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Winter 2-18-2022

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Original Publication Information

Erin Gow, *Identifying Red Herrings in American Legal Research*, 21 *Legal Information Management* 202–206 (2021).

ThinkIR Citation

Gow, Erin, "Identifying red herrings in American legal research" (2022). *Faculty Scholarship*. 753.
<https://ir.library.louisville.edu/faculty/753>

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Identifying red herrings in American legal research

Biography

Erin Gow is the Online Services Librarian at the University of Louisville Brandeis School of Law Library in Kentucky. She completed a MA in Information Studies at the University of Brighton and worked at two Inn of Court libraries before moving back to the United States to take up her current job in 2016.

Abstract

This article presents useful clues for British law librarians and legal researchers conducting research on American laws and legal systems. It focuses on general guidelines and key sticking points the author found when transitioning between legal research in the American and British jurisdictions.

Key skills introduced include the ability to:

- differentiate between federal and state legal jurisdictions in the U.S.,
- recognize key differences in American legal terminology and construct searches using American terms,
- analyze and select key American legal resources for different types of research questions,
- and identify American standards of legal citation.

Introduction

This article presents some useful clues for British law librarians and legal researchers conducting research on American laws and legal systems. There are admittedly many similarities between these systems, but there are equally as many differences which can trip up the unwary legal researcher in unexpected ways. As an American whose library training and first experience of working in a law library occurred in the United Kingdom, I know exactly how difficult it can be to transition between researching the British and American legal systems. As a result, this article focuses on very general guidelines, and the key sticking points that I found in trying to transition between legal research in the American and British jurisdictions. Hopefully, after reading this article you will feel more confident about finding American legal information, if and when you are called on to do so in the future.

The following three topics are the most common places where I think British searchers are likely to go awry in beginning American legal research. These are the red herrings of American legal research, if you will:

- understanding the jurisdiction of Federal and state law,
- navigating differences in legal terminology,
- and using key resources for American legal research.

Before investigating these red herrings further, however, it's worth reviewing some of the similarities between the legal systems in the United Kingdom and United States. It can be helpful to remember that there are many common points of reference when conducting American research as a British researcher, including:

- Both the U.K. and U.S. are common law jurisdictions, meaning case law and precedent are key in both systems.

- Both jurisdictions have a great deal of shared history, meaning much of the American legal system was directly based on the British system at the end of the 18th century.
- English is the primary language in both jurisdictions, meaning you don't have to worry about finding translations!

Unfortunately, there are at least as many differences between the British and American legal systems as there are similarities, with the three key areas of jurisdiction, terminology, and resources bearing further investigation.

Jurisdiction

Understanding the jurisdiction of federal, state, and to a lesser extent local law is vital when conducting effective and efficient American legal research. The interaction between federal and state law in the U.S. is one of the topics that I find often seems to perplex British searchers the most, so this is an important issue to clarify right away.

Most British law librarians and legal researchers are familiar with a basic map of the United States, and often with a map of the Federal court system, which divides the country into 12 circuits. Most are also aware that there are 50 states in the U.S., along with additional territories, American Indian reservations, and local jurisdictions to consider. In my experience, the primary confusion for British researchers arises from trying to understand the interplay between federal and state jurisdictions in the U.S. My best advice for understanding this jurisdictional interplay is to think of it as the opposite of the British system of devolution. A simplified view of the British system, as I understand it, indicates that power is devolved from the Parliament at Westminster to the regional Parliaments and Assemblies in Wales, Scotland, and Northern Ireland. Although "every subject which is not reserved to the U.K. Parliament is devolved,"¹ it is still the U.K. Parliament that grants these powers to the devolved Parliaments. My advice when you are thinking about the relationship between U.S. states and the U.S. federal government, is to turn this around and think of the states as granting power to the federal government. This means that jurisdiction over any issues that haven't been explicitly granted to the federal government remain with the state. In general terms, this is somewhat more similar to the system in the European Union, where member states grant certain competencies to the EU, but retain jurisdiction for all other areas.

This way of thinking is certainly simplified, but it compensates for the British instinct to think in terms of devolution and counterbalances the tendency to assume that the federal government has the right to rule on any issue of importance across the entire country. Understanding the distinction between federal and state competencies is important, not only in helping you to identify where to look for relevant case law or legislation, but also in helping you to identify what types of materials may exist on a particular issue and the limitations on some legal solutions. In concrete terms, for example, you can imagine a scenario in which you're helping someone research American divorce cases in the state of New York. Since family law is in the jurisdiction of the state, you can feel confident that you've done a thorough search even if you don't produce any federal cases. In this instance, cases from the New York Court of Appeals that relate to the specific legal issue in question are likely to be the most valuable authority to cite, since they represent case law from the highest court with jurisdiction over the matter.

