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“AUX ARMES, CITOYENS!”* TIME FOR LAW SCHOOLS TO LEAD THE MOVEMENT FOR FREE AND OPEN ACCESS TO THE LAW

Ian Gallacher**

I. INTRODUCTION

To say that the internet is causing an information revolution more significant than anything the world has experienced in the past five hundred years¹ is a cliché.² But clichés are often just too-frequently expressed truths and so it is in this case; the internet has unquestionably accelerated our ability to find and retrieve information to a point that was inconceivable in 1994 when the world-wide web was introduced.³

Lawyers have been profoundly affected by this revolution.⁴ Although computer-assisted legal research has been available since the mid-1970s,⁵ the rise of the internet, and web-based

* “To arms, citizens.” The first line of the refrain of “Le Marseillais,” composed in 1792 by Claude-Joseph Rouget de Lisle.

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¹ The internet’s capacity to liberate information is unparalleled since Gutenberg printed his first bible using moveable type in 1455.

² It is, however, a cliché that has become commonplace among legal scholars. *See, e.g.* James B. Lake, *Speaking Legally And Freely: Lawyers, Web Sites, And The First Amendment*, 58 S.C. L. REV. 871, 873 (2007) (“... law firms, like all industries and professions, are part of the Internet revolution.”); Guy Pessach, *Digitization and Copyright Law: Taking Stock And Looking Ahead* 1 J. INT’L. MEDIA & ENT. L. 253, 255 (2007) (“Long before the Internet revolution, Andre Malraux had written about the ‘Museum without Walls’ . . .”); Joshua F. Clowes, *I E-Vote, U I-Vote, Why Can’t We All Just Vote?!: A Survey Of The Changing Face Of The American Election*, 42 GONZ. L. REV. 61, 92 (2006). In fact, a search of the term “internet revolution” in Westlaw’s database of journals and law reviews resulted in 294 documents. The earliest article using the term in the context in which it is used here was from 1996; M. Kathleen Price, *Technology And Law Library Administration*, 70 ST. JOHN’S L. REV. 145, 147 (1996) (“The Internet revolution, following on the heels of the LAN/Network and PC revolutions, facilitated these changes. Work can now be spread to any part of the world whose research networks are linked to the internet.”)

³ Although it is impossible to pick a date on which the World Wide Web became part of the fabric of contemporary society, Netscape released its web browser, Navigator 1.0, onto the Internet on December 15, 1994. TIM BERNERS-LEE, *WEAVING THE WEB: THE ORIGINAL DESIGN AND ULTIMATE DESTINY OF THE WORLD WIDE WEB BY ITS INVENTOR* 99 (1999). The Netscape release began the Web on its path to becoming the ubiquitous presence it now is.

⁴ Lawyers, and their access to legal information, have been affected by other developments as well, most notably the contraction of the legal publishing market. During the recent past, three publishers – the Thomson Corporation, Reed Elsevier, and Wolters Kluwer, have bought or merged with a remarkable number of legal information providers: Thomson has purchased West (which had itself acquired Foundation Press, the American Law Book Company, the Edward Thompson Company, and Boston Law Book), and has also acquired Callaghan and Company, Clark Boardman, Warren, Gorham & Lamont, Lawyers Cooperative, Bancroft-Whitney, Research Institute of America, Practitioners Publishing, Counterpoint Publishing, Gale Research, Information Access, Barclays Law Publishers, Federal Publications, Inc., Findlaw, and the Harrison Company; Reed Elsevier has acquired LexisNexis, as well as the Congressional Information Service, R.R.

access to legal information, has radically altered the way lawyers perform research. Instead of using the familiar, pre-indexed, research tools made available by West,⁶ lawyers are now able to perform Boolean⁷ searches that, in theory, allow them to index the law in any way that best meets what they believe to be their research needs.⁸

The freedom to search the law without the fetters of an imposed digesting system is appealing, and allows for research that was inconceivable before computer-assisted legal research became available,⁹ but that freedom has burdens as well as benefits. The most significant of these is the financial cost of conducting such research,¹⁰ making it unavailable

Bowker, University Publications of America, Martindale-Hubbell, Michie, Butterworth's, Mathew Bender, and Shepard's. In addition, it owns a minority interest in VersusLaw and Anderson Publishing; Wolters Kluwer has acquired Aspen Law & Business, Commerce Clearing House, Little Brown, Wiley Law Publications, and Loislaw. KENDALL SVENGALIS, LEGAL INFORMATION BUYER'S GUIDE AND REFERENCE MANUAL [hereinafter referred to as "SVENGALIS"], 8 (2005). These publishers have not limited their activities to the United States, and "are rapidly expanding to acquire more publishers in those countries [where they already own legal publication companies] and in other countries where they do not yet have a presence." Graham Greenleaf, Philip Chung, and Andrew Mowbray, *Emerging Global Networks for Free Access to Law: WorldLII's Strategies*, available at <http://ssrn.com/abstract=975614>.

⁵ The LEXIS database started its life in 1965 as a project of the Ohio State Bar Association. William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 LAW LIBR. J. 543 (1984-85). The project took eight years to complete and was unveiled as the LEXIS database (later LexisNexis) by Mead Data Central in 1973. *Id.* at 545. The WESTLAW database was introduced by West Publishing in 1975. Claudio Grossman, *The Development and Practice of Law in the Age of the Internet*, 46 AM. U.L. REV. 327 (1996).

⁶ The term "pre-indexing" refers to what would, in the days before computer-assisted legal research, have been simply called "indexing" or "digesting," and is the process by which a legal information provider derives the legal principles from a case and categorizes them according to a pre-determined group of categories. The most familiar system of pre-indexing is West's "key number" digesting system. For a full discussion of West's digesting system, see MORRIS L. COHEN, ROBERT C. BERRING, & KENT C. OLSON, HOW TO FIND THE LAW, 83-110 (West Publ'n. 9th ed. 1989). The "pre" prefix became necessary after the introduction of computer-assisted legal research, because the process by which a Boolean-based search engine interrogates the data stored in the database is, essentially, an indexing process that allows the researcher to index the data based on individually selected criteria. For a discussion of the various merits and problems inherent in pre-indexed and computer indexed legal research, see Ian Gallacher, *Forty-Two: The Hitchhiker's Guide to Teaching Legal Research to the Google Generation*, 39 AKRON L. REV. 151, 179-182 (2006).

⁷ The concept of "Boolean" searching comes from George Boole, a mathematician whose work in symbolic logic was a necessary precursor to the full-text search engines used by databases like Westlaw and LexisNexis. Marilyn Walter, *Retaking Control of Teaching Research*, 43 J. LEGAL EDUC. 569, n. 1 (1993).

⁸ Indeed, the LEXIS database was developed in order to offer a non-indexed alternative to pre-indexed legal research. "Members of the Ohio Bar . . . defined what they wanted as a 'nonindexed, full-text, on-line, interactive, computer-assisted legal research service.'" Jo McDermott, *Another Analysis of Full-Text Legal Document Retrieval*, 78 LAW LIBR. J. 337, 338 (1986) (quoting Harrington, *supra* note 5, at 545). The intention of LEXIS' developers was that "Boolean-logic searching . . . would allow each researcher to create an ad hoc index specific to the problem at hand." Harrington, *supra* n. 5, at 546.

⁹ One of the more obvious, and practical, types of research made possible by computer-assisted legal research is the ability to research a particular federal district court judge's opinions in order to form a litigation strategy designed to appeal to the preferences displayed by the judge in previous opinions or, at least, to predict possible outcomes of a case assigned to that judge.

¹⁰ The bewildering series of pricing strategies employed by Westlaw and LexisNexis make it impossible to speak with any certainty about how much computer-assisted legal research actually costs. Firms can opt for flat-rate plans, in which a firm is charged a monthly fee for a year, regardless of how much or how little the attorneys use the service, hourly pricing, transactional pricing, or individualized packages tailored to a firm's geographical and practice areas. For a more complete discussion of computer-assisted pricing, see, Gallacher,

to all but the wealthiest of clients and the lawyers who represent them.¹¹ Although not yet a significant problem in terms of equal access to justice, because of the continued availability of book-based legal information,¹² the seeds of future problems have already been sown and will become significant when book-based legal research is no longer viable.¹³

In order to avoid chaos, any movement¹⁴ – even profound revolutions such as the one we are experiencing in legal information – needs leaders to guide progress and shape the eventual outcome. And just like all revolutions, the legal information revolution has had its leaders.¹⁵ Unlike most social revolutions, however, where leadership is most often seized by those whose actions bring the revolution into existence, the legal information revolution is being led by large corporate entities who have had no role to play in the development of the internet or the world wide web,¹⁶ and who are taking commercial advantage of the possibilities afforded by these technologies.¹⁷ The result is a predictable, but unacceptable,

supra n. 6, at 196-97 (concluding that a flat fee of \$10,000 a month for a medium sized firm with an active litigation practice in a major metropolitan market would not be a surprising charge.)

¹¹ Where a law firm has a flat-rate fee arrangement with either LexisNexis or Westlaw (or both), the firm would likely find it difficult to charge a client directly for time spent on those databases on behalf of the client. But the firm could, and likely would, recapture its flat fee by factoring the fee into its overhead expense which would be spread throughout the firm's client base as part of the hourly fee charged for services. Clients would be billed for an attorney's time conducting legal research, and that hourly fee would help to recover the cost of Westlaw or LexisNexis access. Many clients, however, refuse to pay directly for legal research time, meaning that the firm's hourly rate must be set higher in order to maintain profitability while writing-off attorney time spent in conducting legal research. The bottom line of the accounting issues involved is that computer-assisted legal research using the commercial Westlaw and LexisNexis databases is an expensive business.

¹² As we shall see, though, restricted access to computer-assisted legal information already results in some societal costs in that scholars who might otherwise use legal texts to deepen our understanding of the intersection between law and other disciplines are limited in their ability to do so by being unable to identify appropriate cases for study by using books and their pre-indexed finding tools.. *See, infra*, nn 74 to 88 and accompanying text (discussing the difficulties faced by non-legal scholars seeking to use legal information in their work).

¹³ *See, infra*, nn 89 to 100 and accompanying text.

¹⁴ By the term "movement," I am happy to adopt Judith Koffer's "two defining attributes: one, an alliance that aims at generating political friction, intentionally going against the grain; and two, an effective agitation of the origins of power." Judith Sheck Koffer, Book Review, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 174-75 (1989).

¹⁵ The first of these, of course, was John West who, in 1879, began publication of a compendium of opinions from Northwestern courts. Lynn Foster & Bruce Kennedy, *The Evolution of Research: Technological Developments in Legal Research*, 2 J. APP. PRAC. & PROCESS 275, 276 (2000). Although West's national reporter system was crucial to the development of systematized American legal research, it was his digesting sets, begun in 1897, that truly revolutionized legal research. *Id.* at 277. And the company that bears West's name, albeit now as a division of a much larger corporate enterprise, is still at the forefront of legal research today, joined by Mead Data Central, the company that bought the Ohio Bar Association's LEXIS database and, more recently, the citator service started by Frank Shepard in 1873 that has given its name to the process of updating legal research. *Id.* (citing Thomas A. Woxland & Patti J. Ogden, *Landmarks in American Legal Publishing* 43, 277 n.7 (1990)).

¹⁶ These two are, of course, West, a Thompson Company which I will refer to in this article as West, and LexisNexis, a division of Reed Elsevier which I will refer to in this article as Lexis when speaking of the corporate entity.

¹⁷ This is not in any way to criticize West or Lexis for their actions. Indeed, they are acting entirely appropriately as corporate entities operating within a capitalistic market-based economic model, in which their obligations are to make as substantial a profit as possible for their shareholders. And they are doing so with impressive sophistication and technical prowess; Westlaw and LexisNexis are powerful, quick, flexible, and comprehensive databases that set the benchmark for legal information databases. Although I am critical of the

situation in which access to the law increasingly depends on one's ability to pay for what should be accessible to everyone living in a democracy.¹⁸

There is, of course, a long standing tradition of making the law inaccessible to the citizenry. Sir Edward Coke, who believed that the laws of England were its people's birth-right, also believed that some statutes should not be translated from French into English: "It was not thought fit nor convenient to publish either of those, or any of the Statutes enacted in those dayes in the vulgar tongue, lest the unlearned by bare reading without right understanding might sucke out errors, and trusting to their owne conceit might endamage themselves, and sometimes fall into destruction."¹⁹ But Anglo-American lawyers have not needed to resort to French²⁰ or Latin to save the general public from endamagement: their style of writing, and the form of English they have chosen to write in, has served to exclude non-lawyers quite well enough.

Criticisms of legal writing have existed for almost as long as there have been lawyers,²¹ and writers from Swift²² to Jefferson²³ to Bentham²⁴ have taken aim at the intentionally

potential harm West and Lexis might cause to legal information access in this country, and am deeply concerned that, without swift action, they might soon become the only conduits for legal information in this country, nothing in this article should be taken as criticism of either the Westlaw or LexisNexis databases as databases, or of their corporate owners for acting in the only way legally open to them. And while this article proposes that law schools provide an open-access alternative to the commercial databases, it does not propose, nor do I contemplate, that such an alternative will replace Westlaw or LexisNexis. This article does not, in short, propose a "cyber-coup," the colorful phrase coined by a West adviser to criticize a proposal that federal courts should adopt a vendor-neutral citation system. John J. Oslund, *West Fights to Preserve its Legal Publishing Edge; Eagan Company Goes on Offensive in Washington in Attempt to Hold Off Challengers*, STAR TRIBUNE (Minneapolis), October 20, 1994, at 1D. Rather, it proposes that an open-access legal information site should exist as an alternative, not a substitute, to the commercial legal databases, and assumes that there will be a significant place for commercially published legal information for the conceivable future.

¹⁸ The notion that laws are the communal property of the citizenry is inherent in the concept of "common" law and is well established. "The auintent & excellent Lawes of England are the birth-right and the most auintent and best inheritance that the subjects of this realm have, for by them hee injoyeth not onley his inheritance and goods in peace & quietnes, but his lyfe and his most dear Countrey in safety." 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 127 (Steve Sheppard ed., 2003)(1605).

¹⁹ *Id.* at 76. Coke managed to maintain positions that would make everyone in the debate happy, observing – in language that would delight proponents of the plain English movement – that "there is great reason, that the writing should be expounded in such language, that the party may understand it, although he could read, because, by the law, he is at his peril to deliver it presently upon request, and hath not time to consult upon it with learned counsel." *Id.*, at 44

²⁰ It is more correct to say that they have not needed to resort to French all the time. Some vestiges of legal French – like the term "estoppel" – linger on from Norman times.

²¹ The case of *Milward v. Melden*, 21 Eng. Rep. 136 (Ch. 1566) is perhaps the earliest example of judicial frustration with bad legal writing, and even predated Sir Edward Coke. In that case, a lawyer expanded what should have been "a short pleading" into one of 120 pages. George Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 MICH. L. REV. 333, 346 (1987-88). The judge "ordered a hole cut in the middle of the document, through which the offender's head was thrust; this interlocking pair was then to be led around Westminster Hall during court sessions as a lesson to future padders and expanders." *Id.*

²² Lawyers speak in "a peculiar cant and jargon of their own, that no other mortal can understand." JONATHAN SWIFT, GULLIVER'S TRAVELS 154 (U. Chi. ed. 1952), *quoted by*, Robert W. Benson, *The End Of Legalese: The Game Is Over*, 13 N.Y.U. REV. L. & SOC. CHANGE 519, 521 (1984-85).

²³ "You . . . can easily correct this bill to the taste of my brother lawyers, by making every other word a 'said' or 'aforesaid' and saying everything over two or three times so as that nobody but we of the craft can untwist the diction, and find out what it means. . . ." Letter to Joseph C. Cabell (September 9, 1817), in 17 THE WRITINGS OF THOMAS JEFFERSON 417-18 (Lipscomb ed. 1905), *quoted by* Benson, *supra* n. 22, at 521.

convoluted language lawyers have chosen to use. Despite their criticisms, legal language has remained as impenetrable as ever, although a plain English movement has recently arisen²⁵ generating books,²⁶ jury instruction revisions,²⁷ a journal,²⁸ and even a handbook by the Securities and Exchange Commission.²⁹

Plain English still has its critics, however,³⁰ and it is difficult to claim victory yet in the battle against legalese.³¹ And this is perhaps because, in part, legalese is a symptom, not the disease itself. As Robert Benson has noted, legalese

is strange in the extreme, off the edge of the range of normal prose styles even in a diverse society. It is so out of touch with ordinary language that – in the hands of a powerful, exclusive profession – it becomes at best a symbol of alienation and at worst a tool to intimidate and exploit the public.³²

Legal language is our guild’s symbol, our “livery”³³ and we use it to guard and protect the power we have in society.³⁴ Put simply, we do not want others to understand what we do as

²⁴ Not always the clearest writer himself, Bentham nonetheless criticized lawyers for “poisoning language in order to fleece their clients” and described legal English as “excrementitious matter” and “literary garbage.” Jeremy Bentham, Works 260 (Bowring ed. 1843), *quoted by*, Benson, *supra* n. 22, at 521.

²⁵ Dating the beginning of this movement can be difficult, but one milestone was certainly the publication of David Melinkoff’s *The Language of the Law* in 1963. That book, and his subsequent book *Legal Writing: Sense and Nonsense*, published in 1982, were influential in shining a bright light on a problem that was understood but not much discussed, except perhaps in academic journals.

²⁶ *See, e.g.*, BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH (2001); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS (5th ed. 2005).

²⁷ *See, e.g.*, Arthur J. Hanes, Jr., et al, *The “Plain English” Project of the Alabama Pattern Jury Instructions Committee – Civil*, 68 ALA. LAW. 369 (2007) (“Since 2004, the [Alabama Pattern Jury Instructions] Committee – Civil has adopted the premise that jury instructions should be written in plain English so that jurors, in addition to the judges and lawyers involved in the trials, will learn the principles of law that govern the outcome of the case.”) It is remarkable to consider that before 2004, juror comprehension of the law governing a case was not a priority in Alabama.

²⁸ The Scribes Journal. Scribes is also a society – the “American Society of Legal Writers” – which seeks to encourage “a clear, succinct, and forceful style in legal writing.” <http://www.scribes.org/>.

²⁹ <http://www.sec.gov/pdf/handbook.pdf> (“SEC Handbook”). The Securities and Exchange Commission (“SEC”)’s handbook is crucial because of a drive by the SEC to make disclosure documents more intelligible to the public. *Id.*, at 3.

³⁰ The most notable of these is probably Professor David Crump, who has argued that plain English, in transactional documents at least, can be detrimental and should not be reflexively adopted by the drafting attorney. David Crump, *Against Plain English: The Case for a Functional Approach to Legal Document Preparation*, 33 RUTGERS L.J. 713, 734 (2002) (arguing in favor of abstruse as opposed to “plain” English in some documents, in part because clients are more likely to take seriously legal documents that are written in difficult to understand language).

³¹ Robert Benson’s claim that we had seen the end of legalese, made in 1985, was, as it turns out, somewhat over-confident. Benson, *supra* n. 22.

³² *Id.* at 522.

³³ Gopen, *supra* n. 21, at 339.

³⁴ “[J]ust as it is obvious to every school child who has ever scrawled a dirty word on the chalkboard that language is power, so it ought to be obvious to all of us that lawyers’ language is power exercised by a power elite and that the stakes in it are very real and very high.” Benson, *supra* n. 22, at 520.

lawyers,³⁵ so it should not be surprising that we use language so opaque as to prevent non-lawyers from understanding the law when they find it.³⁶

The Plain English in the law movement has done a great service in making legal language more accessible to everyone. But the movement has perhaps put the cart before the horse. Before anyone can begin to understand what it is lawyers write, they first have to gain access to the language itself. And despite such legislation as the E-Government Act,³⁷ the decline of book-based legal information and the parallel rise of digitally-stored and accessed legal information means that access to the law itself is becoming more, rather than less, restricted. So before the battle for comprehension even becomes relevant, the battle for access must first be fought and won. All movements require a slogan, and my proposed slogan for the legal information revolution is simple: Access First, Understanding Later.³⁸

³⁵ Indeed, lawyers guard their power so jealously that they even punish those in the guild who help others to say things. Ghost writing, a situation in which “an attorney authors court documents for a pro se litigant who, in turn, submits the court document as his or her own writing[,] . . . is widely condemned as unethical and a ‘deliberate evasion of the responsibilities imposed on attorneys.’” *Iowa Sup. Ct. Bd. of Prof. Ethics and Conduct v. Lane*, 642 N.W.2d 296, 299 (Ia. 2002), quoting *Wesley v. Don Stein Buick, Inc.*, 987 F.Supp. 884, 886 (D. Kan. 1997). Although any deception in a forum for truth is surely a bad idea, it is difficult to see why a lawyer ghost writing a court document for a pro se litigant is viewed as unethical, while an associate writing a brief for a partner, or a law clerk writing an opinion for a judge’s signature, is considered to be an acceptable practice.

