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Affordable Content in Legal Education*

Connie Lenz**

Law schools can assist their students by adopting more affordable content in courses while continuing to meet pedagogical goals. This article explores options for affordable content in legal education and addresses ways in which law librarians can promote and support the implementation of affordable content models.

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Introduction

¶1 A law student is expected to spend well over $1000 per year on required course materials.[1] Given the cost of legal education overall,[2] it is not surprising that many students seek to save money on these casebooks and other assigned texts. In recent years, the University of Minnesota Law Library ("UMN Law Library") has received a growing number of requests from students looking for alternative means of accessing required course materials. In fall 2018, representatives of the law school's student governing body requested that the law library place one copy of all casebooks on course reserve as a way to assist those students who were struggling financially.[3] In fall 2019, a faculty member asked that the UMN Law Library purchase a copy of a casebook for the reserve collection to accommodate a student who had purchased an older edition of the assigned text and needed to consult the newer edition for updates. A second faculty member asked the UMN Law Library to provide two print copies, through purchase or interlibrary loan, of the assigned casebook for two students to use during their open-book examination. The students had purchased the casebook in the less expensive digital-only format, and they would not have access to that text during the test due to exam software restricting access to online sources or materials saved to a laptop. In the past few years, the UMN Law Library's interlibrary loan department has experienced an increase in University of Minnesota Law School students asking to borrow casebooks and course materials through interlibrary loan, as well as an increase in requests from other law schools asking the UMN Law Library to lend such materials.

¶2 At the same time that the UMN Law Library has noticed a growing student desire for—and perhaps expectation of—access to assigned course content through the library, the University of Minnesota Libraries system[4] has developed a robust program to promote affordable content to both university faculty[5] and students.[6] Additionally, in spring 2019, the University of Minnesota Senate Library Commit-

1. *See, e.g.*, *Cost of Attendance*, Harvard L. Sch., https://hls.harvard.edu/dept/sfs/financial-aid-policy-overview/student-financial-aid-budget/ [https://perma.cc/XXB4-TXDS] (advising students to budget $1400 for books and supplies for the 2020–2021 academic year); *Tuition & Financial Aid*, Univ. of Minn. L. Sch., https://www.law.umn.edu/admissions/jd-admissions/tuition-financial-aid [https://perma.cc/2GA7-MKSD] (advising students to budget $1700 for books and supplies for the 2020–2021 academic year); *see also* Kyle McEntee, *Law Books for the Price of Printing?*, Above the L. (June 30, 2016), https://abovethelaw.com/2016/06/law-books-for-the-price-of-printing/ (estimating that in addition to spending a total of $3000 to $4000 on course materials while in law school, students who borrow to pay for books ultimately may pay another $1000 to $2000 in interest).

2. Ilana Kowarski, *See the Price, Payoff of Law School Before Enrolling*, U.S. News & World Rep. (Mar. 12, 2019), https://www.usnews.com/education/best-graduate-schools/top-law-schools/articles/law-school-cost-starting-salary (reporting that in the 2018–2019 academic year, average tuition and fees at private law schools were $49,095, and tuition and fees at public law schools averaged $27,591 for in-state students and $40,725 for out-of-state students).

3. While the UMN Law Library receives a student or faculty request to place a required casebook on course reserve periodically, this was the first time the library received such a broad request. For financial and pedagogical reasons, *see infra* pp. 321–22 & n.168, the library was unable to accommodate this request.

4. While there is a very collaborative relationship between the two, the UMN Law Library is autonomous from the University of Minnesota Libraries system.

5. *Course Material Solutions for Instructors*, Univ. of Minn. Libs., https://www.lib.umn.edu/services/course-materials [https://perma.cc/76CG-LCSN].

6. *Save Money with the University Libraries*, Univ. of Minn. Libs., https://www.lib.umn.edu/elearning/studentsavings [https://perma.cc/ZNK2-HX55].

tee—representing faculty, staff, and student interests—concluded a study of the issue and approved a statement supporting affordable content initiatives.[7]

¶3 The University of Minnesota is certainly not alone in focusing on ways to provide more affordable course content. The topic is receiving significant attention from other colleges and universities, particularly undergraduate institutions, and undergraduate students increasingly are using such materials in their classes.[8] As students with experience using affordable course content at the undergraduate level begin their legal education, there will most likely be a greater demand that law schools also adopt such models.[9] This article explores ways that law schools can assist students by assigning more affordable content in courses while continuing to meet pedagogical goals.

¶4 The remainder of the article is organized as follows. The first section summarizes the affordable content movement underway at colleges and universities across the country. The next section discusses recent research on the impact of material format—print versus digital—on student performance and learning, which is a particularly relevant issue given that many options for affordable content rely on digital resources. Because law school learning outcomes depend heavily on critical legal reading skills, the third section explores the distinctive nature of law school reading and the complex critical reading skills required for success in legal education. Next is a discussion on affordable content options for law schools, followed by a section addressing ways in which law librarians can promote and support the implementation of these options. The article concludes by providing recommendations for future research and by encouraging law school administrators, faculty members, and librarians to explore and adopt affordable content options when possible.

The Affordable Content Movement in Universities and Colleges

¶5 Many colleges and universities are developing affordable content initiatives to make higher education more accessible and affordable.[10] These institutions—

7. Univ. of Minn. Senate Libr. Comm., Advancing High Quality, Affordable Course Content at the University of Minnesota, https://docs.google.com/document/d/1vDS-vKLr9WvXUDuAK_nqOhVFYPPCeaMGzUFV1DCoqDs/edit# [https://perma.cc/T4GZ-LV8C].

8. *See, e.g.*, The Evolution of Affordable Content Efforts in the Higher Education Environment: Programs, Case Studies & Examples (Kristi Jensen & Shane Nackerud eds., 2018) [hereinafter Evolution of Affordable Content] (exploring a variety of affordable content programs and providing case studies and examples of such programs, with contributions by authors from numerous institutions); Anita Walz, Kristi Jensen & Joseph A. Salem, Jr., SPEC Kit 351: Affordable Course Content and Open Educational Resources (July 2016), https://publications.arl.org/Affordable-Course-Content-Open-Educational-Resources-SPEC-Kit-351/ [https://perma.cc/V8G3-QXL8] [hereinafter SPEC Kit 351] (reporting survey results of the SPEC Survey on Affordable Course Content and Open Educational Resources based on responses from 65 Association of Research Libraries member libraries); *see also* SPARC Connect OER, https://sparcopen.org/our-work/connect-oer/ [https://perma.cc/52YP-H2PD] (providing a repository for open educational resources activities at colleges and universities across North America).

9. Lawrence A. Cunningham, *Digital Evolution in Law School Casebooks*, *in* Legal Education in the Digital Age 81, 100 (Edward Rubin ed., 2012) (noting that "law students will develop needs and expectations based in part on experience in [secondary schools and undergraduate programs]").

10. *See, e.g.*, Nicolas B. Colvard, C. Edward Watson & Hyojin Park, *The Impact of Open Educational Resources on Various Student Success Metrics*, 30 Int'l J. Teaching & Learning in Higher Educ. 262, 263 (2018) (noting that while tuition costs are the main component of student debt, the costs of textbooks and other course materials also are a "key variable"); U.S. Gov't Accountability Off.,

often led by or with strong participation of their academic libraries—are developing and implementing programs to lower students' costs related to required course content.[11] In addition to producing savings for students, the availability of more affordable content makes the educational experience more accessible to students who might otherwise forgo purchasing expensive texts.[12]

¶6 Many campuses are developing policies, including faculty incentives—such as grants, stipends, or course releases—to encourage adoption, adaptation, and creation of affordable course content.[13] Congress also has recognized the need to address the issue. The proposed Affordable College Textbook Act would create a competitive grant program for colleges and universities "to support projects that expand the use of open textbooks in order to achieve savings for students while maintaining or improving instruction and student learning outcomes."[14] The act, which had been introduced in previous sessions, would permanently authorize grant funding available through the government's Open Textbook Pilot Program.[15]

¶7 Meaningful affordable content programs require strong involvement from administrators, faculty, libraries, support units, and student groups.[16] An effective initiative should incorporate multiple approaches,[17] including the use of online open educational resources (OER), such as open source texts and materials in the public domain, lower-cost textbook options, library-licensed materials, course packs, course reserve, and interlibrary loan. Each model is described briefly below and discussed more fully in the section titled "Affordable Content Options for Law Schools."[18]

Open Educational Resources

¶8 Open educational resources (OER) are "teaching, learning and research materials in any medium that reside in the public domain and have been released

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College Textbooks: Enhanced Offerings Appear to Drive Recent Price Increases 25 (2005) ("Because textbooks may represent a substantial portion of the cost of tuition and fees for students attending some public institutions, any increase in textbook prices may affect affordability and access disproportionately for some students.").

11. For examples of such initiatives, see *supra* note 8 and sources cited therein.

12. Colvard, Watson & Park, *supra* note 10, at 263 (noting that some students from lower socioeconomic backgrounds forgo purchasing a required course text due to financial concerns, and positing that this decision affects their learning and academic performance); Doug Lederman, *Textbook Prices' Impact on Student Behavior*, Inside Higher Ed (Aug. 1, 2018), https://www.insidehighered.com/digital-learning/article/2018/08/01/survey-examines-impact-textbook-prices-student-behavior [https://perma.cc/4WVH-APQ9] (reporting results of a survey of 400 students at four-year colleges finding that 43 percent had not purchased course materials for at least one course).

13. SPEC Kit 351, *supra* note 8, at 4 (noting incentives including grants, stipends, instructional design support, and course release); *see also Search for Programs*, SPARC Connect OER, https://connect.sparcopen.org/filter/programs/ [https://perma.cc/2EVR-SXG5] (providing a searchable database of information about affordable content activities, including incentives and funding, at North American campuses).

14. H.R. 2107, 116th Cong. § 3(b) (2019); S. 1036, 116th Cong. § 3(b) (2019).

15. *Open Textbooks Pilot Program*, U.S. Dep't of Educ., https://www2.ed.gov/programs/otp/index.html [https://perma.cc/932D-JMXH]; *see also Open Textbook Pilot Grant Program*, SPARC, https://sparcopen.org/our-work/open-textbook-pilot/ [https://perma.cc/MVR7-6HCV].

16. Kristi Jensen & Shane Nackerud, *Introduction to the Evolution of Affordable Content Efforts in the Higher Education Environment*, *in* Evolution of Affordable Content, *supra* note 8, at 2, 5.

17. *Id.*

18. *See infra* pp. 312–23.

under an open licence that permits access, use, repurposing, reuse and redistribution by others with no or limited restrictions."[19]

Lower-Cost Textbook Options

¶9 Options for more affordable textbooks include low-cost print versions of OER texts,[20] publisher-discounted electronic versions of commercial texts,[21] and "inclusive access" models, whereby an institution licenses an electronic text for use in a course and students pay for the lower-cost text through tuition or course fees.[22] Other options include textbook rentals and campus bookstore initiatives to provide used books for purchase.[23]

Library-Owned or -Licensed Electronic Materials

¶10 Academic libraries purchase or license a broad array of electronic resources, including journal content and multiuser e-books, to support their institutions' curricula. When libraries can provide online access, teaching faculty may incorporate this content into their courses at no cost to their students by placing the electronic texts on course reserve, providing links on their course page, or embedding links in the course syllabus.[24]

Course Packs

¶11 Instructors may select material to be included in low-cost print or electronic course packs, which may include both free (public domain or open access) materials and proprietary materials.[25]

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19. Commonwealth of Learning, Guidelines for Open Educational Resources (OER) in Higher Education, at v (2011), https://unesdoc.unesco.org/ark:/48223/pf0000213605; *see also* Jason B. Reed & Benjamin Jahre, *Reviewing the Current State of Library Support for Open Educational Resources*, 44 Collection Mgmt. 232, 233–35 (2019) (noting that organizational and institutional definitions of OER vary, but all recognize the ability to adopt, adapt, and create as key elements).

20. *See, e.g.*, *Need to Order Print Copies for Your Campus?*, openstax, https://openstax.org/bookstore-suppliers [https://perma.cc/A7QH-4ZHH].

21. Shanna Smith Jaggars, Marcos D. Rivera & Briana Akani, College Textbook Affordability: Landscape, Evidence, and Policy Directions 4 (2019), https://www.mhec.org/resources/college-textbook-affordability-landscape-evidence-and-policy-directions [https://perma.cc/6N2W-97PG].

22. *Id.* at 4–5.

23. Jensen & Nackerud, *supra* note 16, at 4.

24. Victoria Raish, Chris Holobar & Kathy Highbaugh, *Beyond OER: Library Licensed E-Books as a Proactive Course Reserves Model and Collections Development Tool*, *in* Evolution of Affordable Content, *supra* note 8, at 59 (explaining that Penn State University has expanded its definition of OER to include library-licensed materials that are accessible to the university community, and observing that "this expanded definition offers a solution to one common criticism of OERs: that there are not enough materials broadly available for higher-level coursework"); *see also* Melissa Eighmy-Brown, Kate McCready & Emily Riha, *Textbook Access and Affordability Through Academic Library Services: A Department Develops Strategies to Meet the Needs of Students*, 14 J. Access Servs. 93, 104 (2017) (describing the University of Minnesota Libraries procedure for identifying, purchasing, and promoting required texts available in electronic format).

25. *See, e.g.*, Eighmy-Brown, McCready & Riha, *supra* note 24, at 107 (describing the University of Minnesota Libraries' support for digital course pack creation).

Course Reserve

¶12 Print course reserves provide access to physical copies of assigned course materials, which students may borrow for a brief time.[26] Materials placed on electronic course reserve might include library-licensed journal articles, chapters, and electronic books. These resources may be accessed by multiple students simultaneously from on campus or remotely.[27]

Interlibrary Loan

¶13 Interlibrary loan (ILL) allows a library to borrow materials, upon request of a student or other library user, from another library for a limited loan period.[28]

¶14 Academic librarians are promoting and supporting these various affordable content models within their institutions.[29] By raising awareness, they assist faculty members in considering their range of options, in addition to traditional textbooks, when selecting course materials. This helps to ensure that faculty members can meet their educational goals while maximizing student savings to the extent possible.

Academic Reading Online

¶15 While cost savings are important, the impact of OER and other affordable content solutions on students' learning must be the paramount consideration.[30] Much of the research on the use of OER—which has been conducted outside of legal education—has centered on OER textbooks and academic outcomes, and has focused on cost savings and potential benefits of increased access to course materials for those who might otherwise forgo purchasing an expensive text.[31] A majority of these studies find the use of OER textbooks has no measurable impact (positive or negative) on student outcomes.[32] Others find that OER provides the opportunity for enhanced academic outcomes, including reduced percentage of D or F grades and a narrowing of the achievement gap.[33] Through a simulation study, however, Grimaldi et al. determine that "past research on OER efficacy is severely limited in

26. Lily Todorinova & Zara T. Wilkinson, *Closing the Loop: Students, Academic Libraries, and Textbook Affordability*, 45 J. Acad. Librarianship 268, 269 (2019).

27. *Id*.

28. Am. Libr. Ass'n, *Interlibrary Loan Code for the United States* (2016), http://www.ala.org/rusa/sites/ala.org.rusa/files/content/ILL%20Code%20with%20Supplement_11-20-17_updated-link.pdf [https://perma.cc/GL86-Y4QP].

29. *See, e.g.*, Lucinda Rush, Leo S. Lo, M'hammed Abdous & Deri Draper, *All Hands on Deck: How One University Pooled Resources to Educate and Advocate for Affordable Course Content*, *in* Evolution of Affordable Content, *supra* note 8, at 93 (describing the efforts of librarians at Old Dominion University Libraries to educate faculty and administrators about affordable content options).

30. *See generally* Marcos D. Rivera et al., *Recasting the Affordable Learning Conversation: Considering Both Cost-Savings and Deeper Learning Opportunities*, *in* Recasting the Narrative; ACRL Proceedings 720 (2019), http://www.ala.org/acrl/sites/ala.org.acrl/files/content/conferences/confsandpreconfs/2019/RecastingtheAffordableLearningConvo.pdf [https://perma.cc/H7BD-VEVG].

31. Phillip J. Grimaldi et al., *Do Open Educational Resources Improve Student Learning? Implications for the Access Hypothesis*, 14(3) PLoS ONE, at 2 (Mar. 6, 2019), https://doi.org/10.1371/journal.pone.0212508 [https://perma.cc/JZK5-6LRV] (dubbing the assumption that increased access to texts will improve academic success the "access hypothesis").

32. *Id*. (providing a literature review).

33. Colvard, Watson & Park, *supra* note 10, at 271.

its functional ability to properly evaluate the impact of OER," and they advise skepticism with respect to studies finding positive effects of OER.[34]

¶16 While it is imperative that all students have access to course materials, those students must engage in effective learning techniques while using those materials to achieve the best learning outcomes.[35] Because many affordable content solutions rely on materials in digital format, faculty members should consider the impact of resource format (print versus digital) on comprehension and learning.[36] In reviewing the literature, Mizrachi et al. find:

> Cognitive studies over the last decade suggest that the presentation format of a text, either print or electronic, affects deep learning strategies, retention, and focus capabilities. In a variety of experiments, print format has been found to offer an advantage for learning and remembering information conveyed in a text. . . . Singer and Alexander present evidence that these print advantages may be most pronounced where the processing and recall of more detailed, granular information is concerned, and when dealing with lengthier texts.[37]

¶17 In their own survey of 10,293 college and university students worldwide, Mizrachi et al. find that a majority of students prefer to read academic texts and course materials in print, perceive greater focus and retention when reading in print, and prefer print for longer texts.[38] The study found the use of tools such as highlighting and annotating are far more prevalent for students using print format,[39] but that students who used such strategies were more likely to prefer the format in which they were comfortable engaging in these activities.[40]

¶18 Looking beyond students' perceptions and preferences, Delgado et al. conducted two meta-analyses seeking to identify whether and in what circumstances format affects reading comprehension. The results of their study "yield a clear picture of screen inferiority, with lower reading comprehension outcomes for digital texts compared to printed texts . . . ."[41] The authors find that the superiority of print format is more significant when reading with a time limit and reading for informational purposes.[42] The results also suggest that comprehension may be compromised when reading digital texts requires scrolling.[43] Delgado et al. determine

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34. Grimaldi et al., *supra* note 31, at 3.

35. *Id.* at 10 (cautioning that "while access is an important step towards improving learning, it is not sufficient").

36. Numerous studies have examined the impact of format on student learning. For meta-analyses of studies, see Virginia Clinton, *Reading from Paper Compared to Screens: A Systematic Review and Meta-Analysis*, 42 J. Res. Reading 288 (2019), and Pablo Delgado et al., *Don't Throw Away Your Printed Books: A Meta-Analysis on the Effects of Reading Media on Reading Comprehension*, 25 Educ. Res. Rev. 23 (2018). For a review of literature, see Diane Mizrachi et al., *Academic Reading Format Preferences and Behaviors Among University Students Worldwide: A Comparative Survey Analysis*, 13(5) PLoS ONE 3–5 (May 30, 2018), https://doi.org/10.1371/journal.pone.0197444 [https://perma.cc/7W68-GCBU].

37. Mizrachi et al., *supra* note 36, at 3 (citing Lauren M. Singer & Patricia A. Alexander, *Reading on Paper and Digitally: What the Past Decades of Empirical Research Reveal*, 87 Rev. Educ. Res. 1007 (2017)).

38. *Id.* at 28.

39. *Id.* at 13 (reporting "83.6% of the students surveyed agreed or strongly agreed that they usually highlight and annotate their printed course readings, but only 24.11% said they did the same with electronic readings").

40. *Id.* at 28.