The tricky part, of course, is that many issues fall into either federal or state jurisdictions. A good example involves education. States have legal jurisdiction over education in the U.S., so in most

instances the federal government can only issue guidelines related to education, except when they directly fund an educational program like student aid. The federal government has jurisdiction over federally protected civil rights, however, which can often be an issue present in schools. You may have heard about a letter issued by former President Obama's administration in 2016² that provided guidance for schools to ensure the protection of transgender students' civil rights. Almost immediately this letter became the subject of court cases, and many states proceeded with 'bathroom bills' that required schools to enforce the use of the single-gendered restroom appropriate to the gender students were assigned at birth. These state laws and cases began even before the letter was withdrawn by the following national administration. Part of the problem here is actually one of jurisdiction, because the federal government only has the right to get involved in how schools function if a federal issue like civil rights are at stake. Essentially, the question yet to be permanently settled is whether transgender rights are civil rights.

You can see from this example that already there are clues about where to begin your research. You would want to consult state legal resources for education law questions, federal legal resources for civil rights questions, and perhaps both for materials on an issue under debate such as gender inclusive restrooms in schools. While you could expect to find state legislation relating to a subject like education, since it is under state jurisdiction, you may only find federal guidance documents but no federal legislation on such an issue.

In addition to understanding the relationship between federal and state jurisdictions, it can also be helpful to understand the outline of the legal systems in these jurisdictions. In the U.S., the United States Supreme Court is the final court of appeal for federal courts. There are twelve federal circuits across the country, which hear cases on appeal from the district courts in their circuit. There are ninety-four federal district courts across the country, which are the courts of first instance for federal cases.

This division of the federal court system into districts and circuits can create interesting (and frustrating!) discrepancies in federal case law. When courts in different circuits take opposing positions in different cases on the same point of law, that creates a "circuit split" and is often a good indication that the matter may end up at the U.S. Supreme Court to bring the law into alignment across the country. While researching, it is important to remember that circuit court decisions are only binding in their own circuit. For example, in a scenario where you might be helping to research a case that is due to be heard in the U.S. Court of Appeal for the Ninth Circuit in San Francisco, California, a decision from the U.S. Court of Appeals for the Sixth Circuit in Cincinnati, Ohio, that addresses the point of law you're interested in could be valuable as persuasive evidence, but is not binding precedent in the ninth circuit.

State court systems are sometimes structured similarly to the federal system, such as in California, which has a system of courts of first instance that build to a final court of appeal in the California Supreme Court. Some states have quite different court structures, however, such as in New York where the final appeals court for the state is the Court of Appeals and the New York Supreme Court is a lower court. If you're only interested in case law from the highest court in each state, you may need to check which court that will be, since memorizing the court structure of all fifty states is a task beyond even the average American law librarian. Somewhat confusingly, state cases can be appealed to the U.S. Supreme Court, if the state itself is being sued or if there is a conflict between two or more states, but the average case between two residents of the same state will never be eligible to be appealed to the federal U.S. Supreme Court.

Although the United States is a common-law jurisdiction, legislation is still important. Federal legislation is passed by Congress, which fills a role similar to the British Parliament, debating bills in two houses before passing bills to the President to be signed into law. The President also has the ability to issue Executive Orders and take limited actions directly, without the involvement of Congress. A similar system exists in each state, with a bicameral legislature passing state laws and the state governor filling the executive role of the President.

This is an extremely generalized overview of federal and state jurisdictions, and does not consider the myriad local jurisdictions, U.S. territories, and Native American Indian reservations that have their own legal systems and jurisdictions. The occasional legal researcher is unlikely to encounter questions that get into this level of complexity, but for those who are interested there are resources about these additional jurisdictions available in the handout from the 2021 BIALL conference presentation at <https://louisville.box.com/s/5v8npx9cjmvu5nba2naa0x0u32h9kb3k>.

Terminology

This article has already presented some key terms that are different in the United States, such as Congress or the President, and the savvy reader may even have noticed me unconsciously using terms or spellings that are not the British standard. Although both British and American legal materials are produced in English, often there are significant differences in how this English is used.

An obvious place to begin is in talking about those involved in the legal profession. There are key political roles that are different in the U.S., such as that of President, Governor, Senator, or Representative, but lawyers themselves are also talked about differently. There is no distinction between barristers and solicitors in the U.S., although lawyers may refer to themselves by a variety of titles depending on what type of practice they're engaged in including: lawyer, advocate, attorney, partner, solo practitioner, etc.

While varied titles in the profession may not present too much confusion in terms of legal research, differences in key search terms certainly can.

One aspect to be aware of in constructing searches is the difference in spelling conventions in the U.S. and U.K. Key differences include dropping the u in words like labour (labor), reversing the final re in words like centre (center), and replacing the terminal que with a ck in words like cheque (check). Sophisticated databases will often help by searching for alternative spellings of search terms by default, but many of the free American databases do not do this. When in doubt it is a good idea to use Boolean operators, root expanders, or wild cards to amend your search terms to include spelling variations.

