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Redefining Open Access for the Legal Information Market

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Professor Milles argues that the open access movement in legal scholarship fails to address—and in fact diverts resources from—the real problem facing law libraries today: the soaring costs of nonscholarly, commercially published, practitioner-oriented legal publications. He suggests that one solution to this problem is for law schools to redirect some of their resources—intellectual capital, reputation, and student labor—to publishing legal information for practitioners rather than legal scholars.

Collection Economics without Tears

¶1 Discussions of the future of law library collections tend to focus on familiar themes and variations: whether collections will be solely electronic, whether there will still be a place for printed books, what will be the proper balance between digital and print materials.[1] I have already weighed in on these questions in *AALL Spectrum*[2] and elsewhere. It seems clear to me that law library collections in the future are going to be almost wholly digital. Monographs will continue to be published and read in print for the foreseeable future—at least until better display technologies such as digital paper are perfected—but, as now, they will be found mostly in academic law libraries. Law firm libraries contain few monographs on sociolegal studies or law and economics. Most, if not all, materials actually used by lawyers, law students, and law professors will be accessed and used almost exclusively in electronic formats. The more difficult question is how we—legal

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1. For some of the better recent discussions, see Penny A. Hazelton, *How Much of Your Print Collection Is Really on WESTLAW or LEXIS-NEXIS?* LEGAL REFERENCE SERVICES Q., 1999, no. 1, at 1, 13 (arguing that "many legal materials currently owned by the Law Library will never be in electronic form because it will never be economical to convert them [e.g., treatises from the nineteenth century]"); Michael Chiorazzi, *Books, Bytes, Bricks and Bodies: Thinking About Collection Use in Academic Law Libraries*, LEGAL REFERENCE SERVICES Q., 2002, no. 2–3, at 1, 1 ("over 80% of the use of all legal materials is accounted for by the 20% of all legal materials that are available online"); Gordon Russell, *Re-Engineering the Law Library Resources Today for Tomorrow's Users: A Response to "How Much of Your Print Collection Is Really on WESTLAW or LEXIS-NEXIS?,"* LEGAL REFERENCE SERVICES Q., 2002, no. 2–3, at 29, 30 ("The Alexandrian library of the future will be digital, for the masses of our day demand access to society's cultural riches wherever and whenever they please."); Catherine Sanders Reach, David Whelan & Molly Flood, *Feasibility and Viability of the Digital Library in a Private Law Firm*, 95 LAW LIBR. J. 369, 369, 2003 LAW LIBR. J. 26, ¶ 2 ("Law librarians must embrace the challenges of a digital library or find themselves championing a research mission that does not support the changes occurring in the law firm.").
2. James G. Milles, *Out of the Jungle*, AALL SPECTRUM, Feb. 2005, at 11.

information consumers—will pay for those collections. We currently face two opposing long-term trends—increasing costs and decreasing budgets—that are creating an unsustainable situation for law libraries.

¶2 While these conflicting pressures apply in varying degrees to all libraries, there is no general solution that applies equally well in all situations. Practicing lawyers do not work in quite the same way as accountants, physicians, or other professionals, just as law professors do not work quite like biochemists, medical researchers, or other academics. Every profession, and every discipline, constitutes a distinct discourse community with its own traditions, standards, norms, and ways of seeking and using information.[3] At the same time, law libraries and the legal profession are not isolated from the rest of the world.[4] While we have to look at the specifics of human behavior in devising solutions for information needs, we can draw on general methodologies for looking at that behavior.

¶3 The methodology of economics offers valuable tools for understanding information needs and how individuals and institutions respond to those needs. As a former English major with a deep-seated fear of mathematics, I have a long way to go before I can claim any expertise in economics. On the other hand, no responsible manager can hope to remain ignorant of economics. One of the lessons I have learned as a library director is the importance of looking at all the costs associated with any decision, so I have tried to teach myself what I can by reading a variety of nontechnical books. Fortunately there are some very good authors writing readable and entertaining popularizations of economic principles and how they manifest in daily life.[5] The single best introduction I have found is *Sex, Drugs & Economics* by Diane Coyle, with its coverage of a broad range of economic principles and terminology in an extremely readable and enjoyable style. Her last chapter restates the main lessons of her book in the form of "Ten Rules of Economic Thinking."[6]

¶4 Before proceeding to those rules, it is important to note that economics deals with much more than money, although it often uses mathematical models to express values in monetary terms that can be measured and compared. According

3. Richard A. Danner, *Electronic Publication of Legal Scholarship: New Issues and New Models*, 52 J. LEGAL EDUC. 347, 358 (2002) (footnote omitted) ("Discourse communities are characterized by the language, forms, and traditions that members use to communicate with each other, advance knowledge in the field, and initiate new members into the group, and by specific genres of communication (such as the law review article for legal scholarship) and lexicon (technical terminology, shorthand terms, abbreviations).").
4. *See generally* James G. Milles, *Leaky Boundaries and the Decline of the Autonomous Law Library*, 96 LAW LIBR. J. 387, 2004 LAW LIBR. J. 25 (describing the mainstreaming of interdisciplinary legal scholarship and its implications for law school libraries).
5. I have found the following books helpful: DIANE COYLE, SEX, DRUGS & ECONOMICS (2002); TODD G. BUCHHOLZ, NEW IDEAS FROM DEAD ECONOMISTS (rev. ed. 1999); DAVID D. FRIEDMAN, LAW'S ORDER: WHAT ECONOMICS HAS TO DO WITH LAW AND WHY IT MATTERS (2000) [hereinafter FRIEDMAN, LAW'S ORDER]; DAVID FRIEDMAN, HIDDEN ORDER: THE ECONOMICS OF EVERYDAY LIFE (1996); STEVEN E. LANDSBURG, THE ARMCHAIR ECONOMIST: ECONOMICS AND EVERYDAY LIFE (1993); STEVEN D. LEVITT & STEPHEN J. DUBNER, FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING (2005).
6. COYLE, *supra* note 5, at 221.

