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The Effects of Demand-Driven Acquisitions on Law Library Collection Development

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Demand-driven acquisition programs are becoming more common as a method of collection development. This article first discusses traditional collection development practices in academic law libraries and outlines the mechanics and goals of the demand-driven acquisitions model. It then considers the effects of that model on law library collections and collection development practices.

Introduction

¶1 Many academic libraries have begun using demand-driven or patron-driven acquisitions (DDA or PDA).[1] In this model of collection development, instead of purchasing materials and then adding records for them to the online catalog, a library adds records for certain items without purchasing them. Payment occurs only if and when the item is used.

¶2 While generally thought of as being used for e-books, similar systems can be used for journal articles[2] and print books.[3] DDA has been around for almost two decades,[4] but it is only recently that the convergence of several factors—the increasing availability of e-books on law topics, a strong and ever-growing preference for electronic materials by users, and closer scrutiny of both library collection budgets and library space—have made this a tool that law libraries, particularly academic law libraries, are likely to consider.

¶3 DDA is not the only way for libraries to purchase e-books. Libraries can purchase e-books directly and place them in their online catalogs. They can also enter into subscription agreements with e-book providers for annual access to a selection of titles.[5]

¶4 On its surface, a DDA program may seem like a no-lose proposition: users are provided with a choice of many additional books without the library paying for those that are never used. DDA provides more books to users and is "transparent" in the sense that users do not know their use is what triggers the purchase of a book for the library. But it is not a foregone conclusion that DDA is a good development for library collections. Before fully embracing the DDA model, libraries should ask

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1. One can make arguments for either name, but this article uses the term "demand-driven acquisitions" or "DDA." DDA avoids confusion with other common uses of the acronym PDA, including "personal digital assistant." *See PDA (disambiguation)*, Wikipedia, https://en.wikipedia.org /wiki/PDA_(disambiguation) [https://perma.cc/F7GH-3CG4].

2. See discussion *infra* ¶ 43 on pay-per-view models for acquiring individual journal articles.

3. *See* William H. Walters, *Patron-Driven Acquisition and the Educational Mission of the Academic Library*, 56 Libr. Resources & Tech. Servs. 199, 200 (2012) (describing the use of DDA for both print and electronic resources in several university libraries); *see also* Jason C. Dewland & Andrew See, *Patron Driven Acquisitions: Determining the Metrics for Success*, 59 Libr. Resources & Tech. Servs. 13, 15 (2015) (detailing the DDA process for print books at the University of Arizona).

4. Sue Polanka & Emilie Delquié, *Patron-Driven Business Models: History, Today's Landscape, and Opportunities*, *in* Patron-Driven Acquisitions: History and Best Practices 120, 120 (David A. Swords ed., 2011) ("Patron-driven acquisition as an ebook business model between libraries and vendors began in 1999.").

5. Oxford University Press, for example, offers *Oxford Scholarship Online*, which for a yearly subscription price provides access to a selected group of e-books. Libraries can choose to subscribe only to books in specific subject areas, including many areas of law. *See About*, Oxford Scholarship Online, http://www.oxfordscholarship.com/page/85/about [https://perma.cc/3BRV-GYHC].

questions such as these: Are we losing anything by shifting the responsibility for collection development to the users? What will the effects be on our libraries and researchers in the future? And is it possible to implement a DDA program that provides benefits to libraries while minimizing negative effects?

¶5 This article begins with a brief discussion of collection development practices in academic law libraries, followed by descriptions of both the mechanics and the goals of DDA programs. It then looks at possible changes to library collections as a result of these programs and suggests ways that librarians can continue to develop their collections in a professional manner while still taking advantage of the quick, easy, and possibly cost-saving aspects of DDA. The article focuses on academic law libraries, which are the most likely users of DDA, but in the long term, DDA will affect all law libraries because law firm and government law libraries frequently rely on academic law libraries to lend them materials that they do not own.[6]

The Evolution of Collection Development in Academic Law Libraries

¶6 Before looking at the specifics of DDA, it is helpful to consider how academic law libraries have traditionally handled collection development, particularly for books. This will make it easier to understand the possible effects of DDA on the collection development process and on the collection itself. Only then can a library decide how it wants to integrate DDA into its collection development activities.

The Goal of Law Library Collection Development

¶7 ABA Standard 606 covers library collections and defines the minimum required for an academic law library collection. Standard 606(b) describes the "core collection," including primary materials such as case law, statutes, regulations, and treaties; finding aids; and "significant secondary works necessary to support the programs of the law school." Standard 606(c) further mandates:

> In addition to the core collection of essential materials, a law library shall also provide a collection that, through ownership or reliable access,
>   (1) meets the research needs of the law school's students, satisfies the demands of the law school curriculum, and facilitates the education of its students;
>   (2) supports the teaching, scholarship, research, and service interests of the faculty;
>   (3) serves the law school's special teaching, scholarship, research, and service objectives; and
>   (4) is complete, current, and in sufficient quantity or with sufficient continuing access to meet faculty and student needs.[7]

¶8 No matter what method or combination of methods a library chooses to use for collection development, it must be sure that its collection will continue to meet the requirements of this standard.

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6. There are some nonacademic law libraries that have instituted DDA programs. For example, the New York Law Institute has a DDA e-book program that is available to its member users, which are mainly law firms. *See* Ellyssa Kroski, *E-Books in Law Libraries*, *in* Law Librarianship in the Digital Age 123, 135–36 (Ellyssa Kroski ed., 2014).

7. Am. Bar Ass'n, ABA Standards and Rules of Procedure for Approval of Law Schools 2015–2016, at 42 (2015).

Responsibility for Selecting Library Materials

¶9 Librarians have not always been responsible for selecting books for their collections: "Many bar association librarians recommend books to library committees and need [the committees'] approval to buy—a remnant from the days when lawyers selected books for their private collections . . . ."[8] The same rule applied in academic law libraries: "In the 19th century and the early part of the 20th, almost all book selection was done by the law faculty . . . . Theirs was the decision on what should and should not be in their library, and theirs was the control that made decisions reality."[9]

¶10 In the late 1950s, the Association of American Law Schools (AALS) conducted an inquiry into the state of law schools, including their libraries; the results of the inquiry were published in 1961.[10] One of the subjects addressed was responsibility for book selection, and "[t]he most frequently mentioned method of choosing books [was] by the librarian under major faculty policies."[11] However, the report noted:

> The extensive reliance on the librarian for book selection is not necessarily an arrangement to exclude other influences on actual decisions. No doubt, few librarians, whatever their formal powers, will fail to see the importance of consulting the faculty collectively and individually, or the importance of aiding in the development of policies for faculty approvals, nor will they fail to recognize the value of specific book recommendations.[12]

¶11 In 1970, Marian Gallagher wrote about the evolution of collection development responsibilities in law libraries.[13] In the article, she describes selection decisions moving from "administrator-patrons" to "chief law librarians" to library staff as libraries grew and developed. Gallagher conducted a limited survey of "libraries of all types and sizes" and found that

> [p]ractitioner partners, bar association trustees, and judges apparently are less inclined to give up the authority for final decisions than were law faculty members . . . .
> . . . .
>   Many of our [respondents] volunteered the information that patron-administrators who had relinquished responsibility for collection building still are solicited for advice and that their requests for specific titles are treated as final decisions, the funds being available. . . .
>   Law libraries apparently have begun to come out of the do-it-yourself era and into the leave-it-to-the-professionals era.[14]

¶12 Thus, as academic law libraries developed through the second half of the twentieth century, book selection slowly, but increasingly, became the responsibility of the librarians, with input from the faculty. As library collections increased in

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8. Christine A. Brock, *Law Libraries and Librarians: A Revisionist History; or More than You Ever Wanted to Know*, 67 Law Libr. J. 325, 331–32 (1974).

9. *Id.* at 344–45.

10. Spec. Comm. on Law Sch. Admin. & Univ. Relations, Ass'n of Am. Law Schs., Anatomy of Modern Legal Education: An Inquiry into the Adequacy and Mobilization of Certain Resources in American Law Schools (1961).

11. *Id.* at 465.

12. *Id.* at 465–66.

13. Marian G. Gallagher, *Book Selection in Law Libraries—Who's in Charge Here?*, 63 Law Libr. J. 14 (1970).

14. *Id.* at 17–18.

size and complexity, it was more common for the library to control book selection, while still consulting with faculty when necessary, and continuing to accept book recommendations and requests from faculty. There is no reason to doubt that this practice is still the norm in most academic law libraries.

The Art of Collection Development

¶13 The skill required for collection development, particularly in regard to book collections,[15] is not one that law librarians frequently consider.[16] It is, though, one of the most difficult skills for librarians to develop, requiring consideration of a book's subject, depth of coverage, author(s), and publisher, not to mention cost, relation to other materials already in the collection, and the needs of the library's users now and in the future. In 1952, William Jeffrey, Jr. provided a description that applies equally well today:

> The process of book selection is an incessant game of wits. With varying frequency, the selector is engaged in outguessing the faculty, the students, the curriculum, the publishers, the book dealer, his budget, and in some cases, his fellow librarians. If book selection isn't the heart of librarianship, it comes pretty close to it. It is not for anyone who dislikes guessing, and it can be lots of fun.[17]

¶14 After discussing the specific criteria to be considered in selecting books and how they apply to various types of law libraries and collections, Jeffrey concluded that

> [b]ook selection is a standing invitation to prophecy. It involves the assessment of intangibles, in pursuit of goals which are clear in the abstract but extremely hazy in the particular. . . . [B]ooks . . . display the most tenacious staying power, and will remain to influence the life and work of your successor in the librarian's chair. If you leave a well-selected lot, he will rise up and call you blessed; if his heritage of books is a collection of antique misfits, no condemnation is more righteously pronounced or more richly deserved.[18]

There is no question that selecting books requires time and familiarity with the library's collection as well as with authors, publishers, and faculty and student needs.

