

# Information Hegemony, Transcending Positivism, and Applying Critical Legal Information Literacy Concepts in the Legal Research Classroom and Beyond

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**ABSTRACT:** This article provides an overview of legal information, an overview of the place of legal research in the law school curriculum, information hegemony, positivism in librarianship, critical legal information literacy, and critical legal research. Four methods for applying critical legal information literacy concepts in a legal research classroom setting are provided.

**Keywords:** critical information literacy, critical legal information literacy, information hegemony, legal information-industrial complex, positivism, critical librarianship, Critical Legal Research



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## Introduction

Critical legal information literacy should be a part of every legal research course and at the forefront of researchers' minds when they are gathering legal information because researchers who understand how information is produced, disseminated, and used are better able to evaluate information. Thinking about legal information as a social construct involves asking questions about that information. The questions generated from thinking critically about the production, dissemination, and use of information are integral for all who will use legal information including but not limited to law students who will become lawyers, the general public, and librarians who manage collections and facilitate access to legal information. In this article, I provide an overview of legal information, the place of legal research in the law school curriculum, information hegemony and the legal information-industrial complex, positivism in librarianship, critical legal information literacy, and the related field of Critical Legal Research. Then, I provide four ways to apply critical legal information literacy concepts in a legal research course and note that critical legal information literacy is not only for legal research courses; it is applicable in any legal-information-seeking-context.

## Overview of Legal Information and Law Librarianship

Legal information is documentation regarding the law itself, interpretation of the law, or enforcement of the law.<sup>1</sup> Users of information can make a distinction between legal sources and non-legal sources. Legal sources include the following sources from United States jurisdictions: constitutions, statutes, regulations, court rules, legal encyclopedias, legal dictionaries, textbooks, treatises, and law reviews.<sup>2</sup> Non-legal sources include periodicals and books whose target audience is a group other than lawyers or judges.<sup>3</sup> However, with the plethora of self-help legal information aimed at the general public, sources of legal information may also include “do-it-yourself legal software” and other products for consumers.<sup>4</sup> Laws are rules that govern society and as such they are “critical public information.”<sup>5</sup> There is a movement to make the law available free of charge,<sup>6</sup> however, due to companies who saw an opportunity to gather the laws and sell them for fees, “nobody -not even lawyers or lawmakers -gets a full free copy of our laws.”<sup>7</sup>

Generally, law libraries fall into one of three categories: government, academic, and law firm.<sup>8</sup> Government law libraries may be located within a courthouse and primarily serve judges, attorneys, and members of the public.<sup>9</sup> However, some government law libraries are stand-alone institutions such as county law libraries that serve members of the public as well as officers of

<sup>1</sup> SARAH LAMDAN, DATA CARTELS: THE COMPANIES THAT CONTROL AND MONOPOLIZE OUR INFORMATION 72 (2023).

<sup>2</sup> Frederick Schauer & Virginia J. Wise, *Nonlegal Information and the Delegalization of Law*, 29 THE JOURNAL OF LEGAL STUDIES 495, 498–99 (2000).

<sup>3</sup> *Id.*

<sup>4</sup> See MH Sub I, LLC dba Nolo, *About Us*, <https://www.nolo.com/about/about.html> [<https://perma.cc/66BA-Z8GM>].

<sup>5</sup> LAMDAN, *supra* note 1.

<sup>6</sup> Free Access to Law Movement, *Free Access to Law Movement (FALM)*, <http://fatlm.org/> [<https://perma.cc/CG4M-4KTF>].

<sup>7</sup> LAMDAN, *supra* note 1 at 73. For an in-depth discussion of corporate interests in legal information, see *Chapter 4 Legal Information* in DATA CARTELS: THE COMPANIES THAT CONTROL AND MONOPOLIZE OUR INFORMATION.

<sup>8</sup> Aamir Shahnawaz Abdullah, Kaylan Ellis & Heather J. E. Simmons, *The Profession of Law Librarianship*, in INTRODUCTION TO LAW LIBRARIANSHIP (2021), <https://pressbooks.pub/lawlibrarianship/chapter/introduction/> [<https://perma.cc/3692-QGLJ>].

<sup>9</sup> *Id.*

the court.<sup>10</sup> Academic law libraries provide information resources to faculty and students,<sup>11</sup> and if they are open to the public, they serve members of the public as well. They may also have a role in the provision of instruction and workshops relevant to legal information. Law firm libraries provide information resources to attorneys who work at the law firms and are closed to the public.<sup>12</sup> Law librarians' roles may vary according to the library in which they work and their job functions: some catalog sources, some teach students, some provide reference assistance to those affiliated with their institutions and members of the public.<sup>13</sup> Those who work in law libraries are known as law librarians, however there are many who may work in law libraries and do not identify as "law librarians," yet whose work is integral to the functioning of the libraries.<sup>14</sup>

## Legal Research in the Law School Curriculum

Legal research is an important skill for attorneys, yet legal research course offerings vary depending on the law school. Although the modern-day practice of teaching legal research is over 100 years old, with Federick C. Hicks teaching legal research courses at Columbia Law School in the early 20<sup>th</sup> century, the place of legal research in the law school curriculum is unstable.<sup>15</sup> Some schools place legal research in legal writing classes, some schools have a stand-alone elective class for upper-level students, and some schools require a stand-alone legal research course in the first year of law school.<sup>16</sup> There are other variations on legal research course offerings, however, these predominate. Current legal research textbooks describe legal research as finding the applicable rule(s).<sup>17</sup> Despite the acceptance of critical legal theory by law schools, legal research instruction "has reverted to a vulgar legal positivism"<sup>18</sup> which means that instruction may focus on finding the right rule or the right answer instead of thinking of new legal theories and thinking of who influences the research tools that we use and the implications of that influence. Even still, the importance of legal research skills is paramount. Studies have shown that new attorneys lack research skills.<sup>19</sup> Since the Great Recession, law firms have shifted more of the burden of teaching research skills to law schools.<sup>20</sup> A required assessment of

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> In my experience working in law libraries, various employees who may not have the title of "librarian" yet work in circulation, interlibrary loan, faculty services, etc. provide valuable services that keep libraries running smoothly.

<sup>15</sup> NICHOLAS MIGNANELLI, *Notes for a New Legal Research Pedagogy* 2–3 (2023), <https://papers.ssrn.com/abstract=4503396> citing Frederick C. Hicks, *Instruction in Legal Bibliography at Columbia University Law School*, 9 LAW LIBR. J. 121 (1916); Alyson M. Drake, *The Need for Experiential Legal Research Education*, 108 LAW LIBR. J. 511, 518 (2016) citing Robert C. Berring, *A Sort of Response: Brutal Non-Choice*, 4 PERSPECTIVES: TEACHING LEGAL RES. & WRITING 81, 81 (1996), <https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/other/perspectives/1992-2018/1996-spring.pdf> [<https://web.archive.org/web/20230912223348/https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/other/perspectives/1992-2018/1996-spring.pdf>]. Berring states, "Legal research has forever been a stepchild in legal education."

<sup>16</sup> MIGNANELLI, *supra* note 15 at 2 citing ASS'N OF LEGAL WRITING DIRS. & LEGAL WRITING INST., *ALWD/LWI LEGAL WRITING SURVEY, 2019-2020: REPORT OF THE INSTITUTIONAL SURVEY* 21 (2020), <https://www.alwd.org/images/resources/ALWDLWI2019-20InstitutionalSurveyReport.pdf> [<https://perma.cc/3AE4-UF5Q>].