to one widely accepted definition, *economics* "is the study of human behaviour as it relates scarce means, which have alternative uses, to given ends, such as maximization of income, usually employing price data in the comparison."[7] Time is a scarce resource with an economic value, as any law student knows; space is another, as any librarian knows who has dealt with building construction or renovation, or even with shifting a book collection. Thus, Coyle's first rule of economic thinking is:

Everything Has a Cost[8]

¶5 On the most superficial level, all of us are aware of acquisition budgets and the increasing portion of those budgets devoted to digital resources. In recent years, most legal publishing has become concentrated in the hands of three large information vendors: Thomson, Reed Elsevier, and Wolters Kluwer.[9] The mergers that led to this situation have been accompanied by substantial increases in serial prices.[10] Between 1990 and 2000, serials published by Thomson increased in price by 27%, while Reed serial prices increased by 28%.[11] During the same period, the change in the U.S. consumer price index was 2.7%.[12]

¶6 Not only are prices going up, there are more products to buy. The decision of BNA (Bureau of National Affairs) to withdraw its online materials from the package subscriptions to Westlaw and LexisNexis and to market BNA Online as a separate product line meant that law libraries suddenly had to pay much more to gain access to the same materials. In most cases, academic subscriptions to the BNA full package are much more costly than the same libraries' subscription fees for Westlaw and LexisNexis combined. My law school pays more than $70,000 annually for access to Westlaw and LexisNexis.[13] For that fee, we used

7. A DICTIONARY OF THE SOCIAL SCIENCES 227 (Julius Gould & William L. Kolb eds., 1964).
8. COYLE, *supra* note 5, at 221.
9. In North America alone, Thomson Legal & Regulatory, one of five divisions of Thomson Corporation, owns West Group (including Andrews Publications, Bancroft-Whitney, Banks-Baldwin, Clark Boardman Callaghan, Elite Information Systems, Federal Publications Inc., Findlaw, Foundation Press, Harrison Company, Lawoffice.com, Lawyers Cooperative Publishing, Rutter Group, and IHS Group's environmental and human resources divisions). Reed Elsevier PLC Legal (one of four divisions) owns Courtlink, LexisNexis, LexisNexis Canada, LexisNexis/CD Law, LexisONE, Matthew Bender, Anderson Publishing, Michie, Mealey Publications, and Shepards. Wolters Kluwer owns Aspen Publishers, Inc., CCH Incorporated, Emanuel Publishing, Loislaw, Wiley Law, and more. For a complete list, see Comm. on Relations with Info. Vendors, Am. Ass'n of Law Libraries, *A Legal Publishers List: Corporate Affiliations of Legal Publishers* (2d ed. 2004), http://www.aallnet.org/committee/criv/resources/tools/list.
10. Mark J. McCabe, *Merging West and Thomson: Pro- or Anti-Competitive?* 97 LAW LIBR. J. 423, 431, 2005 LAW LIBR. J. 25, ¶ 26 (finding significant post-merger price increases for titles published by Thomson despite government-mandated divestiture).
11. *Id. at* 431, ¶¶ 26–27.
12. Economy Statistics-Inflation-Duration 1990–2000 By Country, http://www.nationmaster.com/graph/eco_inf_dur_199_200-economy-inflation-duration-1990-2000 (last visited July 14, 2006).
13. This is a large amount by the standards of other law schools worldwide, but relatively small compared to what science, technology, and medical (STM) libraries pay. The canonical example is the journal *Brain Research*, which is available for $20,000 a year.

to get access to the full range of practitioner materials on tax, labor, family law, criminal law, and the like from BNA before it pulled out and started charging separately for its database. A subscription to BNA's full package would cost us around $95,000—more than LexisNexis and Westlaw put together. Typical costs for loose-leaf services and their online versions range from $1000 to $10,000 or more, depending on the type of law and how much money there is in it. Family law is cheap; intellectual property law is expensive.

¶7 Treatises and other practitioner-oriented materials are not the only materials that add to the costs of law libraries. Other new digital products marketed primarily to academic law libraries include HeinOnline, LLMC Online, and Thomson Gale's The Making of Modern Law. Law school libraries may also have an interest in acquiring historical interdisciplinary collections like Early English Books Online, Early American Imprints, and Thomson Gale's Eighteenth Century Collections Online—all of which carry prices in the six-figure range.

¶8 Another source of new materials for purchase or license is the emergence of smaller niche publishers. Digital publishing and distribution lower the barriers to market entry and make it possible for smaller publishers to profitably produce specialized materials,[14] such as Paradigm Publications Inc.'s Religion Case Reporter which, after eight years as a print publication, became exclusively online in January 2006.[15] These niche publications often are not alternatives to or replacements for more expensive or comprehensive titles from the major publishers, but rather are additional materials in specialized research areas. But print is not dead. The major publishers, with large infrastructure investments ranging from massive, expensive printing presses to long-established distribution channels, still see opportunities to squeeze further profits out of the law market by producing new, redundant print materials such as *West's Federal Appendix*.

¶9 So everything has a cost. But, as Coyle reminds us, not every cost involves simply handing over money.[16] A crucial factor that is rarely considered clearly is the concept of *opportunity cost*, "the value forgone from not having made alternative choices. Every decision has an opportunity cost as well as a direct cost."[17] This is the cost imposed when a library has to decide, for example, whether to retain the print version of an online resource or to reduce redundancy to free up funds for additional, nonduplicative materials. Another opportunity cost is the time patrons spend in acquiring and consuming information.[18] In addition, any complicated eco-

14. Susan M. Yoder, *The Rise of the Small: The Effects of Industry Consolidation on Small Legal Publishers*, LEGAL REFERENCE SERVICES Q., 1999, no. 1–2, at 59, 67 (1999) ("Small publishers are picking up product opportunities they see being abandoned, particularly single volume, niche titles that are small in either subject matter or jurisdiction.").
15. Religion Case Reporter, Available Packages and Pricing Information, http://www.paradigmpub.com/guest.htm (last visited July 17, 2006).
16. COYLE, *supra* note 5, at 221.
17. *Id.* at 235.
18. Bruce R. Kingma, *The Costs of Print, Fiche, and Digital Access: The Early Canadiana Online Project*, 6 D-LIB MAG., Feb. 2000, at http://www.dlib.org/dlib/february00/kingma/02kingma.html.

nomic exchange involves *transaction costs*, which include "*search and information costs, bargaining and decision costs*, [and] *policing and enforcement costs*."[19] A third type of cost is external cost, or externality, which "exists whenever one individual's actions affect the well-being of another individual—whether for the better or for the worse—in ways that need not be paid for according to the existing definition of property rights in the society."[20] Where external costs are imposed on very large numbers of people, transaction costs are high, making agreements to internalize the externality very costly to negotiate.[21] I will say more about opportunity and transaction costs later.

