

2020

## Affordable Content in Legal Education

Connie Lenz

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## Affordable Content in Legal Education\*

Connie Lenz\*\*

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

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\*\* Associate Director for Research Services and Collection Development, University of Minnesota Law Library, Minneapolis, Minnesota. Thanks to Joan Howland for her insightful observations, as well as the extraordinary support she has provided throughout my career. I am forever in her debt. Thanks also to Scott Dewey, Loren Turner, and Sarah Yates for their careful reading, excellent questions, and helpful comments and suggestions.

## Introduction

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

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

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

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

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

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

5. *Course Material Solutions for Instructors*, UNIV. OF MINN. LIBRS., <https://www.lib.umn.edu/services/course-materials> [<https://perma.cc/76CG-LCSN>].

6. *Save Money with the University Libraries*, UNIV. OF MINN. LIBRS., <https://www.lib.umn.edu/elearning/studentsavings> [<https://perma.cc/ZNK2-HX55>].

tee—representing faculty, staff, and student interests—concluded a study of the issue and approved a statement supporting affordable content initiatives.<sup>7</sup>

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

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

### The Affordable Content Movement in Universities and Colleges

¶5 Many colleges and universities are developing affordable content initiatives to make higher education more accessible and affordable.<sup>10</sup> These institutions—

7. UNIV. OF MINN. SENATE LIBR. COMM., ADVANCING HIGH QUALITY, AFFORDABLE COURSE CONTENT AT THE UNIVERSITY OF MINNESOTA, [https://docs.google.com/document/d/1vDS-vKlr9WvXUDuAK\\_nqOhVFYPPCeaMGzUFV1DCoqDs/edit#](https://docs.google.com/document/d/1vDS-vKlr9WvXUDuAK_nqOhVFYPPCeaMGzUFV1DCoqDs/edit#) [<https://perma.cc/T4GZ-LV8C>].

8. See, e.g., THE EVOLUTION OF AFFORDABLE CONTENT EFFORTS IN THE HIGHER EDUCATION ENVIRONMENT: PROGRAMS, CASE STUDIES & EXAMPLES (Kristi Jensen & Shane Nackerud eds., 2018) [hereinafter EVOLUTION OF AFFORDABLE CONTENT] (exploring a variety of affordable content programs and providing case studies and examples of such programs, with contributions by authors from numerous institutions); ANITA WALZ, KRISTI JENSEN & JOSEPH A. SALEM, JR., SPEC KIT 351: AFFORDABLE COURSE CONTENT AND OPEN EDUCATIONAL RESOURCES (July 2016), <https://publications.arl.org/Affordable-Course-Content-Open-Educational-Resources-SPEC-Kit-351/> [<https://perma.cc/V8G3-QXL8>] [hereinafter SPEC KIT 351] (reporting survey results of the SPEC Survey on Affordable Course Content and Open Educational Resources based on responses from 65 Association of Research Libraries member libraries); see also SPARC CONNECT OER, <https://sparcopen.org/our-work/connect-oer/> [<https://perma.cc/52YP-H2PD>] (providing a repository for open educational resources activities at colleges and universities across North America).

9. Lawrence A. Cunningham, *Digital Evolution in Law School Casebooks*, in LEGAL EDUCATION IN THE DIGITAL AGE 81, 100 (Edward Rubin ed., 2012) (noting that “law students will develop needs and expectations based in part on experience in [secondary schools and undergraduate programs]”).

10. See, e.g., Nicolas B. Colvard, C. Edward Watson & Hyojin Park, *The Impact of Open Educational Resources on Various Student Success Metrics*, 30 INT’L J. TEACHING & LEARNING IN HIGHER EDUC. 262, 263 (2018) (noting that while tuition costs are the main component of student debt, the costs of textbooks and other course materials also are a “key variable”); U.S. GOV’T ACCOUNTABILITY OFF,

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

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

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

### Open Educational Resources

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

COLLEGE TEXTBOOKS: ENHANCED OFFERINGS APPEAR TO DRIVE RECENT PRICE INCREASES 25 (2005) (“Because textbooks may represent a substantial portion of the cost of tuition and fees for students attending some public institutions, any increase in textbook prices may affect affordability and access disproportionately for some students.”).

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

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

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

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

15. *Open Textbooks Pilot Program*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/programs/otp/index.html> [<https://perma.cc/932D-JMXH>]; see also *Open Textbook Pilot Grant Program*, SPARC, <https://sparcopen.org/our-work/open-textbook-pilot/> [<https://perma.cc/MVR7-6HCV>].