<sup>17</sup> *Id.* at 5–6 citing KENT C. OLSON, AARON S. KIRSCHENFIELD, & INGRID MATTSO, *PRINCIPLES OF LEGAL RESEARCH* 1 (3d ed. 2020); KENT C. OLSON, *LEGAL RESEARCH IN A NUTSHELL* 2 (14th ed. 2021); AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* 1 (8th ed. 2021); J.D.S. ARMSTRONG, CHRISTOPHER A. KNOTT, & R. MARTIN WITT, *WHERE THE LAW IS: AN INTRODUCTION TO ADVANCED LEGAL RESEARCH* 1 (5th ed. 2018).

<sup>18</sup> *Id.* at 6.

<sup>19</sup> Drake, *supra* note 15 at 511–12 citing Richard A. Leiter, *The Missing Lawyering Skill*, AALL SPECTRUM, July 2008 at 22 and AALL SIS TASK FORCE ON IDENTIFYING SKILLS AND KNOWLEDGE FOR LEGAL PRACTICE, *A STUDY OF ATTORNEYS' LEGAL RESEARCH PRACTICES AND OPINIONS OF NEW ASSOCIATES' RESEARCH SKILLS* 76-94 (2013), <http://www.aallnet.org/gm-node/44887.aspx> [<https://perma.cc/3NWE-TZQF>].

<sup>20</sup> *Id.* at 512 citing Erwin Chemerinsky, *Essay, The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 1-13 (2011); Myra E. Berman, *Portals to Practice: A Multidimensional Approach to Integrating Experiential Education into the Traditional Law School*

legal research skills after the first year of law school is uncommon.<sup>21</sup> However, the NextGen Bar Exam, which will be offered for the first time in July 2026, will test legal research skills.<sup>22</sup> It remains to be seen whether the existence of legal research skills as a subject on the NextGen Bar Exam will raise the status of legal research skills offerings in law schools. Those who teach legal research courses or components at law schools may teach in an environment where legal research is not a required course or an ungraded component of another course, and due to time constraints and institutional culture, the focus of research assignments may be finding the right rules. In addition, the curriculum and culture will likely feature subscription databases as the main source of information. The environment described peacefully co-exists with the environment of legal information created by corporate interests that sell legal information and control how legal information is produced, categorized, and distributed. Law schools and academic law libraries purchase subscriptions to databases and actively promote subscription database use among students.<sup>23</sup> Moreover, these databases or their parent companies are major sponsors of

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*Curriculum*, 1 J. EXPERIENTIAL LEARNING 157, 158 (2015); Tierney Plumb, *A Law School-Run Law Firm*, NAT'L JURIST, Feb. 2012, at 22, 23.

<sup>21</sup> *Id.* at 518.

<sup>22</sup> Laura B. Wilcoxon, *A Next-Generation Framework: Using Critical Legal Research Pedagogy to Prepare Law Students for the NextGen Bar Exam*, 42 LEG. REF. SERV. Q. 71, 71 (2023) citing IMPLEMENTING THE NEXT GENERATION OF THE BAR EXAM, 2022–2026, Nat'l Conf. of Bar Exam'rs, <https://nextgenbarexam.ncbex.org/about/implementation-timeline/>; see also Karen Sloan, *Old Bar Exam or New One? States Will Have a Choice in 2026*, REUTERS (January 19, 2023, 4:26pm), <https://www.reuters.com/legal/government/old-bar-exam-or-new-one-states-will-have-choice-2026-2023-01-19/>; *About the NextGen Bar Exam*, NAT'L CONF. OF BAR EXAM'RS, <https://nextgenbarexam.ncbex.org/>.

<sup>23</sup> T14 law schools (or schools ranked in the top tier or tier 14 of law schools) are considered leaders in the field of legal education. See [https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?\\_sort=my\\_rankings-asc](https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?_sort=my_rankings-asc) [[https://web.archive.org/web/20240321183124/https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?\\_sort=my\\_rankings-asc](https://web.archive.org/web/20240321183124/https://www.usnews.com/best-graduate-schools/top-law-schools/law-rankings?_sort=my_rankings-asc)]. A short review of the webpages related to library services and databases offered at the T14 law schools shows that each school has a mention of Lexis and Westlaw on a page within its website. Stanford Law School lists LexisNexis and Westlaw under the heading "Quick Links to Selected Legal E-Resources" on a webpage maintained by its law library. STANFORD LAW SCHOOL, LEGAL DATABASES (2024), <https://law.stanford.edu/robert-crown-law-library/legal-databases/> [<https://web.archive.org/web/20240321183621/https://law.stanford.edu/robert-crown-law-library/legal-databases/>]; Yale Law School provides information for registering for Westlaw, Lexis, and other databases on a webpage maintained by its law library. YALE LAW SCHOOL, WESTLAW LEXIS PLUS AND BLOOMBERG LAW REGISTRATION, (n.d.), <https://library.law.yale.edu/news/westlaw-lexis-plus-and-bloomberg-law-registration> [<https://web.archive.org/web/20240321184431/https://library.law.yale.edu/news/westlaw-lexis-plus-and-bloomberg-law-registration>]; The University of Chicago provides links to Lexis+ and Westlaw Precision on the homepage of its law library. THE UNIVERSITY OF CHICAGO, D'ANGELO LAW LIBRARY (2024), <https://www.lib.uchicago.edu/law/> [<https://web.archive.org/web/20240321184927/https://www.lib.uchicago.edu/law/>]; The University of Pennsylvania Carey Law School maintains an A-Z list of databases on the website of its law library and has notations next to Lexis+ and Westlaw Precision denoting that they are "Featured" databases. UNIVERSITY OF PENNSYLVANIA CAREY LAW SCHOOL, A-Z DATABASES: L (n.d.), <https://law.upenn.libguides.com/az.php?a=l> [<https://web.archive.org/web/20240321193921/https://law.upenn.libguides.com/az.php?a=l>] and University of Pennsylvania Carey Law School, A-Z Databases: W (n.d.), <https://law.upenn.libguides.com/az.php?a=w> [<https://web.archive.org/web/20240321193840/https://law.upenn.libguides.com/az.php?a=w>]; Duke Law School lists Lexis and Westlaw on a webpage maintained by its law library. DUKE LAW SCHOOL, LEGAL DATABASES & LINKS (2024), <https://law.duke.edu/lib/legal-databases> [<https://web.archive.org/web/20240321194705/https://law.duke.edu/lib/legal-databases>]; Harvard Law School lists Lexis and Westlaw as the first two databases under its list of "Popular Databases" on a webpage of its law library. HARVARD LAW SCHOOL, LEGAL DATABASES (2022), <https://hls.harvard.edu/library/research-services/legal-databases/> [<https://web.archive.org/web/20240321194642/https://hls.harvard.edu/library/research-services/legal-databases/>]; New York University Law School lists Lexis and Westlaw in its list of "A-Z Databases" and under the heading "Featured Databases" on a webpage maintained by its law library. NEW YORK UNIVERSITY LAW SCHOOL, A-Z DATABASES (n.d.), <https://nyulaw.libguides.com/az.php> [<https://web.archive.org/web/20240321193842/https://nyulaw.libguides.com/az.php>]; Columbia Law School provides links to Lexis and Westlaw and notes that individual accounts are only for affiliated faculty, students and staff on a webpage detailing library services. COLUMBIA LAW SCHOOL, SERVICES (2024), <https://www.law.columbia.edu/library/services> [<https://web.archive.org/web/20240321193913/https://www.law.columbia.edu/library/services>]; The University of Virginia School of Law lists Lexis and Westlaw on its library's homepage. UNIVERSITY OF VIRGINIA SCHOOL OF LAW, LIBRARY (2024), <https://www.law.virginia.edu/library> [<https://web.archive.org/web/20240321193635/https://www.law.virginia.edu/library>]; Northwestern Pritzker School of Law lists Westlaw and Lexis+ at the top of its library's homepage under the heading "Quick Links." NORTHWESTERN PRITZKER SCHOOL OF LAW, PRITZKER LEGAL RESEARCH CENTER (n.d.), <https://library.law.northwestern.edu/home> [<https://web.archive.org/web/20240321193732/https://library.law.northwestern.edu/home>]; University of California Berkeley School of Law lists Lexis and Westlaw in a dropdown menu under the heading "TOP DATABASES" on its library's homepage. UNIVERSITY OF CALIFORNIA BERKELEY SCHOOL OF LAW, LIBRARY (2024), <https://www.law.berkeley.edu/library/> [<https://web.archive.org/web/20240321193441/https://www.law.berkeley.edu/library/>]; The University of Michigan Law School provides a list of e-resources and lists Lexis and Westlaw under the heading "Major Resources" on its "Search for E-Resources" webpage. THE UNIVER-