¶10 Meanwhile, as costs for libraries continue to rise, budgets are decreasing. In the United States, government support for public universities is decreasing, and competition for grants and philanthropy is squeezing private institutions. All law libraries are facing competition for scarce resources within their parent institutions—particularly with growing demands for information technology.

¶11 Library users are also changing. Empirical studies have repeatedly shown an increasing reliance on, and trust in, electronic formats. For example, a recent Pew Internet & American Life Project study on teen use of the Internet reports a strong preference for instant messaging over e-mail, which teens see as "something you use to talk to 'old people.'"[22]

¶12 Even the scope of our collections and what our users define as "legal information" is changing. Users demand access to a much wider range of materials than was traditionally found in law libraries. Frederick Schauer and Virginia Wise have described the increasing reliance of courts on nonlegal information, a trend they call the "delegalization of law" and attribute in part to the ready availability of nonlegal information via Westlaw and LexisNexis.[23] To those sources we may add academic databases like JSTOR and Project Muse, not to mention the growth of the range of materials published on the Internet by corporations, nonprofit agencies, and others.

¶13 What can be done about these conflicting trends of increasing costs and decreasing budgets? Something has to change. Fortunately, as Coyle's second rule tells us:

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19. *Transaction Costs*, *in* PAUL M. JOHNSON, A GLOSSARY OF POLITICAL ECONOMIC TERMS, http://www.auburn.edu/~johnspm/gloss/transaction_costs (last visited July 14, 2006).
20. *Externality*, *in* A GLOSSARY OF POLITICAL ECONOMIC TERMS, *supra* note 19, http://www.auburn.edu/~johnspm/gloss/externality (last visited July 14, 2006).
21. *Id.*
22. AMANDA LENHART, MARY MADDEN & PAUL HITLIN, TEENS AND TECHNOLOGY: YOUTH ARE LEADING THE WAY TO A FULLY WIRED AND MOBILE NATION, at ii (2005), *available at* http://www.pewinternet.org/pdfs/PIP_Teens_Tech_July2005web.pdf.
23. Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 J. LEGAL STUD. 495, 497 (2000); *see also* John J. Hasko, *Persuasion in the Court: Nonlegal Materials in U.S. Supreme Court Opinions*, 94 LAW LIBR. J. 427, 2002 LAW LIBR. J. 27 (finding a broad pattern of use of nonlegal materials in U.S. Supreme Court opinions).

Things Always Change

> This is another way of saying that economies are made of millions of people who, peskily, react to the environment in which they find themselves. Human initiative is bad news for policymakers because it means a policy drawn up on the basis that people behave in a certain way can be undermined if they change the way they behave in response to the policy.[24]

¶14 Many of our libraries used to depend on revenue enhancement from patron use of photocopy machines. This was a reliable source of income in the years when student access to Westlaw and LexisNexis was severely restricted. However, when Westlaw and LexisNexis changed their law school contracts to provide unlimited access and printing, law students—being rational economic actors—preferred free printing to paying for photocopies. It does little good under these circumstances to lament student "abuse" of printing.

¶15 So things always change. What prevents things from simply changing for the worse until disaster strikes? This is Coyle's third rule:

Metaphorical Time Bombs Don't Explode

> Time bombs are all based on false *ceteris paribus* assumptions [i.e., that all other things will remain unchanged apart from the specific thing you're trying to analyze], when in fact unsustainable trends always lead to changes in people's behavior precisely because they are unsustainable.[25]

¶16 This has also been called "The Fallacy of Uninterrupted Trends."[26] For our purposes, this suggests that publishers simply cannot continue to raise prices so high that nobody can afford to buy their products. If the prices go high enough, then the incentives are sufficient to induce lower cost competitors to enter the market, leading to more pricing options and product differentiation on the basis of value-added factors such as customer service, editorial quality, and the like. Alternatively, large publishers seeking to sell products such as The Making of Modern Law to more than a handful of the largest law libraries may begin to offer different pricing structures such as transactional or consortium pricing for libraries whose need for these products is more limited.

¶17 Pricing is crucial, for as Coyle's fourth rule holds:

Prices Make the Best Incentives

> Changes in prices are usually what defuses [sic] time bombs—and much else besides. . . . Everybody loves a bargain, and somebody always responds to a great profit opportunity. On the other hand, many people don't like to do something—or not do it—just because somebody in authority says so. . . . Whereas people will try to get around regulations, they

24. COYLE, *supra* note 5, at 222.
25. *Id.*
26. Gregg Easterbrook, *There Goes the Neighborhood*, N.Y. TIMES, Jan. 30, 2005, § 7 (Book Review), at 10 (reviewing JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED (2004)).