Legal terminology can also vary, with something like litigants in person being more commonly referred to as pro se litigants in the U.S. A search of American legal research guides, or even a quick browse through a general American article on the subject you're researching can help to identify these specific legal terms in a given subject area.

Research terms themselves also vary, which can sometimes make it a little confusing if you're trying to assist (or gain assistance from) an American law librarian. When Americans want to identify if a case is good law, for example, we often simply say we need to Shepardize the case. The average American librarian, meanwhile, will be baffled if you ask for assistance with Pepper v Hart research, but would be much more helpful if asked to assist with some legislative history research. The easiest solution here is

simply to use the most general term or phrase for the specific research process or technique, even if it is a little wordier!

Resources

The final key difference in terminology when conducting American legal research is understanding the language used to talk about the resources themselves. As in the U.K., most searchers looking for case law to cite will want to find the case in a law reporter.

The *United States Reports* are the official reporter for the U.S. Supreme Court, and should theoretically be cited where ever possible. Unfortunately, in reality their publication is so delayed (they were current though 2014 at the time of writing this article) that anyone needing to read or cite a recent case will need to use an alternative. Either West's *Supreme Court Reporter* or the *U.S. Supreme Court Reports, Lawyer's Edition* from Lexis are perfectly acceptable alternatives, and both series provide references that show where the page breaks fall in the official U.S. Reports. This means you can craft a U.S. Reports citation from either of these commercial sources, without having to switch back and forth between different series if you're researching or citing both recent and older Supreme Court cases.

In lower federal and many state courts there is no single officially sanctioned series of reports. In many jurisdictions, American lawyers are free to bring whichever law report they have access to into court, although some states still publish an official reporter. West's (now Thomson Reuters) Federal Reporter and national or regional reporter system are both widely used, however, so it may be worth being familiar with these. The *Federal Reporter* publishes cases from lower federal courts, while the national reporter system selects cases from state courts and issues them in reporters divided by geographic area. In many smaller states, the relevant national reporter series has become the "official" reporter for that jurisdiction. For example, in Kentucky, the *Kentucky Decisions* series is actually just a reprinting of all the cases from Kentucky in the *SouthWestern Reporter*.

One aspect of researching case law that was new to me when I began working in an American law library was the regular use of dockets. Docket systems collect all the documentation that was filed with a case all the way through to the final transcript of the judge's opinion at the end. Researchers who are interested in the finer details of a case often require dockets when they need to see the documentation beyond the judgment printed in a reporter, and researchers following very recent or ongoing cases may want to access the dockets to find out more about the case before a judgement is issued. Docket systems also provide access to opinions in unreported cases, and in my experience American researchers will ask for the docket rather than the transcript if they know the case is unreported. It is usually helpful to clarify what type of documents (initial filings or a transcript of the judgement?) are needed, if you are simply asked for a docket by an American researcher.

The federal docket system is PACER (<https://pacer.uscourts.gov>). This database allows anyone to create a free account to search federal dockets, but there is a per-page charge for downloading documents from the site. Subscription databases like Bloomberg Law and Lexis+ offer access to dockets, and there is a growing movement to provide free access to court dockets. The RECAP project (www.courtlistener.com/recap) provides free access to many federal dockets, where one person or organization has already paid the initial fee to access the document on PACER. States provide access to dockets in a wide variety of ways, and the court's website is usually a good place to start. State systems

are usually not as robust as the federal system, however, and there are many dockets which may simply be unavailable or may only be accessible to those located in the state.

When considering unreported cases in particular, it is worth knowing that in many states judges decide which cases will be reported, unlike in the U.K. where there “has never been any convention, let alone rule or statutory provision, conferring the decision as to reportability on the courts”.³ A complicating factor in American legal research, however, is that unpublished decisions carry different weight in different jurisdictions across the country, so whether an unpublished case can be cited and if so how varies from state to state and even between different federal circuits. If you work in a specific American jurisdiction frequently, it may be worth becoming familiar with the guidelines on unpublished decisions in that location.

The publication of primary legislation in the U.S. goes through several stages. It is first printed as a slip law (or public law as it is called at the federal level), then as a session law, and finally in a code or statutory compilation. For federal law this publication sequence means that initial slip or public laws are collected at the end of the Congressional session into the *United States Statutes at Large*. They are then usually integrated into the *United States Code* based on subject.

