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Cite Checking: A Brave New World

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Cite Checking: A Brave New World*by Susan Nevelow Mart*

Now that LexisNexis has made it possible to Shepardize[®] headnotes on Lexis, I thought it would be interesting to compare the results from Shepardizing a case and from using KeyCite[®] to cite check the same case. In both scenarios, I would limit the results by Lexis headnote and by the same or a very similar Westlaw headnote.

Headnote Creation

There are differences in the way LexisNexis and West Group editors create headnotes. In the West system, editors take the legal concepts from a case, summarize the concept in the editor's own language, and link the resulting headnote with the appropriate Key Number in the West Digest classification system.¹ (West's Digest is "basically compiled subject arrangements" of the West's headnotes.²) In the Lexis system, the fundamental legal points of a case are drawn directly from the language of the court.³

To generate headnotes, "The text of the headnote of the Shepardized case is compared algorithmically with language from the citing cases to identify references (within the citing case) that match the language of the LexisNexis headnote within the Shepard's report."⁴ The topics that are used to classify Lexis headnotes are the same topics that appear in Search Advisor.⁵

My Comparison Strategy

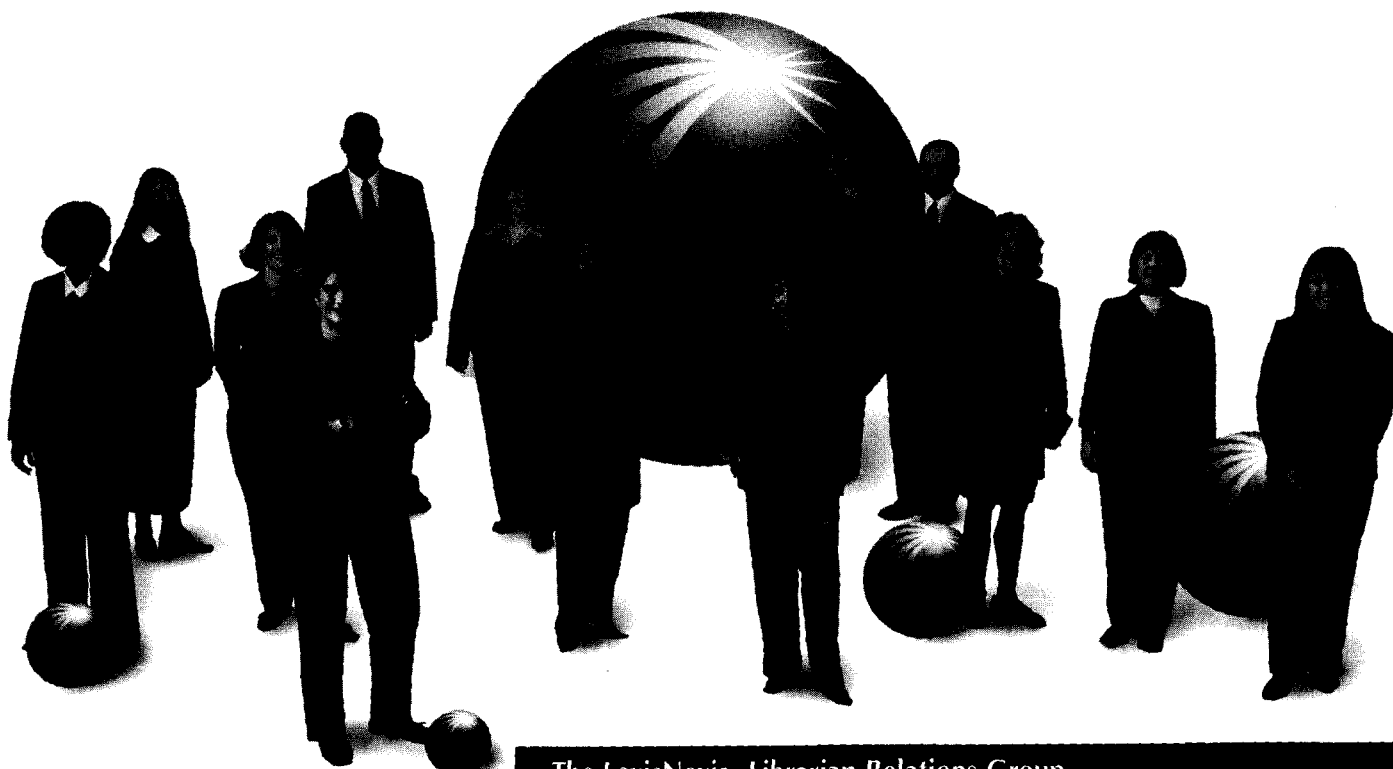
I did my citation checking in March and April. I looked at cases that "made law" and would therefore have generated a large number of citing references. I chose:

Brown v. Bd. of Education, 349 U.S. 294, 75 S.Ct. 753 (1955)
Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976)
Escola v. Coca-Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944)
Griswold v. Connecticut, 381 U.S. 479, 85 S. Ct. 1678 (1965)
New York Times v. Sullivan, 376 U.S. 254, 84 S. Ct. 710 (1964)
Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968)
Tarasoff v. Regents, 17 Cal.3d 425, 551 P.2d 334, 131 Cal.Rptr.14 (1976)

Even limiting the results for each citation checking system to court cases and

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From the Editor...

I didn't know that LexisNexis had made it possible to Shepardize® headnotes on Lexis until Susan Mart approached us with her idea for an article. She felt it would be interesting to Shepardize a case and then use KeyCite® to cite check the same case, limiting her search results by headnotes. In her article, Susan describes how West Group and LexisNexis create headnotes. Then she describes the structure of her research project and shows you that in the "Brave New World" of cite checking, it is best to be thorough. She also provides a chart that shows the results of her unique research project.

Guest columnist Jan Rivers, the computer services librarian at the Dorsey law firm, reviews Firm360 in "Database Report." This business development tool was released in 2005, and Jan has been using it with great success. Jan describes some of its uses and gives an overview of what Firm360 can do for attorneys, law firm marketing departments, and librarians. After reading her report, you will have a good idea of whether Firm360 is right for you. Jan's opinion, that "Firm360 is a very welcome addition to a law firm's competitive intelligence toolbox," comes through loud and clear. In a future issue, Jan will give us a full report on the use of Firm360 in a feature article.

In "New Sources," reviewer Ramona Martinez, a librarian at the University of California School of Law in Berkeley, examines a collection of book excerpts and journal articles discussing the influence of corporate governance on various countries' political systems. Christine Ciambella, a research librarian at George Mason University

Law Library in Virginia, reviews "the first-ever guide to cover the laws and practices for lobbying in 30 major industrial democracies."

We all get glimpses of courtroom tactics via television, but in fact, many of the techniques we see there are being used in courtrooms around the country. Karen Kalnins, of the University of Missouri Law Library in St. Louis, reviews *The Lawyer's Guide to Creating Persuasive Computer Presentations*, a new title from the ABA. "Blending law and technology in a uniquely readable way, this book stresses the importance of technology in attorneys' lives," she says in her very favorable review.

We are looking for someone to write a feature article on corporate governance in the Sarbanes-Oxley era. We have published three articles on Sarbanes-Oxley in the past couple of years and feel it is time to revisit that act to see how it is playing out.

We are pleased to announce that our second book will be published in June. Over the past five years, Sylvia James, a business researcher and training consultant in England, has written a number of articles for *Business Information Alert*. These articles are being published as a four-volume compilation on international business research. The first volume, "Researching Global Business," will be available at SLA and AALL. You will also find a brochure about this title and the forthcoming titles in the series on our web site (www.alertpub.com). The series is titled "Business Information Alert Guides to International Business Information."

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Cite Checking...

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administrative decisions, the total number of citing references for each case that I checked ranged from 310 (Westlaw citing references for *Escola v. Coca-Cola Bottling Co.*) to 24,792 (Lexis citing references for *Terry v. Ohio*). Any reasonable researcher who is doing citation checking for any of these cases would want to further limit the results.

