Technology and the United States Legal System – Increasing Accessibility[1]

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Professor Mersky received his B.S. in 1948, a J.D. in 1952, and a Master's degree in Library Science in 1953 from the University of Wisconsin, Madison. He has been a visiting professor at Queen Mary and Westfield College in London and the New York Law School, a consultant to the University of Melbourne Law School, and a Visiting Fellow at the Australian National University in Canberra.

Professor Mersky is widely published, particularly in the areas of legal research, language and law, and the history of the U.S. Supreme Court. He is co-author of *Fundamentals of Legal Research*, now in its 8th edition, the recognized authority on legal research and the standard textbook used in first year legal research courses across the United States. He recently completed *The First 108 Justices* (W.S. Hein & Co., 2004) which examines and evaluates the character, intellect, and statesmanship of current and former U.S. Supreme Court Justices. He also co-edits a multi-volume series, *The Supreme Court of the United States: Hearings and Reports on Successful and Unsuccessful Justices by the Senate Judicial Committee*, and collaborates on the *Documentary History of the Legal Aspects of Abortion in the United States*, with the most recent volume in that series published in 2003.

Professor Mersky is a pioneer in law librarianship. Under his leadership the Jamail Center for Legal Research has become one of the most important legal research institutes in the United States. He is known for his innovative approaches to library management and services and his strong commitment to improving library resources, services, and facilities. In 1971, he served as the Interim Director of the Jewish National and University Library in Jerusalem. He has served on committees and is a member of the Texas Library Association, the American Library Association, the American Association of Law Libraries, and the Special Library Association. Professor Mersky routinely serves as a consultant to many academic institutions and law firms, as well as private corporations seeking to establish or organize collections of law related material. Professor Mersky has also made significant contributions to the field of law. Committed to the cause of human rights, he has been active in the ABA Section of Individual Rights and Responsibilities, the National Bar Association, and the Native American Bar Association. He was president of the Austin Chapter of the American Civil Liberties Union and president-elect of the Human Rights Documentation Exchange in Texas. He contributes to a variety of legal organizations, holding positions of responsibility on committees of the American Bar Association, the Association of American Law Schools, and the State Bar of Texas. Professor Mersky is also a member of the ABA Gavel Awards Screening Committee; a member of the Editorial Board of *Experience*, the magazine for the ABA Seniors Lawyers Division; and a member of the Technology Committee that is part of the Section of Legal Education and Admissions to the Bar. He is a Life Fellow of the American Bar Foundation, the American Law Institute and the College of Law Practice Management.Professor Mersky is a member of the State Bars of Wisconsin, Texas, and New York, and has been admitted to practice before the Supreme Court of the United States, the U.S. Court of Criminal Appeals for the 5th Circuit, the U.S. Court of International Trade, and the U.S. Court of Military Appeals. He is a member of the International Association of Jewish Lawyers and Jurists.

Active in both state and civic organizations, Professor Mersky is a board member and past president of the Texas Humanities Alliance, as well as a board member of both the Texas Supreme Court Historical Society and the Texas Book Festival.

It is indeed an honor to talk to you today. It has been a pleasure to work with Antonio Benjamin while he has visited Austin, Texas and I have enjoyed meeting other legal experts in Brazil. The fact that a group as diverse as ours has assembled here to talk about white-collar crime bears witness to the ever-increasing globalization of law enforcement and commerce. Our need to know and understand different legal systems, to have access to government information that we can use and make useful to others has never been greater. And it's our good fortune – and good timing - that technology has provided governments and the private sector alike with the tools necessary to allow us to accomplish our goals.

Technology has the power to make government and legal systems transparent. By opening government action and organization to a wide audience, by enabling the public to use information about government action and understand the legal system within which government operates, technology serves a worthwhile purpose. To the extent that governments understand one another, cooperation on a global scale is fostered – international initiatives to deal with issues such as white-collar crime and anti-corruption measures are strengthened, and individuals involved in those initiatives can work more efficiently and effectively with their counterparts around the world.

Transparency in government and law results first from electronic publication of materials that were once available only in print. Almost as important as the (relatively) simple fact of electronic publication is the far more complex issue of increasing the accessibility of materials – by allowing individuals to access documents in different ways, by relating, through hypertext linking, one document to others, and by enabling individuals to electronically interact with materials. It's this adding of value to the texts themselves where technology can make the greatest difference.