Library Approval Plans and Selection Profiles

¶15 Collection development is a time-consuming enterprise requiring knowledge and skill, and has become only more complicated as the number of publications has increased and format choices have grown. What William Jeffrey, Jr. found an "incessant game of wits" in 1952[19] is even more difficult in today's world, where librarians must consider not only the value of the publication to their patrons, but

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15. In this article, I use the term "books" to also include treatises and monographs (i.e., publications that are not regularly supplemented and do not require a subscription).

16. The most recent article I found discussing book selection in detail is P. Michael Whipple, *Selection of Treatises in Academic Law Libraries*, 78 Law Libr. J. 219 (1986).

17. William Jeffrey, Jr., *Book Selection: Evaluation Standards and Procedures*, 45 Law Libr. J. 401, 401 (1952).

18. *Id.* at 408.

19. *Id.* at 401.

also the formats those patrons prefer, the permanence of the resource, and the importance of permanence for their library's particular users.[20]

¶16 Two methods that libraries can use to make the collection of books a little less time-consuming are vendor profiles and approval plans. Libraries frequently set up profiles with library services companies to receive notifications about books with certain call numbers or subject headings, from specific publishers, and so on.[21] The librarians continue to select the books, but their selection is streamlined by using this prefiltering process.

¶17 A step beyond selection profiles are approval plans, where books meeting specified criteria are automatically sent to the library.[22] It is now possible to have an approval plan for e-books.[23] Approval plans require substantial input from librarians to set up the profile but much less work afterward, as all or most books that fit the profile are sent automatically to the library. Moving to DDA, where library users select books for purchase from among those meeting the library's profile, seems like the next logical step in the evolution of collection development.[24]

The Mechanics of DDA for E-Books

¶18 How exactly does DDA work? Programs differ based on a number of variables, but at its core a DDA program for e-books allows a library to add book records to its catalog without purchasing those books. The records remain in the catalog at no cost to the library until a user decides to access the book.[25] Depending on how the plan is set up, once a book is accessed, the library is charged either for a "short-term loan" or for the purchase of the book.[26] As noted above, users do not

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20. Some libraries may decide that if the resources are available permanently somewhere else they will rely on those, while others may want to ensure permanence of access within their own collections.

21. An example is the GOBI system used by YBP, which sends libraries slips weekly for books meeting the library's profile and for which libraries can place orders electronically. *See GOBI³*, YBP LIBRARY SERVICES, http://www.ybp.com/gobi3.html [https://perma.cc/5RM6-99HN].

22. *See* Carmelita Pickett et al., *E-Approval Plans in Research Libraries*, 75 C. & RES. LIBR. 218, 219–20 (2014) (reviewing the literature on approval plans, beginning in the 1960s). Libraries can even have the books processed for them, so that they arrive "shelf-ready" with call number labels and barcodes in place. *See* Pamela Bluh, *The Winds of Change: Acquisitions for a New Century*, 88 LAW LIBR. J. 90, 92–93 (1996).

23. Matthew Buckley & Deborah Tritt, *Ebook Approval Plans: Integration to Meet User Needs*, COMPUTERS LIBR., Apr. 2011, at 15.

24. *See generally* Bob Nardini, *Approval Plans and Patron Selection: Two Infrastructures*, *in* PATRON-DRIVEN ACQUISITIONS: HISTORY AND BEST PRACTICES, *supra* note 4, at 23 (discussing the move from book selection by academic researchers to librarian-created approval plans and the possible reversal of this trend with patron-driven acquisitions).

25. Libraries may pay a small annual fee to have the MARC records for these books customized for their library catalogs, but there is no charge for individual records. Some e-book vendors may charge "platform fees" for the use of their systems, but these are also relatively modest and are sometimes waived if the library's spending meets a minimum threshold each year.

26. Libraries can select different options to determine when a book will be purchased. After purchase, there are various types of availability, depending on the options offered by the vendor and chosen by the library. See *infra* ¶¶ 25–27 for more on these options.

know whether the books they are accessing have already been bought by the library or not—the loan/purchase process is visible only to library staff.

¶19 This section describes the main options available for a DDA program for e-books, but all programs involve contract negotiations between the vendor and the library, making an almost unlimited number of combinations of features possible. Any library entering into a DDA program must make decisions about each variable before the program can be implemented and sign agreements with all the vendors that are part of its DDA program.[27] Libraries must also make adjustments to their acquisitions and cataloging procedures to properly integrate the DDA program.[28]

Selecting Vendors

¶20 To implement a DDA program for e-books, a library signs up to receive records and to purchase books from one or more providers, and creates a collection profile to determine which records will be added to its catalog. Model types include agreements with e-book aggregators such as ProQuest[29] or EBSCO,[30] or with book dealers/library services providers such as YBP or Coutts.[31]

¶21 Part of vendor selection for a DDA program involves considering the variety of e-book formats provided, and what type of software or device is required for reading the books. It may seem tempting to enter into agreements with multiple vendors, but vendors offer different platforms for reading their books on computers, tablets, or e-book readers. They also usually include their own Digital Rights Management (DRM) software (preventing sharing or copying and often limiting printing and downloading) and may require user registration. Vendors may also support formats that work only on certain devices (for example, not every vendor provides Kindle-compatible files). A library using multiple vendors may end up frustrating users, who must install different types of software, register several times

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27. This article provides only a brief overview of the mechanics of DDA and factors to be considered when setting up a DDA program. Those interested in a thorough overview may want to consult the NISO Recommended Practice for DDA, which concludes with a set of recommendations. Nat'l Info. Standards Org., NISO RP-20-2014 Demand Driven Acquisition of Monographs (June 24, 2014), http://www.niso.org/publications/rp/rp-20-2014 [https://perma.cc/HD4A-W9FU]; *see also* Theresa S. Arndt, Getting Started with Demand-Driven Acquisitions for E-Books (2015) (containing a checklist of items that libraries planning to implement DDA should consider).

28. Because this article focuses on the effect of DDA on library collections, these types of issues are not addressed in detail here but are covered in the sources cited *supra* note 27.

29. ProQuest now owns the e-book aggregators ebrary and EBL. *See Ebooks*, ProQuest, http://www.proquest.com/libraries/academic/ebooks/ [https://perma.cc/9SVX-N4UB].

30. *See, e.g.*, *Patron Driven Acquisition*, EBSCO, https://www.ebscohost.com/ebooks/collection-development/patron-driven-acquisition [https://perma.cc/3Q6S-ATDZ].

31. Both Coutts (now owned by ProQuest) and YBP (now owned by EBSCO) allow for DDA plans with a variety of e-book aggregators. Libraries still sign agreements with the individual aggregator, but the dealer mediates the service by making records available, providing MARC records for all books fitting the library's profile, and allowing use of the same or a modified version of the selection profile that the library has for print books. *See, e.g.*, Emily McElroy & Susan Hinken, *Pioneering Partnerships: Building a Demand-Driven Consortium eBook Collection*, Against the Grain, June 2011, at 34 (providing details on how the Orbis Cascade Alliance set up a DDA program with YBP). Brooklyn Law School Library, which uses YBP for its DDA, chose to use a modified version of its print book selection profile to determine which books are included in the DDA program for e-books. There is a modest charge for these services.

to access the books they need, or find that a particular book cannot be read on their preferred device.

What Books to Include

¶22 An important consideration for libraries is determining how books will be selected for inclusion in the DDA program. For example, will the library individually select books, rely on a selection profile, or simply include all books offered by a particular supplier? Law libraries will almost certainly want to specify subject areas for selection, while university libraries might include all books intended for academic audiences. Libraries can also limit the books by publisher or specify a price limit for included books.

¶23 Libraries should also consider how their use of DDA will affect and be affected by their print book selection process. Will the library continue to purchase print books as before, or will fewer print books be selected? Will the library select e-books for purchase apart from those included in the DDA program?[32] What if users, particularly faculty, have a preference for the book in print—will the library buy a second copy in a different format?[33] Will the system eliminate duplicates from the DDA program, so that a book purchased in print is not also available as an e-book via DDA?[34] Libraries must decide whether they are concerned about the possibility of purchasing two different versions of the same book or whether they believe the benefits of duplicate formats justifies the added cost. The print version is owned (instead of licensed) by the library and is more easily preserved, while the e-book provides ease of access and use.

