



比较法学文库

高 祥◎总主编

# 美国法律文献与信息检索

LEGAL RESEARCH IN  
AMERICAN LAW

王 昶◎编著

CHANG WANG



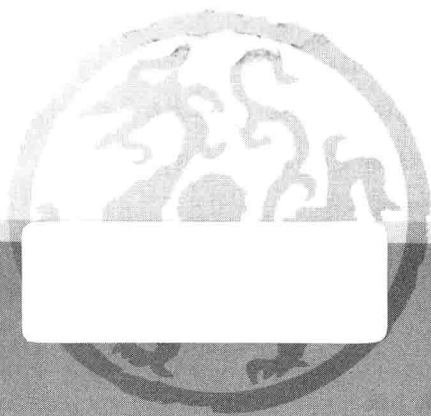
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## 总 序

法治是现代社会文明的标志与基石。良好的法治需要完备的法律制度及其落实的良好氛围。比较法的目的与使命在于通过对不同法域间的法律制度、法律文化和法律体系的比较研究,深化人们对这些法律制度、法律文化和法律体系的认识,了解世界法学发展的动态、法律发展的趋势,进而择善而从,完善已有的法律制度和法律体系,为人类的共同文明与进步服务。

信息化与全球化使得我们所处的世界正在变得越来越小,使得不同法域间的人们的交往越来越频繁、关系越来越密切,彼此间需要了解对方的法律制度和法律文化的要求越来越迫切、内容越来越详细,从而使得比较法在现代法治建设与人类文明进步中的功能越来越明显,作用越来越大,任务越来越重。

在中国法制现代化的过程中,比较法发挥了非常重要的作用。通过研究和认知域外法律制度、法律体系与法律文化,使得中国法学界能够迅速和充分地了解这些制度,使得中国的法律体系能够在学习和借鉴域外相关法律制度的基础上很快建立起来。虽然中国的法制建设已经取得很大成就,但离现代法治的要求仍有很大距离。在中国法制建设的进程中,比较法仍然具有无限的发挥空间。

中国政法大学比较法学研究院是在整合原中国政法大学比较法研究所、中德法学院和中美法学院三个教学科研院所的基础上成立的,是目前中国高校和科研机构中唯一以比较法学为中心的专门的教学科研机构,聚集了一批优秀的比较法人才。其成立的目的是为了适应信息化与全球化以及中国法制国际化与现代化的需要,构建以比较和研究中外法律制度为目的的比较法学研究的平台,力争在巩固其国内比较法学研究领先地位的基础上达到世界先

进水平，从而更好地为中国的法制建设和社会进步贡献自己的力量。

为了完成其光荣使命，中国政法大学比较法学研究院开展了丰富的教学科研活动。这些活动中形成的各种学术成果均蕴藏着比较法教学与科研的最新成果与思想财富，颇具学术价值，非常值得整理出版。这些成果若以单本出版发行，难见系统，编为文库出版，方能相得益彰，蔚为壮观，既便于研读查考，又利于文化积累。

《比较法学文库》能够顺利出版，需要感谢的人很多。但特别需要感谢的是山西联盛能源集团及其董事局主席邢利斌先生，是其慷慨解囊使得中国政法大学比较法学研究院能够设立联盛比较法基金，并对本文库的出版给予资助。

高 祥 \*

2012 年 12 月

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\* 中国政法大学比较法学研究院院长。

## 序言一

金理德

汤森路透首席技术运营官

在新技术的世界里，尽管我可能不知道所有问题的答案，但是我仍然不失自信。在此请不要误解：我的意思是我知道寻找答案的路径，因为技术和技术发展给我们指引方向，由此我们获得信心。重要的是我们首先必须知道向何方求解，事业才会成功。

同样的道理在法律领域也适用，法律实践成功与否非常重要的一步是法律文献与信息检索。

在他最新的著作《美国法律文献与信息检索》一书中，我尊敬的同事王昶副教授详细介绍和分析了美国法律文献体系的基础，并提供了富有启发性的专业法律文献和信息检索方法和路径。他独特的宏观观点和实践建议对法律工作者和商业人士都具有重要的借鉴意义。

美国的法律体系植根于法律文献系统，我所供职的单位汤森路透专精此道。Westlaw 和 WestlawNext 都是内容完善、技术先进的法律文献与信息系统，及时有效地为法律工作者提供权威的法律文献和信息。