³⁶ Although legal English is perhaps the most obvious way we seek to limit non-lawyers from understanding what we do, we have other methods as well, most notably the non-publication of a staggering percentage of appellate decisions. In 2000, 79.8% of decisions issued by the Federal Courts of Appeal were unpublished; the Fourth Circuit had the highest percentage of unpublished decisions, at 90.5% and the Seventh Circuit had the lowest, at 56.5%. Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the United States*, 56 STAN. L. REV. 1435, 1471-72 (2004). Even when decisions are required to be made available to the public, courts find ways to prevent this from happening. The E-Government Act of 2002 requires the federal courts to provide “[a]ccess to the substance of all written opinions issued by the court, regardless of whether such opinions are to be published in the official court reporter, in a text searchable format.” E-Government Act of 2002 § 205(a)(5), Pub. L. No. 107-347, 116 Stat. 2913 (codified at 44 U.S.C. § 3501 (Supp III 2005)). According to a definition of the term “written opinion” supplied by the Judicial Conference, federal appellate judges can determine which of the decisional documents they draft fall within the ambit of the E-Government Act. While the definition notes that “any document issued by a judge or judges of the court sitting in that capacity that sets forth a reasoned explanation for a court’s decision” is a “written opinion,” “[i]n the courts of appeals, only those documents designated as opinions of the court meet the definition of ‘written opinion.’” Stephen B. Burbank, *Judicial Accountability to the Past, Present, and Future: Precedent, Politics and Power*, 28 U. ARK. LITTLE ROCK L. REV. 19, 22-23 (2005)(internal quotation marks omitted)(citing Memorandum on Compliance with Website Requirements of the E-Government Act to All Chief Judges, United States Courts, from Leonidas Ralph Mecham 2 (Nov. 10, 2004)). And those federal courts who elected to use PACER (“Public Access to Court Electronic Records” <http://www.pacer.psc.uscourts.gov>) as their means of complying with the E-Government Act have selected a website that is neither text-searchable to any meaningful degree, nor truly available to all members of the public, especially the poor and the homeless. For a more complete description of the problems associated with PACER as a legal information website, see Ian Gallacher, *Cite Unseen: How Neutral Citation and America’s Law Schools Can Cure Our Strange Devotion to Bibliographical Orthodoxy and the Constriction of Open and Equal Access to the Law*, 70 ALBANY L. REV. 491, 529-34 (2007).

³⁷ See, n. 36.

³⁸ With apologies to Bertolt Brecht, from whom this slogan is derived. Bertolt Brecht, *Die Dreigroschenoper: A Facsimile of the Holograph Full Score* (Edward Harsh ed., Kurt Weill Foundation for Music, Inc. 1996) (1928)(“[E]rst kommt das Fressen, dann kommt dir Moral. . . .”)(Food comes first, morals follow after).

The time to respond to these problems and provide universal access to the law is now, and this article will propose that America's law schools should be in the vanguard of this response. Law schools have a grandstand view of the issues presented by computer-assisted legal research and are best situated to exert a positive influence on the situation. This article will argue that America's law schools should climb out of the grandstand and become actively engaged in the world of legal information. More concretely, it proposes that law schools band together in a consortium in order to publish and freely disseminate American common law on the internet.³⁹

This article first surveys the present legal information environment and reviews the development of computer-assisted legal information⁴⁰ and the long-term future of book-based legal research,⁴¹ and outlines the problems with the present situation where computer-assisted legal information is tightly controlled by two large corporate information providers.⁴² It next considers the need for open access to the law, both for pro-se and low income clients,⁴³ for lawyers in general,⁴⁴ and for scholars from other disciplines who could use legal information in their work but who presently have little realistic access to such information.⁴⁵ The article then considers the present alternatives to the commercial databases of legal information and discusses their inadequacies⁴⁶ and discusses why law schools have both the opportunity and obligation to provide an alternative to the commercial legal information sites.⁴⁷ Finally, the article concludes with ten proposed principles that might guide an open-access legal information site.⁴⁸

This article is a manifesto outlining the principle of open-access to legal information⁴⁹ and law school involvement in such open access, not a technical manual outlining how these principles can or should be accomplished. There is no discussion here of how the inevitable plethora of technical and financial problems inherent in a project of this scope can be

³⁹ I have suggested this idea in a previous article, but discuss it here in substantially more detail. *See*, Gallacher, *supra*. n. 36.

⁴⁰ *See* nn. 51 to 57 and accompanying text.

⁴¹ *See* nn. 58 to 60 and accompanying text.

⁴² *See* nn. 61 to 64 and accompanying text.

⁴³ *See* nn. 65 to 68 and accompanying text.

⁴⁴ *See* nn. 69 to 73 and accompanying text.

⁴⁵ *See* nn. 74 to 88 and accompanying text.

⁴⁶ *See* nn. 89 to 100 and accompanying text.

⁴⁷ *See* nn. 101 to 153 and accompanying text.

⁴⁸ *See* nn. 154 to 239 and accompanying text.

⁴⁹ By "legal information," I mean only access to court opinions, legislative enactments, and regulations. It is possible, of course, to argue for far wider access to all information that pertains in any way to the legal system. *See, e.g.*, Lynn M. Lopucki, *Court System Transparency*, available at <http://ssrn.com/abstract=1013380> (accessed October 20, 2007). In his article, Professor Lopucki advocates the simple proposition that all court documents – transcripts, briefs, orders, and so on – be made public and published. By achieving complete transparency of the legal system, Professor Lopucki contends that the judicial system would undergo a transformation: "Corruption, incompetence, inefficiency, prejudice, and favoritism would first be exposed, and then largely disappear. Public confidence in the system would increase, because the system would become worthy of it. Legislators would have an unprecedented ability to control legal outcomes. Those outcomes would be more predictable, reducing the need for litigation. Laws would have concrete meanings." *Id.* at 3. And while this assessment of the effectiveness of a totally transparent judicial system might seem overly optimistic, the act of making available to the public information that is, in theory at least, public information cannot be harmful to the public perception of the judicial system in this country.

solved.⁵⁰ Before such problems can be solved, or even identified, we first must agree that providing free and open access to American law is necessary, that law school involvement in providing this access is desirable, and must begin the process of outlining the parameters of such an ambitious project. That is the modest goal of this article.

II. THE PRESENT LEGAL INFORMATION ENVIRONMENT

At present, legal information is principally available in two mediums; books and computer databases.⁵¹ Each medium has advantages and disadvantages for the legal researcher,⁵² and both mediums are available only at a substantial cost, especially for practicing lawyers.⁵³ But while books are not cheap to buy, store, or maintain,⁵⁴ and while they limit legal research to

⁵⁰ In a separate article, I do offer one possible technical solution to the problem of providing pre-indexed information in order to facilitate legal research: Ian Gallacher, *Mapping the Social Life of the Law: An Alternative Approach to Legal Research*, Available at the Social Science Research Network: <http://ssrn.com/abstract=1024176>.

⁵¹ There was a time when it appeared that a hybrid medium, in the form of CD-ROM, might be a viable third form in which legal information was available. The legal market, however, seems to have rejected CD-ROM as a legal research format. See, CATHERINE SANDERS REACH ET AL., 2007 AMERICAN BAR ASSOCIATION LEGAL TECHNOLOGY RESOURCE CENTER REPORT, ONLINE RESEARCH TREND REPORT (“ABA Survey”), at 16 (2007) (Only one resource, legal forms at 8 percent, was used as a primary format in CD-ROM by more than one percent of respondents.)

⁵² Pre-indexed research is, of course, the standard for book based legal research and until the advent of computer-assisted legal research, it was the principal method of conducting legal research for almost one hundred years. Other methods of research, such as using legal encyclopedias, annotated reports, treatises, and legal periodicals, were and continue to be available to legal researchers, but these tend to be incomplete sources of information, suitable, perhaps, for the experienced practitioner looking to update already-existing knowledge but inadequate for someone new to the practice of law or to a particular practice area. Pre-indexed research, by contrast, is quick, easy to use for the less experienced practitioner, and comprehensive in coverage if the issue under consideration falls neatly within the pre-indexing system’s categorization of the law. If, however, the issue sits in the cracks of a legal issue, or can be properly placed into more than one category, the legal researcher who does not consider the possibility of the result being located in more than one place within the digesting system runs the risk of missing a crucial case that was placed by the pre-indexer in a location other than the one under consideration by the researcher. More significantly, perhaps, the formalistic nature of the pre-indexed research method limits the researcher’s ability to consider the possibility of factual and legal connections to cases that appear, at first sight, to have no relation to the issue under consideration but which, after more reflection, can be seen to have deep connections that can make them helpful when making less-than-obvious arguments in support of a position. These limitations, along with the pre-indexed researcher’s inability to move beyond the rigid boundaries of the pre-indexing system (see, e.g., the ability to research a particular judge discussed *supra* n. 9), are what led to the development of index-free computer-assisted legal research. See, *supra* n. 8 for a discussion of the motivation behind the development of LexisNexis as a non-indexed legal database. But non-indexed research has its own problems as well. In addition to the possibility of user error, in the form of mistyping a name or word that, as any user of LexisNexis or Westlaw knows, will render the resulting search entirely useless, the balance between research precision and completeness is significant and, perhaps, too-little understood by practicing lawyers. For a discussion of this issue, see, Gallacher, *supra* n. 6, at 184-86.

⁵³ For a discussion of the cost of computer-assisted legal research, and the ways law firms can recover such costs see *supra* nn 10 and 11.

⁵⁴ The cost of book-based legal research is not restricted to the cost of the books themselves, although this cost is not inconsiderable. See, Gallacher, *supra* n. 6, at 194-95 (concluding that a medium sized collection of print materials could cost a law firm \$60,000 in supplementation charges alone. But the cost of the materials is not the only cost associated with a physical library, which is mostly non-productive space (space which is not used to bill time to clients) that represents a substantial rental cost. *Id.* at 195 (concluding that a 500 square foot library in Class A office space in Washington D.C. in the first quarter of 2002 would cost approximately \$70,000 a year.

the terms of their indexing, they remain a valuable and viable source of legal information for many lawyers.

How much longer this will be true, however, is unclear. One of the characteristics of revolution is a renunciation of that which is being rebelled against, and in the case of legal information, the advent of the internet as a viable information source has signaled the rejection of book-based legal research by contemporary law students⁵⁵ and lawyers in practice appear to be following suit.⁵⁶ Even though studies indicate that lawyers are not especially adept at conducting computer-assisted legal research,⁵⁷ the trend towards computers, and away from books, appears to be irreversible.

⁵⁵ This rejection of books has been documented by the librarians at the Georgetown University law library in a 2001 study. Gary J. Bravy & K. Celeste Feather, *The Impact Of Electronic Access On Basic Library Services: One Academic Law Library's Experience*, 93 LAW LIBR. J. 261 (2001). In their study, the librarians tracked the number of photocopies students made in their library. They saw a steady increase during the early to mid 1990s, and then a dramatic decline in copies thereafter. *Id.* at 262-63. This decline, which the librarians hypothesized was caused by students using on-line sources to access the law instead of library books, was paralleled by a decline in book reshelving at the same library over the same period. *Id.* at 265. See also, Erica V. Wayne & J. Paul Lomio, *Book Lovers Beware: A Survey of Online Research Habits of Stanford Law Students*, 6-7 (Robert Crown Law Library Legal Research Paper Series, Research Paper No. 2)(2005). In this study, the authors tracked the research habits of responding students at Stanford University Law School. Over a three year period, the number of responders who answered that they did 100 percent of their legal research online actually fell, from 19 percent in 2002 to 14 percent in 2004. But the numbers of students who did 80 percent or more of their research rose dramatically, from 75 percent of first year students and 62 percent of all students in 2002, to 93 percent of first year students and 79 percent of all students in 2004.

⁵⁶ A recent survey by the American Bar Association's Legal Technology Resource Center demonstrated that 91 percent of respondents conduct legal research online. ABA Survey, *supra*. n. 51, at 13. The survey noted an age difference with online users, with 98 percent of respondents under the age of 40 conducting online research, while 83 percent of respondents aged 60 and over conduct legal research in this manner. *Id.* Although the report characterizes this last statistic as "only" 83 percent, few numbers can demonstrate how pervasive the influence of online legal research is than this remarkably high adoption rate by attorneys who might be thought as being too hide-bound to adopt a new approach to legal research.

⁵⁷ The ABA Survey suggests that associates are "much more likely than partners . . . to regularly conduct their own research." *Id.* at 12. In fact, 85 percent of the respondents suggested that associates would conduct their own research, as opposed to 61 percent for partners. And 69 percent of responding partners indicated that other firm lawyers would conduct research for them. *Id.* Other results from the ABA Survey indicated that 40 percent of respondents had firm law clerks or summer associates regularly conducting legal research, with 14 percent using firm librarians and a perhaps surprising 24 percent using paralegals to conduct research. *Id.* These numbers are consistent with a 1992 study showing that 92 percent of responding attorneys believed that legal research was a skill that should be brought to the practice of law from law school by new attorneys. Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, 43 J. LEG. EDUC. 469, at Table 11 (1993). See also, Leonard L. Baird, *A Survey of the Relevance of Legal Training to Law School Graduates*, 29 J. LEG. EDUC. 264, 273 (1978)(indicating that 61.8 percent of respondents believed law school had "essential" role in attorneys attaining competency in legal research). Yet studies also suggest that the general perception is that summer associates and newer attorneys are not as skilled in legal research as they should be. Joan S. Howland & Nancy J. Lewis, *Effectiveness of Law School Legal Research Training Programs*, 40 J. LEG. EDUC. 381, 383 (1990) (80 percent of responding law firm librarians found summer associates "less than satisfactory in their ability to attack a legal research problem effectively.) And recent surveys of Chicago-area lawyers and law librarians strengthen the idea that at least the perception of newer lawyers is that they are not effective legal researchers: Sanford N. Greenburg, *Chicago-Area Attorney Survey* (2007) ("2007 Attorney Survey") (prepared for the 2007 "Back to the Future of Legal Research" Conference hosted by Chicago-Kent College of Law. A copy of the 2007 Attorney Survey results is on file with the author)(57 percent of respondents answered that new attorneys "seldom" or "never" could use print legal research resources prior to in-house training, and 44 percent answered that new attorneys were "seldom" or "never" able to use fee-based online legal research resources effectively prior to in-house training); Tom Gaylord, *Chicago-Area Librarian Survey* (2007) ("2007 Librarian

This trend appears to signal the beginning of the end of book-based legal information, although whether law books are in for a long slide into oblivion or whether their demise will happen more rapidly is unclear.⁵⁸ The expense of buying and maintaining physical libraries has led many law firms to rely solely on computer-assisted legal research, keeping a few law books more as three-dimensional wallpaper rather than as reference tools.⁵⁹ And the pricing philosophy of law book publishers appears to be contributing to the problem, with costs of law books increasing rapidly, thereby causing more buyers to discontinue their subscriptions.⁶⁰

It is difficult to imagine a corporation like Thomson, West's corporate parent, formerly a publisher but now emphatically an "information resource,"⁶¹ continuing to invest in the

Survey") (prepared for the 2007 "Back to the Future of Legal Research" Conference hosted by Chicago-Kent College of Law. A copy of the 2007 Librarian Survey results is on file with the author)(71 percent of respondents answered that new attorneys were not able to research effectively and efficiently prior to in-house training. Percentage of respondents who answered that new attorneys were able to research effectively and efficiently dropped by almost half between 2005 and 2007).

⁵⁸ The ABA Survey suggests that "[p]rint research is not dead *yet*." ABA Survey, *supra*, n. 51, at 15 (emphasis added). The survey revealed that 52 percent of respondents regularly use print materials and 38 percent use them occasionally. While the survey's authors characterize print as still being "alive and well," with "use staying fairly consistent with the 2006 Survey but lower than 2004-2005" (*id.*, at 16), it is difficult to be so sanguine about the numbers in the face of continually rising costs for print materials. The bare majority of responding attorneys who use print regularly might still prefer that medium, but it is difficult to imagine that their preference will prevail over the bottom-line cost of legal research materials, especially given the 91% acceptance rate for some form of online research.

⁵⁹ Semilogists would doubtless have a field day explaining why it is that television programs in which either fictional or real lawyers appear almost invariably show them in front of a bank of books, yet lawyers themselves are using the books in their work less and less. Books, it appears, convey a sense of *logos* and professional competence to the public more effectively and immediately than a computer screen, even though practicing lawyers are less persuaded by their value in performing day-to-day legal research tasks.

⁶⁰ The rise in cost of reporters is substantial. The Atlantic Reporter, Second Series, for example, cost \$262 in 1999 and \$465 in 2003, an increase of \$203 or more than 77 percent. SVENGALIS, *supra* n. 4, at 17. The truly disturbing trend, however, is the increase in cost for finding tools such as print digests. The Hawaii digest, for example, cost \$312 in 1999 and \$1,371.50 in 2003, while the Rhode Island digest rose from \$432 to \$1,272.50 in the same time. *Id.* Svengalis notes that digest prices dropped substantially in 199, only to rebound dramatically in the following four years. *Id.* Whether this was the result of a concerted attempt by West to augment the number of purchasers of its digests before instituting a planned increase in price, as Svengalis believes, (*id.*) or whether it was the result of circumstances beyond West's control is unclear.

⁶¹ Thomson describes itself as an "information resource" on its website <http://thomson.com/>, and notes that "Thomson businesses are dedicated to getting you the specialized information you need, when you need it, how you need it. Because information not only moves the world, it makes it a better place." *Id.* Certainly Thomson's recent business trajectory has taken it on a course away from its traditional role as a publisher of information and towards a role as an information provider. Thomson was, for many years, a leading publisher of newspapers (<http://thomson.com/about/history/>), and nothing demonstrates its change in focus more clearly than its repudiation of the newspaper publishing business and its recent discussions to buy Reuters, a leading news agency. *Id.* The websites of Thomson, the parent company, and West, the legal information provider, offer an interesting insight into this contrast in emphasis in the legal context. Following the tab for "legal" on the "thomson.com" website takes the reader to <http://www.thomson.com/solutions/legal/>, where one learns about Westlaw, and in particular that it is "the premiere online legal research tool accessed by millions of users around the world. It provides quick, easy access to a vast collection of statutes, case law materials, public records and other legal resources, along with current news articles and business information. Westlaw is backed by industry-leading customer service, from technical support to research assistance. Available 24 hours per day, seven days a week, West's professional reference attorneys are bar-admitted lawyers with representation from more than 20 states, ensuring the best

printing technology necessary to continue publishing books in the future, especially since Westlaw now provides subscribers with the opportunity to print PDF copies of many cases, thereby turning the Westlaw subscriber into a form of micro-publisher.⁶²

It is possible to imagine a cynical corporate publisher milking the last possible penny from book sales while, at the same time, seeking to end book production and force everyone to use its subscription databases, but an alternative, and less nefarious, reason for the increase in law book prices might be more persuasive. Put simply, maybe the books cost more to buyers because they cost more to produce. And in addition to the financial cost of producing books, the environmental cost – consisting not just of the paper use, but also the toxic nature of paper and ink manufacture⁶³ and the fuel expended to transport paper through its various stages from timber to book on the shelf – makes the existence of books that are, apparently, not being used to any great degree, increasingly more difficult to justify.⁶⁴

III. THE NEED FOR OPEN ACCESS TO THE LAW

Lawyers who represent low-income clients and pro se litigants⁶⁵ who have no access to computer-assisted legal research tools can meet their legal research needs at present by

results from each research session.” *Id.* There is no mention, on this page at least, of West’s role as a print publisher. By contrast, a visit to <http://west.thomson.com>, the home website for West within the Thomson family of companies, tells the reader that “[y]our clients demand the best. Guarantee it with West law books and legal products.” *Id.* One way of viewing this difference in emphasis is that Thomson is trying to distance itself from its involvement in print media when presenting its public face, especially to investors (a clue to the importance of this website to Thomson shareholders might be the availability of the 2006 Thomson Annual Report from the homepage of the thomson.com site), and yet is still willing to embrace its traditional role as a publisher of law books when speaking more directly to the lawyers who are more likely to access information from the west.thomson.com site.

⁶² Micro-publishing allows a purchaser to buy and print only that portion of a book which is relevant to the reader’s needs.