41. Delgado et al., *supra* note 36, at 34.

42. *Id.*

43. *Id.* at 35 (observing "scrolling may add a cognitive load to the reading task by making spatial orientation to the text more difficult for readers than learning from printed text").

that—contrary to arguments that comprehension outcomes for digital texts will improve as readers become more experienced with technology—this "screen inferiority" has increased over time, providing "evidence that people develop a shallower processing style in the digital environment."[44]

¶19 Students who wish to read course materials in print format obviously have the option to print their assigned digital readings. While this involves "more effort, time and expense than reading online," Mizrachi et al. found that 68.85 percent of students surveyed preferred to do so.[45] In light of the cost involved, the authors identify this as a potential equity issue, placing students who learn more effectively with print materials at an economic disadvantage, and they encourage institutions to consider their policies regarding printing charges.[46]

¶20 While Mizrachi et al. and Delgado et al. recognize that the use of digital texts will continue to grow, they advise educators to proceed with caution. Mizrachi et al. note, "[h]igher education administrators and learning designers need to know who these readers are, the extent to which they use or prefer certain academic content formats, and the behavioral and learning implications of these preferences."[47] Delgado et al. acknowledge that, although reading print text results in superior comprehension outcomes, students will increasingly be required to read digital texts. The authors assert, therefore, that work must be done to help students develop online reading skills and to help educators develop effective approaches to incorporating electronic resources into their courses.[48]

Reading and Learning in Law Schools

¶21 As students are increasingly exposed to affordable content in their undergraduate institutions, they may begin to expect such course content in law school. Law faculty and law schools seeking to make legal education more affordable and accessible should consider adoption of affordable content models, while being mindful of potential impacts on learning outcomes. This section examines the critical reading skills required for successful learning in legal education.

¶22 "A good deal of time in law school is spent reading—and law school reading is very different from other reading."[49] During the 2017–2018 academic year, full-time law students spent an average of 18.6 hours per week reading for class.[50] While

44. *Id*. at 34; *see also* Kep Kee Loh & Ryota Kanai, *How Has the Internet Reshaped Human Cognition?*, 22 Neuroscientist 506, 516 (2016) ("In terms of information processing, we are shifting toward a shallow mode of learning characterized by quick scanning, reduced contemplation, and memory consolidation. This can be attributed to the increased presence of hypertext environments that reduces the cognitive resources required for deep processing.").

45. Mizrachi et al., *supra* note 36, at 14.

46. *Id*. at 28.

47. *Id*. at 2.

48. Delgado et al., *supra* note 36, at 33–34.

49. Michael Hunter Schwartz & Paula J. Manning, Expert Learning for Law Students 64 (3d ed. 2018).

50. Jakki Petzold, *How Much Time Do Law Students Spend Preparing for Class?*, LSSSE Insights Blog (Jan. 16, 2019), http://lssse.indiana.edu/blog/how-much-time-do-law-students-spend-preparing-for-class/ [https://perma.cc/42TE-8BUX] (summarizing data regarding class preparation collected in the 2018 Law School Survey of Student Engagement (LSSSE)); *see also* Catherine J. Cameron, *In the Eyes of the Law Student: Determining Reading Patterns with Eye-Tracking Technology*, 45 Rutgers L. Rec. 39, 39–40 and accompanying notes (2018) (citing similar figures from the 2006 LSSSE Survey of Student Engagement).

the time spent reading diminished as students continued their legal education—1L students read an average of 21.7 hours per week; 2L students read an average of 18.3 hours per week; and 3L students read an average of 15.1 hours per week—a significant amount of time is devoted to reading throughout students' law school careers.[51]

¶23 The nature of law school reading requires the analysis and interpretation of judicial opinions, statutes, regulations, and dense secondary materials.[52] Students must read with deep concentration, while reviewing, interacting with, and questioning the text. Steel et al. explain the complexity of the legal reading process:

> Reading law is itself a form of legal reasoning. Students ask legally relevant questions and identify legal issues, search for coherence in fact patterns, think linearly, perceive ambiguity, appropriately engage in deductive and inductive reasoning, seek all sides of an argument, and pay attention to detail while recognizing which issues are more important than others.[53]

¶24 Students need to place what they are reading in the context of materials they have read previously, as well as determine how it will affect current and future legal issues.[54] New law students have little experience with this type of reading, and most initially lack the skills necessary for critical legal reading.[55] Recognizing the importance of these skills to learning outcomes and law school academic success, a growing body of literature includes empirical studies of students' legal reading strategies[56] and analyses of the nature of these critical legal reading skills.[57]

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51. Petzold, *supra* note 50; *see also* Cameron, *supra* note 50, at 58–59 (finding that more experienced legal readers read cases faster than inexperienced legal readers because those with greater experience focus more specifically on sections of the opinion that are critical to comprehension). In addition to the fact that law students increase their efficiency in reading legal materials as they gain experience, the diminishing amount of time spent on reading may be explained in part by how reading required for some upper-division courses, such as clinics and externships, differs from that for doctrinal courses.

52. For a discussion of some of the differences in reading cases, statutes, private legal documents, and other legal writing, see Alex Steel et al., *Critical Legal Reading: The Elements, Strategies and Dispositions Needed to Master This Essential Skill*, 26 Legal Educ. Rev. 187, 199–203 (2016–2017).

53. *Id.* at 193.

54. Patricia Grande Montana, *Bridging the Reading Gap in the Law School Classroom*, 45 Capital U. L. Rev. 433, 445 (2017).

55. *Id*. at 433 (observing that many law students, particularly first-year students, struggle in law school because they have poor reading skills, including the inability "to read text closely," and inexperience reading complex writing that requires "deep thinking and reflection").

56. *See, e.g.*, Cameron, *supra* note 50 (examining the case-reading patterns of 14 prelaw students and 20 law students); Leah M. Christensen, *Legal Reading and Success in Law School: An Empirical Study*, 30 Seattle L. Rev. 603 (2007) [hereinafter Christensen (2007)] (examining the case-reading strategies of 24 law students); Leah M. Christensen, *The Paradox of Legal Expertise: A Study of Experts and Novices Reading the Law*, 2008 BYU Educ. & L.J. 53 (examining the case-reading strategies of 10 expert legal readers and 10 novice legal readers); Dorothy H. Deegan, *Exploring Individual Differences Among Novices Reading in a Specific Domain: The Case of Law*, 30 Reading Res. Q. 154 (1995) (examining the strategies employed by 20 law students reading a law review article); Mary A. Lundeberg, *Metacognitive Aspects of Reading Comprehension: Studying Understanding in Legal Case Analysis*, 22 Reading Res. Q. 407 (1987) (examining the case-reading strategies of 10 expert and 10 novice legal readers); Laurel Currie Oates, *Beating the Odds: Reading Strategies of Law Students Admitted Through Alternative Admissions Programs*, 83 Iowa L. Rev. 139 (1997) (examining the case-reading strategies of one expert and four novice legal readers); James F. Stratman, *When Law Students Read Cases: Exploring Relations Between Professional Legal Reasoning Roles and Problem Detection*, 34 Discourse Processes 57 (2002) (exploring the case-reading strategies of 56 law students).

57. *See, e.g.*, Peter Dewitz, *Reading Law: Three Suggestions for Legal Education*, 27 U. Tol. L. Rev. 657 (1996); Steel et al., *supra* note 52.

¶25 Relying and expanding on works published by Deegan and by Dewitz in the 1990s, Steel et al. outline three sets of skills required in critical legal reading:[58] (1) mechanical skills, involving decoding and comprehension; (2) strategic skills, involving the ability to use effective reading techniques; and (3) critical skills, involving the ability to both examine the text within a broader context and monitor one's own comprehension while reading.[59] A brief summary of these skill sets follows.[60]

¶26 Mechanical skills required for critical legal reading involve decoding and comprehension. Decoding requires the ability to recognize words and the understanding of punctuation and grammar. Legal terminology is complex, and the meaning of legal documents often hinges on an analysis of precise grammar.[61] Both of these characteristics make decoding more difficult in legal reading than it may be in other disciplines.

¶27 "Comprehension is the most obviously challenging element of reading for law students."[62] Steel et al. define four main areas of comprehension:

- "Terminology and Syntax": While decoding involves the recognition of words, comprehension involves understanding what those words mean and the concepts they represent.[63] Law school readings will contain many words that are new to students, including perhaps otherwise ordinary words they have not seen or heard prior to their legal studies, archaic legal words, and terms of art.[64] Words also may have different meanings in the legal context than they have had when previously encountered.[65] Additionally, legal composition often incudes complex syntax that must be studied and parsed carefully to determine meaning.[66]
- "Abstraction and Performativity of Legal Writing": Reading legal opinions, in particular, requires students to think in abstract terms and place actions within legally relevant categories to which the law can be applied.[67] With respect to the performative nature of legal language, "law students must learn to distinguish between words in legal documents that merely describe or justify versus those that create legal relationships or results."[68]
- "Domain Knowledge": One must have sufficient background knowledge and expertise in an area to comprehend new information presented and to

58. Steel et al., *supra* note 52, at 190 (citing Deegan, *supra* note 56, and Dewitz, *supra* note 57).
59. *Id*. at 192.
60. This summary provides a high-level overview of the critical legal reading skills identified by Steel et al., *id*., and is intended to illustrate the complexity of critical legal reading. For an in-depth examination of critical legal reading, see *id*. and the sources cited therein. For examples of students engaging in these skills, see the sources cited *supra* note 56.
61. Steel et al., *supra* note 52, at 192; *see also* Peter Dewitz, *Legal Education: A Problem of Learning from Text*, 23 N.Y.U. Rev. L. & Soc. Change 225, 228 (1997) (explaining that "grammatical knowledge helps the reader understand the relationship among concepts within a sentence").
62. Steel et al., *supra* note 52, at 193.
63. *Id*.
64. *Id*.
65. *Id*.
66. *Id*. at 194.
67. *Id*. at 194–95.
68. *Id*. at 195.

make connections within those areas of knowledge.[69]

- "Text Structure": Expert legal readers have an understanding of the structure of legal documents and approach the reading of these materials using this knowledge. For example, "the expert reader will first locate the facts of the case, then the decision, and finally read to understand the rationale behind the reasoning."[70]

¶28 In addition to mechanical skills, critical legal readers must employ strategic skills. "Readers act strategically when they set a purpose for reading, search for important information, make inferences, summarize, and monitor the developing meaning."[71] The strategies employed by expert readers fall into three categories: default strategies, problem formation strategies, and rhetorical strategies.[72]

- Default strategies are the first strategies readers use. They are generally linear in nature and include summarizing what is being read—mentally, by annotating the text, and by notetaking—and marking and highlighting important material.[73] The use of default strategies is merely a first step, and overreliance on such strategies without further engaging in problem formation strategies and rhetorical strategies will not result in successful critical legal reading.[74]
- Problem formation strategies involve interacting with the text to explore the author's intentions and determine meaning in the text.[75] "Readers ask themselves questions, make predictions, and hypothesize about the developing meaning" as they work through the text.[76] Deegan found that problem formation strategies proved to be the most effective of the strategic skills for the students in her study.[77]
- Rhetorical strategies move the reader outside of the text and involve evaluating the concepts presented within a broader context.[78] "In reading law we might try to fit the case in a historical setting, question the decision or the rationale, and comment on the clarity of the judge's writing."[79] Steel et al. identify the use of rhetorical strategies as the "hallmark of critical legal reading."[80]

¶29 Critical skills involve a questioning of the text, considering it within the broader societal context and within the reader's own experiences.[81] Critical skills also include self-critical reading, or metacognition—whereby the reader monitors his or her use of strategies and level of comprehension.[82]

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69. *Id*.
70. *Id*. at 196 (quoting Dewitz, *supra* note 57, at 658).
71. Dewitz, *supra* note 57, at 659.
72. Steel et al., *supra* note 52, at 197–98.
73. *Id*. at 197.
74. *Id*. at 208–09; *see also* Christensen (2007), *supra* note 56, at 644.
75. Steel et al., *supra* note 52, at 198.
76. *Id*. (quoting Dewitz, *supra* note 57, at 659).
77. Deegan, *supra* note 56, at 165.
78. Steel et al., *supra* note 52, at 198.
79. *Id*. (quoting Dewitz, *supra* note 57, at 660).
80. *Id*. at 209.
81. *Id*. at 205.
82. Steel et al., *supra* note 52, at 205–06.

¶30 Law students' learning outcomes depend on their critical legal reading skills.[83] In evaluating options for course content (both traditional and affordable), any impact on the use of such skills should be considered.[84] With respect to digital reading, researchers have found screen inferiority in terms of comprehension, particularly when reading long and/or complex text. The use of default strategies, such as annotating and highlighting, has been found to be much less prevalent in online reading; these strategies cannot be utilized in reserve or interlibrary loan print texts unless they are copied.[85] Problem formation strategies, rhetorical strategies, and critical skills require movement back and forth through text as the reader interrogates, evaluates, and monitors understanding. The scrolling required to engage in such activities online may be more burdensome than when reading in print. Law faculty should be aware of the potential challenges posed by reading complex legal texts online and cognizant of the difficulties faced by students relying on shared copies of print texts.

Affordable Content Options for Law Schools

¶31 Legal education differs from undergraduate studies, particularly in its use of the casebook method and the nature of the skills required for critical legal reading. Today's law students, however, come to law school from undergraduate institutions where they have been exposed in varying degrees to affordable course content, and they may increasingly expect to find the same models in law school. In selecting course content, law faculty should consider costs to students while ensuring that they are able to meet pedagogical objectives. Fortunately, there are multiple options for legal educators to incorporate more affordable content in courses.

Casebooks

¶32 Traditional casebooks are by far the predominant texts used in legal education.[86] The modern casebook includes edited cases, statutory and administrative material, commentary, questions, and excerpts from legal and interdisciplinary

83. *See, e.g.*, Christensen (2007), *supra* note 56, at 646 (concluding that "more successful law students read judicial opinions differently than less successful students, and that there is a correlation between reading strategies and law school success").

84. *See, e.g.*, Steel et al., *supra* note 52, at 211–12 (discussing considerations law professors must have with respect to the impact of technology on critical reading skills).

85. *See infra* pp. 320–23.

86. Stephen M. Johnson, *The Course Source: The Casebook Evolved*, 44 Capital U. L. Rev. 591, 617 (2016) (noting that "at the turn of this century, almost 90% of faculty members continued to rely on casebooks as their primary course materials"); Joseph Scott Miller & Lydia Pallas Loren, *The Idea of the Casebook: Pedagogy, Prestige, and Trusty Platforms*, 11 Wash. J.L. Tech. & Arts 31, 38–39 (2015) ("[The casebook] dominates doctrinal courses, and doctrinal courses predominate in the law school curriculum."). In addition to the casebook, students may be required to purchase a casebook supplement, statutory supplement, and additional material, such as a case file, study aid, or narrative text. While this section focuses on casebooks, the information provided applies to statutory supplements as well. Such supplements are ideal for publication as open texts as they comprise material in the public domain. *See generally* C. Steven Bradford & Mark Hautzinger, *Digital Statutory Supplements for Legal Education: A Cheaper, Better Way*, 59 J. Legal Educ. 515 (2010); *see also* James Boyle & Jennifer Jenkins, *Open Legal Educational Materials: The Frequently Asked Questions*, 11 Wash. J.L. Tech. & Arts 13, 14–16 (2015).

secondary sources.[87] Many of these materials are open or public domain resources, while others are proprietary materials requiring copyright clearance for inclusion in the text.[88]

¶33 Commercial legal publishers are experimenting with casebook publishing models, all of which remain quite expensive for students. These models include print and digital packages with supplementary materials and quizzes, print with digital access, traditional print, and digital-only versions. West Academic Publishing, for example, offers the 11th edition of Rotunda's *Modern Constitutional Law, Cases and Notes* in three "formats." The CaseBook Plus option, available for $275.00, includes a print book, lifetime digital access to a downloadable digital version of the book, and a 12-month online subscription to the "Learning Library," comprising quizzes, outline assistance, and access to relevant study aids.[89] The eBook and Learning Library, available for $202.50, includes lifetime digital access to a downloadable digital version of the book and a 12-month online subscription to the "Learning Library."[90] The hardbound option, available for $250.00, includes the print casebook only.[91] Students who purchase a new or used print casebook from a third-party seller may purchase the 12-month "Learning Library" subscription for $35.00.[92] Other commercial casebook publishers offer similar models.[93] The lowest cost option, which is still expensive, relies on digital-only content, introducing the problem of screen inferiority with respect to critical legal reading and disadvantaging students who may learn more effectively using print resources. When purchasing solely the electronic version, students also lose the resale value of the book.[94] Additionally, if the course involves an open-book examination using

87. Johnson, *supra* note 86, at 620.

88. *Id*. at 645.

89. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th – CasebookPlus*, West Acad. Store, http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th___CasebookPlus_9781634595179.html [https://perma.cc/2GMG-9FNZ].

90. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th – eBook and Learning Library*, West Acad. Store, http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th_eBook_and_Learning_9781634596558.html [https://perma.cc/RR4V-W9U2].

91. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th,* West Acad. Store, http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th_9781628102222.html [https://perma.cc/BNE6-T6UG].

92. *Learning Library to Accompany Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th*, West Acad. Store, http://store.westacademic.com/Learning_Library_to_Accompany_Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unab_9781634597906.html [https://perma.cc/R9YP-6KMR].

93. *See, e.g.*, Casebook Connect, https://www.casebookconnect.com/ [https://perma.cc/UQ7X-D72F] (describing Wolters Kluwer Legal Education's casebook purchase model whereby students purchasing a new "Connected Casebook" receive lifetime access to CasebookConnect.com featuring the digital casebook, quizzes, outlining tools, and a topical news feed). Students purchasing a new Connected Casebook may choose between four purchase models with differing costs: hardcover, digital, looseleaf, or rental. *See, e.g.*, *American Constitutional Law: Powers and Liberties, Sixth Edition - Calvin R. Massey, Brannon P. Denning*, Wolters Kluwer Legal Educ., https://www.wklegaledu.com/Massey-ConLaw6 [https://perma.cc/67F5-J5QB] (use drop-down menu to view available format options: $294.00 hardcover; $176.00 digital; $262.00 loose-leaf; $221.00 rental (hardcover)).

94. Jeremy J. McCabe, *Following the Herd: Bringing Electronic Casebooks into the Law School*, 34 Legal Reference Servs. Q. 196, 205 (2015); Eugene Volokh, *The Future of Books Related to the Law?*, 108 Mich. L. Rev. 823, 830 (2010).

exam software that prevents access to materials other than the exam, students will not have access to the electronic text while taking the test.[95]

¶34 Commercial legal publishers also have introduced inclusive access options. Under this model, a law school licenses a publisher's electronic casebooks for use in courses, and students are automatically billed for access to the lower-cost texts through tuition or course fees. The law school negotiates the terms of the license, including costs, with the publisher,[96] but the Department of Education requires institutions using an inclusive access program to provide students access at below-market rates and to allow students to opt out of the program if the student wishes to obtain the text through some other means.[97] West Academic offers the West Academic Casebook Collection, which provides students with access to downloadable electronic versions of required West Academic and Foundation Press texts adopted for their courses along with the option to purchase low-cost spiral-bound print versions of the books.[98] West Academic's 1L Casebook Collection includes access for all first-year students, and the Full School Casebook Collection includes access for all enrolled students.[99] Subscribers also gain law school-wide access to a student self-assessment tool, West Academic Assessment.[100] LexisNexis offers the Carolina Academic Press Casebook Package on its LexisNexis Digital Library platform, where selected texts may be licensed for simultaneous use.[101]

¶35 While inclusive access programs may result in some cost savings for students—at least for those who would have otherwise purchased the assigned text in new condition at the publisher's price—there are concerns about this model. As noted earlier, reliance on an electronic version of a casebook raises the issues of screen inferiority for critical legal reading, loss of resale value, and possible lack of access to the text during open-book exams.[102] Recent lawsuits have challenged inclusive access programs as anticompetitive practices, which create a monopoly for textbook publishers with the ultimate goal of increasing prices.[103] With respect to

95. *See* Sam Brunson, *Ebooks and ExamSoft*, Surly Subgroup, May 3, 2017, https://surlysubgroup.com/2017/05/03/ebooks-and-examsoft/ [https://perma.cc/BM4Z-4EBS] (raising the issue of ExamSoft limiting access to electronic versions of casebooks).