多年以来，我们致力于将法律文献和信息通过高技术的方式灵活、迅速地传达到法律工作者的案头和手中，给法律工作者指引寻找法律的路径，增强他们的执业信心。

在读完王教授的著作之后，我相信你一定会寻找到正确的法律答案。

祝阅读愉快。

## Foreword One

Rick King

Executive Vice President and Chief Operating Officer, Technology  
Thomson Reuters

The world of technology is one of the only places I feel pretty confident not knowing the answer. Don't get me wrong, I'm going to find what I need— I'm just confident that because of and through technology, I know where to look. It's in the same light, the idea of simply knowing where to go to find what we're looking for, that businesses succeed.

And the same can be said for the world of the law—and the critical component of legal success that lies with legal research.

In his latest title, *Legal Research in American Law*, my esteemed colleague Professor Chang Wang details and analyzes the foundation of the U. S. legal system and provides an analysis of legal research with thought – provoking intensity and demonstrated expertise.

His great combination of historical review and recommendations for future success make for a compelling read—not just for attorneys but for business people, too.

The legal system in the United States is rooted in legal research, something my company, Thomson Reuters, knows all too well. The makers of America's premiere legal research databases Westlaw and WestlawNext, Thomson Reuters grew a business out of understanding customers need for accurate, immediate access to legal data. And we've done it well.

Over the years, we've made an art form out of delivering relevant legal research information to our customers when they need it and in the way they need it—giving

them the confidence to know where to look when they need an answer—all because of technology.

After reading Professor Wang's book, I'm confident you'll find the right answers, too.

Enjoy.



## 序言二

郝兰琼

美国律师协会法学教育和律师执业分会主席

美国明尼苏达大学法学院副院长，罗杰诺仁讲座教授

美国联邦最高法院大法官拜伦·怀特 (Byron R. White) 曾经说过：“律师主要关注的是控制或影响当前及将来的事件。尽管如此，不论是出庭律师、法律顾问还是立法者，他们的法庭行为、学术论文、法律意见或者他们赞成的立法都往往根源于过去的案件……诉讼案件的结果一再地依赖于对过去案件的研究和再创造。法律顾问和出庭律师必须掌握分析过去案件和运用立法背景解释法律的能力。”〔1〕尽管写于40年前，远在电子搜索出现、法律信息爆炸和法律职业强调职业化和技能化之前，怀特大法官的评论仍然是敏锐的、实用的，在某种程度上可以说是告诫性的。在经济和法律全球化的今天，任何一个律师如果缺乏对基本法学理论、基本法律原则、大陆法系和普通法系的法律信息检索技术的掌握，想要成为一个能够负责任的代理国内国际案件的律师是不可能的。

王昶副教授的《美国法律文献与信息检索》一书无疑将得到怀特大法官的高度赞赏。这本书有着广阔的视野和简洁的论述，不啻为庞大的美国法律检索著作群的无价增补。中美两国的律师、法官、图书管理员和其他法律人将会发现这本对法律检索方法论和检索策略有着深入探讨的著作，是把握不断变化和正在发生令人生畏的转变的美国法律体系的重要工具。

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〔1〕 Byron R. White, “Introduction”, in Donald Fleming and Bernard Bailyn ed., *Law in American History*, Boston: Little, Brown and Company, 1971, p. 5.

这本书的出版也是对法学教育者和从业者对于即将进入律师行业的新律师不具备进行有效的法律检索和分析复杂、差别细微的案件的必要能力的担心的回应。1992年,美国律师协会法学教育和律师执业分会(American Bar Association's Section on Legal Education and Admissions to the Bar)的一个特别工作组发布了一份关于法学教育和职业化发展“缩小差距”<sup>[1]</sup>的报告,这份标题为“法学教育和法律职业化发展——一个教育的统一体”<sup>[2]</sup>的报告,被非正式地称为“麦克特报告”(MacCrate Report),这个名字来源于该特别工作组主席罗伯特·麦克特(Robert MacCrate),他是纽约苏利文 & 克伦威尔律师事务所(Sullivan & Cromwell)的合伙人。这项标志性的报告总结了特别工作组的工作,并清晰有远见地表达了对于“改进新成员进入律师业进行法律实践的程序”<sup>[3]</sup>的建议。特别工作组和“麦克特报告”(MacCrate Report)的努力对于美国法律教育在过去20年代的改革起到了催化剂的作用。该报告关于法律检索的特别建议如下:

“为了进行更有有效的法律检索,一个律师必须具备相关的法律职业知识:法律规则和法律制度、法律检索的基本工具、条理分明和有效的检索方案的设计和实施”<sup>[4]</sup>,包括以下几个方面:

关于法律规则和法律制度的基本知识:

- 判例法 (Caselaw)
- 成文法 (Statutes)
- 行政规章和行政部门案例裁决 (Administrative regulations and decisions of administrative agencies)
- 法院规则 (Rules of court)

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[1] American Bar Association, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum; Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, Chicago, American Bar Association, 1992.