professional activities that center on legal information.<sup>24</sup>

## Information Hegemony

Databases used for legal research have a presence in higher education, professional organizations, and the workplace. The developers of the databases categorize and gather information and the parent companies of the databases often have a hand in gathering information on people. Just as there is a sameness throughout legal scholarship due to the reuse and repetition of legal categories,<sup>25</sup> elements of computerized legal research,<sup>26</sup> and the influence of algorithms and artificial intelligence on search tools and results<sup>27</sup> there are effects on legal information when the commercial distribution of that information is overseen by a few large companies. One effect comprises the editorial annotations that characterize the legal information.<sup>28</sup> Another effect comprises allegations against parent companies of databases that assert these parent companies obtain the personally identifiable information of people and sell that information without people's knowledge or consent.<sup>29</sup> Librarians who assist patrons with using legal information and who teach students how to find legal information should consider all these issues. The origins and transformations of LexisNexis and Westlaw provide an example of how the production of legal information has been consolidated over time.

In 2002, John Dethman asserted that the Thomson Corporation, Reed Elsevier, and Wolters Kluwer owned 90% of legal publishing in the United States.<sup>30</sup> Olufunmilayo B. Arewa describes

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SITY OF MICHIGAN LAW SCHOOL, SEARCH FOR E-RESOURCES (2024), <https://umil.iit.edu/search/y> [<https://web.archive.org/web/20240321193520/https://umil.iit.edu/search/y>]; Cornell University lists Lexis and Westlaw under the heading "Databases" on its homepage. CORNELL UNIVERSITY, LAW LIBRARY (2024), <https://law.library.cornell.edu/> [<https://web.archive.org/web/20240321193622/https://law.library.cornell.edu/>]; The UCLA School of Law maintains a libguide with instructions on how to access databases and specifically mentions LexisNexis and Westlaw as being databases that require individual user accounts. UNIVERSITY OF CALIFORNIA LOS ANGELES SCHOOL OF LAW, ACCESS TO DATABASES: DATABASE ACCESS INFORMATION (March 6, 2024), <https://libguides.law.ucla.edu/databaseaccess> [<https://web.archive.org/web/20240321193232/https://libguides.law.ucla.edu/databaseaccess>].

<sup>24</sup> LexisNexis and Thomson Reuters are Platinum Sponsors, Bloomberg Law is a Silver Sponsor, and Wolters Kluwer is a Contributor-Sponsor of the 2024 American Association of Law Libraries Annual Meeting and Conference. AMERICAN ASSOCIATION OF LAW LIBRARIES, AALL ANNUAL MEETING & CONFERENCE, (2024), <https://www.aallnet.org/conference/> [<https://web.archive.org/web/20240321172123/https://www.aallnet.org/conference/>].

<sup>25</sup> Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STANFORD L. REV. 207, 207–08 (1989); Robert C. Berring, *Legal Research and the World of Thinkable Thoughts The Evolution of Research*, 2 J. APP. PRAC. & PROCESS 305, 307–11 (2000).

<sup>26</sup> Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions - The Triple Helix Dilemma Revisited Symposium: Legal Information and the Development of American Law: Further Thinking about the Thoughts of Robert C. Berring*, 99 LAW LIBR. J. 307, 310, 319–24 (2007).

<sup>27</sup> Yasmin Sokkar Harker, *Invisible Hands and the Triple (Quadruple?) Helix Dilemma: Helping Students Free Their Minds*, 101 B.U. L. REV. ONLINE 17, 18–20 (2021).

<sup>28</sup> Julie Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research in THE BOULDER STATE-MENTS ON LEGAL RESEARCH EDUCATION: THE INTERSECTION OF INTELLECTUAL AND PRACTICAL SKILLS* (SUSAN NEVELOW MART, ED.) 175, 197, 200 (2014); Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GENDER SOC. POL'Y & L. 573, 640 (2015).

<sup>29</sup> CBS & Associated Press, *LexisNexis illegally collected and sold people's personal data, lawsuit alleges* CBS NEWS (Aug. 16, 2022), <https://www.cbsnews.com/news/lexisnexis-lawsuit-collected-sold-personal-data-immigration-advocates-allege/> [<https://perma.cc/M6GA-6E49>]; Complaint & Demand for Jury Trial, Maria Fernanda Castellanos et al v. LexisNexis Risk Solutions, No. 2022CH07984 (Circuit Court of Cook County, Illinois County Department, Chancery Division Aug. 16, 2022) at 2 (2022), <https://web.archive.org/web/20220816185618/https://www.justfutureslaw.org/wp-content/uploads/2022/08/Castellanos-et-al.-v.-LexisNexis-Risk-Solutions-Complaint-For-Filing.pdf>; Cat Zakrzewski, *Analysis | The Technology 202: Activists are suing Thomson Reuters over its sale of personal data*, WASHINGTON POST (Mar. 18, 2021), <https://www.washingtonpost.com/politics/2021/03/18/technology-202-activists-are-suing-thomson-reuters-over-its-sale-personal-data/> [<https://perma.cc/8AHT-PSEE>]; Class Action Complaint and Demand for Jury Trial, Cat Brooks and Rasheed Shabazz v. Thomson Reuters Corporation, No. Rg20082878 (Superior Court of California Dec. 3, 2020), <https://www.classlawgroup.com/wp-content/uploads/Thomson-Reuters-CLEAR-class-action-lawsuit.pdf> [<https://perma.cc/CLL5-EALM>].

<sup>30</sup> John Dethman, *Trust v. Antitrust: Consolidation in the Legal Publishing Industry*, in LAW LIBRARY COLLECTION DEVELOPMENT IN THE DIGITAL AGE, 124 (4th ed. 2002).