⁶³ The Natural Resources Defense Council, admittedly not an unbiased commentator, notes that “[t]he pulp and paper industry may contribute to more global and local environmental problems than any other industry in the world. . . . [T]he industry is the third largest industrial emitter of global warming pollution.” Natural Resources Defense Council, *Reforming the Paper Industry: The Power Of Consumer Choice Can Help Transform An Entire Industry From Environmental Bad Guy To Sustainable Business*, <http://www.nrdc.org/cities/living/paper/default.asp>. Some publishers have begun to consider the environmental impact of their business. Time Inc., for example, recently participated in study that “calculated the amount of carbon dioxide emissions produced over the entire process to publishing and InStyle.” Louise Story, *The Hidden Life Of Paper And Its Impact On The Environment*, N.Y. TIMES, October 25, 2006, available at http://www.nytimes.com/2006/10/25/business/media/25adco.html?_r=1&pagewanted=print&oref=slogin.

⁶⁴ This is not an easy admission for one for whom books have always been, and continue to be, a crucial element of daily life. Nor is it to say that computer use does not have serious environmental consequences either. It is, though, to say that computers are with us, for good or ill, regardless of what happens with books. For the purposes of this discussion, then, the environmental impact of computers is not part of the equation. The question of whether we should add to the significant environmental impact of computers by continuing to produce a parallel legal information medium that is not being used is substantially less easy to dismiss.

⁶⁵ Robert Berring has written that it is possible for “any literate, English-speaking person to walk into a local library, perhaps one that specializes in law, but perhaps not, and find federal and state court cases, statutes, and administrative law.” Robert Berring, Essay, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 CAL. L. REV. 615, 618 (1995). Berring’s assessment was likely not entirely accurate when he was writing his article in 1995, and it is likely even less true today.

gaining access to courthouse, bar association, or law school libraries that are open to the public.⁶⁶ When books are no longer available as a legal research resource, however, the need for a comprehensive, no-cost alternative means of researching the law for these users⁶⁷ seems so obvious as to need no further discussion.⁶⁸

Indeed, free and open access to the law is something that should be appealing to all lawyers, not just those serving the needs of clients who cannot afford to pay the fees necessary to justify use of Westlaw and LexisNexis.⁶⁹ A move from a physical library to an online service signals more than a change in research technique; it means a law firm has moved from owning the law, in the form of digests and case reporters, to being a licensee entitled to access legal information according to the terms of a license agreement.⁷⁰

⁶⁶ A simple Google search for “public law library” and a geographical location will usually turn up the nearest public library with a legal collection that is open to the public. While the number of such libraries will be relatively high in large urban areas like cities, more rural locations, especially those far from urban centers or law schools, are less likely to have access to any legal information, and certainly not to the comprehensive national legal information available to any lawyer with a fully-enabled Westlaw or LexisNexis password and an internet connection.

⁶⁷ Public librarians are, more often than not, the first responders to low income potential seekers of legal information, and they have a generally pessimistic opinion on the present availability of legal information. See, Melissa Barr, *Democracy in the Dark: Public Access Restrictions from Westlaw and LexisNexis*, INFORMATION TODAY, Jan. 2003, accessible at <http://www.infotoday.com/searcher/jan03/barr.shtml>.

⁶⁸ Some alternative legal research databases appear to offer this service now, but the impression is illusory. See, *infra*, nn 89--100 and accompanying text.

⁶⁹ The pricing strategies of Westlaw and LexisNexis have changed. Whereas charges for legal research services were principally calculated on a time or library access basis, they now often are calculated based on a flat fee arrangement, where a law firm pays one monthly fee – regardless of time spent online or in which online libraries research is conducted – for access to the database. This means that while firms used to be able to bill clients directly for the time they spent using the service, now they have to incorporate the flat fee into their overhead charges, much like fees for physical libraries. This is calculated as a portion of the firm’s fee to a client, usually in the form of the hourly billing rate. For a more complete discussion of firm billing practices and the effect of flat-fee arrangements on those practices, see, Gallacher, *supra* n. 6., at 197-201.

⁷⁰ The difference between buying the books and obtaining a license to use legal information was illustrated in dramatic fashion by the Jurisline experiment. Jurisline sought to fill what T.R. Halvorson described as the “throbbing deficiency of free legal resources on the internet.” T.R. Halvorson, *The Jurisline Litigation: Implications for Alternative Online Sources of Primary Legal Authority*, available at <http://showcase.netins.net/web/trhalvorson/law/NOCALL/Contents.htm> (“Jurisline Litigation”). In March of 1999, the founders of Jurisline ordered a series of CD-ROM discs from Lexis that gave them court opinions from 38 states, the District of Columbia, and each federal circuit. *Id.* The signatory on the subscription agreement, Lee Eichen – a 1994 graduate of the University of Pennsylvania School of Law – signed an agreement indicating that he was a “sole practitioner.” *Id.* The agreement provided, among other things, that Eichen “would not use the CD-ROM system to develop a database, infobase, or other information resource for resale or reuse without first paying a multi-user subscription fee.” *Id.* But this is, of course, exactly what Eichen and his partner, Kendrick Chow, did: they copied the “core text” of court opinions from the CD-ROMs, stripped the text of any editorial enhancements and any other “value-added product” made by Lexis, and, by at least December 10, 1999, declared that it was in “beta testing” of its site, “with the goal of introducing the Jurisline.com site as a primary internet destination for free legal research needs and related services.” T.R. Halvorson, *Jurisline.com: What You See . . . What You Don’t See*, available at <http://www.llrx.com/features/jurisline.htm> (“Jurisline.com”). On December 8, 1999, Jurisline.com LLC filed suit in federal court in the Southern District of New York alleging that the core data on Lexis’ CD-ROMs was in the public domain, that federal copyright law preempted state contract law, rendering the licensing agreements unenforceable, and that Lexis and West had used their monopoly power in the legal information market to restrict supply and artificially inflate their fees, and seeking, among other things, a declaratory judgment that Lexis’ parent company not be able to enforce its licensing agreements. *Jurisline Litigation*. The response was predictably rapid, well-organized, and brutally effective. On January 28, 2000, Mathew Bender,

This involves a certain amount of risk. Whereas books were a known commodity, and had been the only method of storing and transmitting legal information known to the American legal system until a few years ago, we have seen CD-ROM technology rise and fall as a proposed alternative to the physical library.⁷¹ Any law firm that based its future research budget on the continued viability of CD-ROM as a resource has had to reevaluate its decision in light of this development, and likely has had to increase its reliance on online databases to make up for the loss of CD-ROM.⁷²

Any firm that now gives up its physical library for online databases is gambling that it will not have to make similar changes in the future to accommodate as yet unknown future technologies, and that it will continue to be able to afford West or LexisNexis' future pricing policies; unlike a physical library, where books, once bought, are always available, failure to pay a licensing fee means a foreclosure of access to all law. In short, a license-based approach to a digital library means total reliance on the licensor.⁷³

While the need for all lawyers to have free and open access to the law might appear self-evident,⁷⁴ the need for other potential users, such as scholars in non-legal areas of inquiry, to have open access to the law is less immediately apparent. But that need is currently more

the correct parent entity for Lexis, sued in New York's Supreme Court, claiming fraud and breach of contract. *Id.* Within just over six months – on June 19, 2000 – the litigation was over: the parties stipulated to final judgment in state court in favor of Mathew Bender, Jurisline acknowledged the validity of Bender's license, agreed to remove all data derived from the Lexis CD-ROMs from its system, agreed to return the CD-ROMs and all copies to Bender, and agreed not to deliver of the Lexis-derived material to anyone. *Id.* If the Jurisline fiasco teaches anything other than large corporations will defend themselves aggressively when they feel themselves to be under attack, it is that license agreements are an effective way to subvert the absence of copyright protection for American case law. The cases might not be copyrightable, but someone seeking to re-package case law likely cannot obtain the raw data necessary from a licensed source.

⁷¹ Compare Joanne R. Piersall, *To Move Or Not To Move?* LAW. PRAC. MGMT 54 (April 1997), *quoted in*, Thomas McKnight Steele, MATERIALS AND CASES ON LAW PRACTICE MANAGEMENT, 547 (2003) (“The increasing availability and ease of use of CD-ROM resources make replacing all or part of the traditional hard copy law library a very practical consideration.”), *with* ABA Legal Research Report, at 15 (“The demise of the CD-ROM format for legal research continues.”)

⁷² As a practical matter, a firm that has abandoned its physical library by selling most or all of its law books and rededicating the physical space formerly occupied by the library to other purposes – usually transforming the space from non income-generating to income-generating (in the form of lawyer or paralegal offices) will find it difficult if not impossible to recreate a physical library. Once the books are gone, they likely are gone for good.

⁷³ The Jurisline litigation also sounds the clear warning that a firm relying on a license agreement to access the law necessary for it to conduct legal research should pay close attention to the terms of its license agreement and should not, in any way, intentionally violate the terms of that agreement. The penalty for any such violations could be the termination of the licensing agreement which would, in practical terms, be a death sentence for a firm that could not afford to re-acquire a physical library and which is dependent on its ability to conduct legal research in order to continue to do business.

⁷⁴ There have been some impressive achievements in providing open access to legal information, most notably Cornell's Legal Information Institute and the Library of Congress' THOMAS database of federal legislative information. But most of the scholarly focus on open access has been on the question of providing open access to legal scholarship. This topic was the subject of a one-day symposium in March, 2006 at the Lewis and Clark law school which, in turn, generated several valuable articles published in the Lewis and Clark law review. Joseph Scott Miller, *Foreword: Why Open Access to Scholarship Matters*, 10 LEWIS & CLARK L. REV. 733 (2006). And important though open access to legal scholarship undoubtedly is, making the law itself freely available to everyone is surely a loftier goal for the legal academic community.

pressing because book-based legal information will not satisfy it. Whereas lawyers are able to obtain results using the pre-indexed print digests that have always been a staple of legal research, non-lawyers would find the pre-indexed doctrinal categories virtually useless in their work. What they require is the ability to self-index the law, using Boolean-type searches to interrogate legal databases for the terms and concepts that interest them.

The idea that scholars in fields outside the law might be able to use case law to further their work might seem surprising to lawyers but that is, perhaps, a reaction borne of an understandable but regrettable insularity. Put simply, law is, to most lawyers, a tool by which they conduct their profession, and case law is data, something to be stored these days in a database.⁷⁵ To non-lawyers, though, law is more of a cultural artifact, part of the history of this country, and a part that can tell some profound stories of who we were, who we are, and how we became who we are.⁷⁶ Information like this is more properly stored and studied in an archive.⁷⁷

A simple illustration of this difference in approach can be found in the case of *Jerry v. Townshend*.⁷⁸ To lawyers, this case stands principally for the proposition that intra-jurisdictional transfer of litigation within two Maryland counties is possible where the transfer is sought due to local prejudice.⁷⁹ But to non-lawyers, the case has a deeper, richer,

⁷⁵ The Oxford English Dictionary (“OED”) gives the definition of “database” as “[a] structured collection of data held in computer storage; *esp.* one that incorporates software to make it accessible in a variety of ways” Found at http://dictionary.oed.com.libezproxy2.syr.edu/cgi/entry/50057772?single=1&query_type=word&queryword=database&first=1&max_to_show=10. This definition is, perhaps, too restrictive today, when the word’s meaning can be expanded to mean any collection of data, a word which, according to the Oxford English Dictionary, carries a meaning of “[f]acts, esp[ecially] numerical facts, collected together for reference or information.” http://dictionary.oed.com.libezproxy2.syr.edu/cgi/entry/50057802/50057802spg1?query_type=misspelling&queryword=data&first=1&max_to_show=10&sort_type=alpha&result_place=2&search_id=ULaR-K3VGqt-6200&hilite=50057802spg1.

⁷⁶ An example of this archival approach is a website that makes available the Old Bailey Proceedings from 1674 to 1834. <http://www.oldbaileyonline.org/>. This website, the result of a collaboration between scholars at the Universities of Hertfordshire and Sheffield in England, and funded by, among other entities, the British National Lottery, proclaims itself to be “the largest body of texts detailing the lives on non-elite ever published. . . .” *Id.* The site is completely free, and provides a variety of tools to help the user explore the proceedings, which range from terse summaries of names, alleged crimes, and verdicts, to seemingly verbatim transcripts of the proceedings. As one reads the transcripts, especially those that record testimony from victims, accused, and witnesses, one has an unparalleled chance to hear the voices of real people from hundreds of years ago describing their lives. It is a fascinating and educational experience that gives us profound insights into the way life was different and, perhaps surprisingly, the same as today. These insights are no less valuable because they are the collateral result of documents that were intended to be nothing more than a record of court proceedings. While the level of factual detail, and the immediateness of the unmediated voice of the litigants, is less in American appellate and trial court opinions than it is in these transcripts of court proceedings, judicial opinions nonetheless offer historians, sociologists, anthropologists, and those working in many other scholarly disciplines a unique record of life at the time the decision was written.

⁷⁷ An archive is “[a] place in which public records or other important historic documents are kept.” OED definition of “archive,” found at http://dictionary.oed.com.libezproxy2.syr.edu/cgi/entry/50011586?query_type=word&queryword=archive&first=1&max_to_show=10&sort_type=alpha&result_place=1&search_id=MMNI-k0BvEJ-6296&hilite=50011586.

⁷⁸ 2 Md. 274 (1852).

⁷⁹ 2 Md. 274, 1852 WL 2169, * 2. The case is still occasionally cited for this proposition. *See, e.g.*, *Lennox v. Mull*, 89 Md.App. 555, 561 (1991). The case is also the first identifiable example of representative litigation in Maryland, and is therefore a pre-cursor to the contemporary class action. Ian Gallacher,

and more troubling significance, hinted at by its full and proper name – *Negro Jerry v. Townshend*⁸⁰ – and by its date of 1852.

In fact, this case involved the petition of two slaves, known to us only as Jerry and Anthony, to enforce the manumission petition granted to them and the other slaves on the farm by their previous owner, the father of their owner at the time the suit was brought, before he died.⁸¹ Their ultimately fruitless struggle to gain freedom through the civil justice system is described in this case and in two subsequent Court of Appeals decisions⁸² and taken together, this sequence of decisions allows sociologists, cultural anthropologists, and historians⁸³ an insight into life in middle 19th Century America, and into the minds of Americans then living, that is difficult to obtain from other sources.⁸⁴

This case, as with all other reported cases in this country,⁸⁵ is, of course, available to scholars in book format. But because cases are digested according to purely legal topics,⁸⁶ they are

Representative Litigation in Maryland: The Past, Present, And Future Of The Class Action Rule In State Courts 58 Md. L. Rev. 1510, 1515-18 (1999).

⁸⁰ Some readers might be surprised to see the word “Negro” attached to the case citation. There is a simple historical reason for its presence, and it highlights the value of judicial opinions to scholars.. Slaves could not bring actions at law. *Id.* By placing the word “negro” in front of the case name, the court signified to a contemporary reader the fact that this case likely had little precedential value because it involved litigants who should not, under normal circumstances, be before the court. To the extent that the addition of “negro” of a party’s name can be characterized, it should likely be considered a procedural phrase like “*in re*,” “*ex rel*,” or “*ex parte*” and should, therefore, be included in the case citation. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 82 (Columbia Law Review Ass’s et al. eds., 18th ed. 2005) [hereinafter THE BLUEBOOK].

⁸¹ 2 Md. 274; *Townshend v. Townshend*, 5 Md. 287, 288 (1853); *Negro Jerry v. Townshend*, 9 Md. 145, 146 (1856).

⁸² *Townshend v. Townshend*, 5 Md. 287, 288 (1853); *Negro Jerry v. Townshend*, 9 Md. 145, 146 (1856).

⁸³ The case is, of course, of interest to legal historians as well. In addition to being the first reported representative action in Maryland, and therefore a precursor to Maryland’s present class action rule, the case provides an insight into the strategies of lawyers for both sides and tells us that even though it is unlikely that the two slaves could afford a lawyers’ fees, they were able to obtain better than competent representation during the pre-trial, trial, and appeals stages of their case. But legal historians working in the field of slavery and the legal system would have ready access to this case through the Westlaw and Lexis databases, assuming that they were affiliated with law schools and therefore were provided with passwords for these databases.

⁸⁴ Scholars in other fields might find the case useful as well. In particular, medical historians might be interested in the way the madness of Townshend senior was diagnosed. Witnesses at trial testified, the court said, to facts which were substantially the same as those pled to in earlier proceedings. *Negro Jerry*, 9 Md. 145, 1856 WL 3812, at *3. At one of those earlier proceedings, a witness testified that Townshend senior claimed to talk to God frequently, and that God had told him “to set his negroes free, and to give them all his property, that he had told him this repeatedly, that at one time he, *Townshend*, intended to convey a piece of land to one of his nephews, and that *God* had told him that he must not do so, but must give it to his negroes. . . .” *Townshend v. Townshend*, 9 Gill 506, 1851 WL 3110, *3 (Md. 1851). In a rare insight into God’s political views, Townshend also told witnesses that “*God* then told him, that he himself was a democrat, and had voted the democratic ticket, but that he had determined at that election not to vote at all, that the democrats had become like a saw that had grown dull, and needed filing, and that he meant to let the whigs succeed that year, that they might act as a file upon the saw. . . .” *Id.* After this testimony was offered at trial, the slaves’ owner, and son of Townshend senior, then called Dr. John Fonerden, the head of the Maryland Hospital of the Insane, who had been sitting in court listening to the testimony. *Negro Jerry*, 9 Md. 145, 1856 WL 3812, at *3. Dr. Fonerden was asked to assume, hypothetically, that the testimony he had heard was true and to offer his opinion on the sanity of Townshend Senior, an opinion he apparently offered willingly. *Id.*

⁸⁵ The phenomenon of unpublished decisions is something else that non-lawyer scholars might find worthy of study.

essentially unsearchable by those looking to derive other information from them and the information they contain is hidden from them.⁸⁷ With the advent of non-indexed searching made possible by computer-assisted legal research, however, the information stored in the legal archive was potentially made to scholars of all kinds who could use it to develop a more nuanced appreciation of this country and its judicial process than previously possible.

But neither Westlaw nor LexisNexis make free passwords to their legal databases available to scholars who do not teach at law schools,⁸⁸ and the cost of using these databases without subsidy is too great for these databases to be viewed realistically as resources for interdisciplinary study.

IV. THE PRESENT ALTERNATIVES TO COMMERCIALLY AVAILABLE COMPUTER-BASED LEGAL INFORMATION ARE INADEQUATE

The choice between books on the one hand and the expensive commercial legal information databases maintained by West and LexisNexis on the other is not quite as stark as it might at first appear. There are some low-cost database alternatives to Westlaw and LexisNexis for researching case law⁸⁹, such as Loislaw,⁹⁰ Fastcase,⁹¹ VersusLaw,⁹² lexisOne,⁹³ and there are

⁸⁶ The restrictiveness of the digesting system has come been criticized by lawyers as well and was one of the motivating forces behind the development of computer-assisted legal research. “Members of the Ohio Bar who worked to develop [LexisNexis] defined what they wanted as a ‘nonindexed, full-text, on-line, interactive, computer-assisted legal research service.’” Jo McDermott, *supra*. n. 8, at 338 (quoting Harrington, *supra*. n. 5, at 545). This philosophy was carried over into Lexis’ early promotional material, suggesting that the problems with the digesting process were common knowledge among practicing attorneys. “Traditional legal research procedures are rapidly proving inadequate to permit access to vast, continually expanding reservoirs of information. Based largely in the hierarchical organization of subject matter, manual research tools are effective only so long as the lawyer can easily tune in on the mental frequency of the person who indexed the information the lawyer seeks. While this system has previously been sufficient to meet most of lawyers’ research needs, it has grown too cumbersome, too expensive and too rigid to accommodate practically and efficiently either the continuous influx of routine material or such new precedent as lawyers and judges are now formulating in evolving areas of the law.” Legal Research and the Computer (1975), *quoted in*, Daniel P. Dabney, *The Curse of Thamos: An Analysis of Full-Text Legal Document Retrieval* 78 LAW LIBR. J. 5, 14, n. 13 (1986). Dabney describes this as “early promotional material from LEXIS.”

⁸⁷ Scholars (or more likely, their research assistants) could, of course, read the cases one after the other and make a note of those that might be interesting. But this would involve such a substantial commitment of time and resources as to be a highly inefficient and impractical research strategy.

⁸⁸ West has Campus Research site (located at <http://west.thomson.com/campusresearch/>), a “superior research service for news, business and law-related information . . . designed specifically to meet the needs of librarians and students (*id.*), and Lexis offers LexisNexis Academic (located at <http://www.lexisnexis.com/us/lnacademic/home/>) to the wider academic community. Neither pricing nor coverage information was readily available for these sites, so it is impossible to evaluate their utility for non-lawyer academics. What is clear, however, is that neither site is free, meaning that the information in their databases is not freely available to all scholars who might have use of it.