For each case that I reviewed, I chose a further jurisdictional limit to decrease the number of citing references to a more manageable number for comparison. Then I limited the results by specific headnote numbers. Even after limiting the results by jurisdiction and headnote, in most cases there were so many results that it was impossible to read the results and determine if a case appeared in both sets of results. So I e-mailed the results to myself as Word documents, and used the "Find" feature to check and see if a case name from one set of results was in the second set of results. If the Find function returned a

negative result from searching with the name of the plaintiff, I used the Find function to search with the name of the defendant to limit any possible errors resulting from the use of the Find function.

Despite the fact that LexisNexis and Westlaw generate headnotes in a different manner, in each case I examined there were one or more sets of footnotes that were extremely close or identical. I expected that, however similar the headnotes, the differing underlying philosophies and methods of generating citing references would generate differing results.

The chart reveals many differences in the two citation checking systems. The first apparent difference is in the number of headnotes Westlaw and Lexis assign to a case. In the cases in the chart, Westlaw always had more headnotes assigned to a case. Because the sample was small, I decided to run another comparison. I randomly selected a recent volume of the United States Reports and a recent volume of the California Appellate Reports, and checked the total number of Lexis and Westlaw headnotes for the first 50 cases I found.⁶ The percentages

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CASE NAME	TOTAL HEADNOTES		JURISDICTIONAL LIMITATION	HEADNOTE(S) COMPARED		CITING REFERENCES		NO. IN BOTH DATABASES	UNIQUE	
	LX	WL		LX	WL	LX	WL		LX	WL
Brown v. Board of Education	7	9	Supreme Court only	5	4, 5	13	28	11	2	17
Buckley v. Valeo	42	118	Supreme/Circuits only	6	7,16,17	93	22	7	86	15
				28	75-78	65	17	8	48	9
Escola v. Coca-Cola Bottling Co.	7	13	California only	3	2	15	25	11	4	14
				7	13	24	2	1	23	1
Griswold v. Connecticut	8	10	9 th Circuit	2	3, 4	6	2	1	5	1
				4	7	1	6	0	1	6
New York Times v. Sullivan	27	29	California only	9	9	46	42	34	12	8
				8	5	27	7	3	24	4
Tarasoff v. Regents	15	35	California only	6	8	93	26	21	72	5
				10	15	35	16	9	26	7
				15	34	4	1	1	3	0
Terry v. Ohio	18	34	California only	15	23	149	3	2	147	1
				3	3	1	1	0	1	1



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Cite Checking...

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were different. Westlaw only had a higher number of headnotes 20 percent of the time (10/50), Westlaw and Lexis had an identical number of headnotes 6 percent of the time (3/50), and Lexis had no headnotes 6 percent of the time (3/50). You can't tell who has the more detailed set of headnotes unless you look at both systems. This may mean that there is a concept that could be citation checked by headnote in one database, but could not be similarly checked in the other, because the headnote simply did not exist.

The differing headnote breakdown in each system meant that, in several cases, headnotes in Westlaw had to be combined in order to make a valid comparison with a Lexis headnote. To give an example, in *Buckley v. Valeo*, following are headnotes with nearly identical language:

This is the language of the Lexis headnote 28:

The General Welfare Clause is a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause. Congress has power to regulate Presidential elections and primaries, and public financing of Presidential elections as a means to reform the electoral process is clearly a choice within the granted power. It is for Congress to decide which expenditures will promote the general welfare.

This is the language of the analogous Westlaw headnotes:

Headnote 75: The general welfare clause is not a limitation on congressional power but rather is a grant of power, the scope of which is quite expansive, particularly in view of the enlargement of power by the necessary and proper clause.

Headnote 76: Congress has the power to regulate presidential elections and primaries.

Headnote 77: Public financing of presidential elections as a means to reform the electoral process was a choice within the power granted to Congress to regulate presidential elections and primaries.

Headnote 78: It is for Congress to decide which expenditures will promote the general welfare.