LexisNexis' and Westlaw's hegemony over the legal information industry as a duopoly and notes that "[t]he organization of the legal information industry more generally has certain oligopolistic characteristics, including industry concentration and interdependence among several firms in which members have at times adopted intensely competitive behavior."<sup>31</sup> In 2006, Arewa characterized the major figures of legal publishing as the triumvirate of Westlaw (owned by the Thomson Corporation), LexisNexis (owned by Reed Elsevier), and Wolters Kluwer.<sup>32</sup> In 1977, there were 23 different major legal publishers,<sup>33</sup> however by 2006, the number had dwindled to three different major legal publishers.<sup>34</sup>

Many scholars have written about the origins of LexisNexis and Westlaw,<sup>35</sup> therefore, I will only provide a brief recounting of their origins. Reed Elsevier acquired the parent company of LexisNexis, Mead Data Central in 1994.<sup>36</sup> LexisNexis has over 144 billion legal and news materials. It adds 1.2 million materials to its databases daily.<sup>37</sup> In 1992, the British book and magazine publisher Reed International and the Netherlands scientific publisher Elsevier merged.<sup>38</sup> In 2015, the company Reed Elsevier became RELX Group.<sup>39</sup> RELX is the parent company of LexisNexis.<sup>40</sup> In addition, to LexisNexis, RELX's divisions include Elsevier, LexisNexis Risk Solutions, and Reed Exhibitions. RELX provides its services all over the world.<sup>41</sup> The headquarters of LexisNexis Legal & Professional are in New York City.<sup>42</sup> RELX has offices in London, United Kingdom and New York, United States while its division LexisNexis Legal & Professional has offices in cities throughout North America, Europe, Africa, and Asia.<sup>43</sup> LexisNexis has the largest database for public records.<sup>44</sup> In 2006, LexisNexis finalized its acquisition of Seisint, the parent company of Accurint.<sup>45</sup> Accurint provides access to public records for the collections industry, federal government, and legal industry.<sup>46</sup> Thomson

<sup>31</sup> Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market Symposium: Open Access Publishing and the Future of Legal Scholarship*, 10 LEWIS & CLARK L. REV. 797, 797 (2006) citing WILLIAM G. SHEPHERD, *THE ECONOMICS OF INDUSTRIAL ORGANIZATION* 205, 245 (4th ed. 1997).

<sup>32</sup> *Id.* at 821.

<sup>33</sup> *Id.* at 824 citing Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1698 (2000) quoting Kendall F. Svengalis, *Legal Publishing on the Eve of the Millennium*, AALL SPECTRUM July 1999, at 22.

<sup>34</sup> *Id.* at 824 citing Mark J. McCabe, *Merging West and Thomson: Pro- or Anti-Competitive*, 97 LAW LIBR. J. 423, 428-29 (2005) and John Dethman, *Trust v. Antitrust: Consolidation in the Legal Publishing Industry*, in *LAW LIBRARY COLLECTION DEVELOPMENT IN THE DIGITAL AGE* 123, 124 (Michael Chiorazzi & Gordon Russell eds., 2003).

<sup>35</sup> For histories of LexisNexis and Westlaw in the context of legal publishing see Olufunmilayo B. Arewa, *Open Access in a Closed Universe: Lexis, Westlaw, Law Schools, and the Legal Information Market*, 10 LEWIS & CLARK L. REV. 797 (2006) and Ross E. Davies, *How West Law Was Made: The Company, Its Products, and Its Promotions*, 6 CHARLESTON L. REV. 231 (2011).

<sup>36</sup> Kendall F. Svengalis, *Globalisation and Commercial Legal Publishing*, in *THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT*, 239 (2011) citing KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL* 619-20 (13th ed. 2009).

<sup>37</sup> RELX, *Legal* (2023), <https://www.relx.com/our-business/market-segments/legal> [https://perma.cc/45P4-EUN9].

<sup>38</sup> KENDALL F. SVENGALIS, *LEGAL INFORMATION BUYER'S GUIDE & REFERENCE MANUAL* 13 (2019).

<sup>39</sup> *Id.*

<sup>40</sup> RELX, *supra* note 37.

<sup>41</sup> LexisNexis, *About | LexisNexis* (2023), <https://www.lexisnexis.com/en-us/about-us/about-us.page> [https://perma.cc/VNA7-35M4].

<sup>42</sup> RELX, *supra* note 37.

<sup>43</sup> *Id.* "LexisNexis Legal & Professional is headquartered in New York and has further principal operations in Dayton, Raleigh, and Toronto in North America, London and Paris in Europe, and cities in several other countries in Africa and Asia Pacific."

<sup>44</sup> Candice Crutchfield, *Collective Action Behind Bars: Examining the Conditions Under Which Incarcerated Individuals Strike*, (Jan. 2020), <https://academiccommons.columbia.edu/doi/10.7916/d8-7jzk-2742/download> [https://perma.cc/J3T3-XT6R] citing Lindsey Lambert, "LexisNexis Sweeps Reader Ranking as Best Online Public Records Research Provider." *BizBlog*. March 13, 2018.

<sup>45</sup> insideARM, *LexisNexis Completes Acquisition of Accurint Parent* (Sept. 12, 2006), <http://www.insidearm.com/news/00019553-lexisnexis-completes-acquisition-of-accur/> [https://perma.cc/ET2G-S6UD].

<sup>46</sup> RELX, *Acquisition of Seisint* (July 14, 2004), <https://www.relx.com/media/press-releases/archive/14-07-2004> [https://perma.cc/2RBS-NEUW].

Reuters is the world's largest provider of legal information.<sup>47</sup> Julius Reuter immigrated from Germany to England and in 1851 opened an office from which he transmitted stock market quotations and news between London and Paris via telegraph cable.<sup>48</sup> John West and his brother Horatio West founded West Publishing in 1872 in St. Paul, Minnesota.<sup>49</sup> In 1934, Roy Thomson founded what later became the Thomson Corporation in Ontario, Canada and this corporation was the publisher of *The Timmins Daily Press*.<sup>50</sup> In 1996, Thomson acquired West Publishing.<sup>51</sup> In 2008, Thomson Corporation and Reuters Group PLC merged and became Thomson Reuters.<sup>52</sup> The Reuters News Agency is self-described as “[t]he world’s largest multimedia news provider” and provides news in more than 16 languages.<sup>53</sup> Thomson Reuters has offices throughout North and South America, Asia, Africa, Europe, and the Middle East.<sup>54</sup> In 2023, Thomson Reuters announced plans to acquire Casetext, a legal startup company of 104 employees.<sup>55</sup> Casetext had also developed an AI legal assistant and Thomson Reuters plans to spend \$100 million a year on AI through 2025.<sup>56</sup> Upon completion of the acquisition, the CEO of Casetext said the acquisition by Thomson Reuters places Casetext in a better position to increase access to justice.<sup>57</sup> With much of Thomson Reuter’s legal resources behind a paywall, for whom does the acquisition create more access to justice? Before Thomson Reuters’ acquisition of Casetext, those who conducted research in legal information databases saw Casetext as an alternative to subscription databases.<sup>58</sup> Is Thomson Reuters’ move an act of innovation or an act of stifling the competition? Companies that own subscription databases often publish the official version of state laws so that there is a partnership between government entities and the private companies that disseminate government or legal information. For example, since 1990, Thomson Reuters has been the publisher of the official California Code of Regulations.<sup>59</sup> The relationships between public and private entities to provide legal information form what I call the legal information - industrial

<sup>47</sup> Svengalis describes the legal publishing industry in the United States as “an oligarchy dominated by three international conglomerates: Thomson Reuters, Reed Elsevier and Wolters Kluwer.” Kendall F. Svengalis, *Globalisation and Commercial Legal Publishing*, in THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT, 229, 239 (2016).

<sup>48</sup> Thomson Reuters, *Company history* (n.d.), <https://www.thomsonreuters.com/en/about-us/company-history.html> [<https://perma.cc/BH8G-X2TR>].