[2] American Bar Association, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum; Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, Chicago, American Bar Association, 1992.

[3] Robert MacCrate, “Legal Education and Professional Development—An Educational Continuum”, *Student edition*, 1992, p. 5.

[4] Robert MacCrate, “Legal Education and Professional Development—An Educational Continuum”, *Student edition*, 1992, p. 145.

· “法律重述”和相关非官方法典化工作 (Restatements and similar codifications)

“进行法律文献与信息检索的知识和对重要工具的使用能力” (Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research) 包括:

· 一手法律文献 (Primary legal texts) 包括: 判例法集 (case law reporters), 法庭判例活页集和其他合集 (looseleaf service and other collections of court decisions); 联邦、州和地方方法典 (codification so federal, state, and local legislation); 行政规章和行政部门案例裁决汇编 (collections of administrative regulations and decisions of administrative agencies);

· 二手法律文献 (Secondary legal materials) 包括法律论著 (treatises), 法律文摘 (digests), 成文法汇编注释 (annotated versions of statutory compilations), 法律活页书中的评论 (commentaries in looseleaf services), 法学期刊文章 (law reviews), 以及判例法和成文法的引证码索引 (compilations of citations to cases and statutes)。

“麦克特报告” (MacCrate Report) 探讨了律师理解资料的深度和通用性的必要, 同时探讨了获取信息的方式, 如“打印件、缩影胶片、其他小型化服务”和 Westlaw 之类的电子服务。另外, “麦克特报告” (MacCrate Report) 建议律师们掌握必要的设计和实施有效地检索策略的技巧<sup>[1]</sup>。

“麦克特报告” (MacCrate Report) 的所有的建议和引用资料都交织在王昶副教授的书中。这本书为任何一个认真的学者或学生提供了精通掌握法律检索技能的必要信息, 而这种法律检索技能是在美国从事法律实践被广为提倡的。当然, 王昶副教授提供了比“麦克特报告” (MacCrate Report) 更丰富的资料, 他有识别的精选了在美国法律发展过程中有特殊的里程碑式意义的联邦案例, 这些案例描绘了美国法律发展的轮廓, 如果认真研习这些案例, 能够促进读者掌握高端法律检索和法律推理技巧。

要成为一个美国法律检索方面的专家, 掌握足够的有效的法律检索技巧是一个重要的因素。在当前法律学术和法律职业领域竞争不断增强的情形下, 掌握一定的竞争优势对一个人取得成功起着越来越具有决定性的作用。其中

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[1] Robert MacCrate, “Legal Education and Professional Development—An Educational Continuum”, Student edition, 1992, p. 148.

最重要的一项技能就是掌握花费最少的却最有效的法律检索技巧。

当今，法律检索者面临的最大挑战是获得经济的检索指南和（电子）工具。这些资源如果被熟练的、采用适当方式的运用是相当有价值的。然而，检索指南和（电子）工具必须被串联应用才能保证得到最全面的检索结果。大部分的法律检索者，尤其是刚刚开始职业生涯的检索者，会陷入使用最流行的或最容易获取的工具进行检索的陷阱。他们很少考虑用哪种检索策略或资源能够在最短时间和最低的花费获得想要的检索结果。这些检索者经常凭直觉地登陆最近的电脑或抓来一本最喜爱的教科书，而没有考虑哪种资源最可能提供想要的结果。他们经常不会考虑设计一个同时采用多种检索工具的检索方案。这样做的结果是，不仅可能无视重要的信息，而且可能浪费资金〔1〕。