96. Many details, including subscription costs, of the programs are not available on the publishers' websites, which direct those with interest in the programs to contact sales representatives.

97. *See* 34 C.F.R. §§ 668.164(c)(2), (m)(3) (2019).

98. *West Academic Casebook Collection*, West Acad. Digital Collections, http://www.westacademicdigitalcollections.com/. A student preferring print would pay for access to the electronic materials through tuition or course fees and pay an additional cost (albeit a "low cost") for the print.

99. *Id*.

100. *Id*.

101. *LexisNexis Law School Publishing*, LexisNexis, https://store.lexisnexis.com/site/law-school-publishing [https://perma.cc/L5XV-32EJ].

102. *See supra* pp. 313 and this page.

103. *See, e.g.*, Barabas v. Barnes & Noble Coll. Booksellers, No. 3:20-cv-02442 (D.N.J. filed Mar. 5, 2020) (proposed class action on behalf of students alleging publishers and campus bookstores have conspired to monopolize the textbook market in inclusive access courses in order to raise prices); Campus Book Co. v. McGraw-Hill Global Educ. Holdings, No. 1:20-cv-00102 (D. Del. filed Jan. 22, 2020) (proposed antitrust class action on behalf of independent businesses that sell or rent textbooks against publishers and campus bookstores); Va. Pirate Corp. v. Trident Tech. Coll., No. 2019-CP-10-1951 (S.C. Ct. C.P. filed Apr. 16, 2019) (suit filed by owner of used textbook store against college claiming unfair trade practices with respect to inclusive access program); *see also* Charles Toutant, *Antitrust Lawsuits Target Electronic Distribution of College Textbooks*, N.J. L.J. (Mar. 6, 2020), https://www.law

costs, the extent of student savings is neither uniform nor clear.[104] In addition to cost transparency, the opt-out requirement may render the programs underinclusive in some cases, as students opting out may not have access to supplemental materials included in the digital package.[105] Students also may not understand the process for opting out.[106] Additionally, the programs raise concerns regarding faculty members' ability to select their course materials. If an inclusive access program requires adoption of a text for all sections of a course, it may be difficult for law professors to arrive at a consensus on a casebook.[107] Inclusive access programs also may raise academic freedom issues if a school's administration becomes involved in textbook selection or exerts pressure on faculty members to adopt inclusive access texts.[108]

¶36 In addition to offering various casebook publishing models for student purchase and inclusive access models for institutional licenses, legal casebook publishers offer options for professors who do not wish to use all of an existing casebook. The Wolters Kluwer Custom Program[109] allows faculty members teaching courses with at least 50 enrolled students to order a print or electronic casebook tailored to meet their specific teaching needs. The program enables the professor to

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.com/njlawjournal/2020/03/06/antitrust-lawsuits-target-electronic-distribution-of-college-textbooks [https://perma.cc/3GBD-7PC9].

104. Cheryl Cuillier, *Inclusive Access: Who, What, When, Where, How, and Why?*, *in* Evolution of Affordable Content, *supra* note 8, at 186, 195 (noting lack of transparency in inclusive access pricing, which depends on the negotiating skills of the institution, and citing disparities in discounts available from some publishers); Jaggars, Rivera & Akani, *supra* note 21, at 5 (noting that "institutions . . . which are savvier, larger, and more resource-rich are likely to create better packages for their students"); Kaitlyn Vitez, Automatic Textbooks Billing: An Offer Students Can't Refuse? 8–9 (2020), https://uspirg.org/sites/pirg/files/reports/Automatic-Textbook-Billing/USPIRG_Textbook-Automatic-Billing_Feb2020.pdf [https://perma.cc/Y974-9Q2C] (finding a lack of transparency with respect to student savings in inclusive access contracts negotiated by 31 colleges); *see also* Complaint at 2, Barabas v. Barnes & Noble Coll. Booksellers, No. 3:20-cv-02442 (D.N.J. filed Mar. 5, 2020) (asserting that inclusive access programs increase costs for students while limiting their options).

105. Cuillier, *supra* note 104, at 193; s*ee also* Complaint at 4, Barabas v. Barnes & Noble Coll. Booksellers, No. 3:20-cv-02442 (D.N.J. filed Mar. 5, 2020) (asserting that a student who opts out of an inclusive access program "would be at a massive disadvantage due to not being able to access those required course materials," which may include "reading assignments, homework problems, and quizzes").

106. Cuillier, *supra* note 104, at 193; Vitez, *supra* note 104, at 14.

107. For example, each of the four sections of the first-year civil procedure course offered at the University of Minnesota Law School in fall 2019 required a different casebook and supplementary material. Data on file with author. Agreeing on a single casebook also would require some faculty members to switch texts, which Boyle and Jenkins characterize as an "incredibly disruptive" process comparable to moving to a new home or country. Boyle & Jenkins, *supra* note 86, at 19.

108. Lindsey McKenzie, *A Looming Challenge for OER?*, Inside Higher Ed, Mar. 10, 2020, https://www.insidehighered.com/news/2020/03/10/survey-suggests-challenges-open-textbooks-ahead [https://perma.cc/4KEM-CUSL] (noting that a survey of faculty at two- and four-year institutions found: "Administrators are significantly involved in decisions to choose inclusive-access programs . . . . While 41 percent of faculty reported that they alone selected inclusive access materials, 44 percent of decisions were made by administrators only. Another 15 percent of the decisions were made by administrators and faculty."); *see also* Julia E. Seaman & Jeff Seaman, Inflection Point: Educational Resources in U.S. Higher Education, 2019 (2020), http://www.onlinelearningsurvey.com/reports/2019inflectionpoint.pdf [https://perma.cc/R8JD-9BP5] (reporting the results of a survey regarding course materials selection and distribution practices of 4339 faculty and 1431 chairpersons from two-year and four-year colleges).

109. *Custom Publishing*, Wolters Kluwer Legal Educ., https://www.wklegaledu.com/programs/custom-publishing [https://perma.cc/45BF-QSA3].

"combine content from multiple sources, including sections from any of Wolters Kluwer's casebooks, textbooks, supplements, or study aids," as well as their "own supplemental materials, key cases, or additional coverage on certain topics."[110] This allows the faculty member to organize content in the order he or she chooses, remove sections from a published casebook, and/or add supplemental materials to enhance the casebook's treatment of subjects or to cover new topics.[111] Although other legal publishers do not offer such custom printing services, faculty members interested in using part of a casebook published by a publisher other than Wolters Kluwer may seek reprint permission to use a portion of the casebook.[112]

¶37 While commercially published casebooks in either print or electronic format remain quite expensive, there are a growing number of options for law faculty members to adopt, adapt, or create freely available or low-cost digital casebooks.[113] While such casebooks give the faculty member greater control over the materials used in his or her course,[114] there are barriers impeding faculty members from engaging in such publication. Not only is the creation or modification, as well as updating, of a text very time-consuming,[115] but many law schools do not equate casebook publication with serious scholarship in the context of promotion and tenure evaluations.[116] The issue regarding status of casebook publication may be compounded by the fact that free or low-cost casebooks are published and accessed on nontraditional publishing platforms.[117] If faculty members do choose to create an electronic textbook, they also must consider whether they are comfortable making their work available as OER and permitting others to use and modify freely with attribution; if not comfortable granting these rights, they may want to place

110. *Id*. Wolters Kluwer's website does not address copyright clearance procedures for the inclusion of proprietary supplemental materials not published by Wolters Kluwer.

111. *Id*.

112. *See* "Course Packs," *infra* p. 320.

113. In recent years, much has been written about the promise and potential of the electronic casebook. *See, e.g.*, Matthew T. Bodie, *Collaboration and Community: The Labor Law Group and the Future of Labor and Employment Casebooks*, 58 St. Louis U. L.J. 61 (2013); Matthew Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 57 J. Legal Educ. 10 (2007) [hereinafter Bodie (2007)]; Boyle & Jenkins, *supra* note 86; Ronald K. L. Collins & David M. Skover, *Paratexts as Praxis*, 37 Neohelicon 33 (2010); Stephen E. Henderson & Joseph Thai, *The Future of Law School: Crowdsourced Course Books*, 51 Alta. L. Rev. 907 (2014); Johnson, *supra* note 86; Legal Education in the Digital Age (Edward L. Rubin ed., 2012) (including multiple chapters on electronic casebooks and course books); Lydia Pallas Loren, *The Viability of the $30 Casebook: Intellectual Property, Voluntary Payment, Open Distribution, and Author Incentives*, 22 J. Intell. Prop. L. 71 (2014); McCabe, *supra* note 94; Miller & Loren, *supra* note 86; Ben Trachtenberg, *Choosing a Criminal Procedure Casebook: On Lesser Evils and Free Books*, 60 St. Louis U. L.J. 543 (2016); Volokh, *supra* note 94.

114. *See* Bodie (2007), *supra* note 113, at 14 (observing that other than a casebook authored by the professor, no traditional casebook meets a professor's pedagogical needs completely).

115. *Id*. at 14–15 (addressing the time involved in creating or supplementing a casebook generally). Some scholars have suggested a crowdsourcing model for open access casebooks, with numerous faculty members contributing sections of a book made available for any law professor to adopt and modify the sections to suit their course objectives. Johnson, *supra* note 86, at 628 (citing Bodie (2007), *supra* note 113, at 11, and Henderson & Thai, *supra* note 113, at 919). Such a model would reduce the burden of creating an entire casebook individually. Harvard Law School's H2O provides a platform for such collaboration. *See infra* p. 318.

116. Johnson, *supra* note 86, at 648; *see also* Bodie (2007), *supra* note 113, at 13 ("For the most part . . . junior academics are warned away from taking on casebooks, as the work is not credited for tenure in the way that law review scholarship is.").

117. Johnson, *supra* note 86, at 648; *see also* Miller & Loren, *supra* note 86, at 42–44 (discussing law professors' perceptions of prestige with respect to traditional publishers).

restrictions on such use.[118] Copyright restrictions may limit what may be included in the casebook as well.[119] Adopting an open casebook in whole also may be challenging if a professor is switching from a casebook currently assigned to the new text.[120] Additionally, faculty members relying solely on digital materials may need to invest more time in helping students develop critical legal reading skills in the online environment.[121] To address the issue of screen inferiority, however, many platforms provide an option allowing students to print or purchase a low-cost print version of the text in addition to the free or low-cost online access.

¶38 For legal educators, there are multiple platforms providing access to free or low-cost digital casebooks, as well as support for adopting, modifying, and publishing such texts:

- The Center for Computer-Assisted Legal Instruction (CALI) publishes peer-reviewed open access texts for legal education through its eLangdell Press.[122] Faculty members can adopt and edit the Creative Commons[123] licensed casebooks at no cost, and there is no charge for students' use. Proposals for new casebooks are reviewed, and manuscripts are subject to a peer-review process.[124] Authors of individual chapters are compensated $500 per chapter, and authors of full books negotiate compensation.[125] Copyright in the work is assigned to CALI, which distributes the text with a Creative Commons license.[126] Authors incorporating third-party proprietary materials are responsible for obtaining copyright clearance and permission to distribute with a Creative Commons license.[127] Students may print the content, and copies of some texts may be purchased in paperback or hard cover for the cost of printing services.[128]

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118. Lindsay McKenzie, *Free Textbooks for Law Students*, Inside Higher Ed, Jan. 3, 2020, https://www.insidehighered.com/news/2020/01/03/free-law-textbooks-raise-questions-about-oer [https://perma.cc/NW9L-VFKV] (citing two law professor authors of an open text who permit derivative works only with prior permission because they "didn't want to risk their reputation by having their names associated with content that other people had created, particularly if these modifications introduced errors or espoused views on the law that they don't support").

119. Johnson, *supra* note 86, at 645.

120. Boyle & Jenkins, *supra* note 86, at 19 (addressing the difficulty involved in simply switching to a new casebook). Boyle and Jenkins go on to distinguish the burden of changing from one traditional casebook to another from the adoption of part of an online casebook, which need not be an "all-or-nothing decision." *Id.*

121. Steel et al., *supra* note 52, at 211–12.

122. *Become an Author*, CALI eLangdell Press, https://www.cali.org/elangdell/become-author [https://perma.cc/R6ZK-B959].

123. *Frequently Asked Questions*, Creative Commons, https://creativecommons.org/faq/#what-is-creative-commons-and-what-do-you-do [https://perma.cc/XJ4Z-MWTQ] ("All of our licenses require that users provide attribution (BY) to the creator when the material is used and shared. Some licensors choose the BY license, which requires attribution to the creator as the only condition to reuse of the material. The other five licenses combine BY with one or more of three additional license elements: NonCommercial (NC), which prohibits commercial use of the material; NoDerivatives (ND), which prohibits the sharing of adaptations of the material; and ShareAlike (SA), which requires adaptations of the material be released under the same license.").

124. *Become an Author*, *supra* note 122.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Printing eLangdell Press Books*, CALI eLangdell Press, https://www.cali.org/elangdell/print-books [https://perma.cc/WZ7U-575P].

- H2O, originally developed by the Berkman Center for Internet and Society and currently developed and maintained by the Library Innovation Lab at the Harvard Law School Library, provides a platform for the creation, sharing, and remixing of digital casebooks and course materials under a Creative Commons license.[129] There is no charge for faculty members to use the service, and there is no compensation provided. Students may access the online casebooks at no cost. H2O is integrated with the Harvard Law School Library Innovation Lab's CaseLaw Access Project, which gives authors access to official, reported cases from all U.S. jurisdictions through June 2018.[130] Authors can seamlessly add those cases to their casebooks, along with original text and links to external online sources.[131] H2O provides substantial guidance in the form of tutorials and videos for faculty using the platform, and offers training and assistance to law librarians who are seeking to support professors in the use of the platform.[132] Casebooks may be exported and printed as Word files.[133]
- LawCarta hosts a catalog of digital freely available or low-cost casebooks.[134] There is no cost for faculty members to use the platform to publish, and they may choose whether to make the text freely available or set a price for the text and earn royalties.[135] Authors have the options to allow or restrict the ability to download, order printed copies, and create derivatives.[136]
- Semaphore Press, founded by two law professors, publishes affordable, proprietary electronic legal casebooks authored by law faculty.[137] Students are asked—though not required—to pay a suggested price of $1.00 for each one-hour class session in which the materials are used, and the suggested price for a casebook is $30.[138] The press reviews proposals, uses copy editors, and engages authors in review of editorial changes.[139] Authors retain copyright and are paid royalties under a five-year publishing agreement that may be renewed or, at the option of either party, not renewed at the

129. H2O, https://opencasebook.org/pages/about/ [https://perma.cc/D3KZ-E4AJ]; CaseLaw Access Project, https://case.law/ [https://perma.cc/95HP-VLPM].

130. *Quick Basics*, H2O, https://about.opencasebook.org/ [https://perma.cc/C2WG-U6Q7]. The CaseLaw Access Project currently includes cases published through June 2018 and "may or may not include additional volumes in the future." *About*, CaseLaw Access Project, https://case.law/about/ [https://perma.cc/G34M-8E3Q].

131. *Quick Basics, supra* note 130. By relying on links to external sources, authors need not obtain permissions, as any proprietary content will remain behind a firewall and may be accessed only by authorized users.

132. *Id.*

133. *Printing Casebooks*, H2O, https://about.opencasebook.org/printing-casebooks/ [https://perma.cc/2XRJ-XTTM].

134. LawCarta, https://lawcarta.com/ [https://perma.cc/2MUK-BV7N].

135. *Authors*, LawCarta, https://lawcarta.com/features/#authors [https://perma.cc/39Q9-UL37].

136. *Id.*

137. *Professors*, Semaphore Press, https://semaphorepress.com/professors.html [https://perma.cc/7NLM-5V8P]; *see also* Loren, *supra* note 113, at 83–98 (providing an overview of the Semaphore Press model).

138. *Professors*, *supra* note 137. For the rationale for suggesting, rather than requiring, payment, see *id.* ("We hope that most students will pay, because they recognize the better value proposition that Semaphore Press offers compared to traditional hardbound-casebook publishers.").

139. *Id.*

end of the contract term.[140] All downloaded copies may be printed, and selected titles are available as paperback print-on-demand books.[141]

- Law faculty members also have used other options to host open electronic casebooks, including SSRN,[142] personal websites,[143] organizational websites,[144] and academic websites.[145] Additional options include university publishing services[146] and licensed book production software.[147]

¶39 While there certainly are challenges with respect to the creation or adaptation of online casebooks, these electronic texts hold great promise for introducing affordable content into the law school curriculum. Students have free or low-cost access to the online text. Those who prefer to access their course materials in print may print the book or, in many cases, purchase a low-cost print version.[148] A faculty member who prefers to have students read print could require students to obtain a printed copy.[149]

Library-Owned or -Licensed Electronic Materials

¶40 Academic libraries purchase or license a broad array of electronic resources, including journal content and multiuser e-books, to support their institutions' curricula. Commercially published textbooks and many scholarly monographs are not available for libraries to purchase with multiuser licenses.[150] When, however, law libraries are permitted to provide online access to course materials, teaching faculty may incorporate this content into their courses at no cost to their students by including links to material in electronic course packs, placing the electronic texts on course reserve, providing links on their course page, or embedding links in the course syllabus.[151] Some shorter and less dense materials may be appropriate for online reading, and students can be encouraged to print lengthier or more complex readings.

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140. *Id*.

141. *Id*.

142. *See, e.g.*, Brian L. Frye & Elizabeth Schiller, Professional Responsibility: An Open-Source Casebook (Apr. 8, 2019), https://ssrn.com/abstract=3367936 [https://perma.cc/XYW5-2MTM].

143. *See, e.g.*, James Grimmelmann, Patterns of Information Law: Intellectual Property Done Right (vers. 1.1, Aug. 2017), https://james.grimmelmann.net/ipbook/ [https://perma.cc/3UXC-HC23].

144. *See, e.g.*, Stephen Clowney, James Grimmelmann, Michael Grynberg, Jeremy Sheff & Rebecca Tushnet, Open Source Property: A Free Casebook, https://www.greatlakeslaw.org/blog/2018/01/open-source-property-a-free-casebook.html [https://perma.cc/U76Y-6XWU] (hosted by Great Lakes Law).

145. *See, e.g.*, James Boyle & Jennifer Jenkins, Open Intellectual Property Casebook (2018 & 2019 Supp.), https://web.law.duke.edu/cspd/openip/ [https://perma.cc/QU3T-A4EV] (hosted by Duke University School of Law, Center for the Study of the Public Domain).

146. *See, e.g.*, *Publish with the Libraries*, Univ. of Minn. Libs., https://www.lib.umn.edu/publishing/publishlibraries [https://perma.cc/6BBB-6FWE].

147. *See, e.g.*, Pressbooks: Online Content & Courseware Development, https://pressbooks.com [https://perma.cc/2VWM-SUQQ] (offering institutional and individual licenses for the creation of digital textbooks).

148. Boyle & Jenkins, *supra* note 86, at 21 (finding in an informal survey that their students preferred having access to both the print and digital versions of their open casebook).