<sup>49</sup> *Id.*

<sup>50</sup> Svengalis, *supra* note 47 at 239.

<sup>51</sup> Thomson Reuters, *supra* note 48.

<sup>52</sup> Svengalis, *supra* note 47 at 241.

<sup>53</sup> Thomson Reuters, *About us*, REUTERS NEWS AGENCY (n.d.), <https://www.reutersagency.com/en/about/about-us/> [<https://perma.cc/8HV9-FN8K>].

<sup>54</sup> Thomson Reuters, *Search office locations* (n.d.), <https://www.thomsonreuters.com/en/locations.html> [<https://perma.cc/5GC2-Z2L4>].

<sup>55</sup> Bharat Govind Guatam & Rashmi Aich, *Thomson Reuters to acquire legal AI firm Casetext for \$650 million*, REUTERS (June 27, 2023), <https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27/> [<https://web.archive.org/web/20230629112129/https://www.reuters.com/markets/deals/thomson-reuters-acquire-legal-tech-provider-casetext-650-mln-2023-06-27/>].

<sup>56</sup> *Id.*

<sup>57</sup> Andrew Green, *Thomson Reuters completes acquisition of Casetext, Inc.*, REUTERS (Aug. 17, 2023), <https://www.thomsonreuters.com/en/press-releases/2023/august/thomson-reuters-completes-acquisition-of-casetext-inc.html> [<https://web.archive.org/web/20231228201109/https://www.thomsonreuters.com/en/press-releases/2023/august/thomson-reuters-completes-acquisition-of-casetext-inc.html>]. Jake Heller said, “Joining Thomson Reuters provides us with an unparalleled opportunity to scale the Casetext vision and accelerate breakthroughs for legal professionals. As we look to unlock generative AI’s full potential to drive greater productivity, more impactful work and increased access to justice, there could not be a better home for our brand, talent and products.”

<sup>58</sup> Theresa Abela, *5 Great Legal Research Alternatives to LexisNexis*, CAPTERRA (June 7, 2016), <https://www.capterra.com/resources/5-great-legal-research-alternatives-to-lexisnexis/> [<https://perma.cc/558W-Z6XX>]; Sarah Lamdan, *When Westlaw Fuels ICE Surveillance: Legal Ethics in the Era of Big Data Policing*, 43 N.Y.U. REV. L. & SOC. CHANGE 255, 261 (2019). Lamdan noted that in 2015, Casetext had a commitment not to share the data of users with third parties, citing *Casetext Privacy Policy*, CASETEXT, <https://casetext.com/privacy> [<https://perma.cc/6GYS-EYPE>] (last modified Mar. 15, 2015).

<sup>59</sup> Thomson Reuters, *Barclays Official California Code of Regulations (CCR)*, THOMSON REUTERS (n.d.), <https://store.legal.thomsonreuters.com/law-products/Regulations/Barclays-Official-California-Code-Of-Regulations-CCR/p/106152966> [<https://perma.cc/ZD27-XP3K>].

complex. Others have spoken of the military-industrial complex and the information-industrial complex,<sup>60</sup> however, those with an interest in legal research should know that there is also a legal information-industrial complex.

While this article is concerned with the practice of teaching critical legal information literacy, the topic should be of interest to those who work in local public, academic, and other types of libraries because research queries are increasingly interdisciplinary, requiring the research of sources from multiple fields and the same companies that dominate legal publishing also dominate academic publishing and the dissemination of news.<sup>61</sup> RELX owns Elsevier which has been publishing scientific insights since the time of Galileo.<sup>62</sup> The Thomson Corporation, which started out as a news corporation, purchased another news corporation, Reuters.<sup>63</sup> When people search for information using subscription databases provided by these data companies (or any data company for that matter), they should be aware of the practices of who controls the information. Moreover, data companies may track movement on their platforms and use information they gather for data analysis.<sup>64</sup> Librarians who work at institutions with access to subscription databases provided by RELX and Thomson Reuters may use these databases for research and advise others on search strategies for using these databases. Aside from the majority of commercial legal publishing being in the hands of a few legal publishers and how the reification of categories used over many years creates a “sameness” in legal scholarship and ties researchers to conventional categories when researchers do not think outside the box (which will be discussed in greater depth later in the article),<sup>65</sup> what are the implications for librarians who provide access to or teach others how to use subscription databases that others have alleged are violating their privacy rights?

## Implications for Librarians

Scholars have considered the implications for librarians when corporate interests provide research platforms and also have other services that center on surveillance of people. In a blog post to the American Association of Law Libraries’ (AALL) *Research, Instruction, and Patron Services Special Interest Section Blog* (which was removed on the advice of AALL General Counsel),<sup>66</sup> Sarah Lamdan and Yasmin Sokkar Harker assert that “Librarians are advocates and activists for privacy rights and the protection of personally identifiable information,” “Librarians are also invested in the ethical use of information,” and “Critical information literacy, or understanding the source of information and the roles information providers have in society at large, is also a cornerstone of the library profession.”<sup>67</sup> Sokkar Harker and Lamdan cite an *Intercept* article which details an event hosted by Homeland Security Investigations of United

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<sup>60</sup> The term “military-industrial complex” has been used to describe the military’s partnership with private organizations to accomplish military missions. The term “information-industrial complex” has been used to describe how entities within the government have partnered with entities in the private sector to obtain, share, and analyze information. Shawn M. Powers & Michael Jablonski, *The Information-Industrial Complex*, in *THE REAL CYBER WAR: THE POLITICAL ECONOMY OF INTERNET FREEDOM* 50–73 (2015).

<sup>61</sup> LAMDAN, *supra* note 1. For a lengthier discussion, see Lamdan’s *Chapter 3 Academic Research* and *Chapter 6 News*.

<sup>62</sup> *Id.* at 51.

<sup>63</sup> Svengalis, *supra* note 47.

<sup>64</sup> LAMDAN, *supra* note 1 at 57; “Notably, neither Thomson Reuters nor RELX Group has promised that their legal research product is independent from the data services they provide to law enforcement.” Lamdan, *supra* note 58 at 287.

<sup>65</sup> Delgado & Stefancic, *supra* note 26 at 308–09, 328.

<sup>66</sup> Jamie Baker, *Post Removed*, RIPS LAW LIBRARIAN BLOG (2017), <https://ripslawlibrarian.wordpress.com/2017/12/05/lexisnexiss-role-in-ice-surveillance-librarian-ethics/> [<https://perma.cc/5FF9-EMSE>].

<sup>67</sup> Sarah Lamdan & Yasmin Sokkar Harker, *LexisNexis’s Role in ICE Surveillance and Librarian Ethics – Law Librarian Blog* (2017), <https://web.archive.org/web/20200102033927/https://lib2.com/2017/12/11/ice/>.



States Customs Enforcement for companies who were interested in building an Extreme Vetting Initiative.<sup>68</sup> LexisNexis was one of the companies represented on sign-in sheets for the event.<sup>69</sup> Through the Extreme Vetting Initiative, Homeland Security Investigations seeks an application which will make investigating many people easier than investigations through conventional means.<sup>70</sup> The new application would need to gather data from law enforcement databases, computer systems of government agencies, and the Internet.<sup>71</sup> Regarding the description of LexisNexis' interest in Homeland Security Investigations' surveillance program, Sokkar Harker and Lamdan stated, "Especially if our patrons are likely to be harmed by ICE surveillance, we cannot, in good conscience, counsel them to use products under the LexisNexis umbrella to conduct research in our libraries."<sup>72</sup> Their statement should cause librarians to think about ethical responsibilities.