> will respond to prices, and in ways that reflect their own needs and preferences, so the outcome is likely to be one that makes as many people as content as possible.[27]

¶18 This is true because:

Supply and Demand Work

¶19 "If you restrict the supply of some item, its price will go up at a given level of demand. . . . In fact, supply and demand are as close as social science gets to laws of nature."[28]

¶20 The flip side of supply and demand, though, is the sixth rule:

There's No Easy Profit

> This is a much-mocked principle of economics. The mockery is summed up in an old joke about an economist and her friend spotting a $10 bill lying on the sidewalk. The friend says they must pick up the money, but the economist says not to bother—if it were really there, somebody would already have picked it up. Or in another, about how many economists it takes to change a lightbulb. The answer is none, because if the lightbulb needed changing, market forces would already have done it.[29]

¶21 This rule suggests that there are limits to how long dominant market players can sustain their dominance. "[A]s long as the pioneers are obviously profiting, competitors will follow suit. There are almost always advantages to being first, but in general, any large excess profits will be competed away over time."[30]

People Do What They Want

> [P]eople adjust to do what will suit them best given the current state of the world [i.e., at the current set of prices and given the constraints on technology and government rules and regulations]. This sounds obvious when spelled out but seems hard for noneconomists to grasp in many real-life contexts.[31]

¶22 For example, if "roads become very congested, some people will switch to traveling by train or air until the congestion levels recede enough that people stop switching. Increase tolls, and some more people will switch. Raise train fares and people will become prepared to tolerate traveling on slightly more congested roads."[32]

¶23 Law librarians sometimes say that they cannot replace certain materials with online versions because some attorneys or professors will not tolerate having their familiar print sources taken away. However, as costs of resources such as print loose-leaf services—including the opportunity costs associated with the time it takes to use these complicated and nonintuitive print materials—have significantly

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27. COYLE, *supra* note 5, at 223.
28. *Id.* at 223–24.
29. *Id.* at 224.
30. *Id.*
31. *Id.* at 225.
32. *Id.*

increased, researchers have modified their behavior and adapted to using online materials. How much longer will publishers be able to continue to publish print loose-leaf services at a price that purchasers can afford? These materials are very expensive to print, to ship, and to file. When the number of users diminishes so much that the price becomes prohibitive, libraries will stop buying them and publishers will stop printing them. An informal poll of the law librarians attending a recent symposium showed that most predicted that print loose-leaf services would be extinct in five to ten years.[33]

Always Look Up the Evidence[34]

¶24 The prediction of a five- to ten-year life expectancy for loose-leafs is a combination of instinct and guesswork. Real economics is based on empirical evidence and rigorous statistical analysis. One of the few attempts to apply the formal methodology of economics to legal publishing is McCabe's study of serials pricing in the context of the Thomson/West merger.[35] This kind of research is expensive, time-consuming, and requires expertise that most librarians do not have. Still, it is important for us to keep in mind that:

Where Common Sense and Economics Conflict, Common Sense (Conventional Wisdom) Is Wrong[36]

¶25 In library practice, common sense is another way of saying "we've always done it that way." We have to look at the evidence and be willing to change our practices, because other things will change whether we want them to or not. As Coyle reminds us, "[t]he point is that looking at the data is about applying intelligent skepticism by the truckload. 'Can that be right? What's the evidence? How important is that? Does it really go down that much?' and so on are key questions."[37]

¶26 Finally, Coyle leaves us with her tenth rule:

Economics Is about Happiness

¶27 "In fact, everybody having a good time and being comfortable is the key to a successful economy."[38] This is not simply a whimsical wrap-up for Coyle's work. For David D. Friedman, "economic efficiency" is effectively synonymous with

33. Show of hands at Future of Law Libraries Symposium, Amelia Island, Fla. (Mar. 11, 2005).
34. COYLE, *supra* note 5, at 225.
35. McCabe, *supra* note 10. For a fuller and more technical treatment of this material, see Mark McCabe, *Law Serials Pricing and Mergers: A Portfolio Approach*, 3 CONTRIBUTIONS TO ECON. ANALYSIS & POL'Y 11 (Aug. 27, 2004), http://www.bepress.com/bejeap/contributions/vol3/iss1/art11/.
36. COYLE, *supra* note 5, at 226.
37. *Id.* at 203.
38. *Id.* at 227.

"maximizing total human happiness."[39] This is one reason why law and economics jurisprudence asks the question, "what legal rules are economically efficient?"

> [W]hile economic efficiency—roughly speaking, maximizing total human happiness—is not the only thing that matters to human beings, it is something that matters quite a lot to most human beings. That is true both for selfish reasons—all else being equal, the larger the pie the larger I can expect my slice to be—and for unselfish reasons. Since the objective is important to almost everyone, it makes sense to think about what rules best achieve it.[40]

Keeping these rules of economic thinking in mind may not lead us to clear solutions to the dilemmas currently facing law libraries, but they may help us formulate useful questions about ways to respond.

Open Access and the Legal Information Market

¶28 One response to the dilemma currently facing law libraries is the movement in support of open access scholarly publishing in law. Open access (also known as open archives) has been defined as "the electronic publication of scholarly work that is available for free without copyright constraints other than attribution. In the open access environment, the author holds the copyright, not a secondary publisher."[41] Open archives typically consist of working papers, pre-prints, or final copies of articles published in traditional print journals.[42] Open archives are often organized in the form of institutional repositories (providing access to the publications of the faculty of a particular university, such as the DSpace system[43] developed at MIT and adopted by several major universities). Alternatively, open archives may be organized by discipline, either as a nonprofit consortium or as a commercial entity. Examples of disciplinary repositories incorporating legal scholarship include the Social Science Research Network (SSRN) and its

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39. FRIEDMAN, LAW'S ORDER, *supra* note 5, at 312.
40. *Id.*
41. Paul George, AALL Open Access Task Force, *Open Access: The Future Gate to Scholarly Legal Information*, AALL SPECTRUM, Apr. 2005 (Members' Briefing), at 1 [hereinafter AALL Open Access Task Force Report].
42. Richard A. Danner, *Issues in the Preservation of Born-digital Scholarly Communications in Law*, 96 LAW LIBR. J. 591, 593, 2004 LAW LIBR. J. 38, ¶ 5 (quoting Clifford Lynch, *Metadata Harvesting and the Open Archives Initiative*, ARL BIMONTHLY REP., Aug. 2001, at 1,1, available at http://www.arl.org/newsltr/217/mhp.html) ("'The fundamental idea [of the open archives movement] is that authors would deposit preprints and/or copies of published versions of their articles into such servers, thus providing readers worldwide with a free way of obtaining access to these papers, without needing paid subscription access to the source electronic journals.'").
43. "DSpace is a groundbreaking digital repository system that captures, stores, indexes, preserves, and redistributes an organization's research material in digital formats." Introducing Dspace, http://dspace.org/introduction/index.html (last visited July 17, 2006).