149. Miller & Loren, *supra* note 86, at 41.

150. McCabe, *supra* note 94, at 233.

151. *See, e.g.*, Lisa Davis & Mary Ann Neary, *Leveraging Open Educational Resources & Affordable Course Materials in Legal Education*, AALL Spectrum, May/June 2020, at 40, 41–42

Course Packs

¶41 Instructors may select material to be included in low-cost print or electronic course packs, which may include both freely available materials and proprietary materials.[152] Many colleges and universities provide services to assist faculty members in the creation of course packs, including copyright clearances and printing.[153] The cost for students to purchase a print course pack includes the cost of printing and royalty fees for both library-licensed and other proprietary materials.[154] Electronic course packs are generally a less expensive alternative.[155] If links are provided to library-licensed content, there is no cost to students, who are "authorized users" under the term of the library's contract with the publisher; additionally, there are no printing costs to pass on to students. The selection and curation of material for inclusion in course packs may involve significant instructor time, but this option allows the professor to tailor content closely to pedagogical aims.[156]

Course Reserve

¶42 Print course reserves provide access to copies of assigned course materials, which students may borrow for a brief period, most often a number of hours.[157] Primarily due to financial considerations, many university and college libraries traditionally have not purchased textbooks for course reserve—though there is evidence this philosophy is changing in response to increased demand from students.[158] Entering law students, therefore, may have a growing expectation that they will find their course materials on reserve at the law library as well.[159] Casebook purchasing policies, however, vary by law school.[160] A fall 2019 review of law library websites at the top 100 law schools (as ranked by *U.S. News & World Report*)[161] indicates that 29 libraries purchase all required casebooks, 25 purchase

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(describing ways in which the Boston College Law Library and the FIU Law Library have provided licensed content for use in courses offered at their law schools); Eighmy-Brown, McCready & Riha, *supra* note 24, at 104 (describing the University of Minnesota Libraries' procedure for identifying, purchasing, and promoting required texts available in electronic format).

152. Eighmy-Brown, McCready & Riha, *supra* note 24, at 107.

153. *Id.* (describing the University of Minnesota Libraries' Copyright Permission Service); *Digital Course Packs*, Univ. of Minn. - Twin Cities Libs., https://www.lib.umn.edu/services/dcp [https://perma.cc/2F3U-VTEX].

154. Eighmy-Brown, McCready & Riha, *supra* note 24, at 107; Jaggars, Rivera & Akani, *supra* note 21, at 5.

155. Eighmy-Brown, McCready & Riha, *supra* note 24, at 107.

156. Jaggars, Rivera & Akani, *supra* note 21, at 5.

157. Christopher McHale, *The Life Span of a Print Textbook: An Investigation in the Utility of Aging Textbook Collections in Academic Libraries*, 17 J. Access Servs. 4, 5 (2019) (noting that the most common loan period for textbooks on reserve appears to be two hours).

158. Christine L. Ferguson, *Textbooks in Academic Libraries*, 42 Serials Rev. 252, 252 (2016).

159. Duke's Goodson Law Library explicitly notes students' expectations with respect to its policy of placing all required textbooks on course reserve. Goodson Law Library Collection Development Policy 13 (rev. Aug. 2018), https://law.duke.edu/sites/default/files/lib/collectiondevelopment.pdf [https://perma.cc/A2HH-ZE2H] ("In response to increased requests and expectations for the Library to provide required textbooks, particularly during the first few weeks of the semester, the Library also purchases required texts for all 1L and regularly offered upper level courses.").

160. Amanda Watson, *Don't Burn the Books, Read Them!*, 46 Int'l J. Legal Info. 79, 88 (2018).

161. *2020 Best Law Schools*, U.S. News & World Report Best Grad Schools (2019).

individual casebooks that faculty request for course reserves, 4 acquire some casebooks (e.g., for first-year classes, for classes with high enrollment), and 15 do not purchase casebooks.[162]

¶43 A print copy of a text on reserve will provide some access to course material, but there are significant limitations.[163] The reserve copy, which may be borrowed by any student, may not always be available when a student wishes to use it. The text cannot be highlighted or annotated, or accessed whenever and wherever the student desires. Because critical legal reading requires much time and deep interaction with the text, lack of control over when and how the casebook can be utilized places students relying on a reserve copy at a substantial disadvantage.[164] Students may choose to photocopy or scan and print materials, but this involves a cost to students or the institution.[165] Excessive copying or scanning also may give rise to copyright infringement.[166] Additionally, students facing the most significant financial pressure are those who have not received scholarships, which are awarded to those with stronger academic credentials.[167] Therefore, students who rely on

162. Data on file with author. The websites of the remaining 27 libraries do not provide clear information regarding casebook-collecting policies.

163. *See* Donald A. Barclay, *No Reservations: Why the Time Has Come to Kill Print Textbook Reserves*, 76 Coll. & Rsch. Libs. News 332, 332–33 (2015), https://crln.acrl.org/index.php/crlnews/article/download/9331/10449 [https://perma.cc/SR8Z-NXKK] (arguing that print course reserve is not the solution to escalating textbook costs, and enumerating several problems with the system, including that the practice encourages students to forgo purchasing textbooks without understanding that the books will not always be available when needed; it may be difficult for students to schedule around reserve desk hours and the textbook's availability; students may "game the system" and not follow reserve policies; inequity is created between more privileged students—who will purchase the textbook and have unlimited access to and control of the text—and economically disadvantaged students who will rely on the shared reserve copy).

164. Some law school libraries that place casebooks on reserve caution students against relying on the reserve copy for all course content. *See, e.g.*, Georgetown L. Libr., Collection Development Policy 11 (2017, rev. Sept. 2019), https://www.law.georgetown.edu/library/wp-content/uploads/sites/4/2019/10/CDP_Master_Final_Word_2019_09_05.docx [https://perma.cc/8FDC-RLHL] ("A limited number of casebooks are purchased each semester for 1L courses and selected high enrollment courses. Because these texts are not intended to replace students' personal copies, only one copy is provided."); *Pence Law Library Circulation Desk: Reserves*, Am. Univ. Wash. Coll. of L., https://wcl.american.libguides.com/c.php?g=563255&p=3877847 [https://perma.cc/4HZ9-YMRC] ("Students have an obligation to purchase required class texts; casebooks on reserve are not intended and should not be used as a substitute for the purchase of casebooks.").

165. Some law schools provide free printing for students, but in the context of course materials, this raises the issue of how much of the cost of students' course materials should be borne by the institution. For a survey of law school printing support practices, see *Printing Survey*, Richmond Sch. of L., (updated Feb. 2020), https://law.richmond.edu/faculty/initiatives/printsurvey.html [https://perma.cc/J2GV-QMGQ].

166. *See* 17 U.S.C. § 107. Copyright law allows "fair use" of a work for educational purposes. "The amount and substantiality of the portion used in relation to the copyrighted work as a whole" is one of four factors considered in evaluating fair use claims. *Id*. *See also Using Content: Photocopies*, *in The Campus Guide to Copyright Compliance*, Copyright Clearance Center, https://www.copyright.com/Services/copyrightoncampus/content/index.html [https://perma.cc/J5U6-9SLD] ("For example, photocopying all the assignments from a book recommended for purchase by the instructor, making multiple copies of articles or book chapters for distribution to classmates, or copying material from workbooks, would most likely not be considered fair use under a reasonable application of the four fair use factors.").

167. For a review of the impact of law school scholarship practices, see Aaron N. Taylor, *Robin Hood, in Reverse: How Law School Scholarships Compound Inequality*, 47 J.L. & Educ. 41, 48 (2018) (asserting that "law school scholarships flow most lucratively to students who tend to come

course reserve for their required casebooks due to financial concerns may be those who need greater academic support. Finally, while the cost for the library to purchase all required texts may not be a compelling argument to students who are paying high tuition, that institutional cost would be significant.[168] Law schools and law libraries should consider their course reserve policies with respect to textbooks and determine whether this means of access to required materials will support desired learning outcomes.

¶44 There may be a stronger argument for placing some required texts, other than casebooks, and print copies of other course materials on reserve for students. The nature of reading and interacting with shorter or less complex texts may not require the same critical reading skills as required for cases and other primary legal materials. Among other factors, law faculty placing items on course reserve should consider the nature of the text in determining whether a shared copy may be adequate.

¶45 Materials placed on electronic course reserve may be accessed by multiple students simultaneously from on campus and remotely. This may include open access resources as well as library-licensed journal articles, chapters, and electronic books. Commercial electronic casebooks and textbooks, however, are not available for institutional purchase. Other assigned texts may not be available in electronic format or may have publisher limitations on the number of users, printing, and/or downloading.[169] While electronic reserves are a means to make some content more affordable and accessible, a faculty member considering this option should consider the potential impact of online reading on learning outcomes.

Interlibrary Loan

¶46 Interlibrary loan (ILL) allows a library to borrow materials from another library on behalf of a student.[170] The loan period varies depending on individual libraries' policies and agreements between libraries. The material is generally borrowed for a number of weeks, providing more extended individual access to the text than borrowing the book through course reserve.[171] Although the student has exclusive use of the text throughout the loan period, the book cannot be highlighted or annotated, and it may have to be returned to the lending library before the course ends.

¶47 Many academic libraries have traditionally excluded requests for textbooks through their ILL services.[172] Such policies are based on various assumptions, including "the inability to meet the high demand"; limited loan periods that do not extend through a full semester, resulting in students' loss of access to the texts or overdue fines; other libraries' policies excluding textbooks from ILL lending because

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from privileged backgrounds, contributing, most notably, to increased student loan debt among students from disadvantaged backgrounds").

168. To give a sense of this expense, it would cost the library $1110 to purchase all required course materials for the four sections of the civil procedure course offered at the University of Minnesota Law School in fall 2019. Each section used a different casebook and supplementary material. Data on file with author.

169. Todorinova & Wilkinson, *supra* note 26, at 269.

170. Am. Libr. Ass'n, *supra* note 28.

171. Eighmy-Brown, McCready & Riha, *supra* note 24, at 98.

172. *Id.*; Gemma Blackburn & Robyn Tiemeyer, *Textbooks and Interlibrary Loan*, 23 J. Interlibr. Loan, Doc. Delivery & Elec. Res. 5, 9 (2013) (finding a majority of Association of Research Libraries members do not borrow textbooks through interlibrary loan).

they hold their textbooks on reserve for the use of their own students; and the view that providing textbooks is not a proper role for the library.[173] Recent literature, however, indicates that some college and university libraries are revising policies to provide this service.[174] Therefore, entering law students may increasingly expect to be able to obtain course materials through ILL. Law schools and law libraries should consider their ILL policies regarding textbooks to determine whether this means of access to required materials will adequately support student learning.

¶48 When selecting course materials, law faculty should consider the array of affordable course content options discussed above—along with traditional options—with the goal of achieving desired learning outcomes while maximizing financial savings for students. Some of the models, most notably the creation or adaptation of electronic texts and to a lesser extent the creation of course packs, require a significant investment of time. Both of these options, however, afford legal educators a significant level of control over what they present in their courses. In evaluating options relying on digital content, law professors should consider the problems students may encounter in reading text online. All models should be evaluated in the context of the critical legal reading skills required for law school learning. Students reading in electronic format may require more assistance in developing and using these skills. Students who forgo purchasing required texts in reliance on course reserve or ILL also may not be able to engage fully in critical legal reading due to their lack of control over the shared or borrowed copy of the text.

Law Librarians Promoting and Supporting Affordable Content Models

¶49 While the selection of course content to meet pedagogical goals solely lies with faculty members, law school libraries can support affordable content efforts in several ways.[175] Law librarians should educate themselves about available affordable content options and raise awareness of these options throughout the law school. They can promote the use of affordable content models by offering faculty workshops, suggesting affordable content solutions to individual faculty members at the point of need, and creating guides to affordable content options for faculty.[176] Law

173. *See, e.g.*, Eighmy-Brown, McCready & Riha, *supra* note 24, at 98 (enumerating reasons for the University of Minnesota Twin Cities campus ILL department's former policy of canceling textbook requests).

174. *Id*. In addition to libraries reevaluating their policies in response to student demand, the introduction of unmediated ILL and the lengthening of some consortial interlibrary loan periods has affected policies as well. *See, e.g.*, *UBorrow*, Big Ten Acad. Alliance, https://www.btaa.org/library/reciprocal-borrowing/uborrow [https://perma.cc/PMJ2-DCRW] (allowing students attending schools within the Big Ten Academic Alliance to place their requests directly and providing a 12-week loan period with an option for a 4-week renewal). *But see contra*, Erika Hanson McNeil, *ILLiad, Rapid, and an Unmediated Solution to the Interlibrary Loan Textbook Dilemma*, 14 J. Access Servs. 68, 71 (2017) (discussing the rationale for the University of Connecticut Library's 2014 implementation of its policy restricting textbook borrowing through ILL).

175. *See* Davis & Neary, *supra* note 151, at 41 (suggesting "law librarians, with their in-depth knowledge of their collections and their faculty liaison roles, are in a unique position to promote faculty adoption of affordable course materials").

176. *See, e.g.*, *Law School Affordable Course Materials*, Bos. Coll. L. Libr., https://lawguides.bc.edu/affordablecoursematerials [https://perma.cc/WA4U-9Q86]; *Teaching Tools for Law Faculty: Affordable Content*, Univ. of Minn. Law Libr., https://libguides.law.umn.edu/c.php?g=296857&p=6434956 [https://perma.cc/9MED-PSA7].

librarians with teaching responsibilities should explore affordable course content for their own classes and implement these models when appropriate.[177] Gaining experience with the use of such course materials will allow them to share firsthand knowledge with faculty members.

¶50 Law librarians should familiarize themselves with the available electronic publishing platforms and assist faculty members in selecting and navigating the platforms best suited to their needs.[178] If law school administrators and faculty are interested in exploring inclusive access models, law librarians, who have close relationships with legal publishers and extensive experience negotiating licenses for electronic resources, can assist in that process. Although many law libraries do not manage course packs, librarians should be knowledgeable about their law schools' procedures for the creation of these resources so they are able to advise faculty members and direct them to the appropriate unit within the law school. They also should consult with law school administrators and faculty to develop the scope of course reserves and interlibrary loan for law school courses. Additionally, law librarians should explore affordable content support programs and incentives provided at the university level and help law faculty identify and take advantage of such initiatives.[179]

¶51 With respect to content, law librarians can promote the availability of open and library-owned or -licensed materials. They should review syllabi to identify materials that students may access freely or through library subscriptions, assist faculty members to identify and obtain resources, and help determine how best to make those materials available to students.[180]

¶52 McCabe, writing in the context of electronic casebooks, advocates for two further roles for law librarians. He suggests that, in addition to identifying and supplying content, law librarians should participate in the creation of digital casebooks by adding multimedia and interactive content to texts.[181] He also proposes that law librarians instruct students, through the creation of guides and presentations, in the best way to use electronic course materials.[182]

Conclusion

¶53 The affordable content movement has taken hold at colleges and universities across the country. The effects of this movement on law student expectations,

177. McCabe, *supra* note 94, at 234.

178. *Id*. (noting librarians are in a "unique position to experiment with new technology").

179. Awareness of institutional OER initiatives has been found to increase faculty members' adoption of OER significantly. Tanya Spilovoy, Jeff Seaman & Nate Ralph, The Impact of OER Initiatives on Faculty Selection of Classroom Materials 22 (2020), http://onlinelearningsurvey.com/reports/impactofoerinitiatives.pdf [https://perma.cc/9BSL-55EA].

180. UMN Law Library staff review required reading lists each semester and identify titles that are available for institutional purchase in electronic format with unlimited users. If the e-book is not already owned by the UMN Law Library, it is purchased. Faculty members are informed that the e-book is available to their students, and a LibGuide listing the semester's course texts available as electronic texts is posted for students. *See Fall 2020 Course eBooks*, Univ. of Minn. L. Libr., https://libguides.law.umn.edu/course-ebooks-fall2020 [https://perma.cc/RU5W-F9AG]; *see also* Davis & Neary, *supra* note 151.

181. McCabe, *supra* note 94, at 235 (suggesting, for example, that librarians can embed video and audio sources, and provide links to CALI lessons).

182. *Id*.

as well as the effects of affordable content options on learning outcomes in legal education, are not clear. Empirical research should be conducted in several areas, including law students' expectations regarding affordable course content; the extent to which law students are forgoing the purchase of required texts and seeking alternative means of accessing materials, and the effect of their solutions on learning outcomes; and the impact of various affordable content options on law school learning outcomes. Where negative effects are identified, studies should be conducted to determine how best to improve student learning with various content models. A survey of law schools' current practices with regard to course content should be conducted,[183] and information regarding best practices should be shared widely throughout the legal academy.

¶54 In the meantime, however, law schools should explore and adopt, as appropriate, affordable content options—including OER casebooks and materials, low-cost online and print texts, library-owned and -licensed resources, print and electronic course packs and course reserve, and interlibrary loan—to provide greater affordability and accessibility where possible in light of pedagogical goals. While seeking to provide the most cost-efficient access to law school course materials, legal educators should be cognizant of the potential impact of print versus digital reading and should keep in mind the critical legal reading skills in which law students must engage.

¶55 The development of a successful affordable course content program will involve multiple constituencies within the law school. Although many law faculty members are already incorporating affordable course content into their curricula, the process is burdensome, and the practice should be addressed at the institutional level. Law school administrators should implement policies to encourage, incentivize, and support the exploration and use of affordable content options. When selecting course materials, law faculty members should consider all content options—traditional and affordable—while being mindful of each model's potential impact on the use of critical legal reading skills necessary for law school learning. Law librarians can promote and support these efforts by developing knowledge about affordable content models, implementing programs to support the creation or adoption of such content, sharing information about options with law school administrators and faculty, identifying and obtaining resources, and facilitating access for students.

183. Kayla Reed and Karen Shephard have begun this work by conducting a brief survey of law librarians to obtain information about adoption of OER casebooks and texts in law schools and the roles librarians are playing in promoting and supporting such adoption. Kayla Reed & Karen Shephard, *Open Educational Resources Repositories for Casebooks & Textbooks*, AALL Spectrum, Sept./Oct. 2020, at 30 (reporting results of their survey on open texts in law schools).

Critical Legal Research: Who Needs It?*

Nicholas Mignanelli**

"We shall be questioning concerning technology, and in so doing we should like to prepare a free relationship to it."

—Martin Heidegger[1]

This article builds on prior works to develop a framework for practicing and teaching Critical Legal Research in such a way as "to prepare a free relationship" between the researcher and AI-powered legal research. The author argues that it is only in doing so that legal innovation will continue to be possible.

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What Is Called "Critical Legal Research"?

¶1 The phrase "Critical Legal Research" (CLR), so far as it describes several distinct approaches to applying the insights of critical legal theory[2] to the legal

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1. Martin Heidegger, *The Question Concerning Technology*, *in* The Question Concerning Technology and Other Essays 3, 3 (William Lovitt trans., 1977) (1954).

2. Defined as "a diverse and inclusive canon of literature or ideas, including such schools as feminist legal theory, critical race theory, critical race feminism, LatCrit, queer legal theory, disability theory, law and socioeconomics and critical examinations of environmental law—the theoretical underpinnings of which were influenced by such foundational movements as legal realism, neo-Marxism, post-structuralism, and deconstruction." Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 Am. U. J. Gen. & Soc. Pol'y & L. 573, 600 (2015).

research process, was first coined by Nicholas F. Stump in 2015.[3] Yet the pioneering feminist legal scholar Mary Joe Frug may have been the first to apply critical theory to an arrangement of legal information.[4]

¶2 In an article published in 1985, Frug examines the fourth edition of the Dawson, Harvey, and Henderson contracts casebook,[5] employing reader-response criticism "to expose how the casebook functions to sustain and further" an ideology of gender that privileges men and masculine-associated characteristics over women and feminine-associated characteristics.[6] So that no one will misunderstand her purpose, Frug explicitly states that "legal content, not interest group satisfaction, should be the appropriate standard for including material [in a textbook]."[7] She argues, however, that an underlying bias against women undoubtedly alienates a number of female readers, making the casebook "a less effective learning device."[8] This, Frug opines, is especially troubling in view of the "power and authority that law casebooks have over their readers."[9] In one of the article's most compelling passages, Frug writes,

> [a]lthough the editors have chosen to evade personal involvement and commitment in their casebook, they never acknowledge that the book's neutrality is deliberately contrived; they do not admit that their casebook has a point of view. Thus, the editors are authoritarian about the casebook's neutrality; they offer readers no information about what is left unsaid in their casebook.[10]

She concludes by asserting that "[o]nly by continually re-thinking who we are and why we are making the choices we make can we free ourselves from the belief that our selves are constructed by our sexual identities."[11] It was this same critical impulse to question authoritarian neutrality and the subjective choices involved in the arrangement of legal information that compelled several law librarians and legal scholars to criticize the traditional tools of legal research.