Recent lawsuits against the parent companies of LexisNexis and Thomson Reuters have shed light on alleged information gathering and selling practices. Immigrants' rights activists and Just Futures Law have alleged that LexisNexis has unlawfully gathered and sold the personally identifiable information of people<sup>73</sup> to third parties including the federal government without their consent. In 2022, community activists sued LexisNexis Risk Solutions, alleging that LexisNexis, through Accurant, made the personally identifiable information of people available to law enforcement officers without the people's consent and without law enforcement having to go through a legal process to obtain the information.<sup>74</sup> According to Joseph Cox writing for the news outlet *Vice*, LexisNexis earns millions of dollars through its contracts with governments. For example, the United States Secret Service purchased Virtual Crime Center licenses which allow the Secret Service to connect its datasets with those in public records and other agencies.<sup>75</sup> In 2020, privacy rights activists sued Thomson Reuters alleging that Thomson Reuters sold the personally identifiable information of California residents without their knowledge or consent.<sup>76</sup> At issue was Thomson Reuters' selling of information from its CLEAR<sup>77</sup> database in which it collects public and private information which includes photographs, criminal records, financial and employment information, as well as information on family members and others connected to the people.<sup>78</sup> Those who purchase information aggregated by CLEAR pay a fee to access a

<sup>68</sup> *Id.*; Sam Biddle & Spencer Woodman, *These Are the Technology Firms Lining Up to Build Trump's "Extreme Vetting" Program*, THE INTERCEPT (Aug. 7, 2017), <https://theintercept.com/2017/08/07/these-are-the-technology-firms-lining-up-to-build-trumps-extreme-vetting-program/> [<https://perma.cc/VB6A-G4JY>].

<sup>69</sup> Biddle & Woodman, *supra* note 68.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> Lamdan and Sokkar Harker, *supra* note 67.

<sup>73</sup> "The term 'personally identifiable information' refers to information which can be used to distinguish or trace an individual's identity, such as their name, social security number, biometric records, etc. alone, or when combined with other personal or identifying information which is linked or linkable to a specific individual, such as date and place of birth, mother's maiden name, etc." Memorandum from the Deputy Director of Management, Clay Johnson III, (2007), [https://www.whitehouse.gov/wp-content/uploads/legacy\\_drupal\\_files/omb/memoranda/2007/m07-16.pdf](https://www.whitehouse.gov/wp-content/uploads/legacy_drupal_files/omb/memoranda/2007/m07-16.pdf) [<https://perma.cc/3VCT-M89X>].

<sup>74</sup> CBS and Associated Press, *supra* note 29; Complaint & Demand for Jury Trial, Maria Fernanda Castellanos et al v. LexisNexis Risk Solutions, No. 2022CH07984 (Circuit Court of Cook County, Illinois County Department, Chancery Division Aug. 16, 2022), *supra* note 29 at 2.

<sup>75</sup> Joseph Cox, *LexisNexis "Virtual Crime Center" Makes Millions Selling to the Government*, VICE (Feb. 2, 2023), <https://www.vice.com/en/article/y3p8j5/lexisnexis-selling-data-government> [<https://perma.cc/4GXR-3EJ8>].

<sup>76</sup> Zakrzewski, *supra* note 29.

<sup>77</sup> The CLEAR software provides information in one place so users "can quickly search across thousands of datasets and get accurate details in less time." Thomson Reuters, *CLEAR investigation software* (2023), <https://legal.thomsonreuters.com/en/products/clear-investigation-software> [<https://perma.cc/XW7P-X958>]; Thomson Reuters markets CLEAR to law enforcement, government agencies, and corporations. Thomson Reuters, *Plans and Pricing—CLEAR* (2023), <https://legal.thomsonreuters.com/en/products/clear-investigation-software/plans-pricing> [<https://perma.cc/N3SD-ZWRR>].

<sup>78</sup> Gibbs Law Group, *Thomson Reuters CLEAR Lawsuit*, GIBBS LAW GROUP (2023), <https://www.classlawgroup.com/consumer-protection/privacy/thomson-reuters-clear-lawsuit/> [<https://perma.cc/MW2G-8EF8>].

dossier with information that Thomson Reuters has on a person.<sup>79</sup>

In light of these allegations and the fact that subscription databases provided by LexisNexis and Thomson Reuters are staples in many law libraries, librarians should consider the following questions: What should librarians say to patrons about the research services and sources provided by the library? Should librarians restate to patrons the allegations that have been made against parent companies of research service providers? How will patrons perceive librarians' statements about the allegations against and services offered by the parent companies of subscription databases? What does it mean that companies that have headquarters outside the United States exert influence over the publishing of United States laws? These questions do not have easy answers. Librarians should consider their patrons and the information resources that the patrons will need and recognize that a diversity of information sources is needed. For example, librarians who instruct students who plan to practice law in areas of public interest should feature open access legal information resources because lawyers who work for the public interest may not have access to fee-based resources as do some law firms.<sup>80</sup> In addition, librarians who are providing search strategies and advice on searching should, where possible, feature open access resources in their research consultations because these resources are not fee-based, thus removing cost barriers, and often do not come with the baggage of having been accused of selling people's personally identifiable information without their permission. There is the element of librarianship in which librarians are concerned with helping students and other library patrons find the answers to their research questions or find applicable sources. However, another element of librarianship consists of asking, "What intentions and practices are behind the source?" and "Should we be concerned with the intentions and practices behind the source?" These questions urge librarians and anyone involved in evaluating information to step away from positivism and move to a deeper understanding of both facts and sources.

## Positivism in Librarianship

Positivism is concerned with what can be measured, defined, or otherwise quantified. In Merriam-Webster's dictionary, positivism is defined as "a theory that theology and metaphysics are earlier imperfect modes of knowledge and that positive knowledge is based on natural phenomena and their properties and relations as verified by the empirical sciences."<sup>81</sup> Positivism is concerned with what can be "put in a box" or easily labelled.<sup>82</sup> Or put another way, positivism is concerned with counting or categorizing things. However, looking at the world from a positivistic viewpoint may obscure the true nature of the situation. Henry Giroux describes a study in which workers born in a colonized country worked slower than workers who were

<sup>79</sup> Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, *Cat Brooks et al v. Thomson Reuters Corporation*, No. 21-cv-01418-EMC (N.D. Cal. Aug. 16, 2021), at 1, <https://www.courthousenews.com/wp-content/uploads/2021/08/brooks-thomson-reuters-mtd-ruling.pdf> [<https://perma.cc/UQ9M-G5YE>]. The information collected by CLEAR includes cell phone records in real time, location data from the reading of license plates, DMV records, utility records, and records pertaining to abortion procedures; citing Class Action Complaint and Demand for Jury Trial, *Cat Brooks and Rasheed Shabazz v. Thomson Reuters Corporation*, No. Rg20082878 (Superior Court of California Dec. 3, 2020), *supra* note 29 at 1. The named plaintiff, Cat Brooks, pays a service to remove her personally identifiable information from the Internet, yet CLEAR is able to gather her address, phone number, and information about those who associate with her.

<sup>80</sup> Yasmin Sokkar Harker, *Critical Legal Information Literacy: Legal Information as a Social Construct*, in *CRITICAL INFORMATION LITERACY AND SOCIAL JUSTICE: RADICAL PROFESSIONAL PRACTICE*, 205 (2013) citing Sarah Valentine, *Leveraging Legal Research*, in *VULNERABLE POPULATIONS AND TRANSFORMATIVE LAW TEACHING: A CRITICAL READER* (2011).