¶24 In addition to setting up profiles to determine what books are included in its DDA program, a library can delete individual DDA titles from its catalog. Some programs allow libraries to "request DDA" for a book that is available for DDA but has not been included in the library's profile.[35]

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32. Many, but far from all, e-books available from suppliers can be put into a DDA program. Sometimes, if a library wants to make a book available, it must purchase either the print or the electronic version. *See* Joseph Esposito, *Revisiting Demand-Driven Acquisitions*, The Scholarly Kitchen (Oct. 15, 2014), http://scholarlykitchen.sspnet.org/2014/10/15/revisiting-demand-driven-acquisitions/ [https://perma.cc/UGZ7-N5TD] (noting reasons why publishers might oppose DDA models).

33. The question of whether e-books will eventually be universally accepted as a replacement for print books is still an open one. *See, e.g.*, Alexandra Alter, *The Plot Twist: E-Book Sales Slip, and Print Is Far from Dead*, N.Y. Times, Sept. 23, 2015, at A1.

34. If a library wants to prevent purchase in duplicate formats, there are a variety of methods for doing this. For example, a supplier such as YPB can run an initial de-duplication process between records in a library's catalog and the e-book records that are going to be in the library's DDA program. On an ongoing basis, it will not include e-books in the DDA program if the library has purchased the print version from YBP. However, if the print version is purchased after the book is in the DDA profile or from another supplier, the library staff must manually remove the DDA record from its catalog.

35. *See Demand-Driven Acquisitions*, YBP Library Services, http://www.ybp.com/DigitalServices /demand_driven_acquisitions.html [https://perma.cc/UR57-ZKD3].

Criteria for Triggering Loans and Purchases

¶25 Vendors each have individual criteria for determining when a book is considered to have been "used" and therefore triggers a charge. For example, if a user looks only at the table of contents but not at the text itself, that might not be considered a use. Alternatively, the vendor might allow users five minutes of reading time or viewing of a certain number of pages before a loan or purchase is triggered.[36]

¶26 Libraries must choose how to set up their purchasing plans, deciding whether they want to purchase a book at the time it is first used or allow one or more short-term loans before purchase. Most publishers allow for short-term loans of anywhere from one day to four weeks, for a percentage of the purchase price.[37] Libraries can decide whether they prefer a certain number of short-term loans to trigger an automatic purchase or prefer the vendor to send a notification so that the library can determine whether to purchase the book or pay for an additional short-term loan. As an example, a library could allow two short-term loans for seven days each. Upon the third use of the book, the book will automatically be purchased and added to the library's collection.[38] After that, the library owns the book and will not be charged further.[39] Vendors generally do not credit money paid for short-term loans against the purchase price,[40] so books purchased after the library has paid for one or more short-term loans are more expensive than they would be if purchased

36. *See* Polanka & Delquié, *supra* note 4, at 121–23, 125–26 (noting the different criteria that will trigger a loan or purchase from various e-book suppliers).

37. While these loans were originally relatively inexpensive in terms of the percentage of the purchase price charged, a number of publishers soon began to drastically increase those percentages. *See* Avi Wolfman-Arent, *College Libraries Push Back as Publishers Raise Some E-Book Prices*, CHRONICLE OF HIGHER EDUC. (June 16, 2014), http://chronicle.com/article/College-Libraries-Push-Back-as/147085/ [https://perma.cc/AA82-GC5B]. Even university presses are charging higher percentages for short-term loans. For example, EBL announced that as of December 1, 2014, the University of Iowa Press would increase the cost of its 28-day loan from 30% of the book price to 100%. Based on these types of increases, libraries with DDA programs can now often disable short-term loans from being triggered if the loan cost is over a certain percentage of the purchase price. E-mail from EBL Support re: Price Changes to Short-Term Loans (Nov. 17, 2014, 5:01 PM EST) (on file with author).

38. Under most of these programs, books are not physically owned by the library, and the data files continue to reside on the publisher's or supplier's server. Before entering into an agreement with a supplier, a library should ensure it knows what happens to files of books that have been purchased if the supplier goes out of business or is otherwise unable to continue hosting the book files. Libraries may choose to limit their DDA programs to publishers who participate in digital access preservation programs such as CLOCKSS. For more discussion of these programs, see *infra* ¶ 70.

39. There are exceptions to this, such as the EBL nonlinear lending model, which allows a library to purchase e-books with a set number of uses per year. These can be used at any time, including concurrently. *See About EBL*, EBL EBOOK LIBRARY, http://www.eblib.com/?p=about [https://perma .cc/2A3M-CXXR]. However, if the maximum number of uses is reached before the end of the year, the library must either suspend access to the book for the rest of the year or purchase an additional copy. EBSCO has recently introduced a competing model. *See Acquisition Options*, EBSCO EBOOKS, https:// www.ebscohost.com/ebooks/acquisition-options [https://perma.cc/5T7C-DHCZ].

40. *But see* Press Release, ProQuest, ProQuest Introduces "Access-to-Own" Demand-Driven Ebook Acquisition Model (Nov. 4, 2015), http://www.proquest.com/about/news/2015/ProQuest -Access-to-Own-Demand-Driven-Ebook-Acquisition-Model.html [https://perma.cc/M52Z-YTYM] (announcing a pilot program that "appl[ies] budget dollars spent on rentals to perpetual purchases").

outright.[41] On the other hand, a library saves money if only one short-term loan is used, and the book is never accessed again.[42]

¶27 Given traditional patterns of book use in academic law libraries, it is possible, and perhaps likely, that a single user, by accessing the book several times during a semester, could trigger multiple short-term loans followed by a purchase. It is typical for faculty researchers as well as students writing journal notes or seminar papers to access the same materials repeatedly, over a long period of time.[43] Knowing this, some libraries might decide to purchase books on the first use as an effort to limit additional loan/purchase charges. Another variable that affects cost and usage is the type of access that is purchased: some licenses permit concurrent use by multiple users; others are more limited, allowing access to the book by only one user at a time.[44]

Access Rules

¶28 Libraries also must decide which users can access their e-books, particularly those in a DDA program, and how that access should be managed. The first question is particularly important for academic law libraries that are part of larger university library systems with shared catalogs. Will the law library allow non–law students or faculty to "purchase" books by accessing them? Or will access be limited to law students, faculty, and staff? Would limitations on access violate circulation agreements with other university libraries? If a similar system is used by the main university library, will law students be prohibited from accessing those DDA books?

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41. Most suppliers do not give the standard library discounts to purchases under these programs, which means that a library would likely pay the full price of the e-book in addition to the cost of any short-term loans. The cost of e-books in comparison to print books varies greatly by publisher. Some charge the same list price, while others charge a large (200% or more) premium for e-books. A few anecdotal examples taken from YPB's GOBI system on August 20, 2015, illustrate the differences: (1) Eileen B. Leonard, Crime, Inequality, and Power (Routledge 2015): Cloth $155; Paper $98.50; EBL Non-Linear Lending DDA $232.00; (2) Miles Jackson, Complicity in International Law (Oxford 2015): Cloth: $98.50; E-book (not DDA) $288; (3) Eric Berkowitz, Boundaries of Desire: A Century of Bad Laws, Good Sex, and Changing Identities (Counterpoint 2015): Cloth $28, EBL Non-Linear Lending DDA $27.44. (YBP GOBI records on file with author).

42. *See* Arndt, *supra* note 27, at 68.

43. This situation will be affected by how a library sets up short-term loan periods. If the loan is for fourteen days, multiple uses by a single patron during those fourteen days will not incur additional charges. Libraries can generally choose short-term loan periods of one, seven, fourteen, or twenty-eight days, again depending on the supplier. Each type of short-term loan costs a different percentage of the book price. *See* C. Derrik Hiatt, *The Debate over Short-Term Loan Pricing*, Technicalities, Sept./Oct. 2014, at 12, 12, https://wakespace.lib.wfu.edu/handle/10339/39474 [https://perma.cc/DV3P-T565]. The length of the short-term loan is chosen when setting up the DDA program and cannot be changed for individual books. Some publishers will make books part of a DDA program but will not allow short-term loans, so that the first use triggers a purchase of the book. *See* Nat'l Info. Standards Org., *supra* note 27, at 10.

44. Most publishers offer options for different types of licenses and base the price of the book on the use permitted. For example, the price for one concurrent user might be the same as the price for the print book, while the cost for allowing up to three concurrent users is some percentage higher. (For EBSCOhost, the cost is "typically 50 percent more." Michael Kelley, *Moving Beyond the NetLibrary Legacy, EBSCO Reshapes Its Ebook Platform*, The Digital Shift (May 1, 2012), http://www.thedigitalshift.com/2012/05/ebooks/moving-beyond-the-netlibrary-legacy-ebsco-reshapes-its-ebook-platform/ [https://perma.cc/NLN8-PVW5].

¶29 Many law schools allow alumni to use their library resources, even if alumni cannot check out materials. Those libraries will need to consider whether alumni will be allowed to access e-books, either while in the library or remotely, and if not, consider whether there are certain books that should be purchased in print for the use of alumni.

¶30 Libraries must also choose whether they will allow access to these e-books via IP address or will require individual users to register. A library that allows only its own faculty and students to use DDA books must determine how it can do this using the vendor's registration technology.

¶31 Requiring registration for e-books adds an obstacle to access. Some users may not be willing to take the time to register in order to read an e-book: faculty become frustrated with the library when they must register and remember yet another login name and password. They may then request books in print or resent the library for impeding access to books. Students, on the other hand, are more likely to substitute a different, possibly less relevant, source for their research. Both are negative outcomes libraries should consider when selecting how access is controlled.

