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A Tale of Legal Research

Shepard's® and KeyCite® Are Flawed (or Maybe It's You)

By Alan Wolf and Lynn Wishart

Sally Smith, a first-year associate at an Iowa law firm, is handed her first assignment. The client, a farm worker, was struck by lightning while picking corn. His worker's compensation claim was denied on the ground that lightning is a hazard unrelated to his employment. Sally's supervising partner advises her not to devote an inordinate amount of time to research, given the high cost of the firm's LexisNexis™ service and the relatively small size of the case.

Sally, who considers herself a good online researcher, goes to the Iowa state case law database and performs the "terms and connectors" search: (str! /3 lightning) and (work! /3 compensation).

The search brings up four cases, the most recent being *Mincey v. Dultmeier Manufacturing Co.*, 223 Iowa 252, 272 N.W. 430 (1937). *Mincey* is directly on point, but it applies the "increased risk" rule of *Wax v. Des Moines Asphalt Paving Corp.*, 220 Iowa 864, 263 N.W. 333 (1935), to deny this "act of God" claim. *Wax* reasoned that injuries produced by lightning or severe heat or cold were unrelated to employment because the general public was also subject to these forces.

Sally is careful to Shepardize *Mincey*, and the case appears to be good law. Her supervising partner, whose practice rarely involves worker's compensation claims, asks Sally a single question: "Did you Shepardize it?" Later that day, the client is told that he has no case.

In fact, *Mincey* is *not* good law. More than a dozen years before Sally found and Shepardized the case, the Supreme Court of Iowa unequivocally rejected the "increased risk" rule for an "actual risk" rule more generous to employees in *Hanson v. Reichelt*, 452 N.W.2d 164 (Iowa 1990). In *Hanson*, the court noted that employees required to work outdoors did not feel free to come out of the rain, a freedom enjoyed by members of the general public. Therefore, injury from exposure to the elements was, as the worker's compensation statute demanded, causally related to employment. Under *Hanson*, the farm worker's claim would have been allowed.

Sally would have fared no better if she had relied on Westlaw's KeyCite service. Should we blame Sally or the online citators for failing to determine whether her case was good law?

Failing to Look Forward in Time

To understand why *Mincey* appears to be good law, look at the timeline of Figure 1.

Hanson cited to *Wax* and explicitly overruled it, but *Hanson* did not cite to *Mincey*. When Shepard's and KeyCite processed *Hanson*, they added negative treatment codes to *Wax*, but they failed to look forward in time from *Wax* to find cases like *Mincey* that *explicitly* rely on *Wax*.

In short, *while the citation services send negative treatment backwards in time, they fail to finish the job by moving it forward in time.*

In correspondence with the authors, representatives of LexisNexis[1] and Westlaw[2] concede that their citators do not handle what Westlaw refers to as "implicit" citation.[3]

This omission might be understandable if *Mincey* had relied on the rule of law established in *Wax* without actually citing to the case; looking forward in time might require re-reading every worker's compensation case in Iowa. Where, as here, the reliance on a newly discredited prior case is explicit, the task of finding each and every subsequent *Mincey*-like case is a trivial[4] matter of crunching through an existing database.

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Lynn Wishart is director of the law library and professor of legal research at Benjamin N. Cardozo School of Law of Yeshiva University.

The authors wish to thank Tracy Bloch, now a second-year student at Benjamin N. Cardozo School of Law, for her assistance with research done for this article.

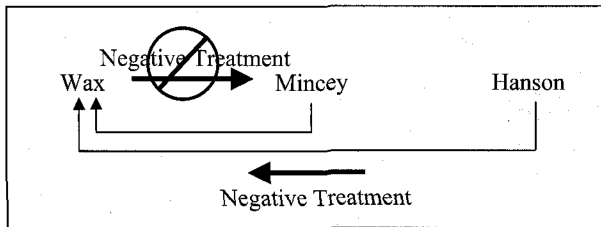

Figure 1

As a practical matter, in relying on Shepard's or KeyCite as Sally did, a lawyer adopts a non-standard meaning for the term "good law." For the citators, a case is bad law only if it is reversed or named in an overruling opinion. For the rest of us, a case also fails to be good law where a clearly overruling case *fails* to name our case.