⁸⁹ There are free alternatives to the commercial databases for conducting other types of research as well, most notably Cornell’s Legal Information Institute (located at <http://www.law.cornell.edu/>), a site that is a model for what free, open access legal information sites should be. The Legal Information Institute site is so pervasive that a Google search for “United States Code?” ranks it as the most accessed site, above even the GPO’s version of the Code, as well as the House and Senate website versions. And no lawyer conducting research on recent legislative history, or present House or Senate activity on a bill, should ignore THOMAS, the Library of Congress’ database of federal legislative information, located at <http://thomas.loc.gov/>. But while the Legal Information Institute site provides access to a limited amount of case law, it is not, nor does it

free databases as well, such as Findlaw⁹⁴ and those provided by state and federal courts.⁹⁵ But these sites are not adequate alternatives to the commercial databases and do not solve the problem of unequal access to the law.⁹⁶

The most significant problem all these sites share is incomplete coverage.⁹⁷ For court sites, of course, this is understandable; their purpose is not to provide a research alternative to commercial databases, but is rather to provide the public with access to the cases recently

claim to be, a comprehensive source of case law information, and THOMAS is strictly limited to legislative branch information.

⁹⁰ Located at <http://www.loislaw.com/>.

⁹¹ Located at <https://www.fastcase.com/Corporate/Home.aspx>.

⁹² Located at <http://www.versuslaw.com/>. VersusLaw's premium (\$24.95 per month) and professional (\$39.95 per month) plans offer access to federal district court opinions, but only those from 1950 and on. *Id.* For practicing lawyers, this gap in coverage might not be significant; federal district court opinions are not precedential, after all, and any state law issues discussed by the federal courts prior to 1950 will likely have been augmented by state court opinions or legislative enactments discussing the same issue. For scholars, however – both legal and non-legal – the gap is significant because trial court opinions often offer more factual information than appellate decisions and that factual detail might be more significant than a potentially outdated analysis of doctrinal issues.

⁹³ Located at <http://www.lexisone.com/>. Significantly, lexisOne began offering case law coverage for cases otherwise available from state court websites shortly after the Jurisline litigation was concluded. Jurisline Litigation, *supra* n. 70.

⁹⁴ Located at <http://www.findlaw.com/>. Findlaw, a free-access legal information site owned by Thomson (and purchased for a rumored \$37 million in 2001: *News This Week Ticker*, NAT'L L. J., Jan. 15, 2001, at A4) does not charge for its information but has very limited coverage. See <http://lp.findlaw.com/>.

⁹⁵ In accordance with the mandate of the E-Government Act, most federal courts have websites on which their opinions are available. These websites can most easily be located by going to the federal judiciary's website at <http://www.uscourts.gov/courtlinks/> and selecting the relevant jurisdiction. For state court opinions, portal sites such as Washburn University School of Law's WashLaw, located at <http://www.washlaw.edu/>, allow the user to relocate to the relevant jurisdiction and conduct a search. Members of many state bar associations have access to a service called Casemaker, which offers good – though still not universal – coverage, but which is limited to lawyers. For more information on the Casemaker consortium business model, see <http://www.casemaker.us/page.php?page=overview>.

⁹⁶ A new initiative is offering up some intriguing possibilities. On November 14, 2007, Public.Resource.Org announced that it had negotiated a deal with Fastcase, Inc. That will make “a large archive of federal case law” available to the public. Press Release, *1.8 Million Pages of Case Law to Become Freely Available*, http://public.resource.org/case_law_announcement.html (November 14, 2007). The deal will make available Courts of Appeals decisions from 1950 to the present (the press release mentions “all” Courts of Appeals decisions although it is unclear whether this truly means all such decisions or only those published in the Federal Reporter series) and Supreme Court decisions from 1754. *Id.* The announcement also hints at the possibility of future additions to this database, including “Federal District and pre-1944 Appellate decisions.” *Id.* This is an encouraging development, although the absence of any contemplation of state court material means that the limited coverage of this release will make it insufficient to offer a viable research alternative to the commercial legal information databases.

⁹⁷ Some of them cost the user money as well, disqualifying them as sites which might provide free and open access to the law.

decided by that court.⁹⁸ Thus the sites tend to have little or no historical coverage, and extend back in time only to the point the web site was established.⁹⁹

For commercial sites like Loislaw and Fastcase, the apparent reason for incomplete coverage is more troubling, and gets us closer to the nub of the problem; put simply, perhaps they do not publish some types of decision because of the costs or difficulties involved in doing so.¹⁰⁰ In short, not only has the internet not fulfilled its potential to make the law freely available to everyone, the legal community's reliance on internet-based legal information is helping the decline in book-based legal research which is, in turn, helping to constrict open and free access to legal information.

V. LAW SCHOOLS CAN AND SHOULD PROVIDE AN ALTERNATIVE TO COMMERCIAL LEGAL INFORMATION SITES

But even though the internet is, at present, helping to make the law less rather than more accessible, it still has tremendous potential to liberate case law and make it accessible to everyone. And law schools are in the best position to take advantage of that potential. Not only do they arguably have the obligation to help to provide that access, they also have available to them the technical resources necessary to overcome the problems that will inevitably arise in a large-scale project like this, as well as the large numbers of personnel that will be required to staff it.

Practicing lawyers are poor candidates for the role of law stewards. They have no time to devote to the task and, in any case, have an appropriately mercenary relationship with the law. For them, it is a tool of their trade, a device by which they obtain results for clients and thereby earn money. Although individual lawyers might be interested in the theory of law for its own sake, and might think and write about issues in the law that engage them intellectually, without regard to their practical value, those are personal, rather than professional, pursuits that have little to do with their practice.¹⁰¹

Courts, too, have a utilitarian relationship with the law, interpreting it to resolve disputes between parties. Although appellate courts must, of course, consider the precedential implications of their rulings, all courts decide cases brought to them as the result of

⁹⁸ Accordingly, even if a court's opinions are available on the internet in a text-searchable format, the researcher can only search one jurisdiction at a time. Although this has some value if, for example, the researcher is only interested in answering a discrete doctrinal question in one jurisdiction, the researcher could not, as a practical matter, use these individual jurisdictional websites to develop a nuanced picture of the national treatment of that same issue.

⁹⁹ Because each individual website has different historical coverage, it is impossible for a researcher to know, without looking, the date from which a particular state or federal court's opinions are available. Although most court websites have decisions from 2000 going forward, historical coverage earlier than that year is variable.

¹⁰⁰ As T.R. Halvorson observes, paying the multi-user licensing fees charged by Lexis or Westlaw "costs money – lots of it." *Jurisline Litigation*, *supra* n. 70.

¹⁰¹ This is not intended as criticism. Indeed, lawyers have an ethical obligation to represent their clients, not to ponder doctrinal niceties. And no one should begrudge lawyers for wanting to make money doing what they are ethically required to do. It is, however, to say that lawyers are best considered as consumers of the law, not its keepers.

litigation, not in order to issue advisory opinions as to what the law is or should be.¹⁰² And while courts have been active in providing access to at least some of their opinions recently,¹⁰³ they are not likely to be enthusiastic supporters of free and open access to the law, since that will likely encourage more, and more complicated, pro se filings.¹⁰⁴

In an ideal world, the democratically-elected legislature and executive branches of government would be the obvious guardians of the law, defending it against parochial and commercial interests and insuring its free availability to the citizenry. But even to express this view exposes its hopeless naivety. The political process affects all decisions made by those in the legislative and executive branches of government, making lawmakers susceptible to influence from lobbyists¹⁰⁵ and therefore unsuitable caretakers of the law.¹⁰⁶

One of the more remarkable examples of the dangers associated with having politicians guarding access to the law can be found in Florida, where the state legislature has literally enshrined its contractual relationship with West in a statute.¹⁰⁷ The federal government, of course, has a similar relationship with West,¹⁰⁸ which is the only print publisher of federal

¹⁰² See, e.g., *Muskrat v. United States*, 219 U.S. 346 (1911).

¹⁰³ Some courts have willingly embraced internet access to their decisions and some less so. See, *supra*, n. 36.

¹⁰⁴ The volume of pro-se filings, especially those from prison inmates, was central to the development of unpublished opinion policies in federal court. See, Pether, *supra*, n. 36, at 1450 (“This makes [a prisoner litigant] paradigmatic of the group of prisoner-litigants whose importuning (together with that of civil rights plaintiffs) assailed the federal courts so much that the contemporary institutionalized practice of ‘unpublishing’ opinions . . . was developed.”) The question of pro se filings, especially from prisoners, is an issue in state as well as federal court. As Pether notes, “[p]risoner-litigants are a group that still troubles the bench, as revealed by a discussion I had on a social occasion in 2002 with a state judge who sought vigorously to defend the practice of institutional unpublication, in significant part because of the waste of court time and resources caused by what she perceived as meritless *pro se* prisoner litigation. . . .”) *Id.* at 1450-51, n.65.

¹⁰⁵ As with lawyers, this is not intended as a criticism. Whatever the merits of the lobbying process might or might not be, lobbying within the rules set up for its conduct is a legitimate activity and commercial entities who might be affected by government action or inaction have a fiduciary responsibility to do whatever they can do within the boundaries of the law to influence the process. West has shown itself to be willing to engage in such lobbying activities, most notably to forestall a move to adopt neutral citation formats in federal courts. See, John J. Oslund, *West Fights to Preserve its Legal Publishing Edge: Eagan Company Goes on Offensive in Washington in Attempt to Hold Off Challengers*, STAR TRIBUNE (Minneapolis), October 20, 1994, at 1D. The importance of citation to legal information providers is discussed more fully in Gallacher, *supra* n. 36.

¹⁰⁶ Government has, of course, a role in insuring that the law be made freely available to its citizens. But the failure of the E-Government Act to achieve this goal (discussed *supra* at n. 36 and accompanying text) is a stark demonstration of the limits of governmental power in this area.

¹⁰⁷ Fla. Stat § 25.381 (2007). The statute provides that “[t]he reports of the opinions of the Supreme Court and the district courts of appeal shall be known as Florida Cases. In July, 1963, and every second year thereafter until otherwise provided by law, the Supreme Court and the Attorney General shall jointly enter into a contract with West Publishing Corporation, St. Paul, Minnesota, providing for the publication, in whatever format or formats are agreed upon, and distribution of such copies of Florida Cases as necessary to furnish copies thereof to the officers and institutions as required or authorized by law. The copies of such reports purchased by the state under such contract shall be paid for from moneys appropriated for this purpose.” The statute has apparently not been revised to reflect West’s new name and corporate parent, although this formalistic detail appears not to have disturbed the relationship between Florida and West. Why the Florida legislature felt it necessary to impose this statutory mandate on its judiciary, or what effect the legislators believed this statute would have on Florida’s ability to negotiate a favorable deal with West for its publishing services, is unknown. Florida appellate decisions from 1999 are also available on the internet. <http://www.floridasupremecourt.org/decisions/index.shtml>.

¹⁰⁸ Unlike Florida, however, this relationship is not blessed by a statutory enactment.

trial and circuit court opinions.¹⁰⁹ This, and some of the federal government's interactions with West,¹¹⁰ make the notion of governmental oversight as the sole protection for open access to the law too uncomfortable a proposition to contemplate. By contrast, whether appropriately or not,¹¹¹ law school curricula are built almost exclusively around the study of legal doctrine, making them the only legal institutions that value the law

¹⁰⁹ Federal trial court opinions are found in the *Federal Supplement* series, the *Federal Rules Decisions*, and in the *Bankruptcy Reporter* for decisions from the federal bankruptcy courts. Federal appellate decisions can be found in the *Federal Reporter* series and, most recently, in the *Federal Appendix*. All recent federal court opinions are, in theory at least, also available on the internet thanks to the E-Government Act.

¹¹⁰ West has, at times in the recent past, maintained close ties with some members of the federal judiciary through its sponsorship of the Devitt Award for federal judges. The Devitt Award honors members of the federal judiciary "whose careers have been exemplary, measured by their significant contributions to the administration of justice, the advancement of the rule of law, and the improvement of society as a whole." http://www.ajs.org/ajs/awards/Devitt%20Award/ajs_awards_devitt.asp. When the award was initially created it was sponsored by West, which raised some questions about judicial independence and was the subject of a series of newspaper articles in the Minneapolis Star Tribune. See, Sharon Schmickle & Tom Hamburger, *Devitt Award is Prestigious – and Unusual; Close Involvement of Corporate Sponsor Sets it Apart*, STAR TRIBUNE (MINNEAPOLIS), March 5, 1995, at 18A (describing West's involvement in Devitt Award for federal judges. Recipients of award receive \$15,000 and crystal obelisk); Sharon Schmickle & Tom Hamburger, *Members Accepted Gifts and Perks While Acting on Appeals Worth Millions to Minnesota Firm*, STAR TRIBUNE (MINNEAPOLIS), March 5, 1995, at 16A (describing trips paid for by West and taken by award nominating committee, including several Supreme Court justices, while Court was considering cases in which West was party). West was also involved in the sad story of JURIS, a precursor of the open access legal information site I argue should now be developed by American law schools. JURIS (a government acronym standing for "Justice Retrieval and Inquiry System") was developed in 1971 by the Department of Justice ("DOJ") on the bones of FLITE (Finding Legal Information Through Electronics), a legal information retrieval site developed by the U.S. Air Force. James H. Wyman, *Freeing the Law: Case Reporter Copyright and the Universal Citation System*, 24 FLA. ST. U. L. REV. 217, 254 (1996). JURIS was a collection of federal case law used by DOJ attorneys to conduct legal research. *Id.* Data entry for JURIS became too large a task for the DOJ to handle, so in 1983 it entered into a contract with West, providing that West would handle data entry and database management services for JURIS. *Id.* The contract contained a provision allowing West to remove all information it had placed into the system if it decided to terminate its relationship with the DOJ, which it did in 1993. *Id.* West pulled out of JURIS when a non-governmental "information activist" sued to gain public access to JURIS (*id.*), presumably raising concerns in West that this would be a first step to setting up a free alternative to Westlaw. West's removal of ten years worth of federal opinions was, of course, a crippling blow to JURIS' effectiveness as a legal information site, but the DOJ kept the remaining JURIS data, and a nonprofit group brought a Freedom of Information Act ("FOIA") petition in order to gain access to it. *Tax Analysts v. Dep't of Justice*, 913 F.Supp. 599, 600 (D.D.C. 1996). West sought to intervene in the action, claiming a "substantial interest in the outcome" of the litigation (*id.* at 601), even though the data remaining on the JURIS site had not been input by West during its time as database manager. Nonetheless, the district court granted its motion to intervene and granted its motion to dismiss, along with the DOJ's partial motion to dismiss, because JURIS was not an "agency record" within FOIA's contemplation. *Id.* at 6 97.

¹¹¹ This is not the place for a discussion of whether law schools should principally be focusing their attention primarily on teaching legal doctrine or in teaching the skills necessary to practice law. Numerous articles have been written over the years describing the uncomfortable relationship between skills and doctrinal education in the American legal academy. See, e.g., Kenneth D. Chestek, *MacCrate (In)Action: The Case for Enlarging the Upper-Level Writing Requirement in Law Schools* 78 U. COL. L. REV. 115 (2007); Kristen Konrad Robbins, *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty*, 3 J. ASS'N. LEGAL WRITING DIRECTORS 108 (2006); Gary A. Munneke, *Legal Skills for a Transforming Profession*, 22 PACE L. REV. 105 (2001); Harry T. Edwards, *The Growing Disjunctions Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992). While skills training has increased in recent years, in part due to the effects of the MacCrate Report (LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT – AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP (Am. Bar Ass'n. Section of Legal Educ. & Admissions to the Bar ed., 1992)), it is undeniable that doctrinal courses form the bulk of the law school curriculum.

for itself, with no additional agenda.¹¹² Law schools' neutral devotion to the law as law, not as a vehicle for dispute resolution or as a unit of political power, makes them the perfect institutions to lead the legal information revolution by making the law openly and freely available to everyone.

The most visible manifestations of this neutral devotion to the law are the law reviews and journals published by each law school. Although these often contain articles with seemingly little or no practical application,¹¹³ student membership on these publications is prestigious and is thought of as a desirable item on a student's resume,¹¹⁴ and faculty members seek to publish articles in them in order to disseminate their views on legal issues as widely as possible¹¹⁵ and, not incidentally, to obtain tenure.¹¹⁶ Thus almost everyone in the legal

¹¹² This is not to say that law schools do not have some disturbingly close ties to the principal commercial vendors of legal information. Although legal educators' relationship with West and Lexis does not now, and likely never will, parallel the relationship between physicians and the pharmaceutical and medical device industry, we are offered small but not insignificant items by legal information publishers. In addition to the library of free textbooks I have received over the years, some of the work for this article was written using a LexisNexis pen, was carried to and from my office in a West briefcase, and the article itself was transferred between several computers using a West flash drive. The principal journal containing articles about legal education, the *Journal of Legal Education*, is printed by West. And, of course, faculty members in law school are offered free (to us) research time on Westlaw and LexisNexis, without which we would have difficulty generating our scholarship. Students also receive Westlaw and LexisNexis time, although part of their law school tuition goes to pay for that. And, of course, they receive the equivalent of "frequent user" points on both Westlaw and LexisNexis which they can exchange for prizes. For a more complete description of these rewards programs, see, Gallacher, *supra* n. 6, at 176-78, nn. 123-135 and accompanying text. It seems unlikely that a law school consortium to make the law openly and freely available would affect the substantive relationship between the commercial vendors – who would, after all, have the same interest in access to law students they have now – and the law schools, although it is possible that some of the collateral details of that relationship might change.

¹¹³ This has led to a decline in interest among members of the bench and bar in legal scholarship. Thomas L. Fowler, *Law Reviews and their Relevance to Modern Legal Problems*, 24 CAMPBELL L. REV. 47, 47 (2001) ("Much of the legal scholarship published in law reviews in recent times does not appear to be relevant to the day-to-day concerns of practitioners and judges.") This has led some to fear that the rift between legal scholarship and practice might become permanent. See, e.g., Michael D. McClintock, *The Declining Use of Legal Scholarship by Courts: An Empirical Study*, 51 OKLA. L. REV. 659, 660 (1998) ("If student edited law journals do not respond to the bar's requests for 'practical' articles, then the dialogue between practitioners, judges, and academics, which began in 1875 in the first student-edited journal, may soon come to an end.") What these authors perceive as a weakness in the nature of legal scholarship, however, can be seen as one its greatest strengths in the present context. It is precisely because legal scholars are not necessarily interested in writing "practical" articles that they could be effective as curators of the law.

¹¹⁴ The prevailing impression among law students is that their "careers turn on the fortuity of law review membership. . . . All employers, or at least all those who interview on campus, assume the law review to be valuable." E. Joshua Rosenkrantz, *Law Review's Empire*, 39 HASTINGS L.J. 859, 907 (1988). In fact, however, the data are less conclusive, suggesting that law review membership does not "correlate with higher salaries after controlling for grades. Dexter Samida, *The Value of Law-Review Membership*, 71 U. CHI. L. REV. 1721, 1725 (2004).

¹¹⁵ While information dissemination has been the rationale for the existence of the law review, the internet has had an effect on this as well. Sites like the Social Science Research Network and legal blogs, for example, allow legal scholars to spread their views further and faster than was possible in the print-only era, and the ability to post less-than-finished drafts of their work means that legal scholars can make their opinions known more rapidly than is possible under the meticulous editing and publishing regimen typical of most law reviews. The results might be less polished and complete than can be found in most law review articles, and perhaps they are less coherent as well, but it is certainly true that scholars now have access to more information more quickly than was possible even a few years ago.

academy is daily engaged in the study and contemplation of the law, and while the burden of this devotion to doctrine can be an apparent ivory-towered isolation from the real life issues experienced by those more directly involved in the legal system,¹¹⁷ the benefit is, or should be, that law schools have an opportunity to take responsibility for the law.¹¹⁸

In fact, many law schools are already actively engaged in making the law accessible to everyone. The most visible example of this is Cornell University Law School's Legal Information Institute,¹¹⁹ although the Altlaw collaborative effort between students at the Columbia and Colorado law schools will also likely garner substantial interest when it is more fully implemented.¹²⁰ Some law schools, most notably Washburn University School of Law's "washlaw" portal site,¹²¹ offer a way for anyone to access legal information on the internet.¹²² And the notion of inter law school-cooperation is not new either, as the Bluebook graphically demonstrates.¹²³

In addition to this obligation for law schools to act as the law's stewards, there are practical reasons for law schools to be involved in the publication of the law as well. An endeavor like this will inevitably require a substantial number of people to maintain it: documents will have to be scanned,¹²⁴ stripped of any copyrighted information,¹²⁵ and converted into an

¹¹⁶ "While the tenure standard for most law schools includes scholarship, teaching, collegiality, and professional service, it is a most unusual research school if the candidate's scholarship is not the sine qua non of the decision." Philip F. Potlewaite, *Publish or Perish: The Paradox*, 50 J. LEGAL EDUC. 157, 159 (2000).