As technology enhances access to government and legal information, public expectations are raised. In turn, advances in technology lead to more materials becoming more readily available and the means to interact with those materials increasing in ways that we cannot always foresee. Technology leads to transparency and increased transparency encourages the development of new technologies.

My remarks to you today focus on this increased transparency, fueled by technology, of government and law. I'll concentrate on the United States government and its legal system – and discuss the structure and operation of our system, a system based on the equality of three separate branches of government. Technology's role is to integrate the intellectual output of the three separate branches – to place each legal pronouncement in context and to make a seamless and coherent whole out of distinct parts. I'll conclude by demonstrating ways in which this increased transparency of United States law and government, and the corresponding opening of other governments and organizations, contribute to global cooperation and initiatives in the area of white collar crime.

But before I begin to discuss the legal system I come from, I wanted to make one additional point. The opening of United States government and its mechanics and the increased availability of United States legal information have come about, not only because of our government's own initiatives, but also, in many cases, *in spite of* government action – or inaction. While I believe that our government has made enormous advances in educating the public, in

making all kinds of important information available to and accessible by a large portion of our citizenry, both commercial entities and non-profit groups have contributed significantly to this increased openness as well. Many commercial and non-profit organizations are in a position to electronically publish materials that the government, for any number of reasons, may be unwilling or simply unable to make available. The aggregation of official government information made electronically available, together with the materials made available online by the private sector, has quite literally changed the way lawyers – and the public – do business.

The United States legal system is a common law system. Law is created in cases decided by the judicial branch of government, statutes passed by the legislative branch, and administrative rules and regulations promulgated by the executive branch. Legislation passed by federal and state legislatures is usually compiled into codes. Unlike civil law systems, there is no expectation in the United States that the legal principles enumerated in federal or state codes will apply to every legal problem.

Because the three branches of government are essentially equal, access to materials generated by all three branches is equally important. And, the legal materials generated by the separate branches are inextricably related. The judiciary interprets statutes. Legislators authorize executive agencies to promulgate rules. And administrative employees propose rules that further the purposes of legislation.

Each of the three branches of government has acted independently to make legal and informational materials generated by it electronically available. More interestingly, certain federal support agencies have undertaken to integrate materials generated by the different branches and by different entities within those branches in order to make those materials more useful to the general public. The Library of Congress and the Government Printing Office have been among the most active agencies fulfilling this public service at the federal level. The Government Printing Office website alone provides electronic access to more than 224,000 government documents. Evidence of the site's popularity are the 335 million document retrievals made during 2001 alone.

Commercial and non-profit groups have gone further. Comprehensive commercial databases like Westlaw and Lexis relate secondary sources and current awareness materials to the specific primary sources they discuss, they relate administrative adjudications to statutory and case law, they permit their subscribers to quickly reference all citations – in whatever type of legal material – to a particular case, statute, or administrative regulation. Non-profit groups are more likely to put the law in context – to explain a particular subject area and to link to diverse sources of law.

But I'll now describe in greater detail how our government is organized and how it operates.

Like Brazil, the United States is organized as a federal system. The Constitution of the United States grants specific and enumerated powers to the federal government, and reserves other powers for the individual states and territories. There are more than 50 legal systems operating in the United States: the central federal government, each of the 50 states, the District of Columbia, Puerto Rico and each of the U.S. territorial governments.

When the colonies first won independence from Great Britain, the newly formed government was a loosely knit confederation of states, each state creating its own system of government and law. It quickly became apparent that a strong nation spread over thousands of square miles required a more centralized federal government. Our Constitution was adopted to provide the framework for a strong federal government with enumerated powers.

Since the United States Civil War, the federal government has continuously expanded its authority, most noticeably into the area of interstate commerce. Today, there are few areas in which federal law does not operate in some way. But the federal government remains one of limited powers. Authority not granted to the federal government by the Constitution is vested in the states or the people.

For example, the authority of the states generally extends to issues concerning the rights of individuals vis-à-vis each other – laws relating to property, the family, torts, and inheritance - are generally enacted by the states. There are state criminal laws as well as federal criminal laws – federal crimes involve individuals in more than one state or nation. Other federal issues include intellectual property, federal taxes, antitrust, securities, labor and employment, and interstate commerce.