To our great surprise, although others[5] have questioned the reliability of online citators (looking, for example, to the assignment of correct treatment codes), the failure to "propagate" negative treatment forward in time is virtually unknown, or at least undiscussed.

Reliance on Shepard's and KeyCite

Citation services perform a number of important tasks for a specified case, such as checking its subsequent history and finding later citing cases and secondary sources. Unfortunately, it appears to be a widespread belief among lawyers that citation services automatically find unrelated subsequent cases that clearly renounce a rule of law relied upon by our case.

From the handful of opinions discussing citators, it appears that judges are not immune from the belief that Shepard's and KeyCite are "one-click shopping" for the verification of case law.

> The process of "Shepardizing" a case is fundamental to legal research and can be completed in a manner [sic] of minutes, especially when done with the aid of a computer. Though we do not consider counsel's actions to be egregious in this case, we admonish all attorneys to ensure the validity of all cases presented before this court.
> *Meadowbrook, LLC v. Flower*, 959 P.2d 115 (Utah, 1998)

> [T]he Corporation Counsel is admonished that diligent research, which includes Shepardizing cases, is a professional responsibility, *see* Taylor v. Belger Cartage Service, Inc., 102 F.R.D. 172 (W.D. Mo. 1984), and that officers of the court are obliged to bring to its attention all important cases bearing on the matter at hand, including those which cut against their position. *See* Model Rules of Professional Conduct, Rule 3.3(a)(3).
> *Cimino v. Yale University*, 638 F. Supp. 952 (D. Conn. 1986)

We are not certain where the gap between what the citators do, and what most lawyers understand them to do, arises. Somehow, most lawyers have never come to the realization that in a case sequence such as *Wax–Mincey–Hanson*, online citators will declare *Mincey* to be good law. A small, and decidedly informal survey of law students, law professors and practitioners revealed that the situation rarely seems to have been considered at any stage of their legal education or practice.

Asked the question, "Does Shepardizing or KeyCiting a case correctly determine its status as good law?" most individuals answered in the affirmative. Some added caveats of the sort "but for the occasional human or computer error" and a few stated that, given their ignorance of the innermost workings of the citators, they would never rely on them to validate case law.

One practitioner did outline the forward propagation problem, but credited her awareness to an experience in which she relied upon a *Mincey*-like case that had Shepardized as good law. To her horror, opposing counsel brought a *Hanson*-like overruling case to the court's attention.

For the most part, questions about the reliability of the citators were met with a blank stare, suggesting an unshakable confidence in the "mojo" of clicking on the "Shepardize" or "KeyCite" button. When we outlined the *Wax–Mincey–Hanson* scenario, practitioners often reacted with a mild case of shell shock.

Promotional materials for Shepard's and KeyCite suggest that their citators provide comprehensive, one-click validation of case law. For the most part, their training materials are no more accurate.

> A *Shepard's* Citations report on *lexis.com* offers *full treatment and history analysis needed to verify the status of a case*. You get a complete and timely listing of authorities that have cited your case, with citing references organized by jurisdiction and court, followed by secondary sources.[6]

> With KeyCite, you can verify *instantly* whether your case, statute, administrative decision, or regulation is good law and find citing references to support and strengthen your legal argument. . . .
> It's easy to use. KeyCite takes minutes to learn, because it's based on symbols that appear in your Westlaw research results. These easy-to-recognize icons make it *nearly impossible to overlook history* that could undermine your argument.[7]

While Westlaw claims, but does not deliver, "instant" verification of case law, LexisNexis warns us that failing to use a citator may be a violation of a professional responsibility.

> Failure to update your authority may cause you to base arguments and findings on outdated law, which is worse than basing them on no law at all.
> Several courts have discussed the importance of proper updating and lawyers' professional responsibility to ensure the reliability of the authority they cite.[8]

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Comment by Westlaw

Thank you for sending us the draft of your article on the use of citators. I think you have a good point to make, and that many practitioners will profit from your analysis.