¶3 In an article published in 1987, the noted legal information scholar Robert C. Berring recounts how the invention of the West Company's comprehensive case reporting system in the late nineteenth century "undercut the theoretical basis of

3. *Id.* at 575. Another important branch of CLR beyond the scope of this article focuses on legal research pedagogy. *See* Yasmin Sokkar Harker, *Critical Legal Information Literacy: Legal Information as a Social Construct*, *in* Information Literacy and Social Justice: Radical Professional Praxis 205 (Shana Higgins & Lua Gregory eds., 2013); Julie Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research*, *in* The Boulder Statements on Legal Research Education: The Intersection of Intellectual and Practical Skills 175 (Susan Nevelow Mart ed., 2014); Yasmin Sokkar Harker, *Legal Information for Social Justice: The New ACRL Framework and Critical Information Literacy*, 2 Legal Info. Rev. 19 (2016–2017).

4. Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 Am. U. L. Rev. 1065 (1985). Some readers will think I have neglected Duncan Kennedy's *The Structure of* Blackstone's Commentaries, 28 Buff. L. Rev. 209 (1979). While I entirely acknowledge the influence that Kennedy's article had on laying the foundation for CLR, I would characterize its subject as a deconstruction of one legal text, namely a treatise, rather than an arrangement of legal information like a textbook.

5. John Dawson, William Harvey & Stanley Henderson, Contracts: Cases and Comments (4th ed. 1982).

6. Frug, *supra* note 4, at 1074–75.

7. *Id.* at 1091.

8. *Id.* at 1097.

9. *Id.* at 1135.

10. *Id.* at 1109.

11. *Id.* at 1140.

the common law" by exposing the "inconsistencies of a system that contained so many constituent parts."[12] The West Company, Berring explains, then solved the problem it had created by introducing the West Digest System, which in turn "lent its structure to American law" and "saved the myth of the common law from what looked like its inevitable demise."[13] "Like it or not," Berring writes, "practitioners and researchers internalized the West structure, and it became the skeleton upon which the rest of the system was built."[14]

¶4 Berring's thesis that the West Digest System is not merely a case-finding tool but also a structure that reshaped American law in its own image was, according to Richard Danner, "essential" to "a series of articles applying and responding to the use of the tools of Critical Legal Studies (CLS) to the process of legal research."[15] In another article from 1987, Steven M. Barkan evaluates what implications CLS—specifically the CLS concepts of "the incoherency and indeterminacy of legal doctrine, the myth of legal reasoning, and the nature and effects of categorizing legal problems"—holds for the legal research process.[16]

¶5 Focusing on "practice research"[17] as opposed to scholarship, Barkan finds,

> the theory of deconstruction conflicts with the notion that legal research is a search for preexisting, findable law as expressed in the writings of courts, legislatures, or agencies. If the meanings of legal texts are created as much by researchers as by the institutions that produce them, judicial opinions, statutes, legislative history materials, regulations and other sources are indeterminate. By attributing meaning to courts or legislatures, researchers can establish rules without admitting their own value judgements. In the name of "authority," researchers can support any chosen position.[18]

Regarding the "myth of legal reasoning," Barkan notes that, according to CLS,

> [t]he search for the *ratio decidendi*, the rule of the case, leads nowhere. Published opinions report what judges say about particular fact situations and disputes that come before them. They record the language that judges must use to legitimize their decisions, but the real reasons for decisions are not expressed.
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> . . .
>
> The subjective preferences of judges will determine how precedents and statutes are interpreted, which ones are followed, and which ones are ignored. The results come from those same political, social, moral, and religious value judgments from which the law purports to be independent. Ultimately, cases cannot be predicted or decided without reference to subjective preferences, even if these preferences are not the conscious basis of decisions.[19]

¶6 Next, addressing "legal categories and reification," Barkan explains that CLS acknowledges the necessity of categorical schemes but holds that "categorical

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12. Robert C. Berring, *Legal Research and Legal Concepts: Where Form Molds Substance*, 75 Calif. L. Rev. 15 (1987).

13. *Id.* at 25.

14. *Id.*

15. Richard A. Danner, *Legal Information and the Development of American Law: Writings on the Form and Structure of the Published Law*, 99 Law Libr. J. 193, 212, 2007 Law Libr. J. 13, ¶ 40.

16. Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian's Commentary on Critical Legal Studies*, 79 Law Libr. J. 617, 618 (1987).

17. Defined, paraphrasing Frederick C. Hicks, as "the research typically done by lawyers, judges, and legislators in the performance of their functions in law offices, courts, and legislatures." *Id.* at 621.

18. *Id.* at 628.

19. *Id.* at 630–31.

schemes are used to mask the incoherence and indeterminacy of legal doctrine" in that "[f]orcing facts and issues into categories inevitably causes us to gloss over the uniqueness of each case and to treat unequal situations as if they were equal."[20] This leads to "reification," a process in which "abstractions are taken for the concrete, and categories begin to be seen as tangible, real things . . . a way of manufacturing necessity," and "[t]he categories are perceived as being built by history, human nature, and economic law, when in reality they are created and perpetuated by society's dominant interests."[21] Thus, legal research reifies

> fact situations to fit them into predetermined and reified schemes. Because we access research tools and resources through categories, published legal resources have played a major role in the reification process. The way that law is organized and categorized in our research sources affects its interpretation and results in a form of "bibliographic determinism." This does not mean that law books control, or cause change in, the law. What it does mean is that legal resources can reinforce and reify dominant ideologies, can narrow perspectives, and can make contingent results seem inevitable. . . . Key numbers, indexes, annotations, footnotes, and cross-references set the limits of inquiry; they "narrow the window," so to speak.[22]

Barkan warns that "[w]e must be aware of the tremendous power that legal research tools have over the way we look at legal problems . . . because in law, more than any other discipline, the structure of the literature implies the structure of the enterprise itself."[23]

¶7 Finally, Barkan turns to the task of "domesticating" CLS. While acknowledging that "when CLS arguments against legal doctrines and legal reasoning are carried to their logical conclusions, there can be no legal research,"[24] Barkan concludes, "we do not need . . . to accept the CLS arguments to appreciate their relevance to legal research"[25] and "the CLS enterprise is worthwhile if it forces us to ask and answer important questions and to look critically at our assumptions and practices."[26] Among them: "[h]ow much control do research tools assert over research practice and legal thinking?"[27] He points out that although "[j]urisprudence has moved far from the Langdellian position that viewed law as science . . . the structure of research tools has not changed since Langdell's time."[28] He speculates that "[a]n enlightened understanding of legal research could result in better resources, better practices, and better research; ultimately, it might help improve the way legal thinkers respond to social problems."[29]

¶8 This was, however, not Barkan's final word on the matter. As Danner puts it, "in an occasionally acerbic response to Barkan's article, Peter C. Schanck challenged the notions that the digest and other research tools play a role in lawyers'

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20. *Id.* at 631.
21. *Id.* at 632.
22. *Id.*
23. *Id.* at 632–34 (quoting Robert C. Berring, *Full-Text Databases and Legal Research: Backing into the Future*, 1 High Tech. L.J. 27, 29 (1986)).
24. *Id.* at 634.
25. *Id.* at 635.
26. *Id.*
27. *Id.*
28. *Id.* at 636.
29. *Id.*

thinking about the law."[30] Responding to Schanck's contention that "[m]ost lawyers suffer under no illusions about the law's 'seamless web' or perfect coherence . . . [and that] . . . key numbers, headnotes, indexes, and so forth have had little or no impact on either the content of our law or our understanding of the legal system,"[31] Barkan counters,

> [m]any lawyers never look through windows, and others cannot afford a window's view. As Schanck states, many lawyers never use digests. Some never consult indexes, treatises, or finding aids. Computer-assisted legal research systems, although heavily used by some lawyers, are still beyond the means of significant segments of the legal profession. For many lawyers, legal research is no more than consulting a jurisdiction-specific subject treatise and reading a few cases. Some lawyers do legal research only through law clerks and paralegals who are much less sophisticated in law and the workings of the legal system. Some lawyers never do legal research.[32]

"Most lawyers," Barkan rejoins, "operate within the parameters set by others."[33]

¶9 Barkan ends his response to Schanck with a call for the recognition of the importance of interdisciplinary materials to the legal research process. He writes,

> [m]any legal decisions cannot be made apart from their economic, social, historical, and political contexts, and are often dependent upon business, scientific, medical, psychological, and technological information . . . Secondary, interdisciplinary, and nonlegal sources can suggest how cases and statutes should be used and why particular legal arguments should win. They can bring some coherence to legal thinking.[34]

Barkan advises that "[i]t is only when all types of relevant, and necessary, information are of acceptable quality and are equally accessible to all participants in the legal process that we will be able to consider our research systems satisfactory."[35]

¶10 Two years later, the preeminent Critical Race Theorists Richard Delgado and Jean Stefancic built on the respective works of Berring and Barkan to articulate a theory of how traditional legal research methods stifle legal innovation and law reform.[36] Calling this phenomenon the "triple helix dilemma," they theorize that the Library of Congress Subject Headings, the *Index to Legal Periodicals*, and the West Digest System "function rather like molecular biology's double helix" to "replicate preexisting ideas, thoughts and approaches."[37]

¶11 To demonstrate their assertion, they invite readers to consider the plight of Black women who wish to sue "for job discrimination directed against them as Black

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30. Danner, *supra* note 15, at 215, ¶ 47.

31. Peter C. Schanck, *Taking Up Barkan's Challenge: Looking at the Judicial Process and Legal Research*, 82 Law Libr. J. 1, 17 (1990).

32. Steven M. Barkan, *Response to Schanck: On the Need for Critical Law Librarianship, or Are We All Legal Realists Now?*, 82 Law Libr. J. 23, 30 (1990) (note that Barkan was writing prior to widespread Internet access and the proliferation of online legal resources).

33. *Id.* at 31.

34. *Id.* at 34–35.

35. *Id.* at 35.

36. Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories? Law Reform, Critical Librarianship and the Triple Helix Dilemma*, 42 Stan. L. Rev. 207 (1989).

37. *Id.* at 217. For a contemporary CLR perspective on bias in the Library of Congress Subject Headings, see Grace Lo, *"Aliens" vs. Catalogers: Bias in the Library of Congress Subject Heading*, 38 Legal Reference Servs. Q. 170 (2019).

women."[38] While attorneys at that time could locate "a large body of case and statutory law" using the headings "race discrimination" and "sex discrimination," "no category combine[d] the two types of discrimination."[39] Thus, the structure of the indexing systems forced attorneys for such a client to file suit "under one category or the other, or sometimes both."[40] Yet "Black women [would] lose if the employer [could] show that it had a satisfactory record for hiring and promoting women generally (including White women) and similarly for hiring Blacks (including Black men)."[41] Therefore, "[t]he employer [would] prevail even if it had been blatantly discriminatory against Black women because the legal classification schemes treat Black women like the most advantaged members of each group (White women and Black men, respectively), when they are probably the least advantaged."[42] Delgado and Stefancic add that "legal scholars have [now] created the concept of intersectionality and have urged that Black women's unique situation be recognized, named, and addressed" but that "until the lacuna was recognized and named, legal classification systems made it difficult to notice or redress."[43]

¶12 Delgado and Stefancic urge that "[r]eform now will require disaggregation of the current dichotomous, classification scheme, creation of a more complex one, and reorganization of the relevant cases and statutes accordingly."[44] They warn, however, that "[w]ord-based computer searches solve only part of the problem" because "the efficiency of word-based searches depends on the probability that the searcher and the court have used the same word or phrase for the concept in question."[45] Furthermore, "computerized research can 'freeze' the law by limiting the search to cases containing particular words or expressions"[46] and even might "discourage innovation and law reform" by "legitimiz[ing] bias and oversimplification."[47]

¶13 They suggest that the two preferable avenues for breaking free of the triple helix dilemma are (1) looking to "divergent individuals," i.e., "thinkers . . . whose life experiences have differed markedly from those of their contemporaries" and whose ideas "offer the possibility of legal transformation and growth"[48]; and (2) using "[o]ur bondage" as "a route to transformation" by closely examining legal indexing systems for greater insight into "the very conceptual framework we have been wielding in scrutinizing and interpreting our societal order."[49] This will allow us to determine "whether that framework is the only, or best means of doing so" and to "turn that system on its side and ask what is missing."[50]

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38. Delgado & Stefancic, *supra* note 36, at 219.
39. *Id.*
40. *Id.* at 219–20.
41. *Id.* at 220.
42. *Id.*
43. *Id.*
44. *Id.* (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. Chi. Legal F. 139, 141–52).
45. *Id.* at 220–21.
46. *Id.* at 221.
47. *Id.* at 221 n.93.
48. *Id.* at 223.
49. *Id.* at 223–24.
50. *Id.*

¶14 In a subsequent article published two years later, Stefancic and Delgado speculate whether the "electronic revolution" (i.e., the advent of legal databases, CD-ROM technology, and electronic publishing) will converge with "outsider jurisprudence" (i.e., CLS, feminist jurisprudence, and Critical Race Theory (CRT)) to accelerate law reform or, alternatively, cancel it out.[51] Weighing the shortcomings of keyword searching and the high cost of computer-assisted research against the promise that a newfound "cut and paste" approach to opinion writing might allow outsider jurisprudence to "enter the mainstream more rapidly than [it] otherwise would have,"[52] they conclude that "[t]he question is still open" and "[t]he situation is still elastic."[53]

¶15 In 1992, Jill Anne Farmer pushed the discourse further by undertaking a poststructual analysis of the legal research process.[54] Defining poststructuralism as a rejection of "master narratives and foundational claims that purport to be based on science, objectivity, neutrality, and scholarly disinterestedness" and an "analytical shift" from the "literary (or cultural) product" as "work," i.e., "a closed entity with a definite meaning," to the "literary (or cultural) product" as "text," i.e., "an ongoing dialogue,"[55] she concludes that the emphasis on citation to "what came before" in legal research is as responsible for the self-replicating nature of American law as classification systems.[56]

¶16 Farmer suggests that law librarians can "help alleviate some of the conceptual lock on legal information" in two ways.[57] First, by teaching patrons that "what they are able to find is not equivalent to a whole universe of information or even a random subset, but rather to that particular universe found economically, politically, and/or personally expedient or essential to publishers, editors, and librarians," as well as "the importance of different conceptual frameworks and how to analyze information packaging and content in these terms."[58] Second, by "go[ing] beyond the usual collection policies to acquire nonlegal material that reflects on social, political, and cultural theory."[59]

¶17 In 2007, Delgado and Stefancic revisited their earlier works to assess whether computerized legal research had overcome the triple helix dilemma and accelerated legal innovation and law reform as they had hoped.[60] They conclude, however, that "[c]omputer-assisted legal research may in fact impede the search for new legal ideas, slow the pace of law reform, and make the legal system less, not more, just."[61] They assert that the problems with computerized research lie in the way the medium influences the researcher:

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51. Jean Stefancic & Richard Delgado, *Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?*, 52 Ohio State L.J. 847, 847 (1991).

52. *Id.* at 857.

53. *Id.* at 858.

54. Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 Law Libr. J. 391 (1993).

55. *Id.* at 392.

56. *Id.* at 400–01.

57. *Id.* at 402.

58. *Id.* at 402–03.

59. *Id.* at 403.

60. Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 Law Libr. J. 307, 2007 Law Libr. J. 18.

61. *Id.* at 310, ¶ 8.

> On the user's side, computer searching can mire the researcher in a sea of facts. It can suppress browsing and analogical reasoning, while giving the impression that one is freer, more creative than one really is. The reason behind many of these limitations is the same. The very categorical structure that limited paper-and-pencil searching, building in a bias for the status quo, appears in a new form—the straitjacket of conventional categories now limits the questions one may ask the computer and the searches one may devise.[62]

In the face of these problems, Delgado and Stefancic suggest that "when searching for a new legal remedy, we should turn our computers off."[63] Accordingly,

> [l]awyers interested in representing clients who (unlike corporations) do not find a ready-made body of developed law in their favor need to spend time with the computer shut down, mulling over what an ideal legal world would look like from the client's perspective. Such lawyers need to practice thinking "outside the box," reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively and in brainstorming sessions with other reformist lawyers.[64]

This is because "[a] computer is good at showing you what is" but "cannot show you what might be."[65] To believe that it can "is an abdication of one's responsibility as a lawyer and an agent of change."[66]

¶18 In a 2015 article, Stump revives CLR, giving it practical application in the ongoing battle to end mountaintop removal mining in Appalachia.[67] In the process, he unifies and synthesizes the above insights and methods as follows: (1) "a more targeted utilization of commercial and non-commercial legal resources," (2) "an increased practitioner reliance upon a wide range of theoretical materials," and (3) "the cultivation of synergistic brainstorming sessions."[68] He further explicated these strategies as the internalization of "critical insights," the utilization of "concept-based research," reliance on "alternative legal resources," the expansion of one's search to include "legal scholarly and multidisciplinary" sources, and unplugged brainstorming.[69] In a 2017 article, Stump expounds upon the unplugged brainstorming method, theorizing about the incorporation of "civil disobedients" in these sessions.[70] He uses Appalachian residents who engage in civil disobedience activities to stop mountaintop removal mining as an example.[71]

¶19 This present work takes its orientation from the above line of articles, reenvisioning CLR as a safeguard against the pitfalls of new legal research tools powered by artificial intelligence (AI) that, in the author's view, pose a far greater risk to legal innovation than classification systems, citations, or keyword searching ever has.

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62. *Id.* at 318, ¶ 28.
63. *Id.* at 328, ¶ 50.
64. *Id.*
65. *Id.*
66. *Id.*
67. Stump, *supra* note 2.
68. *Id.* at 574.
69. *Id.* at 618–23.
70. Nicholas Stump, *Mountain Resistance: Appalachian Civil Disobedience in Critical Legal Research Modeled Law Reform*, 41 Environs: Env't L. & Pol'y J. 69 (2017).
71. *Id.*

The Question Concerning Technology

"Will artificial intelligence reify categorical schemes even more, permitting us to find only what artificial intelligence shows us?"

—Steven M. Barkan[72]

¶20 During a recent library director search at a law school in the southeastern United States, a legal writing instructor attended each of the candidate presentations and, during the question and answer period at the conclusion of each, asked the presenters why legal research instruction remained important in light of the fact that "AI will soon be able to do all of your research for you." Other faculty members in attendance nodded their heads in agreement. Though merely an anecdote, this interaction encapsulates a change in the way those outside of the law library think about the future of legal research.

¶21 One can hardly criticize the legal writing instructor, for she was simply reacting to the rise of AI as a major buzzword in the legal industry. Countless articles and blogposts have heralded the arrival of AI, touting the many ways in which it promises to radically transform the practice of law. AI is best understood as a technology in which computers "perform tasks normally viewed as requiring human intelligence, such as recognizing speech and objects, making decisions based on data, and translating languages."[73] AI can be divided into two techniques: "logic and rules-based engines" and machine learning.[74] In the logic or rules-based approach, "subject matter experts" develop rules that are then "used to automate processes."[75] Machine learning, on the other hand, employs algorithms that "discern patterns in data and infer rules on their own."[76]

¶22 AI was first conceptualized by a group of computer scientists meeting at Dartmouth College in 1956, but only recently has computing power allowed for the actualization of their aspirations.[77] Today in the legal profession, AI programs successfully perform document review (using predictive coding to flag relevant documents more quickly, accurately, and efficiently) and contract analysis (assisting attorneys in the identification, extraction, and analysis of "business information contained in large volumes of contract data" and allowing for the creation of "contract summary charts for [mergers and acquisitions] due diligence").[78] In the realm of legal research, AI allows for natural language searching and retrieves relevant documents as determined by the behavior of prior users and the rules set forth in the underlying algorithms.[79]

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72. Barkan, *supra* note 16, at 636.

73. *See* Lauri Donahue, *A Primer on Using Artificial Intelligence in the Legal Profession*, JOLT Digest (Jan. 3, 2018), https:/jolt.law.harvard.edu/digest/a-primer-on-using-artificial-intelligence-in-the-legal-profession [https://perma.cc/R55R-CMNQ].