Legal Scholarship Network (LSN),[44] Berkeley Electronic Press (BePress),[45] and Legal Electronic Document Archive (LEDA).[46]

¶29 The primary stated purpose of open access scholarly publishing, at least in the discipline of law, is not to decrease costs, but to permit wider and more efficient distribution of scholarly communication.[47] According to the Special Committee on Open Access Applications for Legal Information of the American Association of Law Libraries, also known as the Open Access Task Force, "open access could provide greater exposure to faculty scholarship and might also provide greater exposure to less prestigious journals."[48] Nonetheless, the task force's introduction of a dystopian future of exponentially increasing prices sets an unnecessarily alarmist tone for the discussion.

> Imagine what it would be like if scholarly legal publication was concentrated in a small number of commercial and association publishers. What if the journals were distributed to subscribers, but with subscriptions costing thousands of dollars? And what if the publishers charged authors fees for being included in the journals?
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> Now imagine an alternate world in which every scholarly article was available for free from an electronic source, regardless of whether it was in print or not. Furthermore, you could cite to the article and reprint it without the majority of restrictions imposed by copyright, as long as you acknowledged the original author.
>
> The first world does not exist (yet) for us, but it is the experience of those working in the sciences. The second world is the one envisioned by those promoting what is called open access.[49]

¶30 Moreover, some do see open access as part of the solution to the cost pressures facing law libraries. Supporters of open access scholarly publishing in law often draw an analogy to the well-documented "crisis situation for libraries

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44. "Social Science Research Network (SSRN) is a world wide collaborative of over 800 leading scholars that is devoted to the rapid worldwide dissemination of social science research. It is composed of a number of specialized research networks in each of the social sciences. Each of SSRN's networks encourages the early distribution of research results by reviewing and distributing submitted abstracts and by soliciting abstracts of top quality research papers around the world. The Networks encourage readers to communicate directly with other subscribers concerning their own and other's research. Through our email abstracting journals we currently reach over 80,000 people in approximately 70 different countries." Social Science Research Network, Frequently Asked Questions, http://ssrn.com/update/general/ssrn_faq.html#what_is (last visited July 24, 2006).
45. "The Berkeley Electronic Press ("bepress") produces tools to improve scholarly communication. These tools [including journals, institutional repositories, subject matter repositories, working paper series, and editorial management software] provide innovative and effective means of content production and dissemination." Berkeley Electronic Press, Mission Statement, http://www.bepress.com/aboutbepress.html (last visited July 24, 2006).
46. "LEDA, the Legal Electronic Document Archive, is a repository on the web for law-related articles, working papers, theses, moot court briefs, and other legal academic documents. It is being built by a loosely-knit consortium centered around the Cornell Legal Information Institute and the Harvard Law School Library." LEDA, http://leda.law.harvard.edu/leda (last visited July 17, 2006).
47. Danner, *supra* note 42, at 593, ¶ 5 ("Proponents of electronic repositories aim to create more efficient scholarly communication systems within individual disciplines, as well as the means to disseminate scholarship to wider audiences.").
48. AALL Open Access Task Force Report, *supra* note 41, at 2.
49. *Id.* at 1.

supporting research in science, technology, and medicine (often described collectively as the STM disciplines)."[50] In those disciplines, the chief scholarly journals had traditionally been published by scholarly societies. However, in the second half of the twentieth century, as scholars and researchers became increasingly impatient with the long delays and other problems with this model of publishing and, "[m]ore important, as funding for research increased, especially in science, technology, and medicine,"[51] commercially published journals gradually began to take the place of the society-based journals. Today many of the commercially published scholarly journals in the STM disciplines have subscription prices of thousands of dollars, and authors are charged substantial fees to have their articles published.[52]

¶31 The situation of purchasers of journals in the STM disciplines bears little resemblance to that of law libraries today. The most prestigious law journals are published, not by commercial publishers or scholarly societies, but by student editors heavily subsidized by law schools. Virtually every law school publishes at least one journal, and most schools publish three, four, or more. Law journal subscriptions are inexpensive, with typical annual fees of $25 to $45. Moreover,

> [l]aw school journals have a unique educational function within the law school. They exist not just to provide an avenue for the dissemination of faculty members' works, but also to provide writing and editorial experiences for the students involved. Many would assert that new journals are created at law schools not because there is an unmet need to disseminate otherwise unpublished articles, but rather to provide more opportunities for students.[53]

¶32 Even though analogies between scholarly publishing in law and the STM disciplines are strained at best, open access advocates do not hesitate from advancing the cautionary example of the crisis in STM publishing to support the call for open access publishing in law. The AALL Open Access Task Force claims that "we cannot guarantee that our costs will remain low."[54] True, there is no guarantee. However, it is difficult to identify economic factors that might lead to a reasonable likelihood of substantial increases in journal prices. In fact, one significant economic factor that distinguishes scholarship in law from the STM disciplines is the distinct paucity of funding. Law professors do not receive million-dollar grants from federal agencies or pharmaceutical companies to support their research—a source of funding that, in the STM disciplines, has created enormous incentives to draw commercial publishers into the scholarly arena and to increase journal prices. In law, the supply of scholarship so greatly outstrips the demand that 43% of all law journal articles are never cited and 79% are cited ten times or less.[55]

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50. Danner, *supra* note 3, at 351.
51. *Id.*
52. AALL Open Access Task Force Report, *supra* note 41, at 1.
53. *Id.*
54. *Id.* at 2.
55. Posting of Tom Smith to The Right Coast, http://therightcoast.blogspot.com/2005/07/voice-crying-in-wilderness-and-then.html (July 13, 2005, 14:52 EST).

¶33 The prices for law scholarship are relatively stable. Law schools sell journals primarily to other law schools. If one school were to raise its journal prices, as the *Harvard Law Review* attempted to do in 2004,[56] others would do the same. Each school would pass its own price increase on to other schools, while absorbing the price increases of other schools—essentially taking money out of one pocket to put into another. The high transaction costs of such a pointless move would tend to prevent it from happening. It would be more efficient for law schools simply to increase subsidies directly to their own journals.