The language is nearly identical, but in Westlaw, the concept was broken down into four discrete topics. For purposes of my research in comparing the two systems of headnotes, combining four Westlaw headnotes to compare with one Lexis headnote worked well. However, if all I was interested in was cases discussing public financing of presidential elections as a means to reform the electoral process, then the Lexis results would include many irrelevant citations. Researchers would have to use a FocusTM keyword search feature to limit the results. Further research would have to be done to see if a broad headnote search limited by keyword produced results comparable to a single-issue headnote search.

Results

Two startling results were evident from this comparison of headnote-limited citation checking. The first was that there is so great a difference in the number of citing references each system returns. The second was how few cases appear in both result sets. Because the set of cases examined is so small, no conclusion can be drawn that the results would be the same over a larger sample. The time involved in even doing a 50-case comparison precluded expanding the sample. The results from this small sample, where 14 different comparisons were done, are:

Westlaw and Lexis returned the same number of citing references 7 percent of the time (1/14), but even where the number of citing references was the same, there was a unique result in each database.

Lexis returned more citing references 71 percent of the time (10/14), and Westlaw returned more citing references 21 percent of the time (3/14), but the number of unique citing references in each database was significant.

Comparisons Continued

Next, I did a random comparison of the citing references. With the headnotes from *Buckley v. Valeo* set out above, it will be easy for readers to compare the results. The headnotes refer to the Court's discussion of the potential use of the general welfare clause of the Constitution as a limit on congressional power to regulate public financing of elections. I compared three random citing references from the results for Lexis headnote 28 (65 citing references) with three random citing references from the results for Westlaw's headnotes 75-78 (17 citing references).

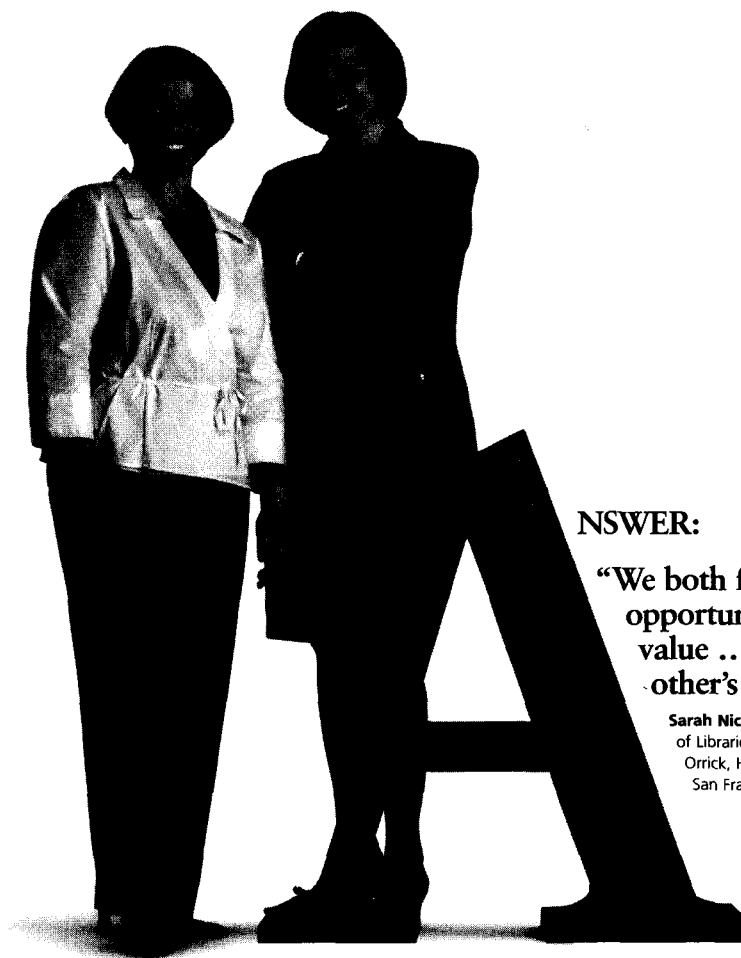
Following are the three cases from the Shepard's report on Lexis headnote 28. In each case, I clicked on headnote 28 in the citing reference entry and was taken directly to the relevant portion of the citing reference.