¹¹⁷ To say that law schools are neutral in their devotion to the law, or that legal academics can appear to be living in a remote, ivory-towered aloofness from real-world concerns, is not to denigrate or ignore the vital work done by law students in clinics and as community advocates in a variety of roles. Indeed, it is this sense of engaged scholarship that animates my proposal for a law school consortium to publish the law.

¹¹⁸ That obligation already manifests itself in many ways, most notably in the accessibility of many law school libraries to members of the public, the numerous pro-bono programs that are part of life in most law schools these days, and – most importantly of all, perhaps – the clinical programs in most law schools that provide real-world legal representation and support for members of the public.

¹¹⁹ The Legal Information Institute is located at <http://www.law.cornell.edu/>. It provides access principally to federal statutory and regulatory information, although it provides direct access to some Supreme Court opinions and acts as a portal to other federal appellate court opinions, New York State appellate decisions, and some other legal information as well.

¹²⁰ Altlaw is accessible at <http://www.altlaw.org/v1/>, and is, at the time of writing, available in beta form. It contains a database of "the last decade or so of federal appellate and Supreme Court opinions." <http://www.altlaw.org/v1/about>. The site's goal is "to make the common law a little more common" (*id.*) and to act as a resource for "attorneys, legal scholars, and the general public." *Id.* Both the Legal Information Institute and Altlaw are mentioned as beneficiaries of the deal recently struck between Public.Resource.Org and Fastcase. *See supra*, n. 96. It appears that Public.Resource.Org will not itself publish the cases obtained as a result of this deal, but will instead act as a conduit to other sites that are already publishing the law. *Id.*

¹²¹ Washlaw is accessible at <http://www.washlaw.edu/>.

¹²² Valuable though Washlaw and other portal sites undoubtedly are, they are an inadequate substitute for full-service legal research sites because of the relative shallowness of coverage found on most court websites, and because of a researcher's inability to conduct searches spread across multiple jurisdictions at one time. In order to search for the way a particular legal rule is treated in all fifty states, for example, a researcher would have to conduct fifty separate searches in each state's appellate database, and for those states with intermediate appellate court databases, the researcher would have to search those sites as well. For all practical purposes, therefore, these sites are insufficient for purposes of serious legal research.

¹²³ The Bluebook is a collaborative (in theory, at least) venture between students at the Columbia, Harvard, University of Pennsylvania, and Yale law schools. THE BLUEBOOK, *supra* n. 80.

¹²⁴ Scanning appears to be the only realistic way of obtaining historical court decisions that are not otherwise available in a free format. Although decisions could be copied from CD-ROM products or ripped

internet-ready format, and all of this activity will require time from a large number of people.¹²⁶ Law schools¹²⁷ have many people who could be actively engaged in this process: law students are well-qualified to provide these services,¹²⁸ and involvement in a project such as this would qualify as pro bono work that would serve a valuable educational purpose by giving students an insight into the way law is stored and retrieved.¹²⁹

In addition to law schools' devotion to legal doctrine for its own sake, there are practical reasons for locating an open access legal information publication effort within a consortium of American law schools. Although many law schools are geographically separated from other schools within a university system, most law schools are affiliated with larger academic institutions and are therefore well situated to make use of the technical expertise of others within the academy¹³⁰ to solve the inevitable technical problems that would arise in such a

from commercial databases, both these practices might be in violation of enforceable licensing agreements, especially in light of the Jurisline fiasco. *See, supra* n. 70. Scanning, by contrast, appears to be a legitimate way of converting court opinions from an analog to digital format. *Mathew Bender & Co. v. West Pub. Co.*, 158 F.3d 674 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999); *Mathew Bender & Co. v. West Pub. Co.*, 158 F.3d 693 (2nd Cir. 1998), *cert. denied*, 526 U.S. 1154 (1999).

¹²⁵ Although the Second Circuit's two Bender decisions confirm that court opinions are neither copyrighted nor copyrightable, and that scanning those opinions and republishing them is not a violation of any copyright interest West might have in the opinions, there is no question that West does generate editorial enhancements which are valuable to lawyers familiar with the West key number system and which are unquestionably protected by copyright. Any non-West digital version of the text of those court opinions would, therefore, have to be stripped of these and any other copyrighted enhancements before being republished. In fact, a better approach might be to delete them, or in some other way make them unreadable, before scanning the opinions. Whichever of these approaches is adopted, however, there would be a substantial need to edit the opinions, either before or after scanning (or both) and this work would not be automatic, requiring the exercise of judgment as to whether all copyrighted additions had been removed from the opinion.

¹²⁶ In addition to these administrative tasks, a site like this would require, at a minimum, supplementary documents explaining the legal research process, the significance of precedent, basic primers in various doctrinal areas, and so on. The need for such supplementary documentation would mean that many law students could be kept busy for a long time preparing and editing them.

¹²⁷ Although I propose here that law schools should form a consortium in order to publish the law, and although the ideal model would be for all law schools in the country to participate in this project, it is unlikely that any venture would achieve such a complete level of participation. But even if a law school is not administratively linked to the project, that is no reason why willing students at that law school should be barred from participating. One of the benefits the internet offers is that ability for people at distant locations to participate as completely in work on a project as if they were physically located close to the project's headquarters. Indeed, there is no need for a physical "headquarters" in a project like this. So while I will continue to speak of "law schools" as the principal administrative unit of this project, the fact of a law school's unwillingness to participate should have no effect on the ability of that school's students to participate.

¹²⁸ And not just law students, of course. Practicing lawyers who are interested in participating could easily be accommodated, as could non-lawyers who have their own valuable perspectives which could be utilized as well. Not all who work on the project would necessarily be engaged in the analysis and preparation of opinions for publication; work of that level of sophistication might reasonably be left to those with some legal training. But non-lawyers could be engaged in a variety of other activities, from more mundane, but crucial, administrative tasks like comparing soon-to-be-published opinions with their original texts to ensure accuracy, to more complex assignments including, for example, editing supplementary texts written to aid non-lawyers negotiate through the site and the legal process.

¹²⁹ Working on this project would, at a minimum, make students adept users of the database, thereby allowing them to gain a valuable research skill that they could use in practice, and they would learn this skill without the inducement of bonus points redeemable for briefcases and golf clubs.

¹³⁰ Scholars from outside the legal academy are already studying legal information. One of the more interesting of these projects is based at the University of Maryland's Department of Government and Politics,

complex undertaking. Many of the most significant developments surrounding the internet come from students and faculty members at American universities¹³¹ and the development of a legal information site is a project that should create substantial interest in a number of different academic disciplines.

Not everyone agrees that a centralized approach of the type I am proposing here is the most appropriate model for providing free and open access to the law. Thomas Bruce, one of the co-directors of Cornell University Law School's Legal Information Institute, would prefer that

a comprehensive public legal information regime . . . be an aggregation of different low- or no-cost providers acting under a variety of arrangements, principally self-publication . . . and achieving interoperability through common standards and practices. If pressed, we would probably advocate the formation of something like a W3C . . . for law, a consortium that could develop and promulgate interoperability standards, but we would not imagine that it would take on responsibility for comprehensive publication at any level, including service as a comprehensive portal.¹³²

Bruce's position is that "government has a responsibility to electronically publish its own creations, be they judicial opinions, legislation, or regulation,"¹³³ and he argues that there is "nothing foreordained that prevents government from publishing law in a timely manner, that prevents the private sector from setting a reasonable price on published law products, that limits the utility of laws to lawyers, or that relegates academics and librarians to the role of passive commentators and consumers."¹³⁴ In addition to his policy arguments, Bruce raises some compelling practical arguments in support of his position,¹³⁵ and as someone who, at the time of writing his article in 2000, had already been living for several years with the problems of providing open access to the law, his opinions should not be discounted or ignored.

where a combination of faculty members, graduate, and undergraduate students are studying and mapping "the flow of precedent across the American court system during the full course of the 20th Century on the issue of regulatory takings." Cite-It: Mapping Precedent Across the American Court System, <http://www.bsos.umd.edu/gvpt/CITE-IT/index.htm>. The project has rendered four academic papers and one thesis proposal to date. <http://www.bsos.umd.edu/gvpt/CITE-IT/DOCS.htm>.

¹³¹ Google, for example, started out as a project by Stanford University students. Sergey Brin and Lawrence Page, *The Anatomy Of A Large-Scale Hypertextual Web Search Engine*, <http://dbpubs.stanford.edu:8090/pub/showDoc.Fulltext?lang=en&doc=1998-8&format=pdf&compression=&name=1998-8.pdf>.

¹³² Thomas R. Bruce, Tears Shed Over Peer Gynt's Onion: Some Thoughts On The Constitution Of Public Legal Information Providers, J. INFORMATION, L. & TECH. http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2000_2/bruce/ (2000).

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ One of Bruce's concerns has to do with the complexities of formatting information received from various governmental bodies. "[At the Legal Information Institute, w]e see not one but several document structures that change from time to time to meet the whims of reporters of decisions, clerks of court, legislative publishing and printing systems, and other ephemeral actors. . . . [A]s with all encoding projects, there is much that needs to be encoded whose appearance and structure varies both from creator to creator and from year to year. In the world of conversion and standardization, this kind of diversity equals cost." *Id.*

But the most compelling argument in opposition to Bruce's position is that in the seven years from the time his article appeared to the time this article was written, neither the federal or state courts nor the various legislatures have stepped up to their responsibilities of self-publishing the law in any meaningful way.¹³⁶

Indeed, a recent incident graphically illustrates the dangers of relying on the courts as information providers. On October 18, 2007, the United States Court of Appeals for the Second Circuit posted its decision in the case of *Higazy v. Templeton*¹³⁷ on the court's website.¹³⁸ On the morning of October 18, Howard Bashman, an appellate attorney who maintains a weblog – "How Appealing"¹³⁹ – on which, among other things, he posts information on noteworthy appellate rulings, received several emails from readers of his blog to tell him that the Second Circuit had issued its ruling in the *Higazy* case.¹⁴⁰ But later that day he received another email telling him that the Second Circuit had removed the decision from its website.¹⁴¹

Bashman posted an item on his blog telling his readers about these events, and posted "a link to another blogger's post about the substance of the Second Circuit's ruling."¹⁴² Bashman subsequently posted a PDF copy of the Second Circuit's October 18 decision on his blog and explained, in a 4:15 pm posting, that the decision had been withdrawn by the court.¹⁴³ At 5:30 pm, Bashman received a call from the head of the Second Circuit Clerk's office asking him to remove the decision from his blog because the ruling "referenced information that had been filed under seal. . . ."¹⁴⁴ The clerk also told Bashman that the court would be posting a revised version of the decision that omitted any mention of the information filed under seal.¹⁴⁵

¹³⁶ The federal courts' continued practice of issuing "unpublished" decisions and grudging, at best, compliance with the E-Government Act of 2001 (discussed *supra* at n. 36) suggest that the federal courts have not assumed the responsibility Bruce quite properly ascribes to them.

¹³⁷ No. 05-4148 (2d Cir. October 19, 2007). The case involved an Egyptian national who was staying at a hotel close to the World Trades Center buildings when they were struck on September 11, 2001. *Higazy v. Templeton*, No. 05-4148, slip op. at 3-4 (2d Cir. October 19, 2007). A radio was found, purportedly in Higazy's room, that was capable of air-to-air and air-to-ground communication. *Id.* Higazy was questioned by F.B.I. agents, denied that the radio was his, and said that he had never seen a radio like that before, although he later admitted that he had served as a lieutenant in the Egyptian Air Force and had knowledge of communications. *Id.* at 5. Higazy was detained as a material witness and, during questioning, told an F.B.I. agent that he had stolen the radio and used it to eavesdrop on telephone conversations. *Id.* at 8. The government brought a criminal complaint against Higazy for making false statements, but three days later an airplane pilot, who had staying in the same hotel as Higazy on September 11, came to the hotel to reclaim his possessions, one of which, it transpired, was the radio at issue. *Id.* at 9. The hotel contacted the F.B.I., the complaint against Higazy was dismissed, and Higazy was released after thirty-four days in custody. *Id.* Higazy subsequently sued the interrogating F.B.I. agent, the hotel, and some hotel employees. *Id.* at 10.

¹³⁸ Howard J. Bashman, *Court Learns Best Way To Keep A Secret Is Not By Posting It On The Internet*, <http://www.law.com/jsp/article.jsp?id=1194050331096> (November 5, 2007).

¹³⁹ <http://howappealing.law.com/>.

¹⁴⁰ Bashman, *supra* n. 138.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

After considering the matter, Bashman decided to leave the October 18 version of the Second Circuit's decision on his blog, where it remains at the time of writing.¹⁴⁶ That decision can now be compared with the October 19 version of the Second Circuit's decision¹⁴⁷ which contains an annotation that "[t]his opinion has been redacted because portions of the record are under seal. For purposes of the summary judgment motion, [the F.B.I. agent defendant] did not contest that Higazy's statements were coerced."¹⁴⁸

The incident is disturbing not just because the *Higazy* case shows how the federal government was able to coerce a false confession from an innocent person,¹⁴⁹ but because it shows that federal courts believe that not only can they release and then retrieve and edit opinions, they believe they have the power to make others restrict access to the information as well, even though it was obtained from the court's own website.¹⁵⁰ This is not the behavior of a governmental body that is taking responsibility for providing accurate, free, and open access to its opinions.

Put simply, Bruce's reliance on a non-centralized model of open access to the law, with its emphasis on governmental self-publication, might have been an acceptable model when he was writing, but seven years of experience suggests that it is time to consider the more centralized model that even Bruce conceded might be desirable under different circumstances than the ones he perceived in 2000:

There is no wholly convincing *a priori* argument in favor of either [model]. I believe that complex circumstances viewed over the long term favor a distributed model. Different circumstances might favor a different approach in the short term, and ultimately some union of the two as successors in time.¹⁵¹

¹⁴⁶ http://howappealing.law.com/HigazyVsTempleton05-4148-cv_opnWithdrawn.pdf.

¹⁴⁷ http://www.ca2.uscourts.gov:8080/isysnative/RDpcT3BpbnNcT1BOXDA1LTQxNDgtY3Zfb3BuLnBkZg==/05-4148-cv_opn.pdf. It should come as no surprise that the version of the *Higazy* case available on Westlaw is the court's revised, October 19, version. *Higazy v. Templeton*, No. 05-4148, ___ F.3d ___, 2007 WL 3024811 (2d Cir. October 19, 2007).

¹⁴⁸ *Higazy v. Templeton*, No. 05-4148, slip op. at 7 (2d Cir. October 19, 2007). The October 18 version of the opinion contains slightly more than one page of specific information about Higazy's questioning by the F.B.I. defendant. *Higazy v. Templeton*, No. 05-4148, slip op. at 7 (2d Cir. October 18, 2007), accessible at http://howappealing.law.com/HigazyVsTempleton05-4148-cv_opnWithdrawn.pdf (accessed November 12, 2007).

¹⁴⁹ How that issue will be resolved is yet to be decided. The Second Circuit vacated the district court's dismissal of Higazy's Fifth Amendment *Bivens* claim and remanded the case for further proceedings. *Higazy*, *supra* n. 147, slip op. at 31.

¹⁵⁰ Bashman has "no doubt that the original version of the [Second] Circuit's ruling in the *Higazy* case was the version that the three-judge . . . panel intended to make public. If the details of the interrogation were irrelevant, the original version of the decision would not have provided them. And if the judges thought that those details should have remained private, the original version of the opinion would not have described them. Perhaps the judges "forgot" that this information had been filed under seal, and, had they remembered, they would have drafted a different opinion to be posted initially to the Internet." Bashman, *supra* n. 138, <http://www.law.com/jsp/article.jsp?id=1194050331096>. This seems an optimistic assessment of a sorry state of affairs.

¹⁵¹ Bruce, *supra* n. 132.

Whether the centralized model I propose here¹⁵² will be the long-term solution or an intermediate step on the path to what might be a more satisfactory approach¹⁵³ is irrelevant at the moment, when we have neither model operating to provide free, open, and meaningful access to much of American law. To offer a possible alternative to my proposed slogan for this movement: Access First, Distribution Model Second.

VI. SUGGESTED PRINCIPLES FOR AN OPEN ACCESS LEGAL INFORMATION SITE

One of the intriguing aspects of a proposal such as this is the ability it offers to reconceptualize the way legal information is presented. The success and ubiquity of West's digesting system has made the legal community so comfortable with the format¹⁵⁴ that the electronic databases have reproduced it, either directly on Westlaw, or indirectly, on Lexis with its LexisNexis Headnotes.¹⁵⁵ Yet there is no requirement that legal information be formatted in any particular way, and developing a new archive of legal information would mean that law schools would have the novel opportunity of starting with a blank slate and making new decisions for every aspect of the form the stored information should take and the function of search tools used to retrieve information.

The remainder of this article suggests ten possible principles that might guide an open access to the law project. Of these principles, only the first – that American legal information should be free and accessible to all – is immutable. The other principles – that an open access site: be as complete and comprehensive as possible; be flexible; permit indexed and non-indexed searches; be fast; be reliable; be permanent; use neutral citation form to identify cases; have a citator function; and support community involvement in its growth -- are debatable, at least to an extent, and that debate will doubtless generate more principles that can be used to structure the process of providing open access to the law.

¹⁵² There might be less difference between Bruce's position and mine that might at first appear. We both agree that the law should be made freely and openly available. Bruce is willing to accept a centralized consortium that could develop interoperability standards (Bruce, *supra* n. 132), and I enthusiastically embrace the necessity for a distributed model for the practical work of scanning, analyzing, editing, and publishing the various opinions, statutes, codes, and other materials to be made openly available to everyone. Where we differ is in who should assume the responsibility for making sure the law actually is made available and whether it is desirable to locate that publication effort in one web site or in a variety of different locations on the internet.

¹⁵³ Bruce noted that "[m]ost of the disadvantages of a centralized mechanism show up in the longer term and in an environment of complexity. For that reason, it is well adapted to be a short-term solution. It can provide better proof-of-concept and a rallying point that will create the political will necessary for longer term efforts. It can buy time for standards development. Longer-term efforts should be aimed at creating a decentralized model, because it enjoys greater scalability and certain quality advantages, as well as holding government to an important responsibility it owes the public. Thus, the two models are competitors but successors-in-time." *Id.*

¹⁵⁴ As Robert Berring has observed, lawyers using West's digesting system might not be aware of how powerful a device it is. "The confluence of Blackstone's categorization structure, the American Digest System, legal education, and all of those trained within it have created a conceptual universe of thinkable thoughts that has enormous power. Indicative of its real strength is the fact that those using it do not perceive it; the classification of legal concepts appears inevitable." Robert Berring, *Legal Research and the World of Thinkable Thoughts*, J. APP. PRAC. & PROC. 305, 311 (1999-2000).

¹⁵⁵ Profound though the influence of the West digesting system doubtless is, legal information databases were initially developed with the intention of liberating the law from the restrictive embrace of digests. *See, supra* n.8. Today, both LexisNexis and Westlaw offer three alternative search modes: pre-indexed, or digested searching, Boolean searching, and natural language searching.

A. Legal Information Should Be Free And Accessible To All

The bedrock principle of an open access legal information site is that it be free and accessible to everyone,¹⁵⁶ not just those who have a professional interest in the information, who live in this country, or who can afford to pay for it: access to American legal information should not be limited by economic status, geographical location,¹⁵⁷ or any other barriers.¹⁵⁸

The concept of public legal information¹⁵⁹ is at the center of the Montréal Declaration on Public Access to the Law, a set of principles articulated in 2002 that provides:

- Public information from all countries and international institutions is part of the common heritage of humanity. Maximizing access to this information promotes justice and the rule of law;
- Public legal information is digital common property and should be accessible to all on a non-profit basis and, where possible, free of charge;
- Independent non-profit organizations have the right to publish legal information and the government bodies that create or control that information should provide access to it so that it can be published.¹⁶⁰

¹⁵⁶ Placing this information on the internet is the best way to make legal information available to everyone in this country, but it cannot ensure complete accessibility. Illegal immigrants, for example, who have no internet access and who are disinclined to use a public library for fear of apprehension, might be foreclosed from access, as will anyone who does not know how to use a computer. In this endeavor, as in most things in life, perfection is likely unattainable. The reality of incomplete success should not, however, deter us from trying to make the law as accessible as possible to as many as possible.