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

17. *Id.*

18. See *infra* pp. 312–23.

under an open licence that permits access, use, repurposing, reuse and redistribution by others with no or limited restrictions.”<sup>19</sup>

### Lower-Cost Textbook Options

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

### Library-Owned or -Licensed Electronic Materials

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

### Course Packs

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

19. COMMONWEALTH OF LEARNING, GUIDELINES FOR OPEN EDUCATIONAL RESOURCES (OER) IN HIGHER EDUCATION, at v (2011), <https://unesdoc.unesco.org/ark:/48223/pf0000213605>; see also Jason B. Reed & Benjamin Jahre, *Reviewing the Current State of Library Support for Open Educational Resources*, 44 COLLECTION MGMT. 232, 233–35 (2019) (noting that organizational and institutional definitions of OER vary, but all recognize the ability to adopt, adapt, and create as key elements).

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

21. SHANNA SMITH JAGGARS, MARCOS D. RIVERA & BRIANA AKANI, COLLEGE TEXTBOOK AFFORDABILITY: LANDSCAPE, EVIDENCE, AND POLICY DIRECTIONS 4 (2019), <https://www.mhec.org/resources/college-textbook-affordability-landscape-evidence-and-policy-directions> [<https://perma.cc/6N2W-97PG>].

22. *Id.* at 4–5.

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

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

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

## Course Reserve

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

## Interlibrary Loan

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

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

## Academic Reading Online

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

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

27. *Id.*

28. Am. Libr. Ass'n, *Interlibrary Loan Code for the United States* (2016), [http://www.ala.org/rusa/sites/ala.org.rusa/files/content/ILL%20Code%20with%20Supplement\\_11-20-17\\_updated-link.pdf](http://www.ala.org/rusa/sites/ala.org.rusa/files/content/ILL%20Code%20with%20Supplement_11-20-17_updated-link.pdf) [<https://perma.cc/GL86-Y4QP>].

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

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

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

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

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

its functional ability to properly evaluate the impact of OER,” and they advise skepticism with respect to studies finding positive effects of OER.<sup>34</sup>

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

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

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

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

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

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

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

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

38. *Id.* at 28.

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

40. *Id.* at 28.

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

42. *Id.*

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



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

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

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

### Reading and Learning in Law Schools

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

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

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

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

46. *Id.* at 28.

47. *Id.* at 2.

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

49. MICHAEL HUNTER SCHWARTZ & PAULA J. MANNING, *EXPERT LEARNING FOR LAW STUDENTS* 64 (3d ed. 2018).

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

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

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

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

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

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

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

53. *Id.* at 193.

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

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

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

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

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

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

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

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

58. Steel et al., *supra* note 52, at 190 (citing Deegan, *supra* note 56, and Dewitz, *supra* note 57).

59. *Id.* at 192.

60. This summary provides a high-level overview of the critical legal reading skills identified by Steel et al., *id.*, and is intended to illustrate the complexity of critical legal reading. For an in-depth examination of critical legal reading, see *id.* and the sources cited therein. For examples of students engaging in these skills, see the sources cited *supra* note 56.

61. Steel et al., *supra* note 52, at 192; see also Peter Dewitz, *Legal Education: A Problem of Learning from Text*, 23 N.Y.U. REV. L. & SOC. CHANGE 225, 228 (1997) (explaining that "grammatical knowledge helps the reader understand the relationship among concepts within a sentence").

62. Steel et al., *supra* note 52, at 193.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 194.

67. *Id.* at 194–95.

68. *Id.* at 195.

make connections within those areas of knowledge.<sup>69</sup>

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

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

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

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

69. *Id.*

70. *Id.* at 196 (quoting Dewitz, *supra* note 57, at 658).

71. Dewitz, *supra* note 57, at 659.

72. Steel et al., *supra* note 52, at 197–98.

73. *Id.* at 197.

74. *Id.* at 208–09; *see also* Christensen (2007), *supra* note 56, at 644.

75. Steel et al., *supra* note 52, at 198.

76. *Id.* (quoting Dewitz, *supra* note 57, at 659).

77. Deegan, *supra* note 56, at 165.

78. Steel et al., *supra* note 52, at 198.

79. *Id.* (quoting Dewitz, *supra* note 57, at 660).

80. *Id.* at 209.

81. *Id.* at 205.

82. Steel et al., *supra* note 52, at 205–06.

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

### Affordable Content Options for Law Schools

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

#### Casebooks

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

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

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

85. See *infra* pp. 320–23.

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

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

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

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

88. *Id.* at 645.

89. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th – CasebookPlus*, WEST ACAD. STORE, [http://store.westacademic.com/Rotundas\\_Modern\\_Constitutional\\_Law\\_Cases\\_and\\_Notes\\_Unabridged\\_11th\\_CasebookPlus\\_9781634595179.html](http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th_CasebookPlus_9781634595179.html) [<https://perma.cc/2GMG-9FNZ>].

90. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th – eBook and Learning Library*, WEST ACAD. STORE, [http://store.westacademic.com/Rotundas\\_Modern\\_Constitutional\\_Law\\_Cases\\_and\\_Notes\\_Unabridged\\_11th\\_eBook\\_and\\_Learning\\_9781634596558.html](http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th_eBook_and_Learning_9781634596558.html) [<https://perma.cc/RR4V-W9U2>].

91. *Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th*, WEST ACAD. STORE, [http://store.westacademic.com/Rotundas\\_Modern\\_Constitutional\\_Law\\_Cases\\_and\\_Notes\\_Unabridged\\_11th\\_9781628102222.html](http://store.westacademic.com/Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unabridged_11th_9781628102222.html) [<https://perma.cc/BNE6-T6UG>].

92. *Learning Library to Accompany Rotunda's Modern Constitutional Law, Cases and Notes, Unabridged, 11th*, WEST ACAD. STORE, [http://store.westacademic.com/Learning\\_Library\\_to\\_Accompany\\_Rotundas\\_Modern\\_Constitutional\\_Law\\_Cases\\_and\\_Notes\\_Unab\\_9781634597906.html](http://store.westacademic.com/Learning_Library_to_Accompany_Rotundas_Modern_Constitutional_Law_Cases_and_Notes_Unab_9781634597906.html) [<https://perma.cc/R9YP-6KMR>].

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

94. Jeremy J. McCabe, *Following the Herd: Bringing Electronic Casebooks into the Law School*, 34 LEGAL REFERENCE SERVS. Q. 196, 205 (2015); Eugene Volokh, *The Future of Books Related to the Law?*, 108 MICH. L. REV. 823, 830 (2010).

exam software that prevents access to materials other than the exam, students will not have access to the electronic text while taking the test.<sup>95</sup>

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

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

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

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

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

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

99. *Id.*

100. *Id.*

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

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

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

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

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

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

104. Cheryl Cuillier, *Inclusive Access: Who, What, When, Where, How, and Why?*, in *EVOLUTION OF AFFORDABLE CONTENT*, *supra* note 8, at 186, 195 (noting lack of transparency in inclusive access pricing, which depends on the negotiating skills of the institution, and citing disparities in discounts available from some publishers); JAGGARS, RIVERA & AKANI, *supra* note 21, at 5 (noting that "institutions . . . which are savvier, larger, and more resource-rich are likely to create better packages for their students"); KAITLYN VITEZ, *AUTOMATIC TEXTBOOKS BILLING: AN OFFER STUDENTS CAN'T REFUSE?* 8–9 (2020), [https://uspirg.org/sites/pirg/files/reports/Automatic-Textbook-Billing/USPIRG\\_Textbook-Automatic-Billing\\_Feb2020.pdf](https://uspirg.org/sites/pirg/files/reports/Automatic-Textbook-Billing/USPIRG_Textbook-Automatic-Billing_Feb2020.pdf) [https://perma.cc/Y974-9Q2C] (finding a lack of transparency with respect to student savings in inclusive access contracts negotiated by 31 colleges); *see also* Complaint at 2, *Barabas v. Barnes & Noble Coll. Booksellers*, No. 3:20-cv-02442 (D.N.J. filed Mar. 5, 2020) (asserting that inclusive access programs increase costs for students while limiting their options).

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

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

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

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

109. *Custom Publishing*, WOLTERS KLUWER LEGAL EDUC., <https://www.wklegaledu.com/programs/custom-publishing> [https://perma.cc/45BF-QSA3].



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

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

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

111. *Id.*

112. See “Course Packs,” *infra* p. 320.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

125. *Id.*

126. *Id.*

127. *Id.*

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

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

129. H2O, <https://opencasebook.org/pages/about/> [<https://perma.cc/D3KZ-E4AJ>]; CASELAW ACCESS PROJECT, <https://case.law/> [<https://perma.cc/95HP-VLPM>].

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

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

132. *Id.*

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

134. LAW CARTA, <https://lawcarta.com/> [<https://perma.cc/2MUK-BV7N>].

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

136. *Id.*

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

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

139. *Id.*

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

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

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

### Library-Owned or -Licensed Electronic Materials

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

140. *Id.*

141. *Id.*

142. *See, e.g.*, BRIAN L. FRYE & ELIZABETH SCHILLER, PROFESSIONAL RESPONSIBILITY: AN OPEN-SOURCE CASEBOOK (Apr. 8, 2019), <https://ssrn.com/abstract=3367936> [<https://perma.cc/XYW5-2MTM>].

143. *See, e.g.*, JAMES GRIMMELMANN, PATTERNS OF INFORMATION LAW: INTELLECTUAL PROPERTY DONE RIGHT (vers. 1.1, Aug. 2017), <https://james.grimmelman.net/ipbook/> [<https://perma.cc/3UXC-HC23>].