¶34 Fears of significant price increases as a reason to support open access scholarly publishing in law are largely unfounded. If the open access movement is to be supported, it must be on other grounds, such as the desire to make legal scholarship widely accessible at low cost to the consumer. As the AALL Open Access Task Force states, "the idea of open access is consistent with the culture of the legal community."[57] However, even this argument is undermined by the fact that, as the task force has admitted, "in law, scholarly articles are already widely available. Academic law journals are among the least expensive materials we purchase."[58]

¶35 Wharton School legal studies professor Dan Hunter makes a similar policy argument for open access legal scholarship.

> [T]here is an enormous benefit to the public in granting the free, unfettered access to scholarly work. Indeed, this justification is stronger in legal publishing than in many other disciplines because law is a discipline that directly affects the structure of our society. Public access to legal scholarship can only generate a more informed and reflective society. Moreover, legal writing in American law reviews is unusually readable for the lay reader; perhaps as a result of writing both for experts and for student editors, legal scholars in America are obliged to make their arguments clear and understandable for a wide audience.[59]

¶36 Hunter's policy argument in favor of open access legal scholarship probably overestimates both the public's interest in legal scholarship (in my experience at the reference desk, public patrons are much more likely to ask to see statutes and cases, and show little interest in scholarly journal articles even when they are directly on point) and the readability of law review articles (unless I've been reading the wrong journals). Hunter's economic argument for open access publishing—that there is no "substitution effect between the free online version of an article and the same article in an electronic version from commercial databases"[60]—is an empirical one and beyond the scope of this paper.

¶37 I do not wish to overstate the matter. Certainly it is a good thing, all things being equal, for legal scholarship, like any scholarship, to be more widely

56. AALL Open Access Task Force Report, *supra* note 41, at 2.
57. *Id.*
58. *Id.*
59. Dan Hunter, *Walled Gardens*, 62 WASH. & LEE L. REV. 607, 624 (2005).
60. *Id.* at 632.

available. There may not be hundreds of thousands of potential readers eager to learn the latest insights from the legal academy, but that does not mean that legal scholarship is of no value to the public. However, in a world of limited resources, all things are not equal. Hence the problem: to the extent that law librarians and their professional associations devote resources to promoting open access legal scholarship, they are not only failing to address, but in fact are diverting resources from, the real problem: the soaring costs of nonscholarly, commercially published, practitioner-oriented legal publications.

¶38 The peculiarities of American scholarly legal publishing have often been noted.

¶39 **Scholarly journals are edited by law students.** A few faculty-edited journals exist; but while they may be highly valued in their areas of specialization such as legal history and sociolegal studies, they are not widely viewed as comparable in prestige to *Harvard Law Review, Yale Law Journal*, or any of the other ten or twenty top journals. This has been the case for almost 120 years. Earlier, commercially published journals were published for decades, but the rise of student-oriented journals was connected with the move of law schools to achieve academic respectability in the university and to replace the earlier system of law office-based training by apprenticeship. After a couple of short-lived attempts at student-edited journals at Albany (1876) and Columbia (1885), the *Harvard Law Review* was started in 1887. In the twenty-year period that followed, five of the most prestigious schools in the United States started new legal periodicals modeled after Harvard: Yale (1891), Pennsylvania (1896), Columbia (1901), Michigan (1902), and Northwestern (1906). The pattern quickly spread to other schools.

¶40 There is an extensive literature by law professors devoted to criticizing the practice of student editorship:

> Our scholarly journals are in the hands of incompetents. I'm not saying that law review editors are stupid; I wish things were that simple. On the contrary, law review editors are smart—frequently smarter than the authors whose work they edit. But they often select articles without knowing the subject, without knowing the scholarly literature, without understanding what the manuscript says, without consulting expert referees, and without doing blind reads. Then they try to rewrite every sentence.[61]

¶41 Even defenders of student editors appear to acknowledge the criticism. "Student selection and editing *lowers* the scholarly tenor of the material published in law reviews, making articles readable and understandable by, perhaps, even nonlawyers."[62]

¶42 **Multiple submissions (often twenty or more journals at a time) are routine.** In most other disciplines this would be considered highly unethical, but

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61. James Lindgren, *An Author's Manifesto*, 61 U. CHI. L. REV. 527, 527 (1994).
62. James W. Harper, *Why Student-Run Law Reviews?* 82 MINN. L. REV. 1261, 1279 (1998). Note that the author is a 1994 J.D. graduate of Hastings College of the Law—a third- or fourth-tier school.

it is standard practice in legal scholarship. Multiple submission is facilitated by electronic submissions through services such as ExpressO (from BePress).

¶43 **There is no blind review.** Numerous reports on legal blogs and occasional law journal articles, and some empirical studies, suggest that the reputation of the author, and the ranking of the school at which the author is a faculty member, are significant factors in the acceptance or rejection of articles at the leading journals.

¶44 **Acceptance turnaround time is extremely short.** Articles by prominent professors have been accepted in forty-eight hours or less. Bargaining for better placements is common. Acceptance by a moderately prestigious journal is a bargaining chip for trading up to an even more prestigious journal.

¶45 Finally, **editorial changes are routinely intrusive.** Student editors are known to require that authors document everything; obsessive footnoting is the rule. Half or more of a typical law journal article consists of footnotes. Student editors also require extensive revisions, often on trivial stylistic matters. For this reason, authors often submit articles in rough form, knowing that they will be heavily edited in any case. Extensive footnotes are crucial, even in these rough drafts, but much of the documentation may be sketchy. Student cite-checkers have the task of deciphering them and putting them in correct form.

¶46 Law journals—or more properly, the kinds of scholarly articles published therein—have also long been the subject of criticism from judges and practicing attorneys, who frequently complain that the scholarship published in law journals is of little value to the practicing bar.[63] This complaint reflects a long-standing debate between practitioners and academics over the functions of law journals. Despite a long history of complaints from both the legal academy and the bench and bar, the system of law journals has been remarkably resistant to change. This is undoubtedly due in part to the fact that calls for increased scholarly rigor from the academy, and calls for increased emphasis on immediate practical applicability in litigation and advocacy from the bar, effectively cancel each other out.