We have long been aware of the "A-B-C" problem (and the related A-B_1-B_2-C problem) you identify. The creation of KeyCite's *Table of Authorities* feature was principally motivated by the desire to contribute to the solution of the problem, used in just the way you describe.

Your A-B-C example is one of several issues that we discuss as problems of *implicit* citation. As we use the term, implicit citations are references that will be understood by the knowledgeable reader despite the absence of an explicit reference. In some kinds of literature, most citations are implicit. For example, film scholars would immediately recognize nearly any scene showing a baby carriage rolling down steps as a kind of a citation to *Battleship Potemkin*, though the connection is rarely made explicit, and many viewers will not know the reference.

In the *Hanson*[1] case, the operative language is "[w]e adopt the actual risk rule in cases involving injuries from exposure to the elements" and, a few lines later, "[b]ecause the district court's judgment is based on a rule of law we now renounce, we must reverse." Such language warns our editors to search the opinion for citations to cases that embody the old rule, and our editors properly tagged *Wax*[2] as being *abrogated* by *Hanson*.[3]

Now the experienced lawyer, reading the *Hanson* opinion, infers that, though not expressly stated, the opinion is rejecting all earlier cases that embrace the increased risk rule. One can imagine a citation system in which the editor undertakes to identify and tag all of the cases subject to this implied rejection. This would add a very different kind of step to the editorial process. In many instances determining the scope of such implied citations would be a relatively straightforward matter. But in many others the effect of a decision on the authority of uncited cases is unclear, and may remain unclear until still later cases explore the issues.

Adding history tags to a citation index calls for judgment and legal analysis, which is one of the reasons that all of the history in both KeyCite and Shepard's is supplied by legal editors rather than by automated systems. But the analysis of these implied citations is a much more difficult and uncertain matter. We feel that this kind of analysis is the proper province of judicial or scholarly analysis, and beyond the scope of the KeyCite editorial service.

KeyCite editors do systematically search for implicit citations when they are doing the direct history of a case. For example, for each federal appellate case we search for district court opinions in the same line of litigation, and will post a case as *affirmed* or *reversed* even if (as happens surprisingly often) the appellate court does not cite the opinion below. Apart from direct history (and with one other exception mentioned below), however, KeyCite is strictly limited to recording explicit citations.

There is, indeed, a very strong tendency for West to oversimplify matters in our promotional literature and, to a lesser extent, in our teaching materials. You are right that it is not strictly true that KeyCite (or any other service) provides really complete "one-click validation of case law."

Marketing and documentation are well outside my area of responsibility at West, but I am sympathetic to the dilemma faced by those who try to describe our products. It is simply the case that legal research is often an exceedingly complex process, and I think it justifiable, at least much of the time, to make generalizations that are not entirely accurate, for either marketing or pedagogical reasons.

Dan Dabney
Senior Director for Research and Development
Westlaw

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1. *Hanson v. Reichelt*, 452 N.W.2d 164 (Iowa 1990).
2. *Wax v. Des Moines Asphalt Paving Corp.*, 220 Iowa 864, 263 N.W. 333 (1935).
3. West avoids using the tag *overruled* unless the court specifically uses some form of the word "overrule." Shepard's also seems to have this policy, but with fewer tags to choose from in the Shepard's system, *Wax* gets a less descriptive *criticized* tag in Shepard's.

CONTINUED FROM PAGE 25

We believe that several of these statements encourage an unjustified and unquestioning reliance on the citators.

The problem has become worse in recent years. The 1997 edition of *How to Shepardize* included the language:

> Usually a case you want to rely on cites other cases or sources of legal authority to establish its position. These sources are called the "underpinnings" of your case. In addition to Shepardizing your case, you need to Shepardize your case's underpinnings to make sure they are still good law, as well. If they are not, and your case has relied on them, then the precedential value of your case could be compromised.