王昶副教授这本书的众多优点之一是向律师和学生提供了一个路线图，这个路线图教会读者如何设计一个有效的检索策略来保证检索结果是全面的而且是经济的。即使是有经验的检索者也经常挣扎于“超负荷的信息”中或在非此即彼的选择中左右为难，并经常错误地认为没有支持某一决定性观点的案例或法律存在。王昶副教授提供了能保证取得准确的、符合趋势的、完整的、恰当的检索结果的检索策略和检索方法。

在关于美国法律教育的评论中，被最频繁引用的是克里斯多夫·哥伦布·兰德尔（Christopher Columbus Langdell）的评论。克里斯多夫·哥伦布·兰德尔1870年到1895年期间担任哈佛大学法学院院长，他说：“……法律是一门科学……一个装备良好的大学是教授这门科学真正的地方。因此，法学图书馆一直是我们的最大的最恒定的关注……同时我们不断地灌输这样的思想，图书馆是教师和学生适当的工作室，就像大学实验室对于化学家、物理学家，自然历史博物馆对于动物学家，植物园对于植物学家一样。”〔2〕如果确实像兰德尔院长指出的那样，法律图书馆对于法律教师和学生是实验室，那么法典、案例、规章、论文、法律活页和电子资源就是用来试验的化学品、工具和标本。就像化学家、物理学家和植物学家，他们制造化学合成物和混合气体，画

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〔1〕 Joan Howland and Kay Todd, *Principles of Power Research: Integrated Manual and Computer—assisted Tools to Maximize Results and Minimize Costs*, St. Paul: West Publishing, 1992, p. 1.

〔2〕 Christopher Columbus Langdell, “Harvard University Quarter—Millennial Celebration”, *Law Quarterly Review*, Vol. 3, 1887, p. 123.

出抛物线图表以观察运动速率，或者嫁接玫瑰花以求培养一个能够抵抗疾病的植物一样，律师学习、分析和研究他们在书本和电脑中发现的信息，并用此来分析、构思和测试法学理论和概念。然而，律师们如果不能够发现、评估和组织起来这些在兰德尔的“适当的工作室”中发现的信息，法学这门真正的科学就不能被理解和掌握。王昶副教授的这本书为律师、教师、学生发现这些信息提供了依据和工具，不仅是为了让他们简单地赢得案件，更是为了让他们卓越地完成工作。

## Foreword Two

Joan Howland

Associate Dean for Information and Technology and Roger F. Noreen  
Professor of Law, University of Minnesota Law School

Chair, Council of Section on Legal Education & Admission to the Bar,  
American Bar Association

Associate Justice Byron R. White of the United States Supreme Court wrote, “The lawyer is chiefly concerned with controlling or affecting present or future events. Nevertheless, whether trial lawyer, counselor, or legislator, the premise for his courtroom conduct, the papers he drafts, the advice he gives, or the legislation he supports is most often rooted in the past... The outcome of lawsuits repeatedly turns on the investigation and re-creation of past events. The counselor, as well as the trial lawyer, must have talent for analyzing past cases and for putting legislative history to use in interpreting statutes.” [1] Although written over forty years ago—long before the advent of electronic research, the explosion in legal information, and the emerging emphasis on professional and skills based learning—Justice White’s comments remain astute, pragmatic, and, to a significant degree, cautionary. It is impossible, especially in this era of the globalization in business and the law, for any legal advocate to responsibly represent clients nationally or internationally without thoroughly mastering the theory, principles, and mechanics of legal research in both

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[1] Byron R. White, “Introduction”, in Donald Fleming and Bernard Bailyn ed., *Law in American History*, Boston: Little, Brown and Company, 1971, p. 5.

civil and common law jurisdictions.

*Legal Research in American Law*, by Wang Chang, would have undoubtedly earned Justice White's high praise. Comprehensive in scope and concise in presentation, this work is an invaluable addition to the broader body of literature on legal research in American law. Chinese and American lawyers, judges, librarians, and others associated with the legal profession will find the text, with its in depth discussion of legal research methodologies and resources, an essential tool in navigating the constantly changing and frequently intimidating currents of the American legal system.