¹⁵⁷ Lest it should seem controversial to suggest that access to American law should be open to anyone interested in it, regardless of their nationality, it is worth remembering that all three principal publishers of American law at the time of writing are non-American: Thomson (West) is Canadian, Reed Elsevier (LexisNexis) is an English-Dutch conglomerate, and Wolters Kluwer (Loislaw) is Dutch. SVENGALIS, *supra* n. 4, at 8-9. In one sense, therefore, American law – or at least access to it – is “owned” by non-Americans.

¹⁵⁸ Some barriers will be more difficult to overcome than others. The language barrier, for example, is a significant one in a country where more and more of its inhabitants do not speak English, a form of which, at least, is still the language of the law here. Translation packages that will take a passage of English and translate it into another language do exist, but these will likely have little value for a legal information site; the performance of these packages is questionable at best, and it is inconceivable that they would be able to cope with the nuances and complexities of legal language. At present, then, the best a legal information site likely can do in this area is to make legal English available to those English speakers who represent or work with non-English speakers who have a need to know or use the law.

¹⁵⁹ Public legal information has been defined as “legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law, and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry.” Montréal Declaration on Public Access to Law, (“Montréal Declaration”) *located at*, http://www.worldlii.org/worldlii/declaration/montreal_en.html.

¹⁶⁰ *Id.* The signatories to the Montréal Declaration were the Australasian Legal Information Institute; the British and Irish Legal Information Institute; the LexUM/Canadian Legal Information Institute; the Hong Kong Legal Information Institute; the Legal Information Institute at Cornell; the Pacific Islands Legal Information Institute; the University of the West Indies Faculty of Law Library; and the University of Witwatersrand School of Law in South Africa.

In the United States, the principal of public access to the law has long been recognized, at least in theory,¹⁶¹ but the practical difficulties of establishing an alternative printing operation made it impossible to establish a comprehensive alternative to West's digested reporters.¹⁶² The advent of the internet, with its ability to make large quantities of information freely available, however, has now made free access to legal information possible.¹⁶³

Free, in this context, should mean "without cost to the user." Although the Montréal Declaration would permit a charge for public legal information under certain

¹⁶¹ "Since the founding of our nation, the cornerstone of information policy in the United States has been the principle of universal access to government information." RICHARD A. DANNER, DISSEMINATION OF LEGAL INFORMATION: SOCIAL AND POLITICAL ISSUES IN THE UNITED STATES (1998), available at <http://www.law.duke.edu/fac/danner/paper2.html> (quoting Wayne P. Kelley, *Keeping Information Public*, LIBR. J., May, 1998, at 34, 37). The Supreme Court has long recognized that its own opinions are in the public domain. *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591, 668 (1834)(no reporter [may] . . . copyright . . . the written opinions delivered by this court). And the *Wheaton* decision was later expanded by the Court to include state court opinions as well. *Banks v. Manchester*, 128 U.S. 244, 253-54 (1888)(no one may copyright "the products of labor done by judicial officers). Other items of public legal information have also been deemed to be in the public domain. *Howell v. Miller*, 91 F. 129 (6th Cir. 1898)(state statutes); *Bldg. Officials & Code Adm. V. Code Tech., Inc.*, 628 F.2d 730, 735 (1st Cir. 1980)(suggesting that state regulations, even when modeled on privately developed code, are in public domain); *Veek v. Southern Building Code Cong. Int'l*, 293 F.3d 791 (5th Cir. 2002)(law of municipalities not copyrightable so copying was not infringement). Documents submitted, by not adopted, by a governmental entity likely are not in the public domain (see, e.g., *John G. Danielson, Inc. v. Winchester-Conant Props., Inc.*, 186 F.Supp.2d 1, 14-18 (D. Mass 2002)(submission of proposed site plans to town did not place them in public domain), but adoption by the government transforms the documents into public property. See, e.g., *Ocean Atlantic Woodland Corp. v. DRH Cambridge Homes, Inc.*, 2003 WL 1720073 (N.D.Ill. Mar. 31, 2003)(allegation that city adopted Annexation Agreement into law, and any developer of land was required, by law, to follow proposed housing development plans attached to Agreement, was sufficient to state defense that plans were in public domain).

¹⁶² Some states do, of course, publish their own official reporters, but to the extent they are not indexed or digested, they are unhelpful as practical research tools. And in any case, the official state reporters of Alabama, Alaska, Arizona, Delaware, the District of Columbia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, Wisconsin, and Wyoming are published by West. SVENGALIS, *supra*. n. 4, at 471-586. And other publishers did compete with West, at least for a while. The Lawyer's Cooperative, described as West's major competitor in the nineteenth century (*id.* at 8), Mathew Bender, the Michie Company, the Anderson Company, and others all provided competition for West and, when it appeared in 1973, Lexis. But all were eventually acquired, either by West (Lawyer's Cooperative) or Reed Elsevier (Mathew Bender, Michie, Anderson. *Id.*, at 8-9).

¹⁶³ One substantial pool of possible users of free legal information might have trouble accessing it using the internet. Internet access is not a privilege extended to many prisoners, meaning that the development of a legal information project that was entirely internet-based would leave them unaffected. This suggests that the open access publisher would have to manufacture at least some CD-ROM disks of the law, or make it available in some other non internet-based medium that would allow some prison computers with no outside communications capability to be dedicated to legal information storage and retrieval. Lexis has already developed a service that offers a CD-ROM of case law, uploaded into a kiosk specially designed to withstand the particular rigors of life in a prison. See Amy Hale-Janeke, *The "Inside" Information on New Jail Kiosks*, LISP NEWSLETTER, June 2004, accessible at, http://www.aallnet.org/sis/lisp/news2004_1.pdf. The Lexis project is a joint venture with Touch Sonic Technologies and was initially limited to county jails in California and Hawaii. *Id.* Given the potential market, however, it is likely that if the trial project is successful, Lexis will seek to expand into the remainder of the American prison system. Making free legal information available to prison inmates, however, seems to be precisely the type of service an open access legal information publisher should be trying to provide.

circumstances,¹⁶⁴ access to American law should not be predicated on an ability to pay for that law. For one thing, Americans have already paid for the law through taxes which fund both the federal and state judicial systems.¹⁶⁵ And charging for access to legal information – the “common law,” as well as the statutory, regulatory, and other law that has a profound effect in the lives of Americans – stands in fundamental contradiction to the libertarian and democratic principles on which this country was founded.¹⁶⁶

But free need not necessarily mean “non-commercial.” Although an open access public legal information site should, perhaps, be funded by the federal and state governments, the reality is that this is unlikely to happen.¹⁶⁷ In the absence of substantial and continuing grant support, a legal information site might need to generate income in order to remain online. And while the adoption of a Google-type commercial model, in which the user pays no fee for the service but is exposed to paid advertisements,¹⁶⁸ might be less desirable than a completely non-commercial site, the benefit of being able to offer completely free legal information to the user outweighs the burden of operating a commercial site.

Even though it might be necessary for a legal information site to sell advertising in order to survive, however, the information provided on the site should not contain any form of copyrighted protection. This would mean that any digesting information or other editorial

¹⁶⁴ The declaration specifies that accessible to all “where possible, free of charge.” Montréal Declaration, *supra*, at n. 160 and accompanying text.

¹⁶⁵ The federal judicial system cost \$5.98 billion in Fiscal Year 2007. <http://www.uscourts.gov/budget.html> (accessed October 22, 2007). The costs of each state court system are, of course, unique to the state.

¹⁶⁶ Such access should not be limited to Americans. One of the best ways Americans have at their disposal to persuade the world that a democratic system of government such as exists in this country is the best one is to give everyone free and unfettered access to the products of our legal system. By contrast, espousing a free and democratic system while simultaneously restricting access to the law to the limited number of people who can afford to pay large amounts of money for that access is a confusing and contradictory message to be sending.

¹⁶⁷ The federal government likely believes it has done enough to make federal case law accessible to the public with the passage of the E-Government Act of 2002. Yet as discussed *supra* at n. 36, the E-Government has been, at best, only partially successful in bringing federal court opinions to the public. Even had the Act been fully and whole-heartedly implemented, however, it would only be a partial solution to the problem of free and open access to the law because it is prospective, not retrospective, in orientation, and therefore all federal court decisions prior to 2002 would still remain inaccessible. State judicial systems have responded to the internet in varying degrees, but even if each state placed all its judicial opinions, from the initiation of a judicial system in the state up to the present, on state judicial websites, each such website would be a closed universe. To gain any understanding of the cross-jurisdictional development of legal doctrine, a researcher would be required to conduct the same search in fifty separate databases, rendering the task functionally impossible. Important though federal and state initiatives to place their jurisdiction’s law on the internet are, therefore, such initiatives are inherently limited.

¹⁶⁸ An advertiser using Google can create an advertisement that uses words and phrases related to the service or product the advertiser is seeking to sell. https://adwords.google.com/select/Login?sourceid=awo&subid=ww-en-et-ads-r2_a_btn&hl=en_us (accessed November 5, 2007). When a person uses that word or phrase in a Google search, the advertisement linked to the word or phrase appears to the right of the search results. *Id.* If the searcher chooses, a click on the advertisement will take the user to the advertiser’s website, which Google will help create if the advertiser chooses. *Id.* This model of advertising would appear to be particularly attractive to advertisers because it targets only those potential customers who are might already be interested in the product of service because of their search request.

enhancement to a public domain document would itself be in the public domain;¹⁶⁹ everything available on an open access site like this should be available without restriction.

B. An Open Access Legal Information Site Should
Be As Complete And As Comprehensive As Possible

As important as making the site available without restriction is the nature of what is made available. While other free and low-cost legal information sites make some primary legal information available, a law school-published legal information site should be as comprehensive as possible, making available as much case, statutory, and regulatory material as is available, and as many secondary sources as can be placed on an open access site.

Comprehensive coverage is necessary for the lawyers, scholars, and general public who might find an open access legal site useful, and would require the inclusion of both published and unpublished decisions¹⁷⁰ from all state and federal courts¹⁷¹ for as far back in time as it is possible to find them.

A site like this would also make an ideal public forum for legal scholarship to open itself up to a larger audience. The question of open access to legal scholarship has been much debated recently,¹⁷² and internet sites like the Social Science Research Network,¹⁷³ the Legal Scholarship Blog,¹⁷⁴ and the bepress Legal Repository,¹⁷⁵ as well as numerous individual legal blogs and law journal websites, are already making much contemporary legal scholarship available to anyone interested in reading it, but making legal scholarship part of a site used to access the law about which scholars are writing would be a natural and helpful addition to the site.

¹⁶⁹ It would also mean, of course, that any editorial enhancements already existing in the source documents used to create the open access database would have to be removed before the information was published. Significantly, the information disseminated through the Public.Resource.Org deal with Fastcase will be “marked with a Creative Commons mark -- CCØ -- that signals that there are no copyrights or other related rights attached to the content.” Press Release, *supra* n. 86.

¹⁷⁰ This is not the place for a full discussion of the issues revolving around the debate concerning the value or significance of unpublished opinions. For a fuller discussion of this topic, see, e.g., Sarah E. Ricks, *Non-Precedential Federal Opinions: A Case Study Of The Substantive Due Process State-Created Danger Doctrine In One Circuit*, 81 WASH. L. REV. 217 (2006); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the United States*, 56 STAN. L. REV. 1435 (2004). For the rates of unpublished opinions in federal courts, see *supra*, n. 36.

¹⁷¹ Federal appellate opinions have been a staple of alternative legal information sites for some time but opinions from the various federal trial courts have been harder to find, although they now appear to be more available. For example, Loislaw, Fastcase, and Versuslaw all now advertise the availability of federal district court opinions, and Loislaw and Fastcase also have opinions from federal bankruptcy and tax courts. Whether these sites have been able to obtain these court opinions without cost, or whether they have paid a licensing fee to West for the right to publish these opinions on their websites is unclear, as is the reason why these opinions have recently been made available to these lower cost websites.

¹⁷² See, *supra* n. 74.

¹⁷³ Accessible at <http://www.ssrn.com/>.

¹⁷⁴ Accessible at <http://legalscholarshipblog.com/>. This site is another example of law school collaboration, this time between the faculties and staff at the University of Pittsburgh School of Law and the Gallagher Library at the University of Washington School of Law.

¹⁷⁵ Accessible at <http://law.bepress.com/repository/>.

In addition to the standard forms of primary legal information, new sources of information are appearing, and the archive should be sufficiently adaptable to take these and other, hitherto unimagined, sources of information into account. In addition to making briefs available, for example,¹⁷⁶ many courts, for example, are posting streaming video of oral arguments on their websites¹⁷⁷ while others are podcasting sound files containing their oral arguments.¹⁷⁸ The ability to retrieve and study these records of court proceedings would add substantially to an understanding of a case and the court's decision, and all users of the archive could find value in studying these as well as the more traditional forms of court records and decisions.

C. An Open Access Legal Information Site Should Be Flexible

The need for a legal information site to be able to accommodate present and future forms of legal information points to the need for flexibility in an archive of this sort. Users should be able to interrogate the system globally, locally, or in any other configuration the researcher

¹⁷⁶ Briefs are presently available from a number of different sources. The Civil Rights Division of the United States Department of Justice makes its more recent briefs available online. *See* <http://www.usdoj.gov/crt/app/briefs.htm>. The Solicitor General's office also posts its recent briefs online. <http://www.usdoj.gov/osg/briefs/search.html>. Selected briefs concerning capital punishment issues are available from the Capital Defense Network. *See* http://www.capdefnet.org/fdprc/contents/appellate_briefs/brief_frames.htm (accessed November 5, 2007). State courts are also posting all or some of the briefs filed before them online. *See, e.g.*, Minnesota (<http://library.law.wisc.edu/elecresources/databases/wb/>), Kentucky (http://chaselaw.nku.edu/library/electronic_resources/briefs_search.php), New York (<http://decisions.courts.state.ny.us/ad2/search/queryad2briefs3.asp>), and Colorado (http://www.state.co.us/defenders/Main_Topics/Topics_Links/Appellate_briefs_library.htm) (all accessed November 5, 2007).

¹⁷⁷ *See, e.g.*, Florida First District Court of Appeal (<http://www.1dca.org/video.html>), Florida Supreme Court (<http://www.wfsu.org/gavel2gavel/>), Minnesota Supreme Court (<http://www.tpt.org/courts/>), Indiana (<http://www.indianacourts.org/apps/webcasts/>), Iowa (http://www.judicial.state.ia.us/Supreme_Court/Oral_Argument_Video/), Massachusetts (<http://www.suffolk.edu/sjc/>), Texas (<http://www.stmarytx.edu/law/webcasts/>), Ohio (<http://www.sconet.state.oh.us/videostream/archives/2006/>), Arizona (<http://www.supreme.state.az.us/courtvideo/>), Mississippi (<http://www.mssc.state.ms.us/DocketCalendar/default.asp>), New Jersey (<http://www.judiciary.state.nj.us/webcast/index.htm>), New York (<http://www.judiciary.state.nj.us/webcast/index.htm>).

¹⁷⁸ *See, e.g.*, <http://www.ca7.uscourts.gov/fdocs/docs.fwx> (Seventh Circuit), <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> (Eighth Circuit), <http://www.ca9.uscourts.gov/oralarguments/> (Court of Appeals for the Federal Circuit), <http://www.wicourts.gov/opinions/soralarguments.htm> (Wisconsin), <http://www.ktoo.org/gavel/court.cfm> (Alaska), <http://www.courts.state.nh.us/supreme/recordings/index.htm> (New Hampshire), <http://www.supreme.courts.state.tx.us/oralarguments/audio.asp> (Texas), <http://www.courtinfo.ca.gov/courts/supreme/audio-arch.htm> (California), <http://www.courts.state.co.us/supct/supctoralarguindex.htm> (Colorado), <http://courts.delaware.gov/Courts/Supreme%20Court/?audioargs.htm> (Delaware), <http://www.isc.idaho.gov/audio.htm> (Idaho), <http://www.kscourts.org/Cases-and-Opinions/SC-Oral-Arguments/default.asp> (Kansas), <http://www.missourinet.com/gestalt/go.cfm?objectid=19BA8AD0-7077-4B92-A55E0121C058CC65> (Missouri), <http://www.nvsupremecourt.us/info/audio/> (Nevada), <http://www.sdjudicial.com/index.asp?category=events&nav=5221> (South Dakota), <http://www.vermontjudiciary.org/audioindex/index.htm> (Vermont), and <http://www.court.state.nd.us/court/webcasts.htm> (North Dakota).

desires,¹⁷⁹ and the archive's design should allow even unskilled researchers to select with ease the type of search to be conducted¹⁸⁰ and the manner in which results are displayed.¹⁸¹

Flexibility should extend to presentation of information as well. To the extent a court's original opinion is used as the basis for the text, that opinion should be available in Portable Document Format ("PDF"),¹⁸² but the user should be able to view cases,¹⁸³ and print them, in as many different formats as technologically possible.¹⁸⁴ In particular, users of this site should be able to download information in a format that allows it to be read by assistive technology such as self voicing technology, Braille translation, document readers, and on-screen magnifiers.¹⁸⁵

¹⁷⁹ This would mimic the search capacity already familiar to users of Westlaw and Lexis, where searches can be conducted in single jurisdictions or in jurisdiction combinations selected by the user.

¹⁸⁰ This would doubtless require the site to contain within it a fundamental primer on the United States court system and how to conduct legal research. It would be ideal, but perhaps unrealistic, to be able to provide live research assistance to users, either by telephone or, more likely, through the medium of an on-line chat. Although providing such assistance would raise some liability issues that could doubtless be resolved, the cost of setting up and maintaining a help facility of the magnitude that would be necessary in order to offer meaningful assistance to users would likely make this an unachievable goal, at least initially.

¹⁸¹ Flexibility in searching will be made possible, in part, by permitting indexed and non-indexed searching. For a fuller discussion of this issue, *see* nn 6 - 9 and accompanying text.

¹⁸² PDF is a file transfer format invented by Adobe Systems and released in 1992. <http://www.adobe.com/products/acrobat/adobepdf.html> (accessed November 5, 2007). It allows a user to download a copy of the original file that is an unalterable but exact version of the original.

¹⁸³ Technology is reaching a point where a legal information site user might well not be viewing information on a computer screen. The potential of electronic books, such as Sony's "Reader" or the "Kindle," a product available from Amazon.com based on the same technology as the Sony "Reader" but with the ability to download information through a wireless connection and therefore not requiring a computer interface in order to acquire the desired text (for more information on the "Kindle," *see* <http://www.amazon.com/Kindle-Amazon-Wireless-Reading-Device/dp/B000FI73MA>), is only beginning to be explored but either these products or as-yet unreleased technology might enable users to read legal information independently of their computers. An open access legal information site should be sufficiently flexible to allow users to access information using these or similar devices as well as by using their computers.

¹⁸⁴ At the very least, the user should be able to view search results in single column and dual column format, with the ability to change and increase font size to make the text readable for those users with vision problems.

¹⁸⁵ The JSTOR site, an online archive for scholarly journals, permits the user to download articles in either PDF or Tagged Image File Format ("TIFF"), thereby facilitating the use of at least some assistive technology. <http://www.jstor.org>.

D. An Open Access Site Should Permit Indexed And Non-Indexed Searches

In order to be able to retrieve information stored in an open access legal information archive, a researcher should be able to rely on different search protocols, allowing for both indexed and non-indexed searches.¹⁸⁶

The provision of non-indexed search capability, while doubtless presenting some technical challenges, should be relatively straightforward. Search engines permitting Boolean-type searches are relatively common and surely could be adapted for a legal information archive.¹⁸⁷ By contrast, pre-indexed searching will likely pose no substantial technical problems, but providing such a service seems like a daunting prospect in other ways.

Without using West's copyrighted Key number system as a guide, the archive's administrators would have to develop an indexing protocol that is sufficiently detailed to meet the requirements of lawyers working to deadline and who have high expectations of accuracy and completeness after working with the West system. And having developed this protocol, every case in the archive would have to be analyzed and indexed, requiring a substantial investment of time and effort.

The prospect of developing such a protocol, analyzing all existing case law according to it, and applying the protocol to all future court opinions is too daunting a task to consider, even for an army of law students. In order for an open access site to be able to offer some form of indexed research, therefore, it seems inevitable that some form of automated indexing process would be necessary.¹⁸⁸ It is possible that community resources could also be marshaled to support this effort.¹⁸⁹

E. An Open Access Legal Information Website Should Permit Fast Retrieval Of Information

Regardless of which type of search a researcher undertakes in this archive, the results should be available quickly. Westlaw and Lexis seemed fast to us until we were exposed to Google and its self-touted, but nonetheless impressive, seemingly simultaneous retrieval of

¹⁸⁶ The differences between pre and non-indexed searching are discussed *supra*, at n. 6.