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Q

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Connell v. FEC, 540 U.S. 93, 227 (2003): (citation to *Buckley* omitted) (rejecting the asserted government interest of “equalizing the relative ability of individuals and groups to influence the outcome of **elections**” to justify the burden on speech presented by **expenditure** limits). This claim of injury by the Adams plaintiffs is, therefore, not to a legally cognizable right (bold in original report).

Elrod v. Burns, 427 U.S. 347, 382 (1976): [**Public financing of Presidential campaigns**] “is... [an effort] to use public money to facilitate and enlarge public discussion and participation in the **electoral process**, goals vital to a self-governing people” (bold in original report).

National Comm. of the Reform Party v. Democratic Nat’l Comm., 168 F.3d 360, 366 (9th Cir., 1998): The **Reform** Party also contends that the Fund Act, as applied, can now be shown to discriminate [**14] unlawfully. The **Reform** Party relies upon the Supreme Court’s reservation in *Buckley* of possible future consideration of an “as applied” challenge. The Court said: “In rejecting appellants’ [facial] arguments, we of course do not rule out the possibility of concluding in some future case, upon an appropriate factual demonstration, that the **public financing** system invidiously discriminates against non-major parties” (bold in original report).

Here are the three random cases from the Westlaw KeyCite printout for headnotes 75-78:

State of S.D. v. Dole, 791 F.2d 628, 631 (8th Cir., 1986): Congress’ power under the spending clause is a separate and distinct grant of legislative authority and is in no way limited by its other broad legislative powers (headnote 75).

Stop H-3 Assn v. Dole, 870 F.2d 1419, 1428 (9th Cir., 1989): Finally, we believe that appellants’ Spending Clause objection to section is answered by the Supreme Court’s directive in *Buckley v. Valeo*: Appellants’ “general welfare” contention erroneously treats the General Welfare Clause as a limitation upon congressional power. It is rather a grant of power, the

scope of which is quite expansive, particularly in view of the enlargement of power by the Necessary and Proper Clause.... *It is for Congress to decide which expenditures will promote the general welfare.*

Charles v. Verhagen, 220 F.Supp.2d 955, 960 (W.D.Wis., 2002): (“It is for Congress to decide which expenditures will promote the general welfare ... [and][w]hether the chosen means appear ‘bad,’ ‘unwise,’ or ‘unworkable’ to us is irrelevant”).

I then chose *Tarasoff v. Regents* for a random comparison. I looked at the citing references from headnote 34 in Westlaw and headnote 15 in Lexis. In both, the Welfare & Institutions Code section granting peace officers a limited immunization from liability resulting from the actions of a released psychiatric patient was discussed. Because the number of citing references was small (one for Westlaw and four for Lexis; three were unique on Lexis), I was able to look at all of the cases. Both Lexis and Westlaw listed *Johnson v. County of Ventura*, 29 Cal.App.4th 1400 (1994) as a citing reference. Following are the cited portions of the three unique cases on Lexis:

Ley v. State of California, 114 Cal. App. 4th 1297, 1304 (2004): But the court reached a different conclusion regarding immunity for police officers who did not confine the patient in *Tarasoff*. It held the officers had absolute immunity based on a provision with language similar to section 1618: “The source of their immunity is section 5154 of the Welfare and Institutions Code, which declares that: ‘[the] professional person in charge of the facility providing 72-hour treatment and evaluation, his designee, and the peace officer responsible for the detention of the person shall not be held civilly or criminally liable for any action by a person released at or before the end of 72 hours’ (italics added).”

Michael E. L. v. County of San Diego, 183 Cal. App. 3d 515, 522 (1986): The court granted the non-suit as to CMH liability on two grounds. The holding in *Tarasoff v. Regents of the University of California*, *supra*, 19 Cal. 3d 425, was inapplicable. If applicable, Welfare and Institutions Code n2 **section 5154**, included within the Lanterman-Petris-Short Act (LPS Act), part 1 of division 5, Community Mental Health Services, sections 5000-5550, immunized the County from liability for negligence of the psychiatrists. As to the deputy sheriff,

the court concluded the opening statement did not state facts sufficient to create the special relationship between the deputy and Cecelia essential to fix County liability... (Note: quote actually begins on page 521.)