¶47 Calls for reform have come from several different and opposing directions and have often been reduced to arguments about the true purpose of law journals. I would suggest that the resistance to reform exhibited by the system of scholarly publishing is evidence of the fact that this system actually serves a fine balance of several competing functions:

¶48 **Providing summary and analysis of law for the guidance of judges and practitioners.** Once the chief purpose of legal scholarship, and nostalgically recalled by the bench and bar, this is now hardly a factor at all, at least among the more elite journals. Some journals publish annual reviews of the law in their state or of the decisions of the state's highest court, but this is generally viewed by legal

63. Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 34 (1992) ("[M]any law schools—especially the so-called 'elite' ones—have abandoned their proper place, by emphasizing abstract theory at the expense of practical scholarship and pedagogy.").

academics as a lower function—a pro bono service, not real, significant scholarship. Moreover, this role has been largely supplanted by newsletters, bar journals, loose-leaf and online services, and now blogs.

¶49 **Publishing high-quality academic legal scholarship**. Since at least the middle of the twentieth century, legal scholarship (as distinct from law teaching) has been marked by a growing shift toward law as an academic discipline rather than a profession.

> Before World War II, law professors and law students wrote materials helpful to all branches of the profession, but the clear trend since the war has been to use the journals for dialogue between law professors or for exchanges between the law schools and other people in the university, chiefly in the economics department, but also scholars doing research in fields such as philosophy, sociology, and political science.[64]

¶50 **Providing publishing outlets for tenure-track faculty**. It should be noted that this third function is not the same as the second. With more than eight-hundred law school journals currently published in the United States, it is sometimes said that almost anything can get published somewhere.

¶51 **Providing educational opportunities for (selected) law students.** The purported educational benefits to the student of the law journal experience are somewhat paradoxical. Journal students learn meaningless citation-checking skills and bad editing habits, but demonstrate an aptitude for tedious detail and a willingness to work hard. The trade-off is that they skip classes to produce the journal. The curious rituals of law journal work have been described humorously in anthropological terms:

> The current structure of law reviews is a wonderful subject for cultural anthropologists. . . . The law review is a well-tuned instrument of cultural transmission—it allows editors to go through a delayed, but intense, adolescent crisis. That is, it permits young members of the tribe to work out their inevitably conflicted attitudes toward their parent figures by simultaneously deferring to their awesome intellectual and moral authority while impudently attacking, degrading, and correcting the products of their genius. The result is a fully socialized new tribal leader.[65]

¶52 It is occasionally suggested that law reviews should be made more democratic, and the number of staff positions increased, so that all law students would be able to participate. But that would conflict with the final purpose:

¶53 **Identifying elite students for large law firm employers.** Many larger law firms want to interview only the top students; law journal membership is a proxy for quality. Typically, students in the top 10% of the class rankings at the end of first year are automatically invited to be on the school's lead journal. Others may "write on," but this is considered a second-class status, as is membership on one

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64. Richard S. Harnsberger, *Reflections About Law Reviews and American Legal Scholarship*, 76 NEB. L. REV. 681, 693 (1997) (footnote omitted).

65. Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 STAN. L. REV. 1147, 1149 (1995).

of the school's lesser, specialized journals. In practical terms, one of the chief benefits of the law journal experience may be that it serves to identify those students ambitious enough to spend punishingly long hours to get ahead.

> [O]bservance of traditional work rituals, emphasis on technical competence, a depersonalized and hierarchically organized work unit, repetitive generation of crises, toleration of stress, avoidance and postponement of emotional demands, unremitting striving to achieve the next level in a linear model of success, and avoidance of inquiry into possible innovation of methods and goals are all preserved as part of law review culture. Identification and socialization of a professional elite is a task at the core of the law review's contribution to legal education.[66]

Law Schools and Publishing for Practitioners

¶54 The open access movement in legal scholarship, at least as exemplified in current law library efforts, is a solution in search of a problem. There is a financial crisis in scholarly publishing in other disciplines, especially the sciences, technology, and medicine, but their problem is not ours. Our crisis is with the increasing cost of commercially published materials intended primarily for practitioners and the law firm market. Programs within law libraries devoted to promoting open access legal scholarship not only fail to address this problem, they put further strain on already stressed library budgets by expending resources that might otherwise be devoted to other purposes for one that is not needed.

¶55 This analysis may not exhaust the purposes for which a law school or law library might choose to pursue open access scholarly publishing. The mission of a particular school might cause it to weigh these factors differently. However, any such purposes are far from generally applicable, and a law school or law library might well reasonably choose to pursue other purposes. A law school might choose to address the problem of the expense of commercially published practitioner materials directly. That is, instead of *expending resources* in support of open access scholarly publishing, some law schools and law libraries might seek to *decrease expenditures* on practitioner materials such as loose-leaf services or newsletters, or even to *increase revenues* by publishing alternatives to those materials, available for a fee to law firms, solo practitioners, and anyone else willing to pay.

¶56 Many law schools possess the expertise and resources to publish information resources for the practicing bar that could compete with existing commercial publications. Many law schools have already developed niches in specific practice areas such as health law, employment law, intellectual property, taxation, securities, and others, through research centers, LL.M. and certificate programs, and

66. Barbara H. Cane, *The Role of Law Review in Legal Education*, 31 J. LEGAL EDUC. 215, 231 (1981) (footnote omitted).

clinics. These specialty niches vary widely in depth and level of institutional commitment, but in many cases they could form the nucleus around which publishing activity could grow.

¶57 Specialized law centers have traditionally followed certain patterns. A school attracts a certain number of faculty scholars with common research interests who begin to consider forming a research center or offering a specialized program of legal education within the school's overall juris doctor program. The law school is able to capitalize on this niche to attract students interested in practicing in that area. Employers gradually come to recognize the school for its special expertise in the niche area, and graduates of the program gain marketability in the job market through their specialized training and the reputation value of the school.