This language was eliminated in more recent editions in response to marketplace pressures.[9] Westlaw's Dan Dabney similarly notes: "There is, indeed, a very strong tendency for West to oversimplify matters in our promotional literature, and, to a lesser extent, in our teaching materials. . . . I am sympathetic to the dilemma faced by those who try to describe our products. It is simply the case that legal research is often an exceedingly complex process, and I think it justifiable, at least much of the time, to make generalizations that are not entirely accurate, for either marketing or pedagogical reasons."[10]

We invite Shepard's and KeyCite to add explicit language to their instructional and promotional materials describing their failure to forward propagate negative treatment and to outline more effective approaches to validating case law.

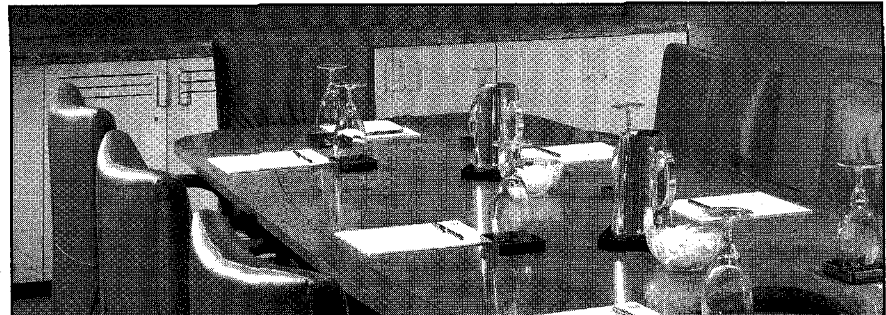
Who Will Fall Victim To the Citator Gap?

We refer to case sequences like *Wax–Mincey–Hanson* as "ABC sequences." Case "A" announces a rule of law. Case "C" subsequently renounces the rule. Assume for the moment that the language of renunciation is unequivocal – "we reject the rule of case X" or "we overrule X." The "B" case(s) are similar cases, both factually and legally, that fall chronologically between A and C. B cases rely on the rule of case A, and may or may not explicitly cite to A.

When the C decision is handed down, the citators go back to each case named in C, which will usually include case A, and add the appropriate negative treatment codes. Case A will then Shepardize, correctly, as "bad law." But none of the B cases will receive any negative treatment, unless specifically named in C. If a lawyer finds a B case, or worse, a number of consistent B cases, they may incorrectly believe that a substantial body of law supports (or opposes) their position.

Not everyone who performs legal research is likely to fall victim to the ABC problem. For example, attorneys who limit their practice to one or a few narrow areas of the law will generally be aware of appellate decisions of the C type. So will legal scholars, who typically read every appellate decision in the area of their research. Many practitioners, however, are likely to do less thorough research, and may miss a C case. This category includes attorneys with diverse practices (such as Sally's supervising partner), new attorneys or attorneys new to a practice area. The largest group of potential victims are those who might otherwise do a thorough research job, but lack the time, staff or money for their best effort.

Whether an ABC problem is discovered may depend on which attorney finds and relies upon a B case, and the procedural posture of the new dispute. For example, if defense counsel relies heavily on a B case in a dispositive motion, opposing counsel is motivated to perform particularly thorough research to trump that case, and



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may well find C. Or the court, through its own efforts, may become aware of the controlling case law. There are fewer bites at the research apple in the Sally Smith scenario. Finding only a B case that undercut her client's position, early in the representation, she simply sent the client home.

The likelihood of missing a C case is in part a function of one's approach to online research. The problem will most often arise with a full-text search such as the one done by Sally Smith: (str! /3 lightning) and (work! /3 compensation) didn't locate *Hanson*. However this combination would have caught it: lightning and (work! /3 compensation).

Hanson is a sunstroke case, not a lightning case, but the opinion does contain the phrase "as from lightning, severe heat or cold," 452 N.W.2d at 167. *Hanson* does not cite to lightning cases and the word might not have appeared in the opinion at all. Sally's search strategy is dangerously dependent on such fortuitous use of language. Our observations of online searching show that law students have a tendency to employ far more search terms and phrases in an initial search query than experienced searchers. Had they performed the search for Sally, they might have used: "struck by lightning" and "workers compensation" and risk and farm.