Goals of a DDA Program

¶32 Decisions on the factors described above are likely to be affected by the particular goals that a library has for its DDA program. Libraries must make their decisions based on what they want DDA to do for the library's collection and why they believe the investment of time in designing the program is worthwhile.

¶33 There are a number of reasons why a library might decide to implement a DDA program. It may want to make a large number of e-books available to its users, more than it could ever afford to buy, or it might consider DDA to be a way of saving the time of collection development staff because marginally relevant items do not have to be identified and researched before purchase. The library may intend to continue buying as many or almost as many items as it did previously, while supplementing the collection with additional materials that will not be purchased unless used. Alternatively, the library may decide that with a limited budget it is best to purchase only books that it is sure will circulate at least once, and that the best way to do this is to let users choose books at the point of need.[45] The library could decide not to purchase certain books that it would otherwise have bought and wait until the title is "requested" by being used. This second scenario is closer to the philosophy of "just in time" collecting that has been advocated by some.[46]

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45. Some have argued that this eliminates the traditional role of librarians as experts in collection development, as well as being a bad practice for collection development generally. *See* Walters, *supra* note 3, at 205–06, as well as the discussion *infra* ¶¶ 56–57.

46. *See* D.R. Jones, *Locked Collections: Copyright and the Future of Research Support*, 105 Law Libr. J. 425, 428–29, 2013 Law Libr. J. 24, ¶ 6 (describing the concepts of "just in case" and "just in time" and how they apply to library collections).

Optimizing Decreasing Budgets

¶34 It is no secret that library budgets have been shrinking in recent years; this has certainly affected academic law libraries and can usually be attributed to the recent "crisis in legal education."[47] The number of law students has decreased, law schools are trying to make tuition more affordable, and library budgets have likely remained flat or decreased.[48] At the same time, libraries find themselves having to pay higher prices for many materials.[49] Cutting serial subscriptions is one way for libraries to deal with curtailed budgets. While many libraries have cut budgets by canceling print materials and relying on databases they already have (e.g., Westlaw, LexisNexis, Bloomberg BNA, HeinOnline, JSTOR), they may also look to see whether they can save money by limiting their purchases of books.

¶35 Even apart from the decrease in law school revenues, many library budgets are coming under stricter scrutiny. The law school administration may believe that with so much legal material available online it should not be necessary to spend as much on library collections.[50] The focus on "practice-ready" graduates and the increasing prevalence of the idea that the value of education is determined by its ability to graduate students who can earn large incomes[51] may lead some to conclude that libraries should not buy books that are not of practical use to current students or faculty.[52]

¶36 All librarians should be aware that some of their books never circulate,[53] and it is tempting to think that the library could find a way to buy only books that

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47. *See, e.g.*, Genevieve Blake Tung, *Academic Law Libraries and the Crisis in Legal Education*, 105 Law Libr. J. 275, 277–78, 2013 Law Libr. J. 3, ¶¶ 4–7. For a more pessimistic view of how the legal education crisis will affect libraries, see James G. Milles, *Legal Education in Crisis, and Why Law Libraries Are Doomed*, 106 Law Libr. J. 507, 2014 Law Libr. J. 28. A rebuttal to many of Milles's arguments is found in Kenneth Hirsh, *Like Mark Twain: The Death of Academic Law Libraries Is an Exaggeration*, 106 Law Libr. J. 521, 2014 Law Libr. J. 29.

48. *See* Taylor Fitchett et al., *Law Library Budgets in Hard Times*, 103 Law Libr. J. 91, 95, 2011 Law Libr. J. 5, ¶¶ 14–15.

49. The *AALL Price Index for Legal Publications* does not cover books that are not supplemented, but prices for supplemented treatises increased 31.6% from 2010 to 2014, and all serials increased 42.5% in that same time period. The Consumer Price Index increased approximately 8% from 2010 to 2014. Am. Ass'n of Law Libraries, AALL Price Index for Legal Publications 2014 (2015), http://www.aallnet.org/mm/Publications/products/pub-price/price-index-2014.html (AALL membership required for access).

50. Even administrators who understand the cost of and need for both print and electronic legal materials can see that their libraries house large collections of books that are no longer being used and are likely to believe that at least some cuts in purchasing are possible.

51. *See* Frank H. Wu, *Reforming Law Schools: A Manifesto*, 46 U. Toledo L. Rev. 417, 419 (2015) ("Almost all who call themselves consumers (and the families paying the bills) demand measures of job placement. They no longer believe, if they ever did, that critical thinking by itself is valuable.").

52. *See* Candice Dahl, *Primed for Patron-Driven Acquisition: A Look at the Big Picture*, 24 J. Electronic Resources Librarianship 119, 121 (2012) ("Growing cultures of assessment and shrinking budgets on campuses . . . have encouraged 'bottom-line' considerations . . . by administrators.").

53. A 2011 OCLC study of circulation at Ohio college and university libraries found that eighty percent of circulation transactions involved only six percent of the collection. OhioLINK Collection Building Task Force, OhioLINK-OCLC Collection and Circulation Analysis Project 2011, at 31 (2011), http://oclc.org/research/publications/library/2011/2011-06r.htm [https://perma.cc/F2SQ-VJBP].

will eventually be used.[54] DDA is one way to approach this issue. Because a book is not purchased from a DDA program until one or more users have looked at it, a library can ensure that it does not spend money for books that will simply sit on the shelf.[55] Several university library studies have shown that the "cost per use" of a book decreases with a DDA program.[56] Not only is purchasing more efficient because fewer unused books are bought, but the cost of the time spent by librarians selecting books is saved as well. In some instances, this can mean that fewer librarians are needed or that librarians could devote the time saved to other responsibilities. If a library's main goal were to cut its budget, it could theoretically shift all or a large proportion of its purchases to DDA and stop buying books that are not being used.[57]

Increasing Choice for Users

¶37 Another goal, not mutually exclusive from the desire to decrease unnecessary expenditures, would be to provide users with additional choices at a low price. If a library adds thousands of book records to its catalog—records for many times the number of books it could afford to buy—then its users will have a much wider variety of sources to choose from, at a presumably affordable cost to the library.[58] This goal comes with a risk that users will take advantage of increased choice to greatly increase library expenditures by accessing large numbers of these books.[59] One of the challenges of setting up a DDA program is balancing increased choice with budget constraints.

Decreasing Interlibrary Loan Requests

¶38 Another reason a library may like the idea of a DDA program is that the library believes that users who want a book not in the collection should not need to wait as long as it commonly takes to receive a book via interlibrary loan (ILL). If instead of requesting a book via ILL the patron could immediately have access to

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54. The Utopian ideal of a library collection would be one that has all the materials users will use, now and in the future, and contains no materials that will never be used. Unfortunately, just like the idea of 100% precision and 100% recall in online search results, this is likely an impossible target. For those unfamiliar with the "precision/recall dichotomy," it refers to the impossibility of retrieving results where 100% are relevant (precision), and the search has also retrieved 100% of the relevant results (recall). *See* Michael Buckland & Fredric Gey, *The Relationship Between Recall and Precision*, 45 J. Am. Soc'y Info. Sci. 12, 12 (1994) ("[A] trade-off between Precision and Recall is unavoidable under certain conditions.").

55. *See* Edward A. Goedeken & Karen Lawson, *The Past, Present, and Future of Demand-Driven Acquisitions in Academic Libraries*, 76 C. & Res. Libr. 205, 206 (2015) (citing studies on percentage of books in academic libraries that circulated, and a 2010 study estimating that the cost of maintaining a book on the shelf "could amount to over $140 per volume" over the long term).

56. Dewland & See, *supra* note 3, at 14.

57. See *id.* for a description of this type of program at the University of Arizona. The program is called On Demand Information Delivery (ODID) and used "as the primary acquisition method for both electronic and print content."

58. *But see* Jean-Mark Sens & Anthony J. Fonseca, *A Skeptic's View of Patron-Driven Acquisitions: Is It Time to Ask the Tough Questions?*, 30 Tech. Servs. Q. 359, 364 (2013) ("The sheer number of titles potentially available as ebooks makes it extremely difficult for researchers who retrieve a large results list to discern what is truly relevant, quality information . . . .").

59. When DDA programs were first set up, this seemed to be a problem, but more recently libraries have learned how to set parameters to control costs. *See* Arndt, *supra* note 27, at 35.

the e-book, it would satisfy patron demand and at the same time decrease the amount of work required by ILL staff to borrow (and return) books (and possibly also decrease the number of ILL staff required). Decreasing ILL requests also lowers the shipping costs incurred by both ILL borrowers and lenders.

¶39 Even without a DDA plan, libraries often choose to buy rather than borrow a requested book. With the discounted pricing and fast shipping options available from Amazon and other services, purchasing a book not only can get it to users more quickly, it also avoids having to ask the patron to return the book quickly to the lending library, and has the additional benefit of adding a book to the library's collection where it can be used by others in the future. Just as these services are used for print books, DDA can work the same way for e-books.

