbooks, so that new lawyers will not copy materials so uncritically when they turn to these tools.

Word-processing, Data Retrieval, and Law Office Management Programs

One cannot start too early learning that words cost money—in writing, editing, typing, proofreading, retyping, filing, and retrieving.⁸⁴ Law school treatment of this subject should lead students concerned with constitutional rights to invent shortcuts and improvements in constitutional research and litigation not yet envisaged.

Independent Institutes

Research Services

In the absence of a series of research tools similar to those available in fields like tax and securities law, and in the absence of large, well-known firms specializing in constitutional rights to whom general

P. NEWTON (1969). Not so fortunate was a civil rights manual. CIVIL RIGHTS AND LIBERTIES HANDBOOK: PLEADINGS AND PRACTICE (A. Ginger ed. 1963) (Supp. 1964-1970).

82. Conversations by the author with representatives of leading law book publishers, 1974.

83. *Merging of Professor and Practitioner: A Symposium*, 1 LEARNING AND THE LAW (1974).

84. See Swett, *Word Processing*, 60 A.B.A.J. 55 (1974).

practitioners can refer cases with confidence, it is essential that efficient research services be provided on a national basis to insure quality representation in constitutional rights litigation. A series of institutions are needed that can provide accurate information on a wide variety of problems in answer to mail and telephone inquiries. This requires institutions capable of handling numerous queries rapidly. Public law libraries and law school faculties are not prepared to do research under these circumstances. At the moment, very few institutions are.

The dearth of research services in constitutional rights may be illustrated by two requests received by Meiklejohn Institute: one from the Select Committee on the Administration of Justice of the California Legislative Assembly seeking cases on alleged police brutality against Mexican-Americans, and one from the United States Commission on Civil Rights seeking cases throughout the country in which a government agency was successfully sued for racial discrimination. Institute files provided some material, but a larger staff, and one able to turn to similar institutions elsewhere, could have provided much more.

Referral Services

Very often, referral to an expert is quicker and more efficient than referral to a series of cases and articles that are likely to be dated by the time they are printed. Maintaining an accurate list of names, addresses, and telephone numbers is not easy, because lawyers move constantly today, particularly those in small offices, who are the ones most likely to be willing to handle constitutional rights cases. Yet such lists are essential, because time is usually of the essence and a day lost in tracking down the name of an expert needed on the witness stand may not be regained.

While almost every lawyer maintains an informal referral service in his geographical area and in his field of law, there is no formal, national service. What is required is a file of people active in constitutional litigation, including members of American Bar Association and National Lawyers Guild committees, attorneys with legal aid and defender societies and with OEO legal service programs, lawyers who are members of minority groups, and law and nonlaw professors who work in this field. The Meiklejohn Institute also published a directory⁸⁵

85. HUMAN RIGHTS ORGANIZATIONS AND PERIODICALS DIRECTORY 1973 (A. Ginger ed.).

of groups concerned with constitutional law questions, some of whom have staff counsel and volunteer attorneys who can be called upon.

National Brief Bank

Lawyers can now search the statutes of the fifty states for legislation on a specific subject or containing a particular word, through the Aspen system.⁸⁶ One dreams of a computerized system for searching briefs on particular points. The United States Department of Justice, through its administrative division, has been developing a computer system (JIMS) capable of providing immediate access to department materials prepared throughout the country.⁸⁷ On a much more modest scale, the Association of Trial Lawyers of America (ATLA), through its Products Liability Exchange, is now surveying sixty periodicals monthly in the fields of law, medicine, science, and drugs. Each publication is scanned for material of interest and filed in an index system where it is retrieved for use by members at a minimal cost.⁸⁸

The fundamental rule for independent institutes concerned with constitutional rights might be to seek to provide whatever necessary services are not provided by other organizations: libraries, law schools, individual firms, public interest groups. Since funding is the paramount problem in this whole area, institutes should be able to obtain grants more easily if they adhere to this principle.

The Future Lies

Uncertain as one may feel about the future shape of constitutional rights in the United States, one is forced to conclude that they will not amount to much unless the research tools available in other law fields are made available to protect their exercise. And no expansion of constitutional rights is feasible without the introduction of the latest computer technology already available in some legal and nonlegal disciplines. Until that day arrives, every existing procedure must be tightened up, expanded, and used more frequently and efficiently by more practitioners committed to constitutional law.

86. See 1:2 Aspen Systems Magazine (1969).

87. Browning Conversation, *supra* note 11.

88. Letter from John O. Hayward, Director, Products Liability Exchange, ATLA, to author, Feb. 26, 1974. The search charge is \$12. per question.