As previously noted, the B case may actually be a group of cases lying between A and C. The larger this group, the more likely a full text search will find a problematic B case, rather than the A or C cases which would be properly handled by a citator.

As an alternative to full-text searching, some lawyers will use Westlaw's Key Number Digest. The ABC problem might be mitigated with this approach, but for these particular cases it was not. While reviewing a case, Westlaw offers several headnote hierarchies as a means of finding additional cases. In *Mincey*, the most promising of these seems to be:

413 Workers' Compensation

413VIII Injuries for Which Compensation May Be Had

413VIII(D) Particular Causes, Circumstances, and Conditions of Injury

413VIII(D)6 Injuries by Elements or Act of God

413k639 k. Lightning. Most Cited Cases

Neither *Wax* nor *Hanson* appears in the last, most specific key number category, 413k639. If we search the topical sub-category (413VIII(D)6) "Injuries by Elements or Act of God" directly above the key number, we find both *Mincey* and *Wax*, but not *Hanson*. The sub-category may be expanded to produce a list of natural hazards:

6. INJURIES BY ELEMENTS OR ACT OF GOD, k637-k642

k637 In general

k638 Storms and floods

k639 Lightning

k640 Earthquakes

k641 Frostbite or freezing

k642 Sunstroke or heat prostration

Looking at the individual key numbers in this list, we find *Wax* by selecting 413k642, "Sunstroke or heat prostration"

Key numbers *didn't* make it easier to validate *Mincey* – to determine that a lightning case was bad law we had to move to the sunstroke cases![11] While lawyers appreciate the need to broaden a search beyond a very specific fact pattern, their motivation is generally to find *additional* authority for their position in factually analogous situations, not to validate the cases that fell into their initial narrow fact pattern.

Another tool in the online research arsenal is topical searching through Lexis's Search Advisor® or Westlaw's KeySearch.® In Search Advisor, if we start with the top level category of "Worker's Compensation" and follow a path through "Compensability," "Injuries" and "Normal Exertion," we find *Hanson*, *Mincey* and *Wax*. If we had taken the equally plausible path "Worker's Compensation," "Compensability," "Course of Employment," "Risks," then only *Hanson* would have been found. Although our results are no longer dependent on the precise words chosen for a full text search, they have become dependent on the particular path we take through several layers of categories. A bit of positive news – for both Search Advisor and KeySearch – for each of the paths that we tested (we don't claim to have tried all plausible paths) we were brought to the rule-killing case, *Hanson*.

Can Citators Fix the Gap?

For *Wax–Mincey–Hanson*, Sally Smith had a solution at hand, albeit a time-consuming one. Had she clicked on Table of Authorities (TOA) in KeyCite or Shepard's for *Mincey*, she would have seen citation information for each case cited in *Mincey*. Because *Mincey* cited to *Wax*, and *Wax* is now flagged as bad law, the TOA would have indicated a potential problem.

Of course finding a negative treatment symbol in a TOA is not the end of the story. It is then necessary to

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Comment by LexisNexis

Thanks for giving us an opportunity to review the article you and Lynn Wishart have prepared. Here are a few comments that I hope will be useful to you.

Shepard's Citations is enormously helpful in providing the citation information that permits attorneys to decide whether or not their cases are "good law," but you are quite correct that citation services have gaps in the ABC-type scenarios you outline.

Shepard's uses "questioned by" to help provide "bad law" information under certain circumstances that seem relevant to your discussion. For example, let's say case A is the foundation case that case B relies upon. Later, case A is overruled by case C for the foundation proposition, but case C does not cite case B. However, case D subsequently states that case C has overruled case B "sub silentio." Shepard's will show that case B was "questioned by" case D, which allows a researcher Shepardizing case B to find case C without resort to TOA.