If state and federal law conflict, the first question is whether the United States Constitution authorized the federal government to enact the law. If it has, federal law controls.

A constitution contains the fundamental principles by which a political body governs itself. Legislation would not be possible without a constitution that granted authority to a legislature. Both our federal and state governments have constitutions.

The United States Constitution, the oldest national constitution in continuous existence in the world, is also one of the shortest. In its first three articles our Constitution establishes a complete tripartite central government. Article I establishes the bicameral legislature called Congress. Article II establishes the executive branch headed by the President. And, Article III establishes the judicial branch. Article III specifically creates only one court, the Supreme Court; the creation of lower federal courts is left to Congress.

The Constitution of the United States is the "supreme Law of the Land." Congress may propose amendments to the Constitution by a two-thirds vote of both houses of Congress. In order to be adopted, amendments must be ratified by vote of the legislatures or conventions of three-fourths of the states. Only 27 amendments to the United States Constitution have been ratified – by contrast, the Constitution of the State of Texas, at least in its current iteration, which dates to 1876, has been amended almost 400 times.

In 1803 the United States Supreme Court, in the case of *Marbury v. Madison*, established the principle of judicial review. Under this doctrine, the courts, and, specifically, the United States Supreme Court, have the power to decide the constitutionality of legislation and other acts of government. Because the three branches of government are considered equal, the idea of judicial review has always been somewhat controversial.

The United States Congress is empowered to make all laws that are necessary and proper in order to execute the powers expressly vested by the Constitution in the federal government. But the judiciary determines whether a federal statute falls within its constitutional mandate.

The Supreme Court has consistently interpreted legislation in such a way so that constitutional questions are avoided. As one Chief Justice has written, the Supreme Court has "repeatedly held that as between two possible interpretations of statute, by one of which it would be unconstitutional and by the other valid, [the] plain duty is to adopt that which will save the act." *[Chief Justice Charles Evans Hughes writing in National Labor Relations Board v. Jones & Laughlin Steel Corporation – 1937].*

The creation of a federal statute can be tracked online – the Library of Congress has created a website that provides access to almost all of the actions undertaken by Congress with respect to proposed legislation. The process of enacting legislation is not a simple one. A member of Congress proposes legislation in the form of a "bill." Congressional committees evaluate the bill, often holding formal hearings and soliciting information from experts. The committees submit to Congress a report of their findings. After deliberation the bill is enacted upon a majority vote in both houses of Congress.

The legislative documentation produced during consideration and enactment of a statute is called the legislative history of the statute. Printed copies of legislative histories have often been hard to come by. The online availability of so much official information - Congressional reports, debates, hearings, preliminary versions of bills, records of the votes of Congress on particular legislation - as well as the electronic publication of unofficial information that evidences the intent of congressional representatives and government policy-makers - for example, newspaper articles and speeches by government officials – all have worked to open our government and its mechanics to an ever widening audience.

We live in an age of statutes. The amount and scope of federal legislative action have grown exponentially in the past decades. Correspondingly, the role of the courts has grown as well. The application of statutes, the legislative intent behind statutes, and the constitutionality of statutes all must be determined by the judiciary.

The value of the World Wide Web lies in its empowerment of the individual. Users of online legal information can link from the text of statutes to the opinions of the courts construing those statutes, from the commentary of scholars to the legislative hearings that discussed particular statutory provisions. Individuals can mold information in ways that they find most helpful and useful to them. No longer are legal documents static boxes of data; instead, the Web renders these pronouncements into malleable sources that each individual can manipulate and use as he or she sees fit.

Treaties between the United States and other countries have equal authority with federal statutes and are subject only to the Constitution. If there is a conflict between a treaty and a federal statute, the one more recently enacted controls. The United States is bound by a treaty only after both the President has signed it, and the treaty has received the approval of two-thirds of the senators voting on the issue. If the treaty is self-executing, it takes effect once passed; otherwise, it becomes effective after Congress passes implementation legislation.

The Office of the Legal Adviser at the U.S. State Department does provide information about the status of treaties in force, but does not make the full text of treaties available online. *[http://www.state.gov/s/l/]* Commercial websites have eclipsed this official government website

by publishing the full text of treaties. These commercial websites are far more current and comprehensive than the government product.

In both the federal and state judicial systems there is a hierarchy of courts. The typical court structure consists of three levels; courts at each of those three different levels play different roles in the judicial process.