<sup>81</sup> Merriam-Webster, *Definition of POSITIVISM* (2023), <https://www.merriam-webster.com/dictionary/positivism> [<https://perma.cc/7WPW-V6RZ>].

<sup>82</sup> HENRY A. GIROUX, *THEORY AND RESISTANCE IN EDUCATION: A PEDAGOGY FOR THE OPPOSITION* 15 (1983).

brought in from elsewhere. Viewing the situation through the lens of positivism leads to the conclusion that workers from elsewhere were more productive (or native workers worked slower). However, local workers may have been slowing down their work as an act of protest.<sup>83</sup> Viewing the situation through the lens of positivism, in the words of Giroux, “recognizes no factors behind the ‘fact.’”<sup>84</sup>

The field of librarianship is grounded in positivism, but it must and can break free from positivism to serve the needs of information seekers. Thirty years ago, Jill Anne Farmer observed that, “For the most part, however, positivism, with its view of a deterministic world that is discoverable, describable, and predictable, underlies many of the assumptions of research in the field.”<sup>85</sup> Furthermore, Farmer sees positivism as outdated.<sup>86</sup> Farmer advocates that librarianship move away from positivism and evaluate legal research from a poststructuralist standpoint.<sup>87</sup> In defining poststructuralism, Farmer notes that “poststructuralism rejects ‘master narratives’ and foundational claims that purport to be based on science, objectivity, neutrality, and scholarly disinterestedness.”<sup>88</sup> Under poststructuralism, texts don’t have one, objective meaning. Instead, words are open to different interpretations and the ideas and experiences of the reader influence the meaning of the text. Farmer asserts, “‘Text’ is used to refer to the entity created by the interactive relationships among the reader, the broader culture, and the work, making the meaning of the product a function of many variables.”<sup>89</sup> Thus the knowledge that the reader brings to the text as well as the cultural context in which the text appears can affect the reader’s interpretation of the text. Nicholas Mignanelli notes a cognitive dissonance between legal research and law librarianship and critical legal theory. Namely, “legal research and law librarianship – is grounded in positivism, while critical legal theory rejects positivism wholesale.”<sup>90</sup> Thus teaching critical legal information literacy and Critical Legal Research requires a questioning of search results, search terms, and search tools instead of taking them at face value.

## Critical Legal Information Literacy

Critical information literacy is asking “why?” and involves asking questions to investigate the information that is presented to us. For example, for Internet search results, we could ask the following questions to think critically about the search results presented: “Is this the best information?”,<sup>91</sup> for whom is this the best information?,<sup>92</sup> who is the intended audience for this information?,<sup>93</sup> what is the reasonableness of operating within a filter bubble? (in other words,

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> Jill Anne Farmer, *A Poststructuralist Analysis of the Legal Research Process*, 85 LAW LIBR. J. 391, 394 (1993) citing Nancy Freeman Rohde, *Information Needs*, in 14 ADVANCES IN LIBRARIANSHIP 49 (Wesley Simonton ed., 1986) and Michael H. Harris, *State, Class, and Cultural Reproduction: Toward a Theory of Library Science, in the United States* in 14 ADVANCES IN LIBRARIANSHIP 211, 221 (Wesley Simonton ed., 1986).

<sup>86</sup> *Id.* at 391.

<sup>87</sup> *Id.* at 391–92.

<sup>88</sup> *Id.* at 392.

<sup>89</sup> Farmer, *supra* note 85.

<sup>90</sup> Mignanelli notes Barkan noted the cognitive dissonance in 1987 and proposed “domesticat[ing]” Critical Legal Studies as a solution and cites Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, 79 LAW LIBR. J. 617, 634–37 (1987). Mignanelli’s solution is that librarians become “genealogists of the law.” Nicholas Mignanelli, *Legal Research and Its Discontents: a Bibliographic Essay on Critical Approaches to Legal Research*, 113 LAW LIBR. J. 101, 126 (2021).

<sup>91</sup> SAFIYA UMOJA NOBLE, ALGORITHMS OF OPPRESSION: HOW SEARCH ENGINES REINFORCE RACISM 5 (2018).

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

why are certain results excluded?),<sup>94</sup> what are the effects of my information resources “being governed by corporate-controlled advertising companies”?<sup>95</sup> As I stated in an earlier article, critical information literacy may need to be reemphasized during discussions with students who are reluctant to discuss biased sources.<sup>96</sup> Critical information literacy comes from critical information theory and critical pedagogy.<sup>97</sup> Critical information theory focuses on culture, sources of information, and the means of accessing these sources.<sup>98</sup> Critical information theory and critical information studies are interchangeable terms used to describe the same concept.<sup>99</sup> Siva Vaidhyanathan has developed what he calls a “rough definition of CIS: Critical Information Studies interrogates the structures, functions, habits, norms, and practices that guide global flows of information and cultural elements. Instead of being concerned merely with one’s right to speak (or sing or publish), Critical Information Studies asks questions about access, costs, and chilling effects on, within, and among audiences, citizens, emerging cultural creators, Indigenous cultural groups, teachers, and students. Central to those issues is the idea of ‘semiotic democracy,’ or the ability of citizens to employ the signs and symbols ubiquitous in their environments in manners that they determine.”<sup>100</sup> This definition emphasizes asking questions through “interrogat[ing] structures, functions, habits, norms, and practices...” and “ask[ing] questions about access, costs, and chilling effects...”<sup>101</sup> Asking questions is important for starting a dialogue to discuss the issues inherent in using information. The definition notes access as a main point. Issues of access to information and the practices of the information provider are especially salient in the legal information context.

Critical legal information literacy involves asking “why?” “how?” and “what undergirds the information?” when evaluating legal information and the creation of legal information. Critical legal information literacy has legal information as its focus, however, even the umbrella term “critical information literacy” could be used when discussing legal information because the goal is to look at the behind-the-scenes framework for the information.

Critical legal information literacy goes beyond evaluating the accuracy of information and delves into how information is a social construct.<sup>102</sup> As Sokkar Harker has stated:

“...critical legal information literacy:

- Describes legal information as a social construct;
- Connects legal information to the people and institutions that produce and publish it; and

<sup>94</sup> *Id.*; Margaret Rouse, *Filter Bubble*, TECHOPEDIA (May 17, 2018), <https://www.techopedia.com/definition/28556/filter-bubble> [<https://perma.cc/ZE2J-YZ6C>].

<sup>95</sup> NOBLE, *supra* note 91.

<sup>96</sup> Latia Ward, *A Librarian’s Experience Teaching Critical Information Literacy*, 41 LEG. REF. SERV. Q. 52, 64–65 (2022).

<sup>97</sup> Eamon Tewell, *A Decade of Critical Information Literacy: A Review of the Literature*, 9 COMMUNICATIONS IN INFORMATION LITERACY, 26 (2015), <https://pdxscholar.library.pdx.edu/comminfolit/vol9/iss1/2> [<https://perma.cc/LQD9-RHRD>].

<sup>98</sup> Krishnaswami, *supra* note 28 at 177.

<sup>99</sup> *Id.*

<sup>100</sup> Siva Vaidhyanathan, *Afterword: Critical Information Studies*, 20 CULTURAL STUDIES 292, 303 (2006).

<sup>101</sup> *Id.*

<sup>102</sup> Sokkar Harker, *supra* note 80 at 207.