Instances of legislative "overruling" are handled similarly using "superseded by statute as stated in." In this scenario, case A is the foundation case that case B relies upon. The legislature subsequently enacts a statute designed to undo the court's holding in case A. (The legislature's intention may or may not be disclosed in the legislative history.) Down the road, case C indicates that case A is no longer good law because of the legislature's action. Shepard's will then show that case A has been "superseded by statute as stated in [case C]." If case C mentions that case B is no longer good law, Shepard's will likewise indicate that case B has been "superseded by statute as stated in [case C]." Or if it takes an even later case, case D, to point out that case B has also been damaged by the legislative action, Shepard's will show that case B has been "superseded by statute as stated in [case D]."

Regarding your discussion of Table of Authorities, the context seems to suggest it is a KeyCite-only feature. Shepard's on LexisNexis also has Table of Authorities, and I believe our TOA feature can be more helpful than KeyCite's under the circumstances you discuss. Because Shepard's indicates when your decision "follows" another case, this information is also pulled into the TOA report. So you will instantly see the cases that your case relied upon, because they are identified as having been followed, and if one (or more) of those cases has a red Signal, TOA will quickly take you to what may well be the hidden weaknesses in the foundation of your case.

A good example of TOA in action is *Juncker v. Tinney*, 549 F. Supp. 574 (D.C. Md. 1982). *Juncker* followed *Parratt v. Taylor*, 451 U.S. 527 (1981), which was subsequently overruled by the Supreme Court. The Shepard's TOA for *Juncker* plainly shows the red Signal on the *Parratt* decision as well as an indication that *Juncker* followed *Parratt*.

Historically, our "How to Shepardize" materials emphasized the importance of Shepardizing "generations" and "underpinnings" to expand your research and be sure the precedential value of your starting case had not been compromised. Here, for example, is some language from the 1997 edition of "How to Shepardize":

> Usually a case you want to rely on cites other cases or other sources of legal authority to establish its position. These sources are called the "underpinnings" of your case.
>
> In addition to Shepardizing your case, you need to Shepardize your case's underpinnings to make sure they are still good law, as well. If they are not, and your case has relied on them, then the precedential value of your case could be compromised.

More recently, we have responded to marketplace pressures to shorten our "how to" materials, and this language was one casualty of our condensation efforts.

In today's fast-paced world, we continue to get feedback from law students, faculty who teach legal research and also from practicing attorneys, most of whom recommend that our "how to" materials need to be even shorter – but when your article is completed, I'd like to pass it along to the people who write these materials so they can consider your suggestions for improvement.

Jane W. Morris, J.D.
Director, Customer Programs, Citations and Caselaw
Editorial LexisNexis

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study the problem with the underlying authority, to see if it has an impact on one's case.

In Figure 2 we modify Figure 1 to show the value of the TOA.

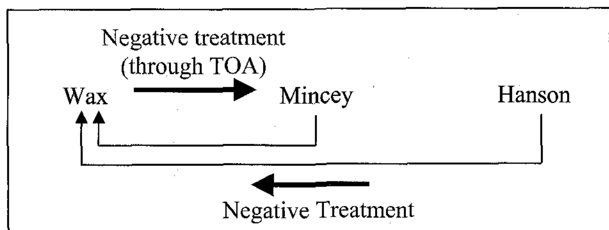

Figure 2

On page 2 of the Westlaw online training materials for KeyCite we find the statement (emphasis supplied):

> You will know ***immediately*** when looking at a case or statute if there is reason to question whether you should cite it.

Buried on page 12 there is an acknowledgment that case validation is not always a trivial matter, and the TOA may be required.

> The Table of Authorities is a useful tool to find a hidden weakness in a case that appears to be good law. It shows whether the cases cited in a case have negative history. This helps you avoid getting "blind-sided" by using a case that has no negative history, itself, but relies on one that does.[12]

Unfortunately, clicking on "TOA" invokes no greater level of magic than clicking on "Shepardize." Consider the chain of four cases, AB_1B_2C, in Figure 3. A is the rule-making case. B_1 follows A, and cites to it. B_2 follows A and B_1, but only cites to the more recent case, B_1. Finally, C is the rule-breaking case that makes A, B_1, and B_2 bad law. C, it so happens, cites only to A.