Increasing Circulation

¶40 A DDA program can also improve circulation statistics. The idea is less that the library will increase its circulation numbers in the aggregate (although with more books to choose from, that is certainly a likely outcome), but that there will be an increase in the percentage of books purchased that actually circulate.[60]

¶41 Law libraries, though, are known for supplying personalized service to their users, particularly faculty, going above and beyond the level of service that can be provided by large university libraries.[61] This personalized service has meant that books are often purchased for the use of one faculty member, and large circulation numbers have never been considered a requirement for book purchase.[62] Thus, while much of the literature on DDA in general academic libraries includes increasing the number of circulations per book as a goal of the program,[63] that goal may not be as important for academic law libraries.

Pay-Per-View for Journal Articles

Pay-Per-View Defined

¶42 Thus far the discussion has focused on DDA for e-books. Law librarians have also been confronted in recent years with sharp increases in journal costs[64]

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60. *See* Dahl, *supra* note 52, at 121 (citing numerous studies).

61. *See* Richard A. Danner, S. Blair Kauffman & John G. Palfrey, *The Twenty-first Century Law Library*, 101 Law Libr. J. 143, 152, 2009 Law Libr. J. 9, ¶ 52 ("The dirty secret is that law school faculty members demand and get far better library services than any other faculty members on campus. And that's a major reason we have independent law libraries, so we can provide that type of high level service.") (comment of S. Blair Kauffman).

62. Connie Lenz, *Faculty Services in Academic Law Libraries: Emerging Roles for the Collection Development Librarian*, 96 Law Libr. J. 283, 287–88, 2004 Law. Libr. J. 18, ¶¶ 13–14.

63. *See* Dahl, *supra* note 52, at 121–22.

64. According to the *AALL Price Index for Legal Publications 2014*, the price of the average commercial periodical increased by approximately 25% between 2010 and 2014. Am. Ass'n of Law Libraries, *supra* note 49, at [6]. Price bases were reset in 2010, but the 2009 Price Index noted a 45% increase for commercial periodicals between 2005 and 2009. Am. Ass'n of Law Libraries, The AALL Price Index for Legal Publications 2009, at [4] (2010), http://www.aallnet.org/mm/Publications /products/pub-price/price-index-2009.html (AALL membership required for access). EBSCO estimated that periodical prices increases for 2014 would "be in the range of 6 to 8 percent." Press Release, EBSCO, Serials Price Projections for 2014, http://www2.ebsco.com/en-us/Documents/Price Projections2014.pdf [https://perma.cc/GB42-LTU5]. This is compared to a 1.6% increase in the

coupled with increasing interest among their users in journals from disciplines outside of law.[65] Even with access to a larger number of journals through aggregating databases, often available as part of university subscriptions, most law libraries cannot afford to subscribe to every journal from which their users need articles. An alternative to subscriptions that has emerged with the advent of online journals is the ability to purchase individual journal articles. Initially at least, using this as a substitute for journal subscriptions appears to present the same issues as using DDA for e-books.

¶43 One way to get an article from a journal to which the library does not subscribe is the traditional method of ILL.[66] Another is for the library to purchase the individual article, using either the journal's website or an aggregator site. With either of these methods, the library first obtains the article and then delivers it to the user. Yet a third method is to allow users to purchase articles directly, using a service such as the Copyright Clearance Center's Get It Now[67] or Elsevier's Science Direct.[68] To the user, the transaction is seamless electronic delivery, with the library paying the cost of the article behind the scenes.[69] The second and third methods (library purchase for a patron and direct patron purchase with library funds) are referred to here as Pay-Per-View (PPV), a term that has become common in the general library literature.[70]

¶44 With PPV, delivery is almost immediate; there are none of the delays inherent in having another library search for and send an article, whether by e-mail, ILLiad electronic transmission,[71] fax, or U.S. Mail. PPV purchases are triggered only by users' requests, which means that a library does not need to subscribe to an entire journal or database to obtain individual articles through the commercial market. In addition, services like Science Direct and Get It Now allow patrons to take actions that have immediate budgetary consequences without the library serving as an intermediary.

¶45 If a library allows patrons to purchase articles without library mediation, from a user perspective the transaction is very similar to direct access to electronic

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Consumer Price Index in 2014, AM. ASS'N OF LAW LIBRARIES, *supra* note 49, and the reality that most library budgets these days are being cut rather than keeping pace with inflation or even remaining flat.

65. *See* Mark P. Bernstein, *One Size Fits All No More: The Impact of Law Specialization on Library Services*, AALL SPECTRUM, Mar. 2007, at 16.

66. When filling ILL requests for journal articles, libraries should consider the CONTU guidelines, which suggest that each year an individual library should not borrow more than five articles from the most recent five volumes of any one journal title. NAT'L COMM'N ON NEW TECHNOLOGICAL USES OF COPYRIGHTED WORKS, FINAL REPORT 54–55 (1979), http://digital-law-online.info/CONTU /PDF/index.html [https://perma.cc/23D3-9EBP]; *see also* Jones, *supra* note 46, at 443–44, ¶ 33.

67. *Get It Now*, COPYRIGHT CLEARANCE CTR., https://www.copyright.com/academia/get-it-now/ [https://perma.cc/3ART-6ZNX].

68. SCIENCE DIRECT, http://www.sciencedirect.com/ (last visited Jan. 15, 2016).

69. Libraries can decide whether to mediate this service (i.e., whether the library needs to approve each request before it is filled and charged to the library). *See generally* Heather L. Brown, *Pay-per-View in Interlibrary Loan: A Case Study*, 100 J. MED. LIBR. ASS'N 98 (2012).

70. *See, e.g.*, Beth R. Bernhardt, *Pay-Per-View: Alternative or a Necessity in Today's Economy*, AGAINST THE GRAIN, Dec. 2009–Jan. 2010, at 1 (introduction to journal issue devoted to the topic). It is also sometimes called transactional access. *See* Ryan Weir & Ashley Ireland, *Getting Our Feet Wet: One Library's Experience with Transactional Access*, AGAINST THE GRAIN, Dec. 2009–Jan. 2010, at 16.

71. For information about how ILLiad works, see *ILLiad*, OCLC, https://www.oclc.org/illiad .en.html [https://perma.cc/Q8NF-TD57].

journals via a library subscription: researchers find articles via a search in a catalog or discovery service, click on a link to the full text, and download the article. The "reality" of the library's subscription to a journal (or lack thereof) would become apparent only if a user searched the library's catalog to see whether the library subscribed to the journal.[72] The same is true for the DDA model for e-books, where users also see no difference between e-books they download that have already been purchased and books for which their use triggers a purchase or short-term loan.

¶46 In addition to eliminating the delay inherent in ILL, another advantage of PPV over ILL for many libraries is that it avoids copyright problems under the CONTU guidelines because PPV articles include copyright permissions and royalties.[73] Libraries no longer need to keep track of how many articles they have borrowed from a particular journal and make decisions about whether they can borrow another article or now need to purchase a subscription.[74]

¶47 Libraries may now consider whether it is worthwhile to subscribe to marginally relevant journals, since it is easy to set up e-mail alerts for faculty when new issues come out, even for journals to which the library does not subscribe. A library can alert faculty of new journal contents and then purchase articles as needed. Over time the library could determine whether a subscription would be more or less expensive than individual article purchases. Working with faculty to determine the number of articles they found to be of interest in a specific journal would allow a library to make the subscription decision in advance, if it did not want to risk the possibility of spending more on individual article purchases.

¶48 This too seems similar to DDA because DDA prevents a library from buying books based only on speculation that they may be used. Instead it allows users to make the decision to use the book before purchase, and also does not factor in the needs of future users.

Are DDA and PPV the Same?

¶49 Given this similarity, does PPV have the same effect on collection development as DDA? Initially PPV's use was only thought of as a replacement for ILL.[75] However, as journal costs continued to increase and library budgets decreased, libraries began canceling subscriptions to expensive journals that they believe are not heavily used. Instead of subscriptions, they rely on purchase options for specific articles that are requested by users.[76]

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72. While a search to see whether a library has a specific journal, as opposed to an article, is common among librarians, it is questionable how many nonlibrarian users choose to find materials this way. My suspicion (admittedly based on experiential rather than empirical knowledge) is that the only users who search this way are those who were taught the method by librarians. Perhaps, with changing methods of access to articles and more options for PPV, reference librarians may want to change how they teach users to look for articles.

73. *See* Brown, *supra* note 69, at 98–99; *see also* Nat'l Comm'n on New Technological Uses of Copyrighted Works, *supra* note 66, at 54–55.

74. *See* Nat'l Comm'n on New Technological Uses of Copyrighted Works, *supra* note 66, at 54–55.

75. *See generally* Brown, *supra* note 69; Mindy King & Aaron Nichols, *Pay-Per-Use Article Delivery at the University of Wisconsin-Stevens Point*, Against the Grain, Dec. 2009–Jan. 2010, at 20, 20.

76. *See, e.g.*, Rick L. Fought, *Breaking Inertia: Increasing Access to Journals During a Period of Declining Budgets: A Case Study*, 102 J. Med. Libr. Ass'n 192 (2014) (describing a pilot program in which the University of Tennessee Health Sciences Library canceled journals and replaced them with "tokens" for article access via Wiley's PPV service; the token system was invisible to users).