The courts of first instance, the trial courts, or, in the federal system, federal district courts, are courts with original jurisdiction for cases in controversy. These courts determine issues of law and fact and are the only fact-finding courts in the hierarchy.

Intermediate appellate courts, the federal circuit courts or courts of appeal, are authorized to review the findings of the trial court, but only with respect to errors of law. No new hearings with respect to factual issues will occur at the appellate court level. The federal courts of appeals are divided into geographic regions, having jurisdiction over all trial courts in that region.

The ultimate federal appellate court, the United States Supreme Court, is the court of last resort for questions of federal law.

No discussion of case law would be complete without an explanation of the doctrine of precedent and *stare decisis*, the latter literally meaning, "to stand on what has been decided." Stare decisis involves the principle that the decision of a court is binding authority on the court that issued that decision and on lower courts within the same jurisdiction. By binding lower courts to the precedents of past decisions, the common law system establishes rules of law that all judges within a particular jurisdiction must follow. From one perspective, judges merely declare what has always been the law. From another perspective, judges create new law each time they apply precedent to new problems.

More and more courts are electronically publishing their recently issued opinions on the World Wide Web. As a general rule, the higher the level of the court, the more material is available online. Archives of historical opinions of United States Supreme Court cases, together with written arguments presented to the Court by advocates arguing before it, are freely available on government and commercial services. Archival court opinions, at least for lower federal courts, are less readily available online free of charge.

Commercial providers enable access to an enormous range of court decisions, including decisions that are not published in print. These vendors also provide enhanced research tools that enable a researcher to determine the treatment of a reported case by subsequent court opinions.

The functions of the president and the various offices of the executive branch have always included rulemaking. From President Roosevelt's administration forward, the amount and scope of the regulatory authority of the federal administrative agencies have increased. Congress determined that it was not in a position to regulate complex industrial and commercial activities, so it created new agencies and expanded the mandate of existing agencies in order to provide the expertise and specialization necessary for regulation. These Congressional determinations resulted in comprehensive regulatory regimes dealing with such subjects as aviation, securities, anti-trust, tax, food and drug safety, and the environment.

Many agencies are empowered to create rules of law and to decide cases. Agency rules are termed subordinate or delegated legislation; agency adjudicative decisions are quasi-judicial.

Some agencies have appointed administrative law judges who conduct initial reviews of agency action. Even in those cases, federal district courts may conduct appellate review of administrative action.

Administrative agencies create regulations by a process called administrative rulemaking. The agency must publish the proposed rule and solicit public comment before the rule can become effective. Proposed and final rules are published in the *Federal Register*, a daily gazette of federal agency action. Codified and currently effective regulations are set forth in the *Code of Federal Regulations*. Both of these resources are freely available online. Moreover, each federal agency has created its own website, where notice of agency actions are electronically published. Those agencies that decide contested cases often have excellent databases of administrative decisions available on their web sites.

United States law is becoming easier to research and correspondingly easier to understand. The availability of so much legal material online and the availability of tools to manipulate that information and make it useful to the public have increased the openness and accountability of government. But the United States is not alone in this phenomenon – the legal materials of all countries, together with transnational documents, are increasingly available online. Those materials may be published by the governments themselves, by academic and other non-profit institutions, or by commercial vendors. Increased availability of international information means increased opportunities for multinational cooperation.

An outstanding example of the kind of resource that the Internet makes possible, and one that has special significance to the group gathered here, is the Organization of American States' online database - "National Legal Instruments on Anti-Corruption." By providing links to summaries of member states' anti-corruption laws, as well as citations to those laws, the OAS has made possible comparisons between different countries' approaches; this website empowers its users. What would make the resource even more useful, however, would be links to the text of the laws themselves, as well as to agency directories and rule-making activities.

The Tarlton Law Library's own contribution to international anti-crime resources includes the two handouts I've made available to you. One is an anti-crime legislation bibliography and the other is a more general reference to United States online legal resources. Both handouts are themselves available online – I hope they are useful to you.

Technology has increased our capacity to understand and explore the legal systems of other countries. It's incumbent on us to maximize the use of this technology, to ensure that it is put to the best possible use. Technology is ours to exploit – as the mechanisms of government become increasingly transparent, we'll have more opportunities to put technology to work for us.