74. Carolyn Elefant, *Part I: The Basics—What is AI?*, myshingle.com (July 19, 2019), https://myshingle.com/2019/07/articles/future-trends/part-i:-the-basics---what-is-ai/ [https://perma.cc/X8XQ-K47N].

75. *Id.*

76. *Id.*

77. *See* Jamie J. Baker, *2018: A Legal Research Odyssey: Artificial Intelligence as Disruptor*, 110 Law Libr. J. 5, 7, 2018 Law Libr. J. 1, ¶ 8.

78. Donahue, *supra* note 73.

79. *Id.*

¶23 While early law library literature evaluating the use of AI tended to be speculative,[80] deferential,[81] or deterministic in outlook,[82] recent articles have taken a more critical approach.[83] Of course, law librarians should not irrationally resist AI or any technology but nor should we passively accept any claim to objectivity or neutrality. As the German philosopher Martin Heidegger once wrote, "[e]verywhere we remain unfree and chained to technology, whether we passionately affirm or deny it. But we are delivered over to it in the worst possible way when we regard it as something neutral."[84] The American mathematician Cathy O'Neil relates this same sentiment to AI: "algorithms [are] being presented and marketed as objective fact, [when] a much more accurate description of an algorithm is that it is an opinion embedded in math."[85] Continuing in this line of thinking, the next two subsections criticize AI-powered legal research on two counts: (1) its tendency to conceal the legal research process and (2) its propensity for further entrenching the biases of society's dominant interests.

Concealing

> *"[T]here still stands the presuppositions that humans have control over the essence of technology. In my opinion, this is not possible. The essence of technology is not something that humans can master by themselves."*
>
> —Martin Heidegger[86]

¶24 The legal research process in its earliest incarnation consisted of a lawyer or judge directly consulting volumes of statutes and cases. Legal training, and then the repetition of information retrieval, allowed the early legal researcher to internalize the law's structure to easily identify and access the material that he believed relevant to the facts at hand. Yet, as the law grew, new tools became necessary to mediate between the legal researcher and legal information. Thus, all legal research technologies, even the oldest ones, partially conceal information, omitting material that the creator thinks irrelevant.

¶25 Consider a tool as simple as the index, defined by *Black's Law Dictionary* as "[a]n alphabetized listing of the topics or other items included in a single book or

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80. *See, e.g.*, Nancy B. Talley, *Imagining the Use of Intelligent Agents and Artificial Intelligence in Academic Law Libraries*, 108 Law Libr. J. 383, 2016 Law Libr. J. 19.

81. *See* Mark Gediman, *Artificial Intelligence: Not Just Sci-Fi Anymore*, AALL Spectrum, Sept./Oct. 2016, at 34, 36 ("Librarians can create the processes and procedures to provide the current information needed to keep the application up-to-date and relevant.").

82. *See* Jean P. O'Grady, *Hand in Hand with IBM Watson*, AALL Spectrum, Sept./Oct. 2015, at 18, 21 ("As a profession, it is important that we don't identify with the pre-Gutenberg scribes. . . . Take a deep breath; we are living in a post-Watson world. Everything is about to change."); *see also* Ed Walters, *Read/Write: Artificial Intelligence Libraries*, AALL Spectrum, Sept./Oct. 2017, at 21, 23 ("A great shift is coming, as great as the Industrial Revolution or the invention of electricity. The most successful libraries of the next 10 years will be the ones that embrace the new tools of the trade.").

83. *See* Kim P. Nayyer, Marcelo Rodriguez & Sarah Sutherland, *Artificial Intelligence & Implicit Bias: With Great Power Comes Great Responsibility*, AALL Spectrum, May/June 2020, at 14; Baker, *supra* note 77; Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re] search*, 109 Law Libr. J. 387, 2017 Law Libr. J. 20.

84. Heidegger, *supra* note 1, at 4.

85. The RSA, *Cathy O'Neil: The Truth About Algorithms*, YouTube (Oct. 17, 2018), https://www.youtube.com/watch?v=heQzqX35c9A [https://perma.cc/9USZ-WVBW].

86. *Supplement 1. Der Spiegel Interview with Martin Heidegger*, The Heidegger Reader (Günter Figal ed., Jerome Veith trans., Ind. Univ. Press 2009) (1976).

documents, or in a series of volumes."[87] The index directs the researcher to only that information that the indexer believed essential to each entry. In using an index, the researcher gives up the ability to freely peruse the entire body of legal information without curation, instead deferring to the choices of the indexer. Therefore, the researcher sees the law through the eyes of the indexer. Yet, because the quantity of legal information is so great and the researcher's time is so valuable, it makes sense to trade this freedom for ease of access to potentially relevant information.

¶26 Research tools that rely on algorithms are markedly different from other tools in that they tend to conceal the research process itself. Take, for instance, AI case briefing software such as Casetext's CARA or ROSS Intelligence's EVA.[88] Far from simply validating citations found in an uploaded document, these platforms suggest citations to unsupported language.[89] One can easily imagine a future in which a legal document is uploaded free of citations, only to have the "correct citations" automatically inserted, to say nothing of a time when complex briefs will be created from previously uploaded material.

¶27 Yet this "backloading" of the research process could have dire consequences for legal innovation. This is because legal research is not only a prerequisite for creative lawyering but is itself a component of the lawyer's creative process. It is, after all, in the midst of the research process that the researcher engages in analogy and strategy, creating new associations from seemingly dissimilar notions and planning new applications for existing concepts.[90] In this way, legal research is more akin to writing and oral advocacy than document review. Thus, backloading and outsourcing—and thus concealing—the research process imprisons the researcher within the limits of his or her own understanding.[91]

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87. *Index*, Black's Law Dictionary (11th ed. 2019).

88. *See Have CARA A.I. Find You the Most On-Point Authorities*, Casetext, https://casetext.com/cara-ai/ [https://perma.cc/A5R7-CZQU]; *see also A Quick Note*, Ross Intelligence, https://rossintelligence.com/eva.html [https://perma.cc/KT9A-PDZG].

89. *See* Robert Ambrogi, *Casetext Just Made Legal Research a Whole Lot Smarter*, LawSites (May 1, 2018), https://www.lawsitesblog.com/2018/05/casetext-just-made-legal-research-a-whole-lot-smarter.html [https://perma.cc/NAJ9-WGZP] ("[Previously,] for CARA to work, the uploaded document needed to contain case citations. That was because its algorithm compared the cases in the uploaded document to the cases and articles in the Casetext database, looking for other cases that were usually cited alongside those cases. [Now], CARA works with any kind of legal document, regardless of whether it contains citations. You can, for example, upload a complaint that contains no citations and use CARA to find cases relevant to the facts and issues."); *see also* ROSS Intelligence, *EVA: Find Similar Language*, YouTube (Feb. 9, 2018), https://www.youtube.com/watch?v=28GYfwypvyw [https://perma.cc/2GP3-T4EY].

90. *See* Delgado & Stefancic, *supra* note 60, at 320, ¶ 33 ("[A] searcher who begins with an index category in a legal digest or practice guide is likely at least to glance at adjacent categories. This browsing encourages the development of analogical or metaphorical reasoning and legal arguments that stretch existing theories to cover new factual settings."); s*ee also id.* at 328, ¶ 51 ("To break loose from hidebound patterns requires more than vast quantities of material linked by some common fact. It requires a conceptual advance that sees old material in a new light.").

91. *See* Robert C. Berring, *Chaos, Cyberspace and Tradition: Legal Information Transmogrified*, 12 Berkeley Tech. L.J. 189, 209–10 (1997) ("The danger . . . is that each step in the research process that is carried out automatically by the front end system, is a step taken away from the purview of the researcher. Each decision that is built into the system makes the human who is doing the search one level further removed from the process. If each user of information was aware of these steps, if each user understood what was being done for her and could monitor results with a skeptical eye, the danger would not be so great. But the whole point of these systems is to work automatically. The whole point is to create an environment where the searcher does not have to know about those steps.

¶28 More troubling, perhaps, is the false impression these platforms and applications give researchers that they are being presented with the "right" answers. As another example, Westsearch Plus, a feature of WestlawEdge that provides the researcher with "predictive research suggestions," encapsulates the search into a preformulated question and presents a corresponding set of relatively precise answers from a limited number of cases.[92] Such results omit those cases left unchosen by most users, including those in which courts may have taken a heterodox approach or expressed doubt about the current rule.

¶29 Yet law is not a science with clear-cut answers. While *stare decisis* might lend predictability to the law, a precedent is not a mathematical formula that predetermines a particular result. Law is dynamic, applying differently to novel factual scenarios. Furthermore, to change and refine the law, old precedents must be challenged with new approaches. Yet for lawyers and judges to accomplish this, they must have the freedom and proper means to do so. Therefore, research tools that excessively foreclose on possibilities or give the impression that the possibilities are much more limited than they are will surely make the path of the law more stagnant.[93]

Entrenching

"[Algorithms] automate the status quo."

—Cathy O'Neil[94]

¶30 Likewise, the source that most users choose is not necessarily the best source, although it may well best serve society's dominant interests. As O'Neil explains, "to build an algorithm you need two things: data (what happened in the past) and a definition of success."[95] In the case of the algorithms found in legal research tools, success consists of the retrieval of relevant documents as defined by the programmers of those algorithms. The data is provided by the past users of those tools.

¶31 In a 2017 article, Susan Nevelow Mart compared the top 10 results of 50 searches across six legal databases.[96] She found that the results differed dramatically from database to database, demonstrating that what a researcher finds in the process of searching depends heavily on who builds the search algorithm and what

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In this environment one accepts the search results as being the best available information. . . . Most researchers do not understand how to critically evaluate search results. The emphasis from the vendors of high-end information will be to lessen that critical evaluation, not enhance it.").

92. *WestSearch Plus*, Thomson Reuters, https://legal.thomsonreuters.com/en/products/westlaw/edge/westsearch-plus [https://perma.cc/W43E-GTEG].

93. *See* Delgado & Stefancic, *supra* note 60, at 322, ¶ 36 ("Computerized research may occasionally help an attorney locate one case, different in some minute respect from the others, where the judge ruled favorably. But the attorney who fails to find such a case can do little but send the client away with the words, 'Sorry, the law is not in our favor.'"). Although one need not subscribe to the CLS concept of indeterminacy to find this phenomenon problematic, those who do should be especially apprehensive about the way AI-powered legal research threatens to reify deterministic notions of law. For an introduction to indeterminacy, see David Kairys, *Legal Reasoning*, *in* The Politics of Law: A Progressive Critique 11 (David Kairys ed., 1982).

94. Cathy O'Neil, *The Era of Blind Faith in Big Data Must End*, TED (Apr. 2017), https://www.ted.com/talks/cathy_o_neil_the_era_of_blind_faith_in_big_data_must_end [https://perma.cc/WDM8-RVP7].

95. *Id.*

96. Nevelow Mart, *supra* note 83.

choices they make in the process.[97] Thus, the biases and assumptions of the programmers are imputed to the search algorithms they write.[98] This is especially troubling because the programmers of algorithms typically come from homogenous groups of people with particular incentives, typically corporate profit.[99]

¶32 Frustratingly, the design and inner workings of the algorithms that underlie commercial legal databases are trade secrets.[100] They are rendered, therefore, invisible, or "black-boxed."[101] Thus researchers are left in the dark, only able to wonder—if they wonder at all—about the basis on which information has been included or excluded, how predictive algorithms are used to anticipate use, how relevance is evaluated, and so on.[102] What is worse, the "the black box of the algorithm's work" may serve to further create a sense in researchers that the results are objective.[103]

¶33 But "algorithms are created by humans."[104] So too is the data that algorithms rely on to "improve" retrieval and choose which results to display. As early as 2007, Delgado and Stefancic complained of what they called the "popularity contest approach," that is, the arrangement of Internet material according to the frequency of use.[105] They point out that such an approach "builds in a structural bias in favor of commonplace items that have found wide use" and allows "[h]eretical or new ideas that are just beginning to be noticed [to] easily escape the attention of a busy searcher."[106] In a 2011 assessment of WestlawNext, Ronald E. Wheeler comments on the same phenomenon, noting that the database's use of crowdsourcing, that is, the "[ranking of] items higher or lower in the result list" based on the behavior of past users, may become problematic "when researchers are looking to find the stone left unturned, the less popular result, [or] the more esoteric tidbit of legal information."[107] Contemplating the greater implications, Wheeler speculates that

> [i]f legal researchers are unable to find unpopular or less used tidbits of legal information, this has the potential to change the law. If the applicable legal precedent is unfindable and therefore unusable, hasn't the law been effectively changed? Existing but less popular legal precedents could effectively become invisible. Rarely used but valid laws, doctrines, or arguments might fade into nonexistence. The unfindable could practically cease to exist. . . . These obscure ideas might never be uncovered, examined, and expounded upon if irretrievable. The result would be to limit the possibilities of legal writing, to limit the reach of creative thinking about the law, to narrow the range of alternative legal perceptions, to close the door to the unknown. Alternative views of the law or of the possibilities of the law would never be exposed.[108]

97. Susan Nevelow Mart, *Every Algorithm has a POV*, AALL Spectrum, Sept./Oct. 2017, at 40, 41.
98. Nevelow Mart, *supra* note 83, at 388, ¶ 2.
99. *See* O'Neil, *supra* note 85.
100. Nevelow Mart, *supra* note 83, at 389, ¶ 3.
101. *Id.* at 391, ¶ 8, n.19.
102. *Id.* at 391, ¶ 8.
103. *Id.*
104. *Id.* at 388, ¶ 1.
105. Delgado & Stefancic, *supra* note 60, at 325, ¶ 40.
106. *Id.*
107. Ronald E. Wheeler, *Does WestlawNext Really Change Everything? The Implications of WestlawNext on Legal Research*, 103 Law Libr. J. 359, 365–66, 2011 Law Libr. J. 23, ¶¶ 17–20.
108. *Id.* at 368–69, ¶ 29.

Joining in this chorus, Stump remarks that "crowdsourcing . . . likely inhibits law reform" because, "like the West Topic and Key Number system, [it] is an agent of homogenization for research outcomes."[109]

¶34 Debate over whether to trust the "wisdom of the crowd" is hardly new and probably dates to the 1841 publication of Charles Mackay's *Extraordinary Popular Delusions and the Madness of Crowds*. It very well may be that the crowd is reliable in collectively reaching an accurate answer to purely factual questions.[110] In political and moral matters, however, which law certainly is in large part, what can we expect but for the crowd to imprint its biases on the historical data it creates? This is especially true where the crowd is self-selecting. After all, the primary users—and most certainly the earliest users—of commercial legal research tools are those who can afford to license them.[111]

¶35 As several prominent thinkers have shown, the perpetuation of racial, gender, and class biases is a matter of grave concern in the use of AI technologies.[112] Although it is true that embedded biases have long blighted legal research tools, older tools of legal research such as indexes and keyword searches did not inspire the blind faith that AI does, nor did they invite users to cede so much control over the research process. While we cannot know precisely how these and other biases will infect legal research powered by AI, thus becoming further entrenched in our legal system, we can be confident that they will.

Forging a CLR Framework

¶36 The framework that follows is adapted from Stump's synthesis. Here, however, the methods are modified to address the dangers of AI discussed above. This framework is intended to obstruct the ability of emerging technologies to close the legal imagination and transform the law into a monolith. Stump has rightly declined to create a definitive framework that unifies CLR methods, for "critical research, as an inherently *creative* process, by its very nature resists a formulaic application."[113] Thus, this framework too is a loose one, more a collection of sug-

109. Stump, *supra* note 2, at 611.

110. This is what the British statistician Francis Galton came to believe after observing 800 random individuals participate in a contest to guess the weight of an ox at a county fair, only to find that the median guess was accurate within 1 percent of the ox's true weight. *See* Francis Galton, *Vox Populi*, 75 Nature 450 (1949). For a contemporary iteration of this view, see James Surowiecki, The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, Societies and Nations (2004).

111. At an AALL 2019 session, the author was assured by the representative of one major database that the results that the algorithms underlying the representative's platform retrieved were *not* based on popularity, as each organization subscribing to that database is counted as one user, regardless of the number of individual users within that organization. This, the representative asserted, ensures that the sample would be diverse. When the author inquired how the creators of the platform had accounted for the fact the majority of subscribing organizations were large law firms and government organizations—as opposed to solo practitioners, small firms, and legal aid organizations—the representative replied that this was "not the kind of diversity [he was] talking about"!

112. *See, e.g.*, Ruha Benjamin, Race After Technology: Abolitionist Tools for the New Jim Code (2019); Virginia Eubanks, Automating Inequality: How High-Tech Tools Profile, Police, and Punish the Poor (2018); Safiya Umoja Noble, Algorithms of Oppression: How Search Engines Reinforce Racism (2018).

113. Stump, *supra* note 2, at 618.

gestions for how legal researchers—and those who train them—might engage with emerging technologies and guard against their pitfalls. Accordingly, this framework represents a starting point, a prayer that others will perceive the same dangers and take up the mantle of engaging in algorithmic activism, creating transgressive bibliographies, practicing unplugged brainstorming, teaching CLR methods to students, and developing new strategies.

Decolonizing the Algorithm

¶37 Stump writes of "internaliz[ing] the central, critical analysis of the research process,"[114] that is, obtaining a deep understanding of the insights and methods discussed in the first section of this article. While legal researchers would still do well to consider the problematic tendencies of information classification systems and the hegemonization of the legal publishing industry, the focus of self-identified "research crits" must now shift to "demanding accountability from our algorithmic overlords"[115] and seeking to gain a deep understanding of how AI will serve the dominant interests of society. This can be accomplished only through study, action, and pedagogy.

¶38 Law librarians must aspire to comprehend the algorithm. While this does not require us to become programmers, it does mean that we must make efforts to understand what the programmers of algorithms do and how algorithms work. Good places to start are Nevelow Mart's articles *The Algorithm as a Human Artifact: Implications for Legal [Re]search* and *Every Algorithm Has a POV*, both previously cited, as well as Cathy O'Neil's book *Weapons of Math Destruction* (2016). As new AI-powered legal research products enter the market, law librarians should publish more studies to keep the profession abreast of new developments and engage in critical dialogue about the impact these products might have on the future of the legal research process.

¶39 We must also put pressure on vendors to "be much more transparent about the biases in their algorithms."[116] While individual law librarians can certainly do this through personal contact with vendors, the American Association of Law Libraries (AALL) should make the demand for algorithmic transparency one of its major objectives moving forward. In June 2018, AALL retained an attorney to write a letter requesting that LexisNexis cease its anticompetitive licensing practices.[117] It would be encouraging if a similar action was taken to promote algorithmic transparency. Another collective measure that law librarians might take is the development of a standard algorithmic audit form that proprietors of commercial research platforms could use to disclose potential biases to concerned researchers.

¶40 Of course, more innovative vendors might see the inherent value in transparency and introduce functions that allow researchers to see and control the algorithms that underlie commercial platforms. For instance, Fastcase now allows users to customize the relevance algorithm on a sliding scale of importance, ranging from

114. *Id.*

115. O'Neil, *supra* note 94.

116. Nevelow Mart, *supra* note 83, at 389, ¶ 3.

117. Letter from Michael Best, Attorney for AALL, to Mike Walsh, CEO of LexisNexis (June 7, 2018), https://www.aallnet.org/wp-content/uploads/2018/06/AALL-2018.06.07-Letter-to-M.-Walsh-23527158-v1.pdf [https://perma.cc/TS7T-8EPR].