¹⁸⁷ The Altlaw website is a good example of a relatively straightforward Boolean-type search engine operating in a free legal information site. <http://altlaw.org> (accessed November 7, 2007). This website, a collaborative project between the Columbia Law School Program on Law and Technology and the Silicon Flatirons Program at the University of Colorado law school, provides access to Supreme Court federal appellate decisions "from the last decade or so." <http://altlaw.org/about>. While its limited size and scope make it inadequate as a serious research tool, even after the infusion of data from the Public.Resource.Org deal with Fastcase (*see supra*, n. 96), its collaborative nature and its intent to make American common law accessible to all who wish to read it makes it a model for the more ambitious project I am proposing in this article.

¹⁸⁸ For one example of how this might be achieved, *see*, Ian Gallacher, *Mapping the Social Life of the Law: An Alternative Approach to Legal Research*, Available at the Social Science Research Network: <http://ssrn.com/abstract=1024176> (proposing that an open access legal information site could develop software that would allow a researcher to map the development of doctrine, as articulated by a court, and graphically present the results.

¹⁸⁹ The potential for community involvement is discussed *infra* at nn 230--239 and accompanying text.

websites.¹⁹⁰ While a legal research site need not inform its users that a search took a specific fraction of a second to perform, and while a comprehensive result should not be compromised by the speed of the search, it is desirable that the site be searchable as quickly as possible.

New technology appears to offer the promise of Google-type speed within a legal database context. Already existing sites like Fastcase, and possible future search engines like the one being developed by Precedent, suggest that the technology now exists, or soon will, to allow research alternatives to Westlaw and Lexis to offer substantial improvements in speed over those services.¹⁹¹

Precedent claims to have developed a search algorithm that “does a better job in returning relevant and authoritative US Supreme Court cases (as judged by human experts) than do the natural language engines of Westlaw and Lexis.”¹⁹² While inspired by the same research that inspired Google, the algorithm powering the Precedent search engine is apparently not directly modeled on Google and was separately developed by the Precedent team.¹⁹³

Whether or not the claims of Precedent’s developers are borne out by experience, and whether they can bring Google-like speed to the legal search process, speed in computer-assisted legal research is important and any new legal information archive should be designed to take advantage of present and future technologies that allow for the fastest results, consistent with accuracy and completeness.

F. An Open Access Legal Information Site Should Be Reliable

One of the fundamental principles of a legal information site must be that the information retrieved be reliable. Content errors are unacceptable and every word in every document must precisely reproduce the language in the original document.¹⁹⁴

¹⁹⁰ As an example, Google processed the search string “legal research” in 0.22 seconds, returning 1,990,000 search results and eight sponsored links. <http://www.google.com/search?hl=en&q=%22legal+research%22> (accessed November 7, 2007. Given the transient nature of information on the internet, it is unlikely that this precise result could be reproduced in the future).

¹⁹¹ In the interests of full disclosure, I should mention that I have signed a nondisclosure agreement with Precedent in order to be able to learn some details of the way the proposed Precedent site has been developed. None of the information in this article, however, was derived from conversations after the nondisclosure agreement was signed and all the information in this article is in the public domain.

¹⁹² Orly Lobel, *The Precedent Search Engine and the Web of Law* Prawfs Blawg, November 29, 2006 (http://prawfsblawg.blogs.com/prawfsblawg/2006/11/the_precedent_s.html).

¹⁹³ *Id.* The Precedent engine has not yet been released, making its developers’ claims unverifiable. The marketing model Precedent will follow is also unknown at the time of writing, although one of the developers of the Precedent algorithm offered one possibility when he posted on a blog in December, 2006. “One model Precedent is considering seriously is just to offer all state and federal cases, with state of the art search, for the very reasonable price of nothing. Just electricity and seeing some ads.” Thomas A. Smith, *Westlaw Bluer*, *The Right Coast*, December 8, 2006 (http://rightcoast.typepad.com/rightcoast/2006/12/westlaw_bluer_t.html).

¹⁹⁴ We assume, as a matter of course, that the texts available through the large commercial publishers are completely accurate, but this is more based on our experience and the common-sense belief that a commercial vendor whose texts were inaccurate would not long survive. Thomas Bruce identified concerns that texts supplied by alternative information providers might be less accurate than those available on commercial websites, and yet, as he notes, there is “no guarantee, other than time and experience, that texts from West are

Technology can help in this, of course. Developments in Artificial Intelligence mean that the rate of error when a document is scanned and then converted to text is dropping all the time.¹⁹⁵ And scanning appears to be the only realistic model for acquiring cases that are not already available in reproduceable digital form.¹⁹⁶ But no matter how close to perfect optical character recognition will become, the results will have to be checked against the original in order to ensure perfection, and this will necessarily involve a large number of people.¹⁹⁷

inherently more reliable than those published by public sector actors on the Internet.” Bruce, *supra* n. 132. But as we shall see, (*infra* nn 198-210 and accompanying text), there is reason for concern as to the trustworthiness of even seemingly official legal information on the internet.

¹⁹⁵ Optical Character Recognition (“OCR”) packages may offer percentage values as an advertisement of their “accuracy,” although such advertisements can be meaningless. OmniPage 16, for example, advertises a “27% increase in overall document conversion accuracy over the previous release.” <http://nuance.com/omnipage/standard/whatsnew.asp>. Without knowing what the previous release’s accuracy percentage was, of course, this means that the program could have an accuracy rate of between 28% and 100%. But even if the program advertises a specific percentage accuracy rate, this would be misleading for two reasons. First, the text used to establish the result advertised by the publisher is doubtless a pristine one, with blemish-free paper, black type, and nothing to impede the program’s ability to recognize and translate the text on the original into an OCR version. Such conditions are not likely to be found in real world originals. This is not to say that claims of specific accuracy percentages are incorrect, but it is to recognize that such percentages are more advertising claims than predictors of actual results. Second, it is unclear what a percentage in this context would mean in practice. If, for example, a page of text has 500 words comprising 2,500 characters, an OCR engine with a purported 98% accuracy rate would incorrectly read 50 characters. Michael Tanner, *Deciding Whether Optical Character Recognition Is Feasible* (available at http://www.odl.ox.ac.uk/papers/OCRFeasibility_final.pdf). But if each of these incorrect characters is in a separate word, then 50 words on the page will be incorrectly transcribed, leading to a word accuracy rate of 90%. *Id.* But if each incorrect word has two misinterpreted characters, the word accuracy rate would rise to 95%. *Id.* Because it likely will take less time to correct an incorrectly transcribed word than to correct individual characters, the software’s word accuracy would be more helpful to know than the character recognition rate, but that information will likely be source-specific, and will depend on how well the original text was scanned, how clean the original copy was, and other factors. Accordingly, the significance of OCR accuracy percentages is, at best, unclear.

¹⁹⁶ As noted *supra* n. 124, the *Bender* opinion appears to foreclose a prospective legal information publisher from downloading the non-copyrighted portions of court opinions from a licensed source and then repackaging that information. Accordingly, scanning the information, converting it into a variety of formats such as PDF and TIFF, removing editorial enhancements and adding information as necessary, and then publishing it appears to be the only viable option for obtaining cases that are not available from public domain sources. For cases directly available from courts, which is to say for most court decisions decided in the past few years and in the foreseeable future, an automated process that sweeps court websites and downloads new cases should be relatively easy to set-up and maintain.

¹⁹⁷ This assumes, however, that the end user of an open access legal information site would view and rely on the text of an opinion that had been processed by OCR software. That is not necessarily the case, however. Although it would be necessary to process the text using OCR software for purposes of developing a searchable file, it is less clear that the researcher would need to see that OCR version of the opinion. JSTOR, for example, uses a process whereby the original text is scanned and an OCR text file is generated for purposes of textual search and retrieval, but the OCR file is an invisible file that is attached to the scanned file. When a user searches through the OCR files for a text string that matches the text in a document, finds a document that matches the search parameters, and selects the document for retrieval, the document that appears on the computer screen is an image of the original file rather than the OCR copy. For a discussion of the way in which JSTOR documents are prepared for retrieval, see <http://www.jstor.org/about/background.html>. An open access legal information site could not use precisely the same protocol as JSTOR, since the scanned image would have to be edited to remove any copyrighted editorial enhancement to the court’s original text, and editorial enhancements – such as paragraph numbers necessary for purposes of neutral citation – would have to be added. Nonetheless, preparing the text viewed by the researcher would be substantially less complicated than editing the text to remove any errors introduced into the text by the OCR

The need for textual perfection is highlighted by a report issued by the Access to Electronic Legal Information Committee and Washington Affairs Office of the American Association of Law Libraries (“AALL”).¹⁹⁸ The survey authors attempted to answer the question “how trustworthy are state-level primary legal resources on the Web,”¹⁹⁹ and their conclusions are disturbing:

A significant number of the state court legal resources are *official*²⁰⁰ but none are *authenticated*²⁰¹ or afford ready authentication by standard methods. State online primary legal resources are therefore not sufficiently trustworthy. Citizens and legal researchers may reasonably doubt their authority and should approach such resources critically.²⁰²

The survey exposes several serious problems with the state of digital legal information. The failure of states to implement relatively simple safeguards to assure their citizens of the authenticity of their legal information means that we simply do not know if the online versions correspond to the laws as passed by the state legislature.²⁰³ Worse, the online versions could be changed by hackers and, without a way to compare the online version with the authenticated version, no one would be any the wiser.²⁰⁴ And without authentication of the language as enacted by the legislature on a particular date, any changes in legislation could erase the previous language forever without accurate, authentic archiving of legislative language.²⁰⁵

The extent of this proliferation of unauthenticated legal information is unknown. At present, we know only what the AALL has studied and, as Robert Berring observes, the data suggest that the problem “lives mostly in administrative codes and registers right now, but legislative materials and judicial opinions cannot be far behind.”²⁰⁶ the reasons for this, of course, is that these materials are, for the moment at least, still produced in permanent paper

process. Whether these errors would so impede the textual retrieval process that they would have to be removed, even though the OCR text would not be seen by the end user, is unclear.

¹⁹⁸ Richard J. Matthews and Mary Alice Baish, *State-By-State Report On Authentication of Online Legal Resources* (“Survey”) (2007), available at www.aallnet.org/aallwash/authen_rprt/AuthenFinalReport.pdf.

¹⁹⁹ *Id.* at 7.

²⁰⁰ The Survey defined “official” legal resource as “one that possesses the same status as a print *official* legal resource. The concept of an *official* legal resource applied to print publications is well established. Print *official* legal resources have generally served as a touchstone for authoritative and reliable statements of the law.” *Id.*

²⁰¹ As defined by the Survey, an “authenticates” legal text is “one whose content has been verified by a government entity to be complete and unaltered when compared to the version approved or published by the content originator. Typically an *authentic* text will bear a certificate or mark that conveys information as to its certification. . . . An *authentic* text is able to be *authenticated*, which means that the particular text in question can be validated, ensuring that it is what it claims to be.” *Id.* at 8.

²⁰² *Id.* at 7.

²⁰³ As Robert Berring notes, “[s]ome states have even completely stopped printing administrative regulations and deemed the online version to be the official publication of the state’s information without providing for authentication or preservation of it.” Robert C. Berring, *Losing The Law: A Call To Arms* 10 Green Bag 2d 279, 280 (2007) available at <http://www.aallnet.org/summit/GreenBag-LosingtheLaw.pdf>.

²⁰⁴ What Berring colorfully describes as the “Dr. Evil scenario. . . .” *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.* at 281.

form. If states begin to discontinue the paper versions of their codes and cases without first ensuring some authentication process, the implications are dire.²⁰⁷

The AALL's report doubtless will spur some in state government to action²⁰⁸ but, as Berring notes, "[t]here is very little sizzle involved in talking about authentication and preservation of legal materials."²⁰⁹ And this suggests an opportunity for a law school-based consortium to act to fill the breach and offer itself as an open access site that can provide reliable and authentic legal information.²¹⁰

G. An Open Access Legal Information Site Should Be Permanent

Any legal information archive has an obligation to be as permanent as possible. Once people rely on the archive as a source of information and as a research tool, it must always be available to them.²¹¹

In this context, permanence carries at least two meanings. First, it means that the archive should be insulated from the vagaries of the business cycle, and its continued existence should not be contingent on its ability to turn a profit.²¹² Second, it means that the archive's

²⁰⁷ The state governments that have allowed this situation to exist are the same governmental entities in whom Thomas Bruce expressed faith seven years ago. Bruce, *supra* n. 132. Indeed, Bruce pointed out the availability of simple authentication protocols that could have prevented this problem. "Indeed, digital signatures make it possible for Internet based providers to prove that what is being transmitted is *exactly* what was received from a court or legislature, without alteration of any kind." *Id.* Sadly, Bruce's hint was not acted upon.

²⁰⁸ The AALL has helped to grease the skids a little by convening a "A National Summit on the Authentication of Digital Legal Information" in April, 2007. Berring, *supra* n. 203, at 282.

²⁰⁹ *Id.*

²¹⁰ This is, perhaps, a way in which Bruce's two competing visions of centralized and decentralized open access to the law can be harmonized, with state government providing authenticated legal information to a law-school consortium's open access website.

²¹¹ The danger of impermanence has recently been highlighted by the announced defection of the journal *Science* from JSTOR. Peter Monaghan, *Librarians Protest Science's Departure From JSTOR, Fearing A Trend*, THE CHRONICLE OF HIGHER EDUCATION October 11, 2007, available at <http://chronicle.com/temp/email2.php?id=FNdHfh8q9JrP3PfDtqDZSJrGrGchftnJ>. *Science*, described as the "flagship journal" for the American Association for the Advancement of Science (*id.*), will continue to be offered, for a fee, on the Association's web site, but unless university libraries subscribe to the Association's subscription service, academic users will be unable to access the journal's articles. *Id.* The fees charged by the Association, plus the fees institutions already pay to subscribe to JSTOR, will doubtless put increased pressure on library budgets, especially for smaller academic institutions. *Id.* And returning to the print version of *Science* is likely not an option for these institutions either, because of space concerns. *Id.*

²¹² It would be naive to assume that setting-up and running a comprehensive legal information site will be an inexpensive endeavor. While it might be possible for smaller companies to borrow start-up funds from a variety of sources, that money will have to be repaid from money the site generates. Recent past experience suggests that while there is money to be made on internet start-up ventures such as this, a substantial amount of money can be lost as well, making the commercial future of a site like this unclear. The necessity of repaying loans necessary to start a commercial site like this also presents the site publishers with one of two choices; either they can generate revenue by charging users for access, thereby removing the site from consideration as a free and open access legal information site, or they can offer the legal information free and sell advertising on the site. While this is more desirable, since the user can, like a many Google users, ignore the advertising and concentrate on the service offered by the site, it would make the site highly sensitive to market pressures that could affect its advertisers. In either scenario, a commercial legal information site will have financial

technology should be sufficiently reliable to operate continuously and the archive should be impervious to such measures as denial-of-service attacks.²¹³ Put simply, once an archive like this comes into being, a user should be confident that at any time of the day or night, now and in the foreseeable future, a click on the appropriate uniform resource locator (“URL”) will make free legal research instantly available.

Permanence of this kind would also offer a stable archive where government information that is unstable for political²¹⁴ or other reasons²¹⁵ could be stored. Even though this information would also be available directly from the various agency websites, duplicating it on an archival site such as the one I propose would preserve the information and allow it to remain available.²¹⁶

H. An Open Access Legal Information Site Should Use Neutral Citation Form To Identify Source Material

Cases stored in an open access archive should be identified by citations that are neutral as to publisher.²¹⁷ This will require a radical change in the way citation manuals require case

obligations that could doom it to failure, and that would leave users who had grown to depend on the site for legal information without a viable alternative.

²¹³ Denial of service attacks happen when an individual or group makes a concerted attempt to prevent internet users from accessing information from a particular source. The targets of such attacks are typically large corporations and governmental agencies, and are typically carried out by people who fancy their actions as a form of cyber civil disobedience or “cultural pranks.” Goselle Fahimian, *How the IP Guerillas Won: (R) TM ark, Adbusters, Negativland, and the “Bullying Back” of Creative Freedom and Social Commentary*, 2004 STAN. TECH. L. REV. 1, 7,9 (2004). It is, however, possible that a site providing legal information – even one providing such information in a free and open access manner – would be sufficiently associated with the establishment to be deemed a viable target for these “media provocateurs and corporate saboteurs.” *Id.*

²¹⁴ To the extent the site could be expanded to include information from such agencies, it could act as an antidote to the toxic practice of culling information from agency websites that does not conform to the political orientation of the administration then in power. This issue was highlighted in 2002, when a directive was sent to the Department of Education identifying “problems” with the department’s website because it contained information that did not “reflect the priorities, philosophies, or goals of the present administration.” Michelle R. Davis, *No URL Left Behind? Web Scrub Raises Concerns*, EDUC. WK. ON THE WEB (2002), available at, http://web.archive.org/web/20021218111636/http://www.edweek.org/ew/ew_printstory.cfm?slug=03web.h22. In an irony that proves the point more graphically than any description, it appears that the story reporting the administration’s actions has itself fallen victim to the internet’s curse of impermanence and is no longer available at the Education Week on the Web site. A copy of the story was, however, recoverable from the Internet Archive, hence the double “http://” designation in the article’s URL.

²¹⁵ Some legal information is ephemeral by nature, without any political or other motive acting as the cause. Statutory language, for example, can be amended or superseded, yet the earlier form can retain legal significance, both directly – in the sense that litigation concerning statutory language could be instituted after the language itself changes – and indirectly – especially as the changes to statutory language can help scholars understand the development of legislative thought in an area. A legal information site that provided open and free access to historical versions of legislative language, as well as the current version, would be a valuable one.

²¹⁶ The Internet Archive, a site that used to be called the “wayback machine” (it retains that name for part of its archival function), seeks to fulfill this role for the internet at large. The Internet Archive, <http://www.archive.org/index.php>. This archive treats the internet as a cultural artifact and allows researchers to retrieve internet sites in their previous incarnations, allowing researchers to trace the development of these sites as well as to recover information that has fallen out of the current versions of websites. For a demonstration of the value of this type of archive, see *supra*, n. 214.

²¹⁷ Neutral citation format is an idea that has been around for some time. The American Association of Law Libraries posed one neutral citation format in 1995 and the American Bar Association proposed its own

citations to be presented²¹⁸ and will require an adjustment by lawyers and judges as well. But neutral citation will help to liberate the law from its present close association with West, and will ease the passage of making the law openly and freely available to all.

At present, both principal citation manuals require citations to West-published reporters for cases from all courts except the Supreme Court.²¹⁹ This requirement helps West to maintain its control over legal information and makes it difficult for any legal information publisher – whether seeking to open access to the law or not – to gain any real traction in the legal information market.²²⁰

The solution is to organize an archive on neutral citation principles. Persuading the legal community of the need for a move to neutral citation will likely be difficult. Federal judges were particularly unhappy about the prospect of a neutral citation format when the idea was last seriously considered, objecting to the concept for a variety of reasons including tradition,²²¹ aesthetics,²²² cost and complexity,²²³ and judicial independence.²²⁴ West also

format in 1996. The federal judiciary in general reacted with hostility to the notion of neutral citation and the Judicial Conference rejected the ABA's neutral citation proposal. Coleen M. Barger, *The Uncertain Status of Citation Reform: An Update for the Undecided*, 1 J. APP. PRAC. & PROCESS 59, 80-81 (1999). Several states have adopted some form of neutral citation format for attorneys citing to their cases in their courts. See, ASS'N OF LEGAL WRITING DIRS. & DARBY DICKERSON, ALWD CITATION MANUAL: A PROFESSIONAL SYSTEM OF CITATION app. 2 (3d ed 2006) [hereinafter ALWD MANUAL] (listing Colorado, Louisiana, Maine, Mississippi, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Wisconsin, and Wyoming as having adopted neutral citation formats). Nonetheless, neutral citation has not been

²¹⁸ Both principal citation manuals do make provision for neutral citation, but at present only require it for court documents in filed in courts that require its use. ALWD MANUAL, at 12.16(b) (“Use neutral citations when required by local rule.”); THE BLUEBOOK, *supra* n. 80, at 10.3.1(a) (“[A]ll case citations must be to the source(s) required by local rules.”)

²¹⁹ The exception to this rule, as every first year law student learns, is to United States Supreme Court decisions, which should be cited to only in the official reporter published by the Supreme Court. THE BLUEBOOK, *supra* n. 80, tbl. T.1 (“Cite to U.S., if therein; otherwise, cite to S. Ct., L. Ed., or U.S.L.W., in that order of preference”; ALWD MANUAL, *supra* n. 217, 12.4(c)(1) (“Unless required by local rule. . . , typically cite only one source, in the following order of preference: . . . United States Reports. . . .”) West is the only publisher of the reporters in which other federal opinions can be found, so citations to those opinions will naturally require citation to a West-published reporter. For state court opinions, the Bluebook's tables always list the West regional reporter in which a particular state court's opinions can be found as the first source to be cited. THE BLUEBOOK, *supra* n. 80, tbl. T.1. And the ALWD Manual lists West reporters as the first in citation order of preference for case citations in documents not governed by state court rules. ALWD MANUAL, *supra* n. 217, 12.4(b)(2)(a).