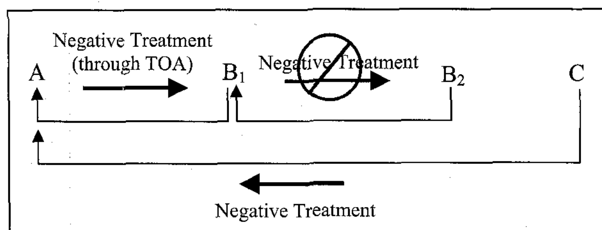

Figure 3

Shepard's and KeyCite will properly add negative treatment codes to A when they process C, because A was cited in C. Is this information propagated back up the chain of cases from A to B_1 to B_2? Not directly, and in any event, not very far. The problem with A reaches as far as B_1, but only, as discussed above, through the TOA. The problem with A and B_1 does not reach B_2 at all. Since B_2 does not cite to A, its TOA is "clean." A four-case chain of this sort may be a relatively common event. A judge writing a B_2 opinion in 2003 may cite to a B_1 opinion in 2000, but may not feel that it is necessary to cite to an A case that dates to 1920.

If one's research leads initially to B_2, the only way to be certain that it is good law is to review each case in its TOA, then the TOA for each of those cases, and so on, back to the origin of the rule of law. The number of cases to be checked quickly becomes prohibitively long. This is the task that Shepard's and KeyCite, with their vast resources, cannot perform across their entire case law database, and it is a task that lawyers cannot generally afford to perform in every research assignment.

One example of an AB_1B_2C case sequence occurs in the context of "exhaustion of remedies" in California. The rule-making "A" case is *Alexander v. State Personnel Board*, 22 Cal. 2d 198, 199, 137 P.2d 433, 434 (1943) ("The rule that administrative remedies must be exhausted before redress may be had in the courts is established in this state."). A "B_1" case that relies on *Alexander* is *Alta Loma School District v. San Bernardino County Committee*, 124 Cal. App. 3d 542, 554, 177 Cal. Rptr. 506, 513 (4th Dist. 1981). A "B_2" case that cites to *Alta Loma* but *not* to *Alexander* for the mandatory character of the exhaustion rule is *Cal-Air Conditioning, Inc. v. Auburn Union School District*, 21 Cal. App. 4th 655, 672, 26 Cal. Rptr. 2d 703, 712 (3d Dist. 1993). Finally, *Alexander* is explicitly overruled in the "C" case, *Sierra Club v. San Joaquin Local Agency Formation Committee*, 21 Cal. 4th 489, 510, 87 Cal. Rptr. 2d 702, 717 (1999) ("We hereby overrule *Alexander*, *supra*, 22 Cal. 2d 198, 137 P.2d 433, and hold that, subject to limitations imposed by statute, the right to petition for judicial review of a final decision of an administrative agency is not necessarily affected by the party's failure to file a request for reconsideration or rehearing before that agency.").

The sequence is summarized in the table below. Only the relevant entries have been filled in. If a researcher finds *Alexander*, its Shepard's flag indicates that it is bad law. The status of *Alta Loma* can be determined by scrutinizing its TOA. If, however, *Cal-Air* is located, neither the Shepard's flag nor the TOA indicates a problem with the case.

Role	Case	Shepard's [KeyCite]	TOA
A	*Alexander*	Red [Red] Overruled by *Sierra Club*	
B_1	*Alta Loma*	Yellow [Yellow] Distinguished by a case outside the sequence	Red symbol for *Alexander* (one of 34 entries in the TOA)
B_2	*Cal-Air*	Blue [Green] – no negative treatment	Yellow symbol next to *Alta Loma* (not suggesting invalidity)
C	*Sierra Club*		

We leave it to others to determine how often scenarios of the ABC or AB_1B_2C type occur. For our purposes

it was sufficient to find a few examples that established that Shepard's and KeyCite did not attempt "forward propagation" of negative treatment.