1 through 10 across two categories and eight subcategories.[118] The first category is "Documents Properties" with the subcategories of "Responsiveness" ("[d]ocuments that have the search terms close together are preferred"), "Importance" ("[c]ases that are cited many times are preferred"), "Authority" ("[c]ases from sources of higher authority are preferred"), and "Date" ("[m]ore recent cases are preferred").[119] The second category is "Documents Usage" with the subcategories of "Frequently Read" ("[f]avors documents that are read more often by Fastcase users"), "Frequently Favorited" ("[f]avors documents that are saved more often by Fastcase users"), "Frequently Downloaded" ("[f]avors documents that are downloaded more often by Fastcase users"), and "Frequently Emailed" ("[f]avors documents that are emailed more often by Fastcase users").[120] Fastcase should be lauded for this feature, as it not only puts control back in the hands of the researcher but provides an excellent tool for showing legal research students how algorithmic rules control search results.

¶41 Finally, we should use our pedagogy to instill in our students a healthy dose of skepticism about claims of objectivity and neutrality. This is especially true in the context of technology, where these claims are made behind a veil of complexity and widespread arithmophobia. It no longer suffices to teach our students simply how to navigate a platform's interface. Instead, we must encourage students to learn about what takes place inside the black box, emphasizing that all technologies are created by human beings with their own biases and that there is a power differential between the entities that create and shape these technologies and the individuals who use and rely on them.[121] While it is true that academic law librarians, as a general matter, never have as much classroom time with students as they would like, these lessons have become too important to omit.

Looking Beyond

¶42 Stump advises that researchers should "engage in traditional concept-based legal research," such as "the usage of a wide range of secondary sources" and that "[t]o truly search outside the system box, researchers also may seek out cross- and multidisciplinary materials."[122] As discussed in the previous section, the tendency of AI-powered legal research tools to conceal the research process stifles analogical reasoning and, thus, creativity. What is needed, then, is more exposure to secondary legal and nonlegal sources.

¶43 Law librarians can best assist in this endeavor by creating, publishing, and disseminating new transgressive and archeological bibliographies that, approaching a particular legal issue, juxtapose a wide range of cases, statutes, regulations, and legislative history materials with secondary sources, theoretical scholarship (both legal and nonlegal), news articles (both historical and contemporary), literary and

118. Fastcase User Guide: Tellus Edition, https://www.fastcase.com/wp-content/uploads/2020/01/1.17.2020-User-guide-tellus.pdf [https://perma.cc/54H6-LB9V].

119. *Id.*

120. *Id.*

121. *See, e.g.*, Susan Nevelow Mart, *Teaching the Benefits and Limits of Human Classification and Machine Algorithms: Theory and Practice*, *in* The Boulder Statements on Legal Research Education: The Intersection of Intellectual and Practical Skills 153 (Susan Nevelow Mart ed., 2014).

122. Stump, *supra* note 2, at 619–21.

artistic works, editorials and opinion pieces, first-person narratives, and even social media posts. By arranging these sources chronologically rather than hierarchically, these living timelines could serve to contextualize the law, demonstrate that law is a cultural product, and, most important, stir creativity in the researcher.

Unplugged Brainstorming

¶44 Taking his cue from Delgado and Stefancic, Stump writes that "[a]fter . . . resource-gathering methods have been exhausted, an attorney may engage in (more purely) analytical strategies. Perhaps most importantly, the critical researcher should, at this point, consider unplugging."[123] Delgado and Stefancic conceptualize unplugged brainstorming as an exercise in which the computer is shut down and the legal researcher contemplates "what an ideal legal world would look like from the client's perspective," thus allowing for "the free association of ideas, policies, and social needs."[124]

¶45 In today's fast-paced world, law students, attorneys, and even legal scholars are often looking for quick answers to their queries. Indeed, this is what makes AI-powered legal research tools so appealing. However, quality, innovation, and creativity are often sacrificed to haste. *Thinking*, not briefing software, should be the bridge from research to writing. Accordingly, students—our future practitioners and scholars—must be taught to internalize and own, not externalize and outsource, the research process: taking the time to think carefully about the information they are accessing and stepping away from the research platform to consider the implications of what they have found.

¶46 One component of unplugged brainstorming is collaborating with other attorneys as well as stakeholders in the case at hand. While law faculty members have long used colloquia to test out new ideas and obtain feedback from their peers, the pace and nature of practice is such that practitioners have never formalized such a process. Doing so, however, especially in and across public interest organizations, might serve to further foster creativity.

Conclusion

¶47 It is the author's hope that nothing he has written here marks him as a Luddite. To the extent that AI can free researchers from repetitive processes that take time away from clients and patrons, expand access to justice, and even aid in finding the perfect case to support an argument, law librarians should welcome the changes it brings. However, law librarians also have an obligation to interrogate claims of objectivity and neutrality, to promote transparency, and to do their part to ensure that our legal system becomes more, not less, equitable. To do so—and to answer this article's titular question—we will all need to practice and teach CLR in the age of AI.

123. *Id.* at 621.
124. Delgado & Stefancic, *supra* note 60, at 328, ¶ 50.

Keeping Up with New Legal Titles*

Compiled by Susan Azyndar** and Susan David deMaine***

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* Most of the works reviewed in this issue were published in 2018, 2019, and 2020. The one exception was published in 2016, and that review was delayed from a prior issue. If you would like to review books for "Keeping Up with New Legal Titles," please send an e-mail to sazyndar@nd.edu and sdemaine@indiana.edu.

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Barton, Benjamin H. *Fixing Law Schools: From Collapse to the Trump Bump and Beyond*. New York: New York University Press, 2019. 287p. $30.

Reviewed by Ariel Scotese[*]

¶1 *Fixing Law Schools: From Collapse to the Trump Bump and Beyond* covers the period 2008 through 2018, dubbed the "lost decade" for American law schools due to terrible employment results for graduates, severely reduced applications and enrollment, and precipitous drops in revenue. In this decade, the American Bar Association (ABA) and the Department of Education acted much more aggressively than in previous years with regard to accreditation, and we saw some law schools close. In recent years, with the election of President Trump, law schools have seen an increase in enrollment, aptly called the "Trump Bump," but the question remains whether law schools can continue to approach legal education in the same way as before: high tuition despite diminished job prospects, along with a focus on a scholarly approach to the law versus a practical one. Barton answers this question with a resounding "No," for both top- and lower-tier schools, as it is not clear that law school will have the same return on investment for graduates that it once did unless sweeping changes are made. While the concerns outlined in this book are not novel, it will still interest most academic law librarians because the call to innovate has an impact on all parts of law school.

¶2 *Fixing Law Schools* unpacks the underlying causes of the lost decade by delving into the history of legal education. The book starts with a discussion of how the existing model of legal education came into being, leading to the "original sin" of legal education: the focus on a more scholarly and academic approach as opposed to a practical one. Barton contends that regulatory bodies such as the ABA and state judiciaries have historically played a role in the currently broken state of legal education by allowing underperforming schools (e.g., schools with low bar passage rates and low employment rates) to remain accredited and have continuing access to federal student loan monies. Ultimately, Barton concludes, the constituencies that benefit from these regulations are law faculty.

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¶3 Barton also highlights the lengths to which institutions have gone to stay afloat, including hiking up the price of law school exponentially to take advantage of the increase in student loan monies available to law students, while at the same time lowering admissions standards and reducing faculty and staffing. Combining these tactics with some rather shady obfuscations of the reality of the legal job market and student performance, law schools seem startlingly predatory, as they rely on past successes and the salaries a minority of students receive at "big law" firms as a justification for burdening law students with massive amounts of debt. As someone who has assumed the majority of students attending the law school I work at would earn a healthy six-figure salary, the revelation of how damaging this assumption is hit home.

¶4 Barton ends the book with his ideas for what law schools *should* do versus what he thinks law schools will most likely do. In this section, he proposes two significant recommendations. First, law schools need to lower their prices and teach law students how to effectively use and partner with technology. Second, Barton calls for schools to be regulated based on their outputs (e.g., bar passage rate and employment) rather than their inputs (e.g., curriculum), and for the bodies regulating legal education, specifically the ABA, to be active in enforcing those regulations. All in all, Barton is calling for law schools to be innovative, an unsurprising admonition.

¶5 The book is the spiritual successor to Brian Z. Tamanaha's *Failing Law Schools* (2012), which examines legal education through 2011. Both books discuss the failures of legal education and, in particular, how law school governance benefits faculty as opposed to students. *Failing Law Schools* takes an in-depth look at law school governance, while *Fixing Law Schools* takes the analysis even further by incorporating the more recent issues facing law students, including evolving technology and the new significance the ABA places on experiential learning. Both books provide ample support for their assertions, relying on a combination of news articles, statistics, reports, and stories to support these assertions, presented in thorough endnotes for each chapter. A researcher interested in this subject would do well to read both books.

¶6 *Fixing Law Schools* challenges us to scrutinize legal education intensely. The book takes little time to read, in no small part because of the humor thoughtfully sprinkled throughout, and the argument is quite compelling. As someone who went to law school, practiced law, and then pursued an alternative career as an academic law librarian, I found this book prompted me to ask more questions about legal education. For example, looking at the scholarly impact now included in the *U.S. News* rankings through this lens necessitates the question of what value this metric has for students attending law school, whose goal is to become lawyers as opposed to legal scholars. Does this new metric and focus on faculty scholarship inadvertently exacerbate the issues outlined in the book, creating additional external incentives to support faculty scholarship at the expense of students' educational experience? I also found myself thinking about the role academic law librarians can play in addressing some of these issues. For example, Barton's suggestion to teach technology better is a task that law librarians can embrace, and many already are.

¶7 Are the answers to these problems as straightforward as Barton suggests? It is clear that law schools should not rest on their laurels, despite the Trump Bump because, as Barton points out, "[n]either the Trump Bump nor an improving econ-

omy has changed postgraduate employment that much, and law school continues to be very expensive measured by either tuition or debt levels" (p.125). Clearly, law schools will need to be more innovative, but this is not the entire picture. For example, concerning costs, Barton does not consider forces external to law schools pushing tuition costs upward, such as the costs associated with obtaining access to resources crucial for preparing students for conducting legal research. How does a school mitigate the external pressure driving up costs and meet students' educational needs?

¶8 All in all, *Fixing Law Schools* is an interesting book that puts a new gloss on problems with which we are already familiar. Academic law librarians can find value in the book because the changes to legal education Barton discusses are, in some ways, inevitable, especially if the Trump Bump does not lead to lasting changes in enrollment. Therefore, this book presents an opportunity for academic law librarians to think about the role that we can play in this new era of legal education. It is recommended for academic law libraries.

Cameron, Catherine J., and Lance N. Long. *The Science Behind the Art of Legal Writing, Second Edition*. Durham, N.C.: Carolina Academic Press, 2019. 192p. $25.00.

Reviewed by Whitney A. Curtis[*]

¶9 Catherine Cameron and Lance Long's *The Science Behind the Art of Legal Writing*, as the title implies, provides the research to support long-offered assertions by legal writing professors (and others) on how to be an effective legal writer, a much-needed resource for legal writing professionals. The second edition updates the science presented in the first and adds chapters on the science behind passive voice and the effect of legal training on students' ability to read legal texts. Like the first edition, the second provides easy access to the results of social psychological experiments, statistical analyses, and surveys bolstering much of the advice given to legal writing students. Professors need not rely on the oft-used saying, "because I say so," when requiring students to follow many common legal writing conventions.

¶10 The book is divided into seven parts, which makes the book easy to digest, even as the authors incorporate a good dose of science. As in the previous edition, the majority of the discussion appears in parts two through four, which focus on what to do prior to writing and how to distinguish between writing general legal documents and persuasive documents. The last part, "Science and Legal Writing Top Ten," reviews the most important practices that foster reader comprehension and persuasion. This edition retains brief assessment exercises interspersed throughout the book to foster discussion in the classroom.

¶11 Part seven's top 10 practices should help to cement students' understanding and their buy-in to the book's principles. These practices are (1) know (or write to) your audience; (2) write concisely and clearly; (3) use outlining; (4) organize paragraphs with topic sentences; (5) use introductory and transitional phrases; (6) explain

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the law before applying it; (7) include emotional reasoning; (8) incorporate narrative; (9) think about formatting; and (10) edit carefully. This wrap-up serves as an excellent synopsis for legal writers to return to again and again, not only as students but also during their careers.

¶12 *The Science Behind the Art of Legal Writing* is a book that belongs in every academic law library collection and every legal writing professor's office. In the introduction, the authors acknowledge the plethora of legal writing texts available to complement any legal writing program, but this is the first to explain the science behind the directives given by legal writing professors and legal writing textbooks. It is a one-stop shop for learning and understanding the science behind legal writing, where students can learn to make informed and logical choices on how to structure their legal writing. Court and law firm libraries would also benefit from adding this title to their collections.

Canan, Russell, Gregory Mize, and Frederick Weisberg, eds. *Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made*. New York: New Press, 2018. 278p. $26.99.

Reviewed by Sara Galligan[*]

¶13 Looking for an excellent new book about judicial thinking and real-world legal issues? *Tough Cases: Judges Tell the Stories of Some of the Hardest Decisions They've Ever Made* fits the bill. This collection of essays on important legal cases is written by the judges themselves and edited by current judges on the Superior Court of the District of Columbia.

¶14 The book contains 13 personal essays, some of which cover well-known cases such as those involving Terri Schiavo, Elián González, and Scooter Libby. The judicial authors weave substantive and procedural issues and embellish their storytelling with commentary, analysis, and insights about the parties involved. All the essays are fascinating to read, as they vividly describe the issues the judges wrestled with and the personal tolls exacted by these tough cases.

¶15 Judge Jennifer D. Bailey wrote about the Elián González litigation, one of the book's most famous cases, in a chapter entitled, "The Boy from Cardena." Having served as the presiding judge, Judge Bailey provides historical, social, and legal contexts in her essay to familiarize the reader with an event that many Americans remember as a heart-wrenching struggle between a son's right to a better life and freedom and a father's right to raise his son in Cuba.

¶16 The enduring image of the 1999 coverage of Elián's rescue off the coast of Florida was a child in an inner tube, his mother lost at sea. Judge Bailey's essay unpacks the events in a manner that easily holds the reader's attention, despite the case's complexities. The case landed in state court with Judge Bailey after Elián's Florida relatives lost their federal case. Judge Bailey describes her commitment to the rule of law amid unrelenting media and political pressures, and she acknowledges the trauma felt for years on both a personal and a community level.

¶17 Judge Wilson's essay, "Building Justice in Kosovo," is particularly intriguing for its portrayal of a transitional society grappling with a corrupt judicial system.

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* © Sara Galligan, 2020. Director, Ramsey County Law Library, St. Paul, Minnesota. Please note that two retired Ramsey County judges contributed to the collection reviewed.

Judge Wilson describes his arrival in Kosovo in 2002 as one of the first international judges serving under the auspices of the United Nations Mission in Kosovo (UNMIK), the governing structure established to temporarily administer the province of Kosovo. UNMIK initially had to impose a revamped court structure to replace one steeped in ethnic hatred and known for handing down unjust convictions for Serb defendants and lesser charges for Kosovars for similar offenses.

¶18 Arriving in Prizren, Kosovo's second largest city, Judge Wilson was assigned a variety of cases, including war crimes, weapons smuggling, homicide, and organized crime. Serving on a panel with other international judges, he encountered assumptions contrary to the U.S. justice system including, for example, more lenient sentencing. Judge Wilson shared cases with "lay judges" from Prizren, whose degree of bias should have excused them for cause. Judge Wilson, successfully confronting this bias, imposed sound legal principles and adhered to high standards of proof to determine a defendant's guilt or innocence. Reflecting on his service in Kosovo, Judge Wilson concludes, "I was reminded that individual trials, no matter how significant they may appear at the moment, fade from memory with time. But properly administered justice, like wisdom, will linger" (p.254).

¶19 *Tough Cases* presents an intriguing window into judicial decision making, illustrating not only the strength, determination, and diligence expected of judges, but also the personal consequences of their dedication to the rule of law. Readers will come away with genuine revelations, a regard for the challenges (both legal and nonlegal) that judges confront, and the satisfaction of time well spent. It is recommended for all library types: law, general academic, and public.

Conrad, Suzanna. *Prison Librarianship Policy and Practice.* Jefferson, N.C.: McFarland & Co., 2016. 216p. $45.

Reviewed by Tarica LaBossiere[*]

¶20 Many law librarians actively participate in the growing resurgence of providing library services to institutionalized individuals. The interest in doing so often stems from our duty to provide access to legal information to all who seek it. The Assistance for Prisoners Subcommittee, under AALL's Social Responsibilities Special Interest Section (SR-SIS), aims to increase access to legal information, research, and resources in prison libraries. Some of the subcommittee's current projects include updating collection development guidelines for prison law libraries; conducting surveys on prison law libraries to see how they are operating currently; and following the U.S. Supreme Court decision in *Lewis v. Casey*,[1] holding that inadequate and insufficient access to law library materials and assistance did not violate a prison inmate's right to access to courts.

¶21 Suzanna Conrad undertakes a similar guideline review and conducts surveys about prison libraries in this 2016 publication. Conrad aims to identify current prison library policy by exploring the history of formerly accepted prison library standards, literature published by prison information professionals, and

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1. Lewis v. Casey, 518 U.S. 343 (1996) (regarding the rights of prisoner access to courts); AALL, Social Responsibilities SIS, Assistance for Prisoners, https://www.aallnet.org/srsis/resources-publications/assistance-for-prisoners/ [https://perma.cc/NW94-P22K].

case law. She further aims to compare historical policies to current policies as evidenced by research on prison library Internet sites, in national and state surveys, and through interviews with prison librarians.

¶22 Conrad has pursued these goals in several projects. She first attempted to gather information on prison libraries in November 2010, after *State v. Hayes*[2] raised ethical issues concerning prison library collection development and prisoners' rights to privacy and confidentiality as patrons of a prison library. In response, Conrad conducted a preliminary case study to explore "(1) the purpose of the prison library and how its collection development policy adheres to that purpose, and (2) how circulation records, including borrowing records, are handled in the prison library and who has justifiable access to those records."[3] Her 2012 article presented the results of a brief survey of prison librarianship primarily focused on prison libraries' collection development policies and approaches to confidentiality.[4]

¶23 *Prison Librarianship Policy and Practice* proves a natural extension of Conrad's 2010 investigation. Expanding on her brief 2010 survey, she developed a longer survey that was distributed both online and via mail to over 500 recipients. Whereas the earlier survey focused primarily on collection development and confidentiality, the 2016 survey inquired about demographics, prison administration, the purpose of the prison library, collection development policies, restrictions, legal resources and services, and needs assessments.

¶24 These central topics provide the framework for *Prison Librarianship Policy and Practice*. The text is divided into three parts. The first, "The Prison Library in Context: Current and Historic Purposes and Policies of Prison Libraries," explores the history of prison library policies and standards, using prior national policies to demonstrate how current policy and practice operates under these outdated guidelines. The segments that specifically discuss law libraries and technology would be of the most interest to law librarians seeking an overview of general access to legal materials and resources for inmates.

¶25 Part 2, "Neglect and Disadvantage: The Prison Library as the Forgotten Field of Librarianship," provides lists of annotated court decisions that impact current prison library practice. The first list regards cases affecting prisoners' right to read, while the second lists cases affecting prisoners' right to access to courts. Anyone researching this area may find these lists useful when exploring case law related to prison libraries and inmates' fundamental rights.

¶26 Part 2 also examines the relationship between prison libraries and the potential neglect prison libraries face within the library community and from other information professionals. For this purpose, Conrad examines average time between prison library policy updates, the amount of published literature related to prison librarianship, professional development opportunities, and library school curricula. The results of her investigation demonstrate an unfortunate lack of attention to prison librarianship from the rest of the library community.

¶27 Finally, in part 3, "Research and Discovery," Conrad presents the research methods and results of her expanded 43-question survey. She received 84 usable

2. State v. Hayes, No. CR070241859, 2010 WL 3025585 (Conn. Super. June 30, 2010).

3. Suzanna Conrad, *Collection Development and Circulation Policies in Prison Libraries: An Exploratory Survey of Librarians in US Correctional Institutions*, 82 Libr. Q. 407, 409 (2012).

4. *See generally id.*

responses from state, federal, and private prisons across the nation. While this number is not enough to support any general conclusions about library policies and practices, the research is presented in a clear and detailed format and offers a good starting point for anyone aiming to conduct a similar survey.