The book also responds to ongoing concerns among educators and practitioners that attorneys entering the legal profession do not have the skills necessary to effectively research and analyze complex or nuanced issues. In 1992, the American Bar Association's Section on Legal Education and Admissions to the Bar issued a *Report of the Taskforce on Law Schools and the Profession: Narrowing the Gap*.<sup>〔1〕</sup> Officially titled, "Legal Education and Professional Development—An Educational Continuum"<sup>〔2〕</sup> and unofficially known as the "MacCrate Report" referencing the Taskforce's chairperson Robert MacCrate, a partner in the New York City law firm of Sullivan & Cromwell, this landmark work summarized the work of the Taskforce and articulated visionary recommendations for "improving the processes by which new members of the [legal] profession are prepared for the practice of the law."<sup>〔3〕</sup> The efforts of the Taskforce and the MacCrate Report have served as a catalyst for the transformation of American legal education over the past two decades. Among the outgrowths of the report were specific recommendations related to legal research as follows:

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〔1〕 American Bar Association, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum; Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, Chicago, American Bar Association, 1992.

〔2〕 American Bar Association, Section of Legal Education and Admissions to the Bar, *Legal Education and Professional Development—An Educational Continuum; Report of the Task Force on Law Schools and the Profession: Narrowing the Gap*, Chicago, American Bar Association, 1992.

〔3〕 Robert MacCrate, "Legal Education and Professional Development—An Educational Continuum", *Student edition*, 1992, p. 5.

“In order to conduct legal research effectively, a lawyer should have a working knowledge of the nature of legal rules and legal institutions, the fundamental tools of legal research, and the process of devising and implementing a coherent and effective research design”<sup>〔1〕</sup> including:

Knowledge of the Nature of Legal Rules and Institutions including

- Caselaw
- Statutes
- Administrative regulations and decisions of administrative agencies
- Rules of court
- Restatements and similar codifications

Knowledge of and Ability to Use the Most Fundamental Tools of Legal Research including

• Primary legal texts including: caselaw reporters, looseleaf service and other collections of court decisions; codification of federal, state, and local legislation; collections of administrative regulations and decisions of administrative agencies;

• Secondary legal materials, including treatises, digests, annotated versions of statutory compilations, commentaries in looseleaf services, law reviews, and Shepard's Compilations of citations to cases and statutes.

The MacCrate Report also discussed the need for lawyers to understand the depth and currency of materials as well as alternative methods of accessing information “including hard copy, microfiche and other miniaturization services” and electronic services such as Westlaw. In addition, the MacCrate Report recommended that lawyers acquire the skills necessary to design and implement effective, efficient research strategies.<sup>〔2〕</sup>

All of the recommendations and resources cited in the MacCrate Report are interwoven throughout Wang Chang's text. The book's content provides any serious

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〔1〕 Robert MacCrate, “Legal Education and Professional Development—An Educational Continuum”, *Student edition*, 1992, p. 145.

〔2〕 Robert MacCrate, “Legal Education and Professional Development—An Educational Continuum”, *Student edition*, 1992, p. 148.



scholar or student with the information needed to master research competencies and the skills necessary to practice effective advocacy in the United States. Indeed, Wang Chang goes beyond the resources referenced in the MacCrate Report and identifies specific federal cases that have defined the development of American law and, if carefully studied, could facilitate the development of sophisticated legal research and legal reasoning skills.

A major component of becoming an expert researcher of American law is acquiring the skills to become a competent and cost-effective legal researcher. In the current climate of increased competition in all academic and professional environments, it is more crucial than ever to obtain the competitive edge an individual needs to ensure success. One of the most important skills to develop is the ability to perform legal research with maximum efficiency and minimum cost.

The biggest challenge facing legal researchers today is the cost-effective integration of manual and electronic tools. These sources are equally useful when accessed skillfully and in the appropriate situations. However, manual and electronic tools must be used in tandem to ensure the most comprehensive results possible. Many legal researchers, especially those beginning their careers, fall into the trap of using whatever tools are most familiar or within easy reach. There is often little thought given to research strategy or to which sources will lead to the answer in the least time and at the lowest cost. Researchers often instinctively log on to the nearest computer or grab a favorite textbook, without reflecting on which sources are most likely to produce the desired answer. There is often no consideration given to developing a research plan that coordinates the use of various tools. Vital information can be overlooked and funds can be spent needlessly. [1]

One of the many strengths of Wang Chang's book is the roadmap it provides lawyers and students of how to develop an efficient research strategy that ensures a comprehensive, cost-effective result. Even experienced researchers often flounder in "information overload" or, in the alternative, erroneously determine that no cases or

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[1] Joan Howland and Kay Todd, *Principles of Power Research: Integrated Manual and Computer-assisted Tools to Maximize Results and Minimize Costs*, St. Paul: West Publishing, 1992, p. 1.