Conclusion

The few hours of legal research training received by most law students and practitioners creates a sense that case validation is a simple matter. It is not. As Dan Dabney observes: "As a practical matter, most of the legal research world has to go about its business without grappling with the issues of implicit citation or Cutter's rule. As a result, a lot of lawyers are relying on techniques that might not work, and they're taking chances that they're not even aware of."

Neither LexisNexis nor Westlaw provides "one-click" validation of case law. Both companies can solve the ABC problem, and we encourage them to do so, but they cannot solve the AB_1B_2C problem (or the ABC problem where B fails to explicitly cite A).

We wish we could offer lawyers a new one-click approach to case validation, but the nature of language and our legal system precludes any simple solution to this problem. To insure reliance on good law requires additional time devoted to legal research. Ideally one takes the time to find the foundational "A" cases as well as rule-changing "C" cases, rather than relying on full text searching of narrow fact patterns which is more likely to find potentially problematic "B" cases. Good research habits, such as exploring secondary sources (particularly when working in an unfamiliar area of law), the use of TOAs, topical or key number strategies to broaden searches and a reduced dependence on complex full text searches, may keep this added burden to manageable levels.

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1. "[Y]ou are quite correct that citation services have gaps in the ABC-type scenarios you outline." E-mail from Jane W. Morris, Director, Customer Programs, Citations and Case law, Editorial LexisNexis (July 18, 2003) (on file with authors).
2. "Apart from direct history (and with one other exception mentioned below), however, KeyCite is strictly limited to recording explicit citations." E-mail from Dan Dabney, Senior Director for Research and Development, Westlaw (July 10, 2003) (on file with authors).
3. *Id.*
4. Dan Dabney of Westlaw disagrees that the solution is trivial, arguing that adding a red flag to these cases "would cause a great proliferation of meaningless red flags." *Id.* The authors agree that red flags are inadvisable and suggest instead the addition of a new color or icon for potentially problematic implicit citations. As with the yellow icon, legal researchers can choose whether or not the (brown?) symbol merits further attention.
5. *See, e.g.*, William L. Taylor, *Comparing KeyCite and Shepard's for Completeness, Currency, and Accuracy*, 92 Law Libr. J. 127 (2000); Jane W. Morris, *A Response to Taylor's Comparison of Shepard's and KeyCite*, 92 Law Libr. J. 143 (2000) (looking at, *e.g.*, multi-day backlogs in data entry, and the vagaries of assigning treatment codes); James F. Spriggs II & Thomas G. Hansford, *Measuring Legal Change: The Reliability and Validity of Shepard's Citations*, 53 Pol. Res. Q. 327 (2000) (looking at the validity of treatment codes); Donald R. Songer, *Case Selection in Judicial Impact Research*, 41 W. Pol. Q. 569 (1988) (looking at, *e.g.*, whether a case's reference to "Miranda warnings" will trigger a Shepard's entry to the *Miranda* opinion).
6. <http://web.lexis.com/lawschoolreg/tutorials/updating/page3.htm> (emphasis supplied) (last visited July 27, 2003).
7. <http://west.thomson.com/store/product.asp?product%5Fid=KeyCite&catalog%5Fname=wgstore> (emphasis supplied) (last visited July 27, 2003).
8. <http://web.lexis.com/lawschoolreg/tutorials/updating/page2.htm> (last visited July 27, 2003).
9. Morris, *supra* note 1.
10. Dabney, *supra* note 2.
11. *Id.* Dan Dabney explains the rationale for this indexing as an application of "Cutter's rule," "whereby items are posted only to classifications that are at the finest level of articulation the item calls for." In effect, Cutter's rule, which "has often been criticized, and not without reason," prevents double-posting cases like *Wax*, *Mincey* and *Hanson* to other key number categories.
12. <http://training.westgroup.com/programs/using_wl/menu_lb.asp?course=using_wl_lb> (click on "Using KeyCite to verify good law" to launch the tutorial in a separate window) (last visited July 27, 2003).

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