¶50 Although DDA and PPV share many characteristics, as discusssed below, there are enough substantial differences in their effects on library users that I do not believe they should be considered together. Articles are shorter, and electronic versions can be downloaded and easily stored and printed; journal publishers do not limit printing and downloading of articles by subscribers; and e-journal articles are almost always available in PDF format, with which users are already familiar. E-books, on the other hand, are almost never in PDF format, and many vendors limit the percentage of a book that can be downloaded and printed, even when the library "owns" the title.[77]

¶51 Because libraries rarely allow patrons to check out journal volumes, researchers are accustomed to making photocopies of articles—a format that is almost identical to the PDF they receive of an e-journal article. This allows them either to store the article online or print it and put it in a folder, just as they would if the library owned the print journal. The differing characteristics of e-books and electronic journal articles generally have meant that users, and libraries, appear more comfortable transitioning to electronic journals than to electronic books.

¶52 And while many still advocate for print books for both usability and preservation purposes, no one seems to be lamenting the replacement of print journals with electronic versions. There are a number of reasons for this: (1) As noted above, format issues for academic e-journals are settled. (2) Electronic journals make searching much easier. Gone are the days when users must consult an index to find articles within a journal; you can search a journal database or a web search engine like Google Scholar to easily locate articles on your topic. (3) Once purchased (however purchase is transacted, whether via a database, a journal subscription, or an individual PPV article purchase), users have full rights to download and print the article, and reuse it as frequently as they like; this is not yet the case with e-books. (4) Journals not subscribed to now are more likely than books to be available for purchase in the future. (5) Many users appreciate the ability they have with print books to go back and forth easily between chapters or sections and see multiple parts of the book, or even multiple books, at one time.[78] Because articles are relatively short, users do not seem to need to do this as frequently.

¶53 All of the above point to a conclusion that, despite superficial similarities, librarians should not consider PPV and DDA to be the same when thinking about their use in an overall collection development plan. DDA is likely to have many effects on the library's collection that do not need to be considered if a library chooses to use PPV for journal articles.

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77. This is not the case when a library actually owns the book rather than purchasing a perpetual license for it. Jones, *supra* note 46, at 449–50, ¶ 45 (discussing the "Douglas County model" where libraries buy and host e-books files on their own servers).

78. *See* Jeff Staiger, *How E-Books Are Used: A Literature Review of the E-Book Studies Conducted from 2006 to 2011*, 51 Reference & User Servs. Q. 355, 359–60 (2012). This article also notes that compared to the "liquidity" of electronic journal articles, users find printing and downloading barriers with e-books to be frustrating. *Id.* at 359.

Possible Effects of DDA on Law Library Collections

Effect of Selection by Individual Users

¶54 DDA provides advantages to library users and to the library itself. A major advantage for users is that they can choose the books they need rather than being limited to those preselected by librarians.[79] Savvy researchers have always looked beyond the library's online catalog, often receiving recommendations for new books of interest from colleagues or publishers. The larger universe of book records in the online catalog with a DDA program allows for easier searching, without requiring searches of separate sources like WorldCat and the additional step of asking the library to either buy or borrow the book. This makes it more likely that library users will find the books recommended to them to already be in their library catalog and that a key word search of the catalog will retrieve more relevant books.

¶55 DDA also has the advantage of library preselection of the book records that are added to the catalog, so that users see books only on subjects thought to be appropriate for that library. Books included in the DDA program can be publicized via new books lists or other current awareness programs, again increasing their visibility to researchers. Unless a library chooses a very restrictive approach to its selection profile (e.g., including only books it would have purchased outright if there were no DDA program in place), the system provides researchers with a wider choice of books than previously existed in the library's catalog and provides this increased choice without the library paying for books that are never used.

¶56 Some, though, argue that a DDA program "is likely to diminish collection quality unless librarians implement safeguards to maintain their central role in book selection."[80] They believe that allowing collections to grow via DDA will cause a poorly developed collection because the collection will consist of books that have been chosen by individuals interested only in their own immediate research needs.[81] For example, according to William Walters, DDA is likely to cause "at least six problems," four of which relate to collection development:

- failure to distinguish between students' immediate desires and their long-term educational needs
- failure to make full use of librarians' knowledge and expertise
- failure to represent the full range of library stakeholders, such as future students and faculty
- systematic and idiosyncratic biases in selection . . . .[82]

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79. *See* Dahl, *supra* note 52, at 122 ("Many selections made by librarians are necessarily based on speculation and often fall wide of the mark."). Of course, there is some preselection of books that are included in the DDA profile. Even a very extensive selection of books is limited by publisher, supplier, type (e.g., adult vs. juvenile literature), and other broad categories.

80. Walters, *supra* note 3, at 199. *But see* David C. Tyler et al., *Just How Right Are the Customers? An Analysis of the Relative Performance of Patron-Initiated Interlibrary Loan Monograph Purchases*, 35 COLLECTION MGMT. 162, 174–75 (2010) (finding that at the University of Nebraska–Lincoln, patron-initiated purchases in lieu of ILL circulated more often than other materials and reasonably mirrored the Library of Congress classification distribution in the rest of the collection).

81. *See, e.g.*, Sens & Fonseca, *supra* note 58, at 365, 369; Walters, *supra* note 3, at 204–06. Most selection, of course, is done by one or two individuals, but when those individuals are librarians, we presume they have the expertise to consider a wide range of factors.

82. Walters, *supra* note 3, at 209.

¶57 In answer to this, we can note that academic law libraries have always routinely purchased books requested and used by only one faculty member.[83] And some studies show that books chosen via a DDA program are similar to those selected by librarians.[84] However, arguments for maintaining librarian-selectors, at least for some portion of the collection, persist. For example, it has been argued that "the whole basis of the conception of libraries is the altruistic one of sharing resources for the general good at the time of need, be it today or in 20 years' time."[85]

¶58 Though there is a possibility that collections "developed" by individual users may be skewed toward the specific needs of current users, I believe this outcome can be avoided if libraries follow the suggestions discussed here and in the section on designing an optimal DDA program.[86] In assessing the effect of DDA on its collection, each library must tailor its plan to its purpose and mission. Perhaps a library that considers itself to be a "research collection" needs to spend more time pursuing "balanced" collection development, while a library that is simply trying to serve the research needs of current users can depend more on DDA.[87]

¶59 Libraries also must be aware of which books are available through a DDA plan compared to the universe of books available in print and electronically. Many books are not available as e-books.[88] And even if publishers offer an e-book version, they may not make that e-book available for DDA.[89] Thus, libraries that rely too much on DDA for collection development are likely missing out on items that they should be adding to their collections.[90]

¶60 Libraries must also ensure that their catalogs contain records only for materials that are still available. Many libraries do this by deleting all DDA records for materials that have not been accessed after a specified length of time.[91] Libraries will also want to make sure that they do not lose the opportunity to purchase materials

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83. *See* Lenz, *supra* note 62, at 287–88, ¶¶ 13–14.

84. *See, e.g.*, Lisa Shen et al., *Head First into the Patron-Driven Acquisition Pool: A Comparison of Librarian Selections Versus Patron Purchases*, 23 J. ELECTRONIC RESOURCES LIBRARIANSHIP 203, 216 (2011).

85. Ruth Bird, *Libraries—The Value of Just in Case, Not Just in Time*, SLAW (July 29, 2015), http://www.slaw.ca/2015/07/29/libraries-the-value-of-just-in-case-not-just-in-time/ [https://perma .cc/6Q6R-TYHW].

86. *See infra* ¶ 82.

87. *See* Michael Whiteman, *Book Burning in the Twenty-first Century: ABA Standard 606 and the Future of Academic Law Libraries as the Smoke Clears*, 106 LAW LIBR. J. 11, 32, 2014 LAW LIBR. J. 2, ¶ 65 ("It seems that the ABA Standards are becoming flexible enough to allow different academic law libraries to collect and organize their information in a way that could vary from collection to collection based on the needs of the particular institution.").

88. *See* Craig Anderson & Jeanie Pham, *Practical Overlap: The Possibility of Replacing Print Books with E-Books*, 44 AUSTRL. ACADEMIC & RES. LIBR. 40 (2013) (studying the overlap in availability between print and electronic academic books).

89. *See* Esposito, *supra* note 32.

90. This is where a system such as that used by YBP can be very helpful. When book notices are sent for approval, the system indicates (1) what versions of a book are available (e.g., hardcover, paperback, e-book), and (2) whether the e-book is part of a particular vendor's DDA program. Librarians can then choose which format to purchase, and if there is an e-book that is available for DDA but that has not yet been added to the library's DDA program, it is possible to "Request DDA" and ask that the record be added to the library's catalog.

91. *See, e.g.*, Dennis Dillon, *Texas Demand-Driven Acquisitions: Controlling Costs in a Large-Scale PDA Program*, *in* PATRON-DRIVEN ACQUISITIONS: HISTORY AND BEST PRACTICES, *supra* note 4, at 157, 163 (stating that the University of Texas chooses to remove titles "that have received no use over the past twelve to twenty-four months").

before they become unavailable in any format. This is less of a problem than in the past, as electronic files and Internet-based used book dealers make older books easier to obtain, but it still is possible for a library to find it difficult to purchase an older book in new or as-new condition.[92]

¶61 Collection development is a difficult skill for librarians to practice well but one they have fought hard for the right to exercise. Rather than abandoning their role in collection development to technology, librarians must find a way to integrate technology into the collection development process. Giving up collection development responsibility impacts not only librarians, but library collections as well.