Although the session law is usually the version with legal value, the official code that integrates all laws currently in force is the version most lawyers use for research and to cite in court. This was initially confusing to me, since I assumed lawyers would be expected to cite the official version of legislation in court, but ultimately it makes life easier for researchers. Codes are generally easy to work with since they are arranged by topic, regularly updated, and only include current law. Versions of codes provided by commercial publishers also include commentary and annotations, very similar to a service such as *Halsbury's Statutes*. Both the U.S. Statutes at Large and unannotated U.S. Code are freely available online (www.govinfo.gov), making legislative research easier to conduct without costly subscriptions. State legislation usually follows a similar process, and is almost always freely available on state government websites.

For those who need a comprehensive overview or comparison of state laws, it is worth looking for a 50 or multi state survey. These are often simply tables that compile key points of state legislation in a handy guide to allow you to look for outliers and check how states compare to each other. It is also a quick and easy way to gather accurate citations to legislation on a specific topic across a wide range of states. The *National Survey of State Laws* is the archetype, and is available in print and electronically through HeinOnline. It is regularly updated, but most American subscription legal research databases have sophisticated systems that allow you to build your own multi-state survey on any topic you wish with the most current law available.

Administrative law is more specialized than case law or legislation, and generally incorporates the types of government regulations and guidance that I learned to think of as secondary legislation, and is very similar to Statutory Instruments in the United Kingdom. Federal regulations are published chronologically in the *Federal Register*, and then by subject in the *Code of Federal Regulations* (mirroring the way legislation is published in the Statutes at Large and then the U.S. Code). A second type of administrative law, which has been increasingly important over the past few years, are executive orders and presidential proclamations. The state-level counterpart is executive orders from governors. These federal executive materials are also incorporated in the *Federal Register* and *Code of Federal Regulations*, although there can be a delay so it may be easiest to find them from government websites.

Both the *Federal Register* and the *Code of Federal Regulations* are freely available online (www.govinfo.gov), and state publications are usually available electronically, although publication may be seriously delayed. Regulatory research often strikes fear into the hearts of otherwise confident American legal researchers, so don't be surprised if you have difficulty navigating these sources. If you have an American expert to call in, a research project involving administrative or regulatory law may be the place to do so!

In terms of secondary materials, the most significant difference British searchers are likely to notice is the prevalence of law reviews. Law reviews are simply journals published by law students at law schools across the country, and are a key source for academic legal articles and discussions in the U.S. Although you might be inclined to dismiss a student publication, in the U.S. some law reviews can be extremely prestigious and may even be cited in court as persuasive evidence for an argument.

Obviously, the easiest way to find legal materials is usually when you have an accurate citation, but even that can become difficult if you don't know how to interpret the citation, so it may be worth being familiar with some standard American legal citation forms for materials such as cases, legislation, and law reviews.

- Examples of common citations (emphasis added in **bold** to draw attention to key components):
 - United States Reports:
 - *Wisconsin v. Mitchell*, 508 **U.S.** 476 (1993)
 - Federal Reporter:
 - *United States v. Hill*, 927 **F.3d** 188 (2019)
 - Southern Reporter citation (one in the National Reporter System):
 - *State v. Stalder*, 630 **So.** 2d 1072 (**Fla.** 1994)
 - United States Code:
 - 18 **U.S.C.** § 249
 - Law Review:
 - Maureen E. Brady, *Turning Neighbors Into Nuisances*, 134 **Harv. L. Rev.** 1609 (2021)

The most predominant form of legal citation in the U.S. is the Bluebook system, and you may even hear Americans refer to assembling and checking citations simply as "Bluebooking." *The Bluebook* is published by the Harvard Law Review Association, and can be extremely complicated to use and can become costly to keep up to date in proportion to its use. Luckily, there are a couple of free alternatives. The Legal Information Institute provides a good introduction to the system (www.law.cornell.edu/citation), while the *Indigo Book* (<https://law.resource.org/pub/us/code/blue/IndigoBook.html>) is very similar to *The Bluebook* in terms of layout and content but is now a few years out of date. Either free resource provides enough guidance to assemble or interpret standard or common American legal citations.

It's worth noting that state courts may indicate particular citation standards for use within the state. Often these relate to the citation of state materials, in order to simplify citation for key state materials, or to indicate a preference for a particular resource in the state. If you work in a single state a lot, it might be worth familiarizing yourself with the local rules, but for the most part a basic understanding of Bluebook citation should be enough.

Conclusion

This is just an overview of the three key 'red herrings' of American legal research for British searchers: jurisdiction, terminology, and resources. Certainly, there are other potential stumbling blocks and confusing detours involved in American legal research, but for common questions and basic legal research hopefully the clues presented in this article will allow you to confidently navigate around the most common red herrings.

Endnotes

¹ Brenda Hale, 'The Changing Legal Landscape' (2019) 19 LIM 217, 222

² Generally referred to as the Dear Colleague letter and available online at:

<https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

³ Paul Magrath, 'Law Reporting and Public Access in the Courts' (2019) 19 LIM 224, 227