¶58 When these niche programs, or brands, develop a critical mass of students, they often generate specialized subject area law journals. Almost every law school now boasts at least one specialized journal in addition to its main journal, and at many schools a handful of specialized journals are supported. Suppose some of these resources—intellectual capital, reputation, and student labor—were to be redirected to publishing legal information for practitioners rather than for legal scholars?

¶59 Law schools, using readily available distribution technologies such as RSS, blogs, wikis, and other collaborative authoring tools, could easily compete with the commercial publishers of many of the legal newsletters and loose-leaf services currently available. One reason for a law school to do this would be to answer the frequently repeated complaint of lawyers and judges that the scholarship published in law journals is of little value to the practicing bar.[67] Law journals once served the function of analyzing and synthesizing developments in the law, as well as commenting on current cases.[68] To the extent that this function is still met by law journals, it is largely relegated to student-authored case comments. Blogs, especially in combination with RSS feeds, make electronic publication and distribution of analysis and commentary quite easy. It has been suggested that legal blogs are already making law journal case comments obsolete.[69] Comments published on blogs are distributed as soon as they are written, without the year-long delay typical of law journals. Certainly such immediate, undigested commentary is of limited value, but it is of some value nonetheless. If journalism is the first draft of history, case comments are the first draft of jurisprudence.

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67. *See supra* note 63 and accompanying text.
68. Richard A. Posner, *Against the Law Reviews*, LEGAL AFF., Nov.-Dec. 2004, at 57, 57 (noting that when the law journal system emerged in the latter part of the nineteenth century, "[i]t's primary aim was to serve judges and practicing lawyers, rather than other professors, by offering careful doctrinal analysis, noting, for example, divergent lines of authority and trying to reconcile them").
69. Posting by Orin Kerr to The Volokh Conspiracy, http://volokh.com/posts/1109009511.shtml (Feb. 21, 2005, 13:11 EST) (arguing that blogs have eclipsed two of the functions of case comments: "[a]lerting readers to a recent decision" and "[o]ffering a scholarly assessment of the decision soon after the decision is out, hopefully before academics and appeals courts have had time to digest it").

¶60 Let's consider some hypothetical law schools to see how this law school solution might play out. First there is Law School A, a middle-tier private law school in a midwestern state. It is a successful regional law school with aspirations to national status and a good balance of junior and senior faculty, most of them highly productive scholars. This school is most widely known for its highly regarded program in health law. It offers a J.D. certificate in health law and an LL.M. program with a specialization in health law, as well as a dual degree program (J.D. and Master's in Health Administration) together with the university's school of public health. This law school attracts a strong pool of talented students interested in health law; many of them come with substantial medical backgrounds, often as nurses or physicians. Graduates of the health law program have a good record of placement nationwide. Faculty members connected with the program are prolific authors of journal articles and casebooks on health law.

¶61 Law School B is a state-affiliated law school in a large northeastern state. It is an upper-middle-tier school with a primarily regional reach, but is known (among other things) for its public interest tradition and the high quality of the interdisciplinary scholarship produced by the faculty. At the same time, it offers a number of successful clinics engaged in a wide range of practices, such as elder law, housing and development, and environmental law.

¶62 Finally, Law School C is a small state-affiliated school in a western state. Like the previous examples, it is a solid middle-tier school with a largely regional reputation. It is widely known, however, for its clinical programs, including a water rights clinic, an area in which the clinical instructors have developed a unique depth and breadth of expertise.

¶63 School A decides to begin publishing HealthLawOnline, an online, fee-based health law newsletter, offering critical commentary and analysis of current court decisions, legislation, and regulatory action. Faculty members in the health law program serve as advisors and general editors. A staff of student editors, working for course credit, review and summarize new case law, statutes, and regulations from across the nation, and publish this commentary in the form of a subscription-based online newsletter using blog software such as WordPress or TypePad. RSS feeds are implemented to allow subscribers to review daily updates from their desktop, laptop, or Blackberry.

¶64 School B begins publishing EnvironmentalLawOnline. This is a somewhat smaller operation than HealthLawOnline, with a smaller group of faculty editors and a select staff of student editors. This online newsletter focuses on legal developments from the federal government and the states in the Great Lakes region—the primary market for the new publication. Like School A, School B uses off-the-shelf software to publish and distribute the newsletter. School C begins publishing WaterLawOnline. In this instance, clinical instructors serve as general editors, with a small staff of student editors.

¶65 Students compete for editor positions with online treatises such as HealthLawOnline, EnvironmentalLawOnline, and WaterLawOnline, knowing they

will gain valuable experience in legal writing and familiarity with their chosen area of practice. While these positions may not be as prestigious as journal editorships for those students planning to work for the one or two largest firms in town, the experience these students gain in legal analysis within a specific subject area, as well as the ability to work and to write clearly and efficiently on a tight schedule, makes these students very attractive to employers, especially mid-size and smaller firms.

¶66 Meanwhile, alumni support for Law Schools A, B, and C begins to grow. Graduates, thankful for the practical experience they gained in law school, give generously. Law firms, pleased to see that their law schools are producing the kind of legal scholarship and analysis that they can use in their practice, begin calling the deans to inquire about naming opportunities.

¶67 Perhaps we have gotten carried away in the last paragraph; let us come back to practical matters. One area where the law schools are likely to need assistance is with managing subscriptions and billing. Late or missing issues of law journals, while bothersome to the academic libraries that subscribe to them, are not mission-critical. Managing fee-based subscriptions of daily publications like those contemplated here would require a degree of professionalism and staff continuity that would be difficult for the typical student editorial board working on its own. Perhaps this project could be developed in partnership with an existing consortium such as CALI, or a commercial organization such as SSRN or BePress. One could imagine various ways of sharing revenue among the various parties involved in such a project. Membership in the consortium and entitlement to discounts could be conditioned on contribution to the project by publishing an online newsletter or treatise. Discounts could be tied to revenues, so that a law school would not be tempted to free ride by publishing a poor quality newsletter or one with no market.

¶68 This is just one model of what is, for most law schools, a new way of thinking. It is not unknown in the modern university, with its increasing pressures for partnerships between academia and the private sector. What I propose is a way that law schools could develop their own partnerships so as to support both their educational activities and their public service mission.