Effect on Future Researchers

¶62 Librarians must also consider the effect of DDA on future scholars and scholarship. Most libraries have had DDA programs for only a few years, and there is no guarantee that the companies supplying the records and the books will still be around ten, twenty, or fifty years from now.[93]

¶63 Having records in the catalog for books that have never been purchased and are no longer available via the link in the catalog is another problem that must be faced, and it will likely become more pressing the longer that a library has a DDA program. Libraries do not want users to become frustrated by using a catalog riddled with nonfunctioning links to e-books.[94]

¶64 To examine how future researchers may be impacted by DDA, it is helpful to consider three possible scenarios: (1) the library ceases having librarians select books and relies solely on a DDA program; (2) librarians continue to select some books, but forgo all "borderline" purchases in favor of a DDA; (3) the library selects and purchases books according to its existing collection development policy but supplements its collection with a DDA plan so users can obtain books that normally would not have been bought. It seems clear that in the first scenario future scholars are likely harmed because the library will have fewer books, and records for books it might have purchased without a DDA program may no longer be in the catalog. In the third scenario, they are not harmed by DDA because the library is likely to have more books than it would have in the past.

¶65 The most interesting, and perhaps most common, scenario is the second one—the library purchases fewer books than it would have, while adding more records to its catalog than it would have. Here there is a balancing act between the direct purchase of those books thought to be essential and less essential books that

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92. Our library has not had good luck purchasing "as new" or "excellent" condition books from used book dealers; most of the time we are forced to return them when they turn out to be heavily highlighted or otherwise marked up.

93. For example, NetLibrary began supplying e-books to libraries in 1999 via an early DDA program. The company declared bankruptcy in 2002 and was acquired by OCLC and later by EBSCO. Polanka & Delquié, *supra* note 4, at 119–21. It appears that these books and book records are still available to libraries. *See* Kelley, *supra* note 44. If the company had not been bought, we cannot know what the situation would be for either the records in library catalogs or the e-books that had been purchased by libraries, although if the company participated in an archival service such as CLOCKSS, the e-books would still be available via that system. *See infra* ¶ 70.

94. Many vendors send out "delete" files when books are removed from the DDA plan, if those books have not yet been purchased by the library. Libraries must be sure to run these files to delete outdated records for e-books.

are only made available for purchase by users through DDA. While this seems like the perfect solution, and in fact is the one I would recommend, it still requires thoughtful implementation. Just as selection of treatises is difficult and complicated, it is hard to know which books are "essential." Still, I believe it makes sense to use this model when a library has a decreased budget or if money is repurposed for something that the librarians believe to be more valuable to users, such as additional databases or journal subscriptions.

¶66 There is no right answer to what the best solution is for future scholars, but the question is one that libraries must focus on as they decide whether and how to implement a DDA program.

Effect on Permanence of Access

¶67 Two issues affect permanence of access to books purchased through DDA. The first is that the book is almost always licensed, albeit with a "perpetual license," rather than being truly owned by the library.[95] Librarians should think about the effect an increased emphasis on licensed e-books will have on the complicated question of "ownership" of electronic resources—that is, whether permanent access or license to a book or journal article confers the same benefits to the library as physical ownership and how access is implemented in various publisher licenses.[96]

¶68 Most licenses currently prohibit interlibrary loans, and the choices that an academic law library makes on this issue will have an effect not only on peer institutions that might need to borrow a title but on law firm, government, and other law libraries that may be relying on their ability to borrow titles from academic law libraries. As libraries decrease the number of books they purchase because of budget constraints, DDA programs for e-books likewise decrease the ability to borrow books for users from other libraries.[97] The law library community as a whole should consider the effects of e-book licensing on its users and the effects of all collection development decisions, including DDA.

¶69 The second issue regarding permanence of access is that even if a book record is in the catalog and the e-book was purchased, the link to the book may no longer work because it depends on continuing access to the e-book supplier's website. If, for example, the publisher or supplier goes out of business, how will this affect access to the e-book?[98]

¶70 To avoid this potential problem, libraries should negotiate with vendors regarding permanent access to materials if the online provider is no longer in existence. This is where a service like LOCKSS or CLOCKSS can prove useful. LOCKSS stands for "Lots of Copies Keep Stuff Safe." Developed at Stanford University, LOCKSS is a system that allows libraries to preserve electronic content in the event the publisher's site is unavailable.[99] CLOCKSS is "Controlled LOCKSS," a nonprofit organization that libraries and publishers can join and that preserves electronic

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95. *See supra* ¶ 50 and note 77.
96. For discussion of this issue in the law library literature, see Jones, *supra* note 46, at 434–37, ¶¶ 14–20; Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 Law Libr. J. 233, 242–43, 2005 Law Libr. J. 14, ¶¶ 30–33.
97. *See generally* Jones, *supra* note 46.
98. See the discussion of NetLibrary *supra* note 93.
99. *What Is LOCKSS?*, LOCKSS, http://www.lockss.org/about/what-is-lockss/ [https://perma.cc/P5BP-DRXF].

content if that content is no longer available from a publisher.[100] CLOCKSS "preserves publisher titles in a secure dark archive," and they are not available until there is a "trigger event such as business failure or a catastrophic occurrence."[101]

¶71 The question of e-book preservation was recently addressed in a report by the Digital Preservation Coalition. Although this report discusses the questions more than it does proposed solutions, it still serves as a useful introduction to the problems facing e-book preservation. It contains case studies of Portico and HathiTrust, among other organizations involved in digital preservation.[102] E-book publishers are beginning to take preservation seriously and to add their books to archives such as CLOCKSS.[103]

Effect on the Requirement for a Collection Development Plan

¶72 The ABA expects libraries to plan for a balanced collection that meets the research needs of students and faculty, and it mandates that each accredited school's library have a written collection development plan.[104] There is little guidance from the ABA as to what should be included in a collection development plan, however. It is an open question as to whether a collection developed only through individually requested purchases by faculty and students meets the requirement for a collection development plan.

¶73 It could be argued that a library that buys every book (but only those books) requested by faculty or students is meeting its users' needs, but it is hard to see the difference between that library and one that borrows books only as users request them. This "plan" puts the burden on students and faculty to seek out relevant books and then wait for them to be purchased and shipped to the library. It is unlikely that this plan would meet the requirements of the ABA standards.[105] Whether the immediate response to faculty and student requests via DDA for e-books would compel a different decision by the ABA is unclear. One sticking point is that not all, or perhaps

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100. According to its website, "CLOCKSS is a not-for-profit joint venture between the world's leading academic publishers and research libraries whose mission is to build a sustainable, geographically distributed dark archive with which to ensure the long-term survival of Web-based scholarly publications for the benefit of the greater global research community." CLOCKSS, https://www.clockss.org/clockss/Home [https://perma.cc/8N4A-TZGY].

101. Michael Kelley, *Check It Out: How Do We Keep E-Books from Being Lost in a Deepening Digital Memory Hole?*, Publisher's Wkly., Oct. 6, 2014, at 23, 24.

102. Amy Kirchhoff & Sheila Morrissey, Preserving eBooks (DPC Technology Watch Report 14-01, June 2014), http://dx.doi.org/10.7207/twr14-01 [https://perma.cc/9V3L-V96Y].

103. *See, e.g.*, Press Release, Elsevier, Elsevier Now Adding eBooks to CLOCKSS Archiving (Feb. 5, 2015), https://www.elsevier.com/about/press-releases/science-and-technology/elsevier-now-adding-ebooks-to-clockss-archiving [https://perma.cc/NH3L-6RXK]; *see also Participating Publishers*, CLOCKSS, https://www.clockss.org/clockss/Participating_Publishers [https://perma.cc/9JCL-Y8G3].

104. "The law library shall formulate and periodically update a written plan for development of the collection." Am. Bar Ass'n, *supra* note 7, at 42 (Standard 606(d)). This requirement originated in the 1977 standards. Theodora Belniak, *The History of the American Bar Association Accreditation Standards for Academic Law Libraries*, 106 Law Libr. J. 151 n.82, 2014 Law Libr. J. 9 n.82. I was unable to uncover any information about the reason for the added requirement.

105. Interpretation 606-4 states that "Standard 606 is not satisfied solely by arranging for students and faculty to have access to other law libraries within the region." Am. Bar. Ass'n, *supra* note 7, at 43. Just as requiring students and faculty to use other libraries is not permissible, requiring them to borrow all their books would appear to violate the standards.

even most, books that users would want are likely to be available through the DDA program. Given that limitation, a library would almost certainly need to supplement DDA in some way to meet ABA requirements.

Effect on the Collection Development Process

¶74 DDA allows libraries to defer some or all of their selection decisions to users and may therefore make selection less time-consuming for the librarians. The arguments for and against this are similar to those regarding approval plans for book purchases.[106] Both require a lot of time to set up and monitor on an ongoing basis, which may or may not be made up for in the time saved in collection development decisions. And even more than approval plans, DDA requires constant oversight by library staff to ensure the collection continues to grow in support of the library's mission.