²²⁰ For a more complete discussion of this issue, see, Gallacher, *supra* n. 36.

²²¹ Letter from the Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia Circuit, to the Appellate Court and Circuit Administration Division (Feb. 26, 1997), available at <http://www.hyperlaw.com/jccite/004.txt> (adding paragraph numbers to opinions “belongs to the civil law tradition and to decisions of the Federal communications commission, not to the common law.”)

²²² Letter from the Honorable Richard A. Posner, Chief Judge, United States Court of Appeals for the Seventh Circuit, to the Honorable J. Owen Forrester, Chairman of the Automation & Technology Committee (Mar. 3, 1997), available at <http://www.hyperlaw.com/jccite/015.txt> (arguing against neutral citation format because numbering paragraphs would “disfigure and bureaucratize the opinion-writing process”).

²²³ Letter from the Honorable David D. Dowd, Jr., Judge, United States District Court for the Northern District of Ohio, to the Appellate Court and Circuit Administration Division (Feb. 26, 1997), available at <http://www.hyperlaw.com/jccite/016.txt> (neutral citation formatting would be “cost prohibitive” for sole practitioners and small law firms and would “simply add[] needless and expensive complexity without adding much, if any, efficiency”).

mounted an aggressive attack on neutral citation.²²⁵ But neutral citation has two important proponents – the American Bar Association and the Association of American Law Librarians, both of whom have proposed neutral citation formats,²²⁶ and their continued support for, and pressure in favor of, neutral citation will be crucial in order for the idea to be accepted by lawyers and judges. And while the legal community is not the primary target audience for a cite like this, its acceptance or, at least, tolerance of legal arguments supported by cases identified by neutral citations is a crucial step in the development and ultimate acceptance of an open access legal archive.²²⁷

I. An Open Access Legal Information Site Should Include A Citator

Being able to find the law quickly and efficiently, and being able to rely on the accuracy of the law one finds, is crucial for any legal researcher, but this on its own will not be of much help unless one can be sure that the law is still good. This means that any archive site must develop a citator service of some form.²²⁸

²²⁴ Letter from the Honorable Procter R. Hug, Jr., Chief Judge, United States Court of Appeals for the Ninth Circuit, to the Administrative Office of the United States Courts Appellate Court and Circuit Administration Division (Mar. 14, 1997), *available at* <http://www.hyperlaw.com/jccite/400.txt> (arguing against neutral citation format because “the court should be responsible for the text of the opinion and initial page formatting”); Letter from the Honorable Leonie M. Brinkema, Judge, United States District Court for the Eastern District of Virginia, to Joan Countryman, Appellate Court and Circuit Administration Division, Administrative Office of the U.S. Courts (Mar. 5, 1997), *available at* <http://www.hyperlaw.com/jccite/006.txt> (opposing the imposition of a neutral citation format because “[t]o mandate that judicial opinions conform to a specific format, such as numbering every paragraph and including parallel cites to electronic publications, seriously invades judicial independence”).

²²⁵ Two West employees were on the AALL Task Force on Neutral Citation Formats and they published a vigorous dissent to the Task Forces’ recommended adoption of a neutral citation format. Am. Ass’n of Law Libraries, *AALL Task Force on Citation Formats Report: March 1, 1995*, 87 L. LIBR. J. 580 (1995) [hereinafter AALL REPORT]. The West representatives criticized the neutral citation format on numerous grounds, the most significant of which was their concern that it was a “nowhere” citation format (*id.* at 613) because neutral citation “provides absolutely no clue that helps the researcher to identify the publication, CD-ROM, or online service where she can *actually find* the opinion. It is truly a citation to nowhere.” *Id.* This objection would, of course, vanish if neutral citation was used as a means of identifying opinions on a free access legal information site, since the citation would then point the researcher to a specific location where the opinion could be found.

²²⁶ See, AALL REPORT; A.B.A. SPECIAL COMM. ON CITATION ISSUES, REPORT AND RECOMMENDATIONS (1996), *available at* <http://abanet.org/ftp/pub/citation/report.txt>.

²²⁷ The Public.Resource.Org press release announcing its deal with Fastcase, Inc. mentions that the data will be encoded in a way that will allow the public to “add . . . alternate numbering systems for citation purposes.” Press Release, *supra* n. 96. While the recognition of the importance of an alternative notation system is encouraging, the implicit possibility that Public.Resource.Org might be contemplating multiple – even individual – citation systems is disturbing. As Paul Axel-Lute has noted, a legal citation has two purposes: “First, it indicates the nature of the authority upon which a statement is based. Second, it contains the information necessary to find and read the cited material.” Paul Axel-Lute, *Legal Citation Form: Theory and Practice*, 75 LAW LIBR. J. 148, 148 (1982). The danger of a system whereby every person reading the text developed an idiosyncratic method of citing to the text, of course, would be that the second of these maxims would potentially be violated, and where a citation fails accurately to describe where the cited material could be found, the citation has, at best, limited value. It would be better, therefore, if those using the data derived from the Public.Resource.Org and Fastcase deal not implement at this part of the Public.Resource.Org vision.

²²⁸ A citator is a tool that “catalog[s] cases and secondary sources, analyzing what they say about the authorities they cite.” AMY SLOAN, BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES 129 (3d Ed. 2006). Most significantly, perhaps, citators “will help [a researcher] determine whether an authority is still ‘good law,’ meaning it has not been changed or invalidated since it was published.” *Id.* at 129-30.

A simple citator, with no analysis of subsequent case treatment of the target case, should be a relatively simple feature to develop,²²⁹ but its usefulness is questionable. One might learn from such a service that a case has been directly overruled if a subsequent court cites to the target case by name and indicates that it has been overruled. But such a service would do nothing for cases that overrule principles, or where a case is overruled by statute. Here, again, the value of a community of law students working together to confirm the initial results of an Artificial Intelligence process seems to hold the most promise, although it is possible that the wider user community could also be called into service.

J. An Open Access Legal Information Site Should Support And Encourage Community Involvement In Its Growth

The issue of community involvement in a legal information archive's development is perhaps the most controversial element in this proposal. The Wikipedia,²³⁰ and its problems with accuracy and reliability,²³¹ has caused many to close their minds to the notion of community involvement in any sort of information source, although others appear to be more receptive to its use.²³²

²²⁹ A service of this sort would, in essence, search all other cases for all subsequent mentions of the case in question. Such a citator should not be too difficult to develop, and while it would lack the sophisticated analysis features found in the Shepard's Citator service or in West's KeyCite, it would at least alert the researcher to any direct overrulings of the target opinion.

²³⁰ The Wikipedia is an open-access encyclopedia project. Wikipedia, <http://en.wikipedia.org/wiki/Wikipedia> (last accessed November 6, 2007). Its entries are drafted by volunteers and most entries can be edited by anyone with access to the internet. *Id.*

²³¹ Perhaps the most notorious of these problems involved John Siegenthaler, a journalist who was Robert Kennedy's administrative assistant in the early 1960s. John Siegenthaler, *A False Wikipedia 'Biography,'* USA Today, November 29, 2005 (accessible at http://www.usatoday.com/news/opinion/editorials/2005-11-29-wikipedia-edit_x.htm). For 132 days, the Wikipedia's entry on Siegenthaler contained the false information that he had, for a brief time, been implicated in the assassinations of both Robert and John Kennedy, and that he had lived in the Soviet Union between 1971 and 1984. *Id.* Siegenthaler wrote a newspaper column detailing his unsuccessful attempts to discover who had written the incorrect entry about him, drawing attention to the problems inherent in a seemingly authoritative site where entries can be posted without editorial oversight. *Id.* Despite the problems the Wikipedia has experienced with inaccurate entries, a study published in Nature in 2005 concluded that the Wikipedia's is "no less accurate than the *Encyclopedia Britannica*. . ." Ken S. Myers, *Wikimunnity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J. L. & TECH. 163, 164 n.5 (2007)(citing, Jim Giles, *Internet Encyclopedias Go Head to Head*, 438 NATURE 900 (2005).

²³² Some professors are barring students from using the Wikipedia as a source to support assertions made in their papers. See, Scott Jashick, *A Stand Against Wikipedia*, InsideHigherEd.com, January 26, 2007, accessible at <http://insidehighered.com/news/2007/01/26/wiki> (describing decision by history department at Middlebury College to bar students from citing to Wikipedia). On the other hand, many legal academics are using the Wikipedia to support at least some assertions they make in articles published in well-respected law reviews. see, e.g., Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 894 n. 358 (2007); Peter S. Menell and David Nimmer, *Legal Realism in Action: Indirect Copyright Liability's Continuing Tort Framework and Sony's DeFacto Demise*, 55 UCLA L. REV. 143, 182, n. 199 (2007). A recent posting on an online blog asserted that as of February 5, 2007, the Wikipedia had been cited in 545 legal academic articles, with an additional 125 articles mentioning this source but not citing to it. Paul Caron, *Concurring Opinions*, February 5, 2007, accessible at <http://www.concurringopinions.com/archives/2007/02/>

²³² Some professors are barring students from using the Wikipedia as a source to support assertions made in their papers. See, Scott Jashick, *A Stand Against Wikipedia*, InsideHigherEd.com, January 26, 2007, accessible at <http://insidehighered.com/news/2007/01/26/wiki> (describing decision by history department at Middlebury College to bar students from citing to Wikipedia). On the other hand, many legal academics are using the Wikipedia to support at least some assertions they make in articles published in well-respected law

But Wiki technology,²³³ like all technology, is just a tool to be wielded effectively or ineffectively. In fact, community involvement in a legal information archive – properly managed, edited, and mediated²³⁴ – opens up a number of possibilities.²³⁵ In addition to passive user involvement (which is perhaps a contradiction in terms but by which I mean here a Google-like ranking feature in which a researcher’s search is compared against viewed results and a results hierarchy is built up without active participation by the user) users could, for example be asked to locate a found case within the indexing parameters set out by the site’s administrators, or could suggest changes in the way a case is indexed.²³⁶ Such changes could be moderated by an editorial board, and would not be implemented without careful consideration in order to insure accuracy in the archive’s results.²³⁷ But the more, different,

reviews. *see, e.g.,* Peter K. Yu, *The International Enclosure Movement*, 82 IND. L.J. 827, 894 n. 358 (2007); Peter S. Menell and David Nimmer, *Legal Realism in Action: Indirect Copyright Liability’s Continuing Tort Framework and Sony’s DeFacto Demise*, 55 UCLA L. REV. 143, 182, n. 199 (2007). A recent posting on an online blog asserted that as of February 5, 2007, the Wikipedia had been cited in 545 legal academic articles, with an additional 125 articles mentioning this source but not citing to it. Paul Caron, *Concurring Opinions*, February 5, 2007, accessible at http://www.concurringopinions.com/archives/2007/02/when_is_it_appr.html. Demonstrating that legal academic use of the Wikipedia is still by no means a settled issue, another post noted in response that the authors of such articles “should be blacklisted from scholarly careers.” *Id.* Court use of the Wikipedia is also on the rise, with a recent New York Times story noting that more than 100 judicial rulings have relied on the Wikipedia since 2004. Noam Cohen, *Courts Turn to Wikipedia, But Selectively* New York Times, January 29, 2007, accessible at http://www.nytimes.com/2007/01/29/technology/29wikipedia.html?_r=1&ex=1170824400&en=5982f9a34322f876&ei=5070&oref=slogin. The same article quotes Judge Richard Posner as saying “Wikipedia is a terrific resource, . . . [p]artly because it is so convenient, it often has been updated and is very accurate.” *Id.* Displaying the ambivalence to this resource that appears inevitable until the provenance of its information is more stable, Judge Posner continued that “[i]t wouldn’t be right to use it in a critical issue. If the safety of a product is at issue, you wouldn’t look it up in Wikipedia.” *Id.*

²³³ Although Wiki technology and the Wikipedia appear to be inextricably linked, the Wikipedia is, in fact, only one manifestation of Wiki software. Wikipedia, *Wiki* <http://en.wikipedia.org/wiki/Wiki> (last accessed November 6, 2007). Wiki software allows users to “create, edit, and link web pages” (*id.*), and is frequently used to create collaborative websites like the Wikipedia. *Id.* Perhaps belying its open access image, Wiki software is also used by businesses to create intranet sites or for use in knowledge management. *Id.*

²³⁴ Perhaps stung by all the criticism surrounding the site, the Wikipedia itself is now offering a mediated site. The “Veropedia” is, or will be, “a collaborative efforts by a group of Wikipedians to collect the best of Wikipedia’s content, clean it up, vet it, and save it for all time. These articles are stable and cannot be edited. The result is a quality stable version that can be trusted by students, teachers, and anyone else who is looking for top-notch, reliable information.” <http://veropedia.com/docs/faq.php> (accessed November 5, 2007). Significantly, the Veropedia will apparently be supported by advertising because, its managers note, “the liberation of content costs money. Rather than ask for donations from our potential target audience of teachers and students, we believe that unobtrusive advertising is preferred.” *Id.*

²³⁵ For example, the Legal Information Institute, based at Cornell University law school, has introduced Wex, a community legal dictionary to which approved participants can post entries. Wex, http://www.law.cornell.edu/wex/index.php/Main_Page.

²³⁶ A recent article in the Journal of Legal Education points out one of the principal benefits of Wiki technology to law students. “Wikis enable students to *deliberate* with others and engage in the public exchange of reasoned ideas and arguments. Working together fosters greater individual learning by making students – and their teachers – active producers of expertise rather than passive consumers of information.” Beth Simone Noveck, *Wikipedia and the Future of Legal Education*, 57 J. LEGAL EDUC. 3 (2007). The same could be said of all users of legal information; allowing the larger community to engage in the law, analyze it, and share their work with others

²³⁷ One of the Wikipedia’s principal strengths is the ease and speed at which changes can be made to it. “Despite common misconceptions, this variability does not pose a challenge to the authenticity and legitimacy of legal knowledge. Every change to a wiki page is recorded as a version. Unlike a web page, which can

brains that consider a case and its indexing, the more refined and accurate the indexing likely would be.²³⁸ And philosophically, community involvement seems to be at the heart of what open access to the law should be about.²³⁹

VII. CONCLUSION

The use of revolutionary rhetoric to describe the changes occurring in the legal information field might seem overblown to some.²⁴⁰ But no one can deny the speed and power of the change that has come over an area that had remained essentially static for over one hundred years. Many practitioners working today remember a time when there was no Lexis or Westlaw, and while the days when Lexis and Westlaw were accessible, if at all, through special dedicated terminals that often were kept in their own rooms might seem like the distant past to younger lawyers and law students, they are still fresh in the memories of those who graduated from law school relatively recently. It is possible that in a few years, those of us who think fondly of book-based legal information will be greeted with looks of incomprehension when we speak of digests and the values of annotated codes.²⁴¹

change, a citation to a Wikipedia page is a pin-cite to a particle version that is always preserved. The reader is free to check how the pages have changed over time, and doing so provides important context on the reliability of the content.” Noveck, *supra* n. 236, at 6.

²³⁸ As Professor Noveck notes, “[t]he quality and abundance of information and the ability of everyone to participate in correcting mistakes make many wikis as reliable as a single authored source. . . . Wikis use the power of many eyes to check for accuracy. Because they are easily searched via search engines . . . their content often receives a great deal more scrutiny than a single editor can give a book” Noveck, *supra* n. 236, at 6.

²³⁹ The Public.Resource.Org press release suggests that community involvement with legal information forms an important part of that site’s philosophy. “Public.Resource.Org intends to perform an initial transformation on the federal case law archive . . . which will allow the insertion of markers that will approximate page breaks based on user-furnished parameters such as page size, margins, and fonts. ‘Wiki’ technology will be used to allow the public to move around these ‘star’ markers as well as add summaries, classifications, keywords, alternate numbering systems for citation purposes, and ‘digs’ on opinions.” Press Release, *supra* n. 96. Much of this is positive, especially since it will enhance the flexibility of sites containing this information, although the reactions of federal judges to having their opinions “rated” by anyone who reads them can only be imagined. One possible danger raised by the degree of individual customization offered by this approach, however, is the degree to which individual presentation of details like page size could affect citation. This highlights again the importance of a stable citation system that uses unchangeable features such as paragraph numbers to identify the location of information within an opinion.

²⁴⁰ Revolutionary themes are not unprecedented in the legal research and writing area. In particular, the struggle for control of legal citation brought out the revolutionary instincts in legal academics across the country. See, e.g. Julie Cheslik, *The Battle Over Citation Form Brings Notice To LRW Faculty: Will Power Follow?*, 73 UMKC L. REV. 237, 241 (2004) (“Every student of history knows that revolutions do not come about due to any one, single factor. . . . Thus . . . it is probably an oversimplification to say that they uprising of the legal writing directors showing their collective muscle was caused by their dissatisfaction with *The Bluebook*.”); Jennifer L. Cordle, *ALWD Citation Manual: A Grammar Guide to the Language of Legal Citation*, 26 U. ARK. LITTLE ROCK L. REV. 573, 573 (2004) (“Sides were taken – revolutionaries supported the adoption of [the ALWD Manual], . . . and loyalists remained true to *The Bluebook*.”); Alex Glashauser, *Citation and Representation*, 55 VAND. L. REV. 59, 61 (2002) (“Through the lens of the American Revolution, this Article traces the roots of the citation uprising. . . .”). Since the ALWD Manual is different from *The Bluebook* more in form than substance, perhaps it is more appropriate to think of that particular dispute more as an attempted coup d’etat rather than as a full-blown revolution.

²⁴¹ Anyone who doubts this should try to recall the color sequence for using the various volumes of Shepards print citators, most of which have vanished irreversibly from our library shelves in the past five years.

Change can be disturbing, and revolutionary change rarely comes easily. But along with the inevitable disruption and occasional pain they bring, revolutions can also offer new ways of doing things, and can often inspire startlingly new insights that lead society into surprising new directions. And so it has been with the internet revolution. A few years ago the present ubiquity of electronic information and communication was unimaginable to all but the few visionaries who understood the potential for change inherent in the world wide web and email, yet life now is unimaginable without these tools.

Yet for all the innovation and change that has occurred, the internet has not changed the way in which legal information is made available, and American legal information is still the hostage of commercial interests. The large commercial vendors are being challenged by smaller upstart companies offering services like Fastcase and Versuslaw, but they are really only offering alternative versions of the same thing; the law is still being treated as a commodity to be bundled, sold, and profited from rather than being offered free to the citizenry that has already paid once for it through taxation.

Governmental bodies have failed to take up the responsibility of providing this information. State and federal courts have websites that post recent decisions, to be sure, but the courts have failed to dig back and publish cases that reflect decisions issued before the advent of the internet and in the absence of a centralized site that permits coordinated searching of more than one database at a time, using court websites to research the law is a hopelessly inefficient and Balkanized process.

Although some might disagree about the virtues of a centralized source of as complete an archive of American law as it is possible to create, no alternative approach has worked to provide free, open, and meaningful access to the law in this country. And no one is better situated to provide such a service than America's law schools, with their vast reservoirs of talented, intelligent, and motivated law students,²⁴² access to computer scientists, information theorists, and other experts in all the fields necessary to make this project a success, and a commitment to engaged scholarship that has brought a significant benefit to the country in the form of the clinical education movement.

But the time for action is now. This will be a large and complex undertaking and it will take time for all the elements necessary for success to coalesce into a workable consortium. Meanwhile, the commercial vendors are strengthening their grip on legal information every day. The time for action is not when the fate of books is finally sealed and the only way to access the law is through websites supported by fees, but now, while the books still provide free access to the law for those who live close enough to a library with a legal collection to be able to use them. To offer a final variation on my legal information revolution slogan: Access First, Access Now. Although if legal information truly is power, and if the goal of a consortium such as the one I have proposed here is to ensure that all American legal information should be openly and freely available to everyone, perhaps it is time instead to

²⁴² Even if not all law students would not be motivated to work on a project like this by philanthropy and a sense of its being the right thing to do (and I suspect that the number of students who would be willing to do this work for precisely those reasons might surprise those who view today's group of law students with a cynical and jaundiced eye), many would recognize the chance to learn from the inside how to use and retrieve information from this archive as an important skill that would serve them well in their careers. Selflessness and self-interest should combine to produce a large and motivated work force to support this project.

co-opt a slogan from a different time. Perhaps the true slogan of the legal information revolution should be, simply: Power To The People.