Johnson v. County of Los Angeles, 143 Cal. App. 3d 298, 315-16 (1983): "...In 1963, when section 856 was enacted, the Legislature had not established the statutory structure of the Lanterman-Petris-Short Act. Former Welfare and Institutions Code section 5050.3 (renumbered as **Welf. & Inst. Code**, § 5880; repealed July 1, 1969) which resembled present section 5150, authorized emergency detention at the behest only of **peace officers**, health officers, county physicians, or assistant county physicians; former section 5047 (renumbered as **Welf. & Inst. Code**, § 5551; repealed July 1, 1969), however, authorized a petition seeking commitment by any **person**, including the 'physician attending the patient.' The Legislature did not refer in section 856 only to those **persons** authorized to institute emergency proceedings under section 5050.3; it broadly extended immunity to all employees who acted in accord with 'any applicable [***34] enactment,' thus granting immunity not only to **persons** who are empowered to confine, but also to those authorized to request or recommend confinement" (*Tarasoff v. Regents of the University of California*, *supra*, 19 Cal. 3d at p. 447). In the case at bench, there is no suggestion that anyone empowered to confine (such as a physician) had made a determination by the time Decedent was released. Thus, any action (or inaction) by Sheriffs with respect to Decedent pursuant to Penal Code section 4011.6 took place in the process of commitment. It does not constitute "the type of careless or wrongful behavior subsequent to a decision respecting confinement which is stripped of protection by the exception in section 856" (*Id.*, at p. 449; italics supplied) (bold in original).

Conclusion

In the *Buckley v. Valeo* comparison, the three random citations I looked at on Lexis did not directly cite the language of Lexis headnote 28 or the relevant page citations to *Buckley v. Valeo*, while the three random cases from Westlaw I looked at did directly cite the language of one of the relevant headnotes and cite to the corresponding pages of *Buckley v. Valeo*. In the

comparison of citing references for *Tarasoff v. Regents*, two of the three cases from the Lexis list that were not found in the Westlaw list either quote the headnote language or cite to the corresponding pages of *Tarasoff v. Regents*. (*Michael E.L. v. County of San Diego* does not.) While language quotations and page citation may not be the only determining factors for whether or not a citing reference is "relevant" in the absence of an actual legal problem to solve, it will have to do.

Only one conclusion can be drawn from such small comparisons. Based on my experiments with using headnotes as a limiting factor in citation checking on Westlaw and Lexis, if I wanted to be a thorough researcher, I would need to check both. The differing methods of generating headnotes and generating the citing references result in different sets of citing references. Good cases may be found in both sets of unique citing references. Despite the fact that researchers might retrieve some percentage of cases that are not directly on point, it is not going to be possible to be thorough without checking both systems.

In the brave new world of citation checking, there are now more cases to review.

Susan Nevelow Mart is a reference librarian and adjunct professor of law at UC Hastings College of the Law in San Francisco. She can be reached at marts@uchastings.edu. **A**

¹ *How to Find the Law*, 9th ed., Morris L. Cohen, Robert C. Berring, and Kent C. Olson, West Publishing Co.: St. Paul, MN (1989) at 84.

² *Id.*

³ *LexisNexis® Headnotes Now Integrated With Shepard's Citations Service; Integration of Headnotes Further Elevates Value of Industry's Premier Citation Tool for Legal Research*, June 29, 2005, at — www.tmcnet.com/usubmit/2005/Jun/1159530.htm.

⁴ Citing Cindy Spohr, Senior Director, LexisNexis Librarian Relations Group, in an e-mail from Debra Myers, Account Executive, LexisNexis, (April 3, 2006, 11:23:15 PDT) (on file with the author).

⁵ *Id.*

⁶ I checked all of the cases in 528 U.S. and the first 17 cases in 120 Cal.App.4th on both Westlaw and Lexis.