¶75 To maintain a balanced, useful collection, libraries may decide to purchase books they consider to be important for current researchers and those likely to be of use in the future, and allow decisions about more marginal or tangentially relevant items to be purchased only if users choose them from a DDA plan. While eliminating some collection development decisions, a DDA program still requires that a library consider whether and how that program will affect its collection and what it can do to ensure the collection remains a "well-selected lot."[107]

¶76 Will DDA change current practice and move collection development not back just to "administrator-patrons" but to all library users? If it does, what will this mean for our collections and our role as librarians? This article does not focus on the effects of DDA on technical services functions, but these are sure to be significant. Not only does DDA affect purchasing and processing of books, it has the potential to completely change the role and responsibilities of collection development and acquisitions librarians as well as staff who order and process books, whether print or electronic. Libraries and librarians worried about these effects must carefully craft their DDA programs to maintain the type of library their institutions require.

Effect on Library Budgets

¶77 Most of this article has been written with the assumption that a library can design its DDA program to control the budget and, at least in most instances, decrease its spending on books. Unfortunately, though, it can be complicated to know how much money will be spent on a DDA program. Much depends on how frequently books are used by researchers, the cost of those books, and the library's decisions on duplication of format, number of copies purchased, and so on. A library that uses DDA for casebooks and study guides, as well as other popular titles, is likely to spend much more than one that limits the DDA program to scholarly monographs of interest to faculty and students writing research papers. Decisions on whether users from outside the law school community can access books in the DDA program will also have a significant effect on cost.

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106. *See* Bluh, *supra* note 22, at 92–93 (arguing that the costs of outsourcing selection and processing may outweigh the time saved by library staff).

107. Jeffrey, *supra* note 17, at 408.

¶78 Libraries that need to control costs may want to start conservatively and adjust their profiles after the program has operated for six to twelve months. Libraries that value increased choice and have fewer spending limits may initially provide for a broader collection accessible to a larger pool of users.

Designing an Optimal DDA Program

¶79 The judicious use of DDA for e-books has real potential for allowing law libraries to do more with less. To avoid the main negative consequences discussed above (loss of control over collection development, runaway budgets, privileging the short-term needs of current users over the longer-term needs of scholars and researchers, and lack of reliable permanent access), law librarians must think carefully about how to proceed with these programs.

¶80 It may be worthwhile here to briefly describe how we have set up our program at the Brooklyn Law School Library and the effect it has had on the library collection and budget over the past two years. We implemented our program conservatively, in that we did not include titles for DDA if we owned them in print, and we included back files for only the two previous years. We used a modified version of our print book selection profile from YBP but narrowed it to eliminate certain books (e.g., study aids) and did not add e-book titles that cost more than $250. We signed agreements with two aggregators, EBL and EBSCO, with EBL as our preferred provider because of its nonlinear lending option.[108]

¶81 Once the program was implemented, we could see in the GOBI system which book records had been added to our catalog through the DDA program; we did not purchase those titles unless we believed they were "essential" to the collection, either for current or future researchers. This had the immediate effect of substantially decreasing our spending on books. Use of the e-books in the DDA program, though, has been quite low.[109] Rather than figuring out ways to contain costs, as we thought we might have to, we are now concentrating on promoting our e-books to students and faculty.

¶82 Given our experiences, studies in other libraries, as well as the potential effects on collections discussed above, here are some ways in which I believe law libraries can implement DDA without negatively impacting researchers now or in the future.[110]

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108. See *supra* note 39 for a description of nonlinear lending.

109. There are many possible factors, alone or in combination, that could be causing this: (1) these titles are ones that never would have been used if purchased, and the library was purchasing books unnecessarily in the past; (2) users do not like e-books but do not make the effort to request the book in print; (3) users no longer use books for research, preferring shorter journal articles; (4) users do not look in our online catalog when researching. Our experience may not be typical for academic law libraries, and things may change as e-books become more accepted. Certainly university libraries have seen much greater use of their e-book collections. *See generally* Steven B. Carrico et al., *What Cost and Usage Data Reveals About E-Book Acquisitions*, 59 Libr. Resources & Tech. Servs. 102 (2015).

110. None of these ideas are original with me. For other good sources of recommendations for a DDA program, see Nat'l Info. Standards Org., *supra* note 27, at 31–35. *See also* Karin J. Fulton, *The Rise of Patron-Driven Acquisitions: A Literature Review*, 51 Ga. Libr. Q., iss. 3, art. 10 (2014), http://digitalcommons.kennesaw.edu/glq/vol51/iss3/10 (summarizing and citing articles on the advantages and disadvantages of DDA programs and how to best set up a program for your library).

- Think through your DDA program carefully before signing with vendors. Be sure you understand your goals—the library should have clear goals for whether it wants a program that leans toward "more choice" or "less money spent" or a balance between the two. Monitor and tweak what is in your DDA profile to ensure the collection does not develop contrary to your library's goals. This should involve looking closely and on an ongoing basis at what is being added to the collection.[111]

- Be sure you understand the rules governing ownership/licensing, lending, and printing. You may want to purchase books either in print or without lending restrictions if they are books that you believe will be of long-term interest to researchers at your library or other libraries you want to support. Consider alumni use of books and whether your license permits them to access e-books when not physically in the library.

- Determine the status of purchased books if the DDA vendor goes out of business. Most contracts will guarantee you the rights to the e-book files, but, depending on the format, actually accessing those files without vendor software may be problematic.[112] Perhaps select only vendors who belong to CLOCKSS or another digital preservation program.[113]

- Even if you defer most decisions on book purchases to a DDA program, periodically survey the collection to make sure the library is buying the most essential books. Continue to purchase some books directly if you think permanent access is needed for future scholars. It is probably wise to assume DDA books you have purchased (and definitely the records for books that have not been purchased) may not be available from the e-book aggregator fifty (or even twenty) years from now and collect accordingly.[114]

- Ensure you buy materials in formats that users want and will use. For example, if you have faculty with a strong preference for print, offer to buy duplicate print copies of books when requested.[115]

- Ensure that your collection development processes are set up to deal with books purchased in a variety of ways. If you purchase some books in print, purchase some via DDA, and have others available through a subscription service like Oxford Scholarship Online, you must have processes in place to manage duplication issues and decide when to purchase in a particular format and whether the library should own books in multiple formats.

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111. For example, at Brooklyn Law School we noticed that a year or more after our program began, law-related books in the "Dummies" series were being added to our catalog, and we had to request a tweak to our YBP profile to eliminate them.

112. *See* Sallie Smith, Susanna Leers & Patricia Roncevich, *Database Ownership: Myth or Reality?*, 103 Law Libr. J. 233, 238–42, 2011 Law Libr. J. 15 ¶¶ 14–24 (discussing what happened when their library took over hosting of Gale's *U.S. Supreme Court Records and Briefs* database).

113. *See supra* ¶ 70.

114. Given the current nature of technology, it is still risky to assume that an electronic version of a book will be available and usable in fifty years. In our library, if we think a book will have real "staying power," we purchase a print copy. *See also* Bird, *supra* note 85.

115. When the DDA program began at Brooklyn Law School, we informed faculty that if they saw e-books in the catalog but preferred to use the book in print, they should let us know, and we would buy the print version. As far as I am aware, this has not yet happened.

- Do not forget about your DDA profile once it is set up. Continue to moni-tor what books are being added, which books and what percentage of them are being used, and what effect the program is having on the library's budget.

Conclusion

¶83 DDA offers law librarians a new technology for collection development. It is important for us to implement this technology in ways that enhance rather than impoverish our collections.[116] This means ensuring we consider the long-term effects of DDA on current and future researchers—probably by supplementing it with outright purchase of a limited number of print or electronic materials. Librar-ies must also consider the "unknown unknowns"[117] and not rely on a DDA pro-gram to alert them to all books, since many books are not available via DDA.

¶84 DDA can be a way to save money on purchases, but the goal for the collec-tion should remain as it always has been for libraries—to satisfy the needs of cur-rent users while ensuring that future users will have the materials they need. A DDA program should be seen as just one more tool that allows libraries to do this while managing flat or decreasing budgets. Just as libraries make decisions about whether to cancel individual subscriptions and rely on aggregating databases, deci-sions about which purchases to defer to a DDA model must be made with an awareness of all the possible effects, both current and future, on the library's collection.

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116. *See* Wayne Bivens-Tatum, *Creating the Future of Ebooks: Peer to Peer Review*, LIBR. J. (Dec. 11, 2014), http://lj.libraryjournal.com/2014/12/opinion/peer-to-peer-review/creating-the -future-of-ebooks-peer-to-peer-review/ [https://perma.cc/MX9Z-QXGE] (discussing how librarian selection in addition to DDA can result in the creation of a balanced, well-developed collection).

117. Errol Morris explored the origin of this phrase in the *New York Times*. Errol Mor-ris, *The Certainty of Donald Rumsfeld (Part 1)*, N.Y. TIMES OPINIONATOR (Mar. 25, 2014, 9:00 AM), http://opinionator.blogs.nytimes.com/2014/03/25/the-certainty-of-donald-rumsfeld-part-1/ [https://perma.cc/5JGL-WVAP].