144. *See, e.g.*, STEPHEN CLOWNEY, JAMES GRIMMELMANN, MICHAEL GRYNBERG, JEREMY SHEFF & REBECCA TUSHNET, OPEN SOURCE PROPERTY: A FREE CASEBOOK, <https://www.greatlakeslaw.org/blog/2018/01/open-source-property-a-free-casebook.html> [<https://perma.cc/U76Y-6XWU>] (hosted by Great Lakes Law).

145. *See, e.g.*, JAMES BOYLE & JENNIFER JENKINS, OPEN INTELLECTUAL PROPERTY CASEBOOK (2018 & 2019 Supp.), <https://web.law.duke.edu/cspd/openip/> [<https://perma.cc/QU3T-A4EV>] (hosted by Duke University School of Law, Center for the Study of the Public Domain).

146. *See, e.g.*, *Publish with the Libraries*, UNIV. OF MINN. LIBRS., <https://www.lib.umn.edu/publishing/publishlibraries> [<https://perma.cc/6BBB-6FWE>].

147. *See, e.g.*, PRESSBOOKS: ONLINE CONTENT & COURSEWARE DEVELOPMENT, <https://pressbooks.com> [<https://perma.cc/2VWM-SUQQ>] (offering institutional and individual licenses for the creation of digital textbooks).

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

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

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

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

## Course Packs

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

## Course Reserve

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

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

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

153. *Id.* (describing the University of Minnesota Libraries’ Copyright Permission Service); *Digital Course Packs*, UNIV. OF MINN. - TWIN CITIES LIBRS., <https://www.lib.umn.edu/services/dcp> [<https://perma.cc/2F3U-VTEX>].

154. Eighthmy-Brown, McCready & Riha, *supra* note 24, at 107; JAGGARS, RIVERA & AKANI, *supra* note 21, at 5.

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

156. JAGGARS, RIVERA & AKANI, *supra* note 21, at 5.

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

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

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

160. Amanda Watson, *Don’t Burn the Books, Read Them!*, 46 INT’L J. LEGAL INFO. 79, 88 (2018).

161. *2020 Best Law Schools*, U.S. NEWS & WORLD REPORT BEST GRAD SCHOOLS (2019).

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

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

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

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

164. Some law school libraries that place casebooks on reserve caution students against relying on the reserve copy for all course content. See, e.g., GEORGETOWN L. LIBR., COLLECTION DEVELOPMENT POLICY 11 (2017, rev. Sept. 2019), [https://www.law.georgetown.edu/library/wp-content/uploads/sites/4/2019/10/CDP\\_Master\\_Final\\_Word\\_2019\\_09\\_05.docx](https://www.law.georgetown.edu/library/wp-content/uploads/sites/4/2019/10/CDP_Master_Final_Word_2019_09_05.docx) [<https://perma.cc/8FDC-RLHL>] (“A limited number of casebooks are purchased each semester for 1L courses and selected high enrollment courses. Because these texts are not intended to replace students’ personal copies, only one copy is provided.”); *Pence Law Library Circulation Desk: Reserves*, AM. UNIV. WASH. COLL. OF L., <https://wcl.american.libguides.com/c.php?g=563255&p=3877847> [<https://perma.cc/4HZ9-YMRC>] (“Students have an obligation to purchase required class texts; casebooks on reserve are not intended and should not be used as a substitute for the purchase of casebooks.”).

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

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

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

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

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

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

### Interlibrary Loan

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

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

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

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

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

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

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

172. *Id.*; Gemma Blackburn & Robyn Tiemeyer, *Textbooks and Interlibrary Loan*, 23 J. INTERLIBR. LOAN, DOC. DELIVERY & ELEC. RES. 5, 9 (2013) (finding a majority of Association of Research Libraries members do not borrow textbooks through interlibrary loan).

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

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

### Law Librarians Promoting and Supporting Affordable Content Models

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

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

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

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

176. See, e.g., *Law School Affordable Course Materials*, BOS. COLL. L. LIBR., <https://lawguides.bc.edu/affordablecoursematerials> [<https://perma.cc/WA4U-9Q86>]; *Teaching Tools for Law Faculty: Affordable Content*, UNIV. OF MINN. LAW LIBR., <https://libguides.law.umn.edu/c.php?g=296857&p=6434956> [<https://perma.cc/9MED-PSA7>].



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

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

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

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

## Conclusion

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

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

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

179. Awareness of institutional OER initiatives has been found to increase faculty members' adoption of OER significantly. TANYA SPILOVOY, JEFF SEAMAN & NATE RALPH, *THE IMPACT OF OER INITIATIVES ON FACULTY SELECTION OF CLASSROOM MATERIALS 22* (2020), <http://onlinelearningsurvey.com/reports/impactofOERinitiatives.pdf> [<https://perma.cc/9BSL-55EA>].

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

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

182. *Id.*

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

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

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

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