¶28 In the final chapter of the book, Conrad discusses her interviews with 11 prison library professionals. Each librarian spoke generously about the rewarding experience of being a prison librarian. The librarian interviews give insight into topics such as professional development, administrative support, and the varied regulations and protocols affecting prison libraries.

¶29 Overall, *Prison Librarianship Policy and Practice* contains valuable information. Conrad aims to show the discrepancies between outdated national and state prison library policies and actual prison library practice, and does so successfully. Unfortunately, limitations on publicly available information regarding prison library practices somewhat diminish the impact of Conrad's research. More research and transparency is needed to better understand these complex issues, a limitation Conrad readily acknowledges.

¶30 Conrad notes that she is neither a prison librarian nor a law librarian and has no experience in prison libraries. Rather, she presents the perspective of an interested outside observer. Her research was denied funding or sponsorship, and many federal and state prisons refused to participate. Her work relied extensively on publicly available websites, some of which may have been outdated or lacked relevant information regarding their state prison libraries.

¶31 This book is highly useful for anyone seeking information related to prison library policies and practices. Recommended for public and academic libraries.

Criado-Perez, Caroline. *Invisible Women: Exposing Data Bias in a World Designed for Men*. New York: Abrams Press, 2019. 411p. $27.

Reviewed by Cas Laskowski[*]

¶32 "[W]hat may seem objective can actually be highly male-biased . . . ." (p.17). Shocked to learn that doctors misdiagnose women because of standards based on the "default male," Caroline Criado-Perez began years of intensive research into the various ways women's bodies, lived experiences, and historical contributions are discounted or ignored. The result is *Invisible Women*, in which Criado-Perez crafts a readable, often sharply humorous narrative about the gender data gap.

¶33 Criado-Perez identifies a gender data gap that is "both a cause and a consequence of the type of unthinking that conceives of humanity as almost exclusively male" (p.xv). What began as an examination of how ignoring women's bodies in healthcare research and training causes women to have severe side effects and even die became an exposé on the ways our society ignores half the population to its detriment.

¶34 Chapter 1 describes a gender-equality initiative in Karlskoga, Sweden, that required all municipal departments to reevaluate their policies through a gendered lens. Officials joked that surely snow-clearing policies were safe. How could a snow-removal policy that prioritized streets, then walkways, and finally bike paths

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be gendered? It was discovered, however, that men dominate car travel, while women walk and use public transportation at greater rates. After switching the priority order, the city saved money. Two-thirds of pedestrian injuries during winter months were caused by falls in icy conditions. By clearing these areas first, healthcare costs went down. This example is only the first of myriad examples in the book of how considering women can create positive change more broadly.

¶35 Women make up half of our society, but historically they have been excluded from medical studies because it would be inconvenient to include them. For example, Criado-Perez cites an op-ed in *Scientific American* that "complained that including both sexes in experiments was a waste of resources" (p.202). This idea permeates medical research. Criado-Perez cites several studies of gender bias in medical research, finding that researchers exclude female bodies because they are "too complex, too variable, too costly to be tested on," and integrating them into the research is "burdensome" (*id.*).

¶36 Although women form a large part of the economy, businesses tend to build products with men in mind, such as phones that do not fit a woman's hand. Entrepreneurs pitching their female-centric products (e.g., breast pumps) to venture capitalists are met with investors disturbed by discussion of female issues, leaving them without funding to get these crucial products to market. Media entities bring all-male expert panels to speak about female issues because they cannot seem to find female experts.[5]

¶37 Criado-Perez acknowledges that in many circumstances, the failure to account for women is not malicious, but with this book she draws a line. No longer should "I did not know" be sufficient to excuse biased behavior. Timely, thoroughly researched, and expertly crafted, *Invisible Women* is an engaging and thought-provoking read that belongs in every law library, especially those supporting any sort of empirical or social science research.

Cwik, Cynthia H., Christopher A. Suarez, and Lucy L. Thomson, eds. *The Internet of Things: Legal Issues, Policy, and Practical Strategies*. Chicago: ABA Section of Science and Technology Law, 2019. 584p. $89.95.

Reviewed by Alisa Holahan[*]

¶38 How can attorneys keep pace with the rapid technological innovations that have become the norm? Crucial to answering that question is understanding the force the increasingly common use of connected devices exerts on the legal system and the creation of policy. *The Internet of Things: Legal Issues, Policy, and Practical Strategies*, with chapters by more than 30 experts, makes an important contribution to understanding these issues. The Internet of Things (IoT) includes a wide range of extant and future technologies that connect to the Internet or, under a broad definition of the IoT, to other types of networks. IoT technologies are being deployed in a vast and constantly expanding range of circumstances and industries. Nevertheless, these technologies have an important element in common: they all

5. Criado-Perez started The Women's Room, a database of women experts for journalists to search, to address this problem. *About Us*, The Women's Room, https://www.thewomensroom.org.uk/aboutus [https://perma.cc/29NL-4N8T].

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facilitate connection. As Michael Chertoff, former secretary of the U.S. Department of Homeland Security, explains, "[t]he so-called Internet of Things encompasses the ability to connect and direct almost any kind of mechanical system, whether it's automotive, medical, residential, or critical infrastructure" (p.xv). Both the problems the IoT solves and the myriad legal and policy challenges it generates emanate from our increasingly connected world.

¶39 *The Internet of Things* provides a far-ranging discussion of technologies and the legal and policy challenges and innovations arising from their use. The book is organized into three parts. Part 1 describes specific types of current and emerging IoT technologies, along with the legal and policy issues that accompany them. For example, as cars become more automated, they will be able to coordinate both with other vehicles and with traffic management systems, easing traffic congestion. In the healthcare industry, IoT devices increasingly support and monitor patient health through the exchange of patient data. Blockchain, a secure digital ledger system that eliminates the need for a centralized authority, can facilitate smart contracts under which an IoT device detects a contract-relevant event, automatically triggering an action under the contract. These and other IoT innovations generate significant legal challenges. When an autonomous car crashes, how will liability be determined? When large amounts of healthcare information are shared among various devices, how can patient privacy be protected? In a dispute regarding a blockchain transaction facilitated by the IoT, how will courts determine where the transaction took place for the purpose of jurisdiction?

¶40 Part 2 addresses the current state of IoT laws and regulations. The parenthetical within the title of part 2, "The State (or Lack Thereof) of IoT Laws and Regulations," largely reflects the present state of IoT regulation in the United States, which lags behind the more robust regulatory approach of the European Union. At the same time, U.S. regulators at both the state and federal levels are actively evaluating possible new regulations of the IoT, and the chapter on the U.S. regulatory framework for the IoT provides numerous examples of these developing efforts.

¶41 Part 3 addresses IoT risks and possible solutions. The increased connection that the IoT provides offers enormous benefits, such as vastly increased efficiency or much greater automation, but it also poses challenges, often similar regardless of the application. In particular, the increased automation facilitated by the IoT also creates new liability risks: sharing masses of data between devices and systems carries enormous privacy implications and greater interconnection also means greater security risks. The authors point to a number of solutions to these problems, not only in the form of new laws and efforts at creating new regulations and guidance on the part of both the government and industries, but also of urging attorneys to take proactive steps to decrease the risks presented by the IoT, even in the absence of established laws, regulations, or guidelines.

¶42 This thorough work, which is heavily footnoted but also highly readable, is both scholarly and practical. It is written with legal and policy practitioners in mind, particularly those practicing in fields heavily involved with technology law. However, it also provides a thoughtful overview of topics broadly relevant to readers interested in learning more about the IoT and the promises and challenges that IoT technologies pose.

¶43 The expert contributors to this book make clear that the IoT will have an increasingly powerful impact on both industry and public life. As a result, this title

is invaluable for attorneys and policymakers from diverse backgrounds. To be a good lawyer in the age of the IoT, it is essential not only to respond to novel problems but, more important, to anticipate them. An underlying theme in the book is that it is impossible to know precisely how the law as it relates to the IoT will be applied and practiced in the future. However, by informing attorneys about the current state of the IoT and suggesting possible future developments, the book provides attorneys with a strong foundation to excel in a world increasingly dominated by the IoT. Recommended for all law libraries.

Fish, Stanley. *The First: How to Think About Hate Speech, Campus Speech, Religious Speech, Fake News, Post-Truth, and Donald Trump*. New York: One Signal Publishers/Atria, 2019. 228p. $20.99.

Reviewed by Rebecca Kite[*]

¶44 In the opening pages of Stanley Fish's *The First*, the author declares his twin theses: first, "that the First Amendment is a participant in the partisan battle, a prize in the political wars, and not an apolitical oasis of principle"; second, "there is nothing wrong with that" (p.4). The majority of this book addresses the first thesis, not only as it applies to matters Fish identifies as falling squarely within the purview of the First Amendment, such as religious practice, but also the myriad ways the First Amendment is invoked in matters that fall outside its scope.

¶45 *The First* provides numerous examples and illustrations to support the first thesis, taking the reader through various notable scenarios, such as when Roseanne Barr found her sitcom cancelled by ABC because of her tweets, the discipline of various professors based on their public statements, and Colin Kaepernick's ongoing battle with the National Football League. Fish's arguments rely on not only First Amendment jurisprudence but also the philosophical arguments underlying the discourse about speech and expression. This well-executed weaving of the legal and the philosophical assists in explaining Fish's conclusion that the First Amendment is not simply a neutral principle.

¶46 Structuring the work, provocative statements open each chapter, such as "Why the Religion Clause of the First Amendment Doesn't Belong in the Constitution" and "Why Transparency Is the Mother of Fake News." Throughout the text, Fish routinely poses questions to the reader to illustrate both competing views and the challenges inherent in considering the matters of speech and religion. This format may be familiar to readers with an educational background in philosophy or political science, where this method of instruction is designed to elicit new ideas and to challenge students to question some of their own assumptions. As a result, the work is extremely thought-provoking in ways that address some core issues in First Amendment jurisprudence, such as whether freedom of speech is best described as a value or a principle and, depending on that answer, whether the application of the First Amendment in specific cases can be reconciled with its nature.

¶47 This question-based structure serves as the organizing theme of *The First*: Although our First Amendment jurisprudence is a mess and we live in a post-truth world, we can nevertheless embrace the principles of First Amendment law such as

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they are because they provide necessary tools. Fish declares that "[t]he fact that the speech/action distinction cannot be cashed in and is infinitely malleable (as the case law abundantly shows) is no reason to discard it; it makes possible all of the ingenious maneuvers First Amendment jurisprudence so abundantly displays when there is a job to be done" (p.195).

¶48 In the epilogue of *The First*, Fish returns to the second of his two theses: that there is nothing wrong with using the First Amendment as a political tool. Structurally, this move leaves the reader with the sense that the true thesis is buried in the final pages: that many First Amendment rulings are contradictory, and many of the issues frequently discussed along with the First Amendment, such as campus speech, are less about constitutional rights and more about the boundaries of professionalism. But in the end, Fish concludes that these contradictions and inconsistencies are far less important than the reader might believe upon reaching the epilogue.

¶49 Having taken the reader through various thought exercises regarding the First Amendment and the philosophical issues connected to the notion of truth, Fish asks whether there is anything to be done about the post-truth condition. He concludes that we are not in a new social state after all. Rather, humans have always lived in a post-truth world. It is part of the human condition, Fish argues, that there can be no objective fact. All facts are filtered through the perspectives and beliefs of those exposed to the facts, and differences of perspective lead inevitably to different understandings and interpretations of the facts.

¶50 Ultimately, this book is true to the title. Fish presents a way to consider matters like campus speech, fake news, and the Trump presidency in light of the First Amendment. For a reader looking for more concrete suggestions about what to do to address some of these issues, particularly with respect to the issues of truth and politics, this book offers little. As Fish concludes that we have always been in a post-truth age, the solutions are the same as they have always been in America: winning elections and enacting laws and policies that address the ills we see. There may be some limited comfort in the notion set forth at the close of the chapter addressing our post-truth age: that there have always been those in power willing to lie for their own advantage, and that we are not seeing the advent of fake news, merely new examples of an age-old problem. But many readers may be seeking something more concrete.

¶51 While the work is engaging and readable, deftly moving from issues of religion to fake news, I advise readers seeking a primer on First Amendment law to look elsewhere. However, there is no need to have a legal background to understand *The First*, as Fish effectively summarizes relevant cases. Lawyers, law professors, and law students will recognize many of the notable cases, but discussion of cases largely serves to make broader and more philosophical points about the nature of the First Amendment. Thus, *The First* would not only be of interest to legal scholars, but also to those in other disciplines, particularly political science. Recommended for academic and public law libraries.

Karakatsanis, Alec. *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*. New York: New Press, 2019. 240p. $24.99.

Reviewed by Franklin L. Runge[*]

¶52 As a thought experiment, let us imagine that 20 years ago you attended an academic conference. At the opening reception, while you visited with colleagues from other institutions, picked at heavy appetizers, and tried to balance your wine glass, you were introduced to an unassuming scholar. After initial introductions, imagine that this scholar said, "I am writing a book about the criminal justice system." In 2000, if you heard that statement, you could imagine a variety of conclusions for that book. Now, move this thought experiment to 2020. If you hear that a scholar is writing about the criminal justice system, your head and your gut tell you that there is but one conclusion: the criminal justice system in the United States of America is irretrievably broken. What does it mean that this knowledge is deeply embedded in your thought process, yet every hour government agents commit brutal acts in American communities in the name of justice?

¶53 Alec Karakatsanis's new book, *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System*, is a collection of three essays, and it conforms to the thesis that we all inherently know. What makes this book stand out alongside the numerous new titles pointing to the cruelty and racism of our criminal injustice system? Four elements of this book make it a worthy acquisition: (1) its use of language to describe the criminal injustice system, (2) its focus on the commonplace brutality certain communities experience, (3) the author's dichotomous argument about the macro-generation and micro-execution of criminal laws, and (4) its value for law students, particularly the thoughtful and creative second essay.

¶54 I tend to favor authors who use common English words in new or unexpected ways, such as Toni Morrison. While Karakatsanis is no Morrison, I thoroughly appreciate his wordsmithing. Language matters in how we frame and solve large societal problems. Karakatsanis explicitly aims to "employ the language of life against the language of bureaucracy" (p.11). The book is rife with examples of how we use language to normalize cruelty and applies rhetorical tools to escape that trap. Instead of prisons or jails, the author discusses "mass human caging." In describing the criminal injustice system, he uses the phrase "punishment bureaucracy," and its actors (i.e., prosecutors and police officers) are "punishment bureaucrats."

¶55 Our society's stark contrast in political, social, and economic power has made it easy for the "haves" to ignore marginalized communities and the brutality perpetrated by state actors on those communities. Karakatsanis thoroughly presents (and documents in endnotes) numerous instances that will shock the reader's conscience. We all know that Ferguson, Missouri, has struggled in administering justice, but I was left slack-jawed at the details, including the case of a disabled man arrested without a warrant for failing to have an occupancy permit for guests to visit his home (p.6). The jails in Ferguson are a never-ending conveyor belt of misery: the city averaged "3.6 arrest warrants *per household*" arising out of low-level municipal ordinance violations (p.59, emphasis in original). The brutality of putting marginalized populations in filthy cages because of their inability to pay fines is appar-

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ent, but Karakatsanis furthers his argument by providing details of serious crimes that go unpunished because the criminal actors have access to socioeconomic power (pp.49–57).

¶56 The book's most compelling jurisprudential argument focuses on what Karakatsanis calls the "central paradox of American criminal law," the juxtaposition of the following principles: "in order to put a person in prison, we have to prove by overwhelming evidence that she merits punishment in a narrow factual sense; but in order to put millions of people in prison, we just need to show that doing so would do any good" (p. 33). I have been in legal academia or practicing law for 17 years, and I had never thought about the criminal law in those terms. Of course, I am aware of the "beyond a reasonable doubt" standard for returning a guilty verdict. That said, I had never compared that standard to the "rational basis" test for determining the constitutionality of criminal statutes. Karakatsanis excels at explaining and providing examples of illogical statutes that imprison countless citizens. These statutes (some of them tinged with racist underpinnings) would be stricken from code books if only our courts applied a heightened form of scrutiny.

¶57 As someone who conducts collection development for an academic law library, I appreciated that the second essay in this book ("The Human Lawyer") is focused on law students and their journey to becoming better lawyers and citizens. This piece would serve as a great conversation starter during student orientation, a professional responsibility class, or a faculty/student reading group. *Usual Cruelty: The Complicity of Lawyers in the Criminal Injustice System* is a call to action deserving of a place in any law library's collection.

Kroski, Ellyssa, ed. *Law Librarianship in the Age of AI*. Chicago: ALA Editions, 2020. 209p. $66.99.

Reviewed by Nam Jin Yoon[*]

¶58 *Law Librarianship in the Age of AI* is an ambitious collection: the title confidently predicts that artificial intelligence (AI) will define the current epoch. The book's contributors face a daunting task—to say something meaningful about a rapidly growing technology that, as noted in the first chapter, already has such a wide range of uses and forms that it is difficult to pinpoint even a working definition. If the contributors focus solely on specific AI applications in law librarianship, they risk their words becoming obsolete mere months after publication. Go too far in the other direction, by speaking in generalities, and they risk losing their audience to the very abstractions they seek to explain.

¶59 Lucky for us, our intrepid contributors do not shirk from this double-edged challenge. In "AI Defined," Casandra Laskowski kicks things off with a practical definition of AI ("a machine behaving in ways thought to be intelligent if a human were so behaving") and a brief overview of its core structures and concepts. In "What Machine Learning Can Tell Us About Shakespeare," Erik Adams uses the case study method, illustrating how machine learning can aid (and hinder) our understanding of Shakespeare's plays. In Heidi Heller's "Types of AI Tools in Law"

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and Chris Laut's "AI Tools and Applications," we see contrasting approaches to describing the almost overwhelming number of AI tools in law, with Heller presenting the different types of AI tools in broad strokes, and Laut opting to categorize, list, and summarize the many AI solutions currently in the marketplace.

¶60 The next two chapters—Valeri Craigle's "Law Libraries Embracing AI" and Grace Boivin's "Opportunities for Law Librarians"—take different approaches in exploring how law librarians might be able to introduce AI into their libraries. Craigle describes different AI applications already being used in the adjacent fields of legal practice, library reference, and legal research. Boivin adopts more of a skills-based approach, looking at the AI trends in the legal market to suggest specific skills and opportunities enterprising law librarians can acquire. Readers more interested in the role AI will play in the specific areas of legal research and legal education are well served by Jamie Baker's "AI and Legal Research" and Theresa Tarves's "AI in Legal Education." Both chapters stand out for their concise lay-of-the-land summaries followed by carefully considered implications for legal research and legal education.

¶61 Chapters 9 through 12 consider more questions worth asking. In "Access to Justice in the Age of AI," Tawnya Plumb examines how AI can both advance the A2J cause (by making services more efficient and affordable) and harm it (by incorporating discriminatory bias). In "Benefits, Drawbacks, and Risks of AI," James Donovan considers how AI might improve legal services while asking us to consider whether AI will make us overreliant on its automated features. In "Ethics in the Use of AI," Scott Bailey and his coauthors dive into how AI is already being used in the practice of law and how ethics rules might govern a lawyer's use of AI. In "The Future of AI in Law Libraries," Robert Ambrogi considers new roles AI might carve out for law librarians. Finally, in "AI Resources," Virginia Neisler provides a well-organized list of resources to help further an AI enthusiast's study.

¶62 While there are certainly repeating motifs throughout the book—Casetext, for one, will be pleased that CARA is described no fewer than seven times—the strength of *Law Librarianship in the Age of AI* comes from its diversity of voices. With a subject as complex and rapidly expanding as AI, the reader benefits from the authors' varied approaches. Read the book like you would a book of short stories—sure you can go from front to back, but if a chapter title or description catches your eye, do not feel guilty about skipping ahead. You can rest assured you will be in good hands. Recommended for all types of law libraries.

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