- Engages students in a process of problem-posing about who produces legal information, and who benefits from it.”<sup>103</sup>

In addition, Mignanelli asserts that “instructors who subscribe to critical legal information literacy also strive to teach law students to interrogate legal information by exposing them to the processes that shape it.”<sup>104</sup> While these definitions of critical legal information literacy are multi-faceted, here I will focus on the facet of legal information as a social construct.

Legal information is a social construct and that means that the social construct has the potential to change the information we see. Some information is not available unless we go to great lengths to search for it and even then, the information found may be incomplete. For example, generally, state trial court cases are not reported and do not have precedential value,<sup>105</sup> however, some states publish a few of their trial court cases.<sup>106</sup> Prior to the New York Legal Assistance Group’s (NYLAG) settlement with the Board of Immigration Appeals (BIA) in 2022, there were limited avenues for members of the public to access non-precedential, unpublished decisions of the BIA.<sup>107</sup> Filing a Freedom of Information Act request with the BIA did not always yield the desired information as the government could refuse to provide information for reasons such as the decision may have been filed under seal and the decisions would be too difficult to find given the features of the Executive Office for Immigration Review’s (EOIR) database.<sup>108</sup> EOIR will provide designated, unpublished decisions from the past and unpublished decisions in the future according to a schedule.<sup>109</sup> There are still challenges such as the noted exceptions to disclosure, however, the settlement stands to produce greater access to unpublished decisions.<sup>110</sup> While unpublished BIA decisions and state trial court decisions lack precedential authority, researchers and lawyers may want the information they contain. Only the decisions made visible (or easily accessible) by the people who organize the information construct the law and the invisible decisions are not able to be critiqued or used as a foundation for other arguments; it is as if the invisible decisions do not exist.

In addition, the social construction of legal information has the potential to change the information we retrieve, for example, by using generative AI. Generative AI systems (such as ChatGPT and Perplexity AI) “learn patterns and relationships from massive amounts of data, which enables them to generate new content that may be similar, but not identical, to the underlying training data. They process and create content using sophisticated machine learning algorithms and statistical models.”<sup>111</sup> Even with a large language model (LLM), humans have a role in designing and studying how it works.<sup>112</sup> Aside from the foundational task of recognizing

<sup>103</sup> *Id.*

<sup>104</sup> MIGNANELLI, *supra* note 15.

<sup>105</sup> ROY M. MERSKY, DONALD J. DUNN & J. MYRON JACOBSTEIN, FUNDAMENTALS OF LEGAL RESEARCH 23 (8th ed. 2002); STEVEN M. BARKAN, BARBARA BINTLIFF & MARY WHISNER, FUNDAMENTALS OF LEGAL RESEARCH 41 (10th ed. 2015).

<sup>106</sup> MERSKY, DUNN, AND JACOBSTEIN, *supra* note 105 at 23; BARKAN, BINTLIFF, AND WHISNER, *supra* note 105 at 41.

<sup>107</sup> Faiza Sayed, *The Immigration Shadow Docket*, 117 NORTHWESTERN UNIVERSITY L. REV. 893, 910–13 (2023).

<sup>108</sup> *Id.* at 913.

<sup>109</sup> *Id.* at 914 citing Stipulation of Settlement at 1-2, N.Y. Legal Assistance Grp. v. Bd. of Immigr. Appeals, 401 F. Supp. 3d 445 (S.D.N.Y. 2019), *vacated*, 987 F.3d 207 (2d Cir. 2021) (No. 18-cv-9495).

<sup>110</sup> *Id.* at 915.

<sup>111</sup> Katrina Pekar-Carpenter et al., *Science & Tech Spotlight: Generative AI*, GAO SCIENCE, TECHNOLOGY ASSESSMENT, and ANALYTICS (June 2023), <https://www.gao.gov/assets/830/826491.pdf> [<https://perma.cc/W23B-KL2A>].

<sup>112</sup> Karen Hao, *The race to understand the exhilarating, dangerous world of language AI*, MIT TECHNOLOGY REVIEW (May 20, 2021), <https://www.technologyreview.com/2021/05/20/1025135/ai-large-language-models-bigscience-project/> [<https://web.archive.org/web/20231216151408/https://www.technologyreview.com/2021/05/20/1025135/ai-large-language-models-bigscience-project/>]. Hao asserts, “Studies have already shown how racist, sexist, and abusive ideas are embedded in these [large language]

when a response includes a hallucination (false information), for example, a case name that looks real but does not exist,<sup>113</sup> those thinking about critical legal information literacy should seek to know whether the tool is trained on biased information that affects its responses. While critical legal information literacy may be taught or exercised on its own, a related field is Critical Legal Research which has overlapping and similar practices.

## Critical Legal Research

Critical Legal Research consists of research strategies for movement lawyers, lawyers seeking to challenge the status quo,<sup>114</sup> and comes from Feminist Legal Theory, Critical Legal Studies (CLS), and Critical Race Theory.<sup>115</sup> Feminism is “the idea that women and men should have equal political, economic, and social rights.”<sup>116</sup> Feminist Legal Theory began in the 1960s and while it has several branches, two overarching tenets are “recogniz[ing] that the world has been shaped by men, who for this reason possess larger shares of power and privilege” and “women and men should have political, social, and economic equality.”<sup>117</sup> CLS did not begin as a school of legal theory but rather began as a movement that arose to challenge legal thought at a point in time.<sup>118</sup> CLS rebelled against the method of reasoned elaboration which interprets law in a favorable way that conceals the powerful forces that control the law.<sup>119</sup> CLS began in the 1970s and was an organized movement until the 1980s.<sup>120</sup> According to Virginia Wise, scholars started the CLS movement in 1977 in a meeting at the University of Wisconsin and “doctrinaire Marxists” and “prominent liberals” were excluded from this meeting.<sup>121</sup> CLS asserts that legal questions do not have right or definitive answers (the law is indeterminate) and that law is not necessarily coherent. Steven M. Barkan notes: “Much of the CLS enterprise focuses on three interrelated subjects: the incoherency and indeterminacy of legal doctrine, the myth of legal reasoning, and the nature and effects of categorizing legal problems. CLS denies that there is a coherent body of legal doctrine of a distinctive form of legal reasoning. CLS claims that the categories available to classify legal problems mask the incoherency and indeterminacy of legal doctrine, inhibit the growth of the law, and cause injustice by forcing us to treat unequal situations as if they were equal. In attacking these fundamental jurisprudential concepts, CLS

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models. ...Unfortunately, very little research is being done to understand how the flaws of this technology could affect people in real-world applications, or to figure out how to design better LLMs that mitigate these challenges.”

<sup>113</sup> Benjamin Weiser & Nate Schweber, *The ChatGPT Lawyer Explains Himself*, THE NEW YORK TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html> [<https://web.archive.org/web/20231228214018/https://www.nytimes.com/2023/06/08/nyregion/lawyer-chatgpt-sanctions.html>]; Generative AI could radically alter the practice of law, THE ECONOMIST, 2023, <https://www.economist.com/business/2023/06/06/generative-ai-could-radically-alter-the-practice-of-law> [<https://web.archive.org/web/20231228212055/https://www.economist.com/business/2023/06/06/generative-ai-could-radically-alter-the-practice-of-law>]. Steven Schwartz, a lawyer in New York, used ChatGPT to find case law when writing a motion and after the motion was filed with the court learned that ChatGPT had cited fake case law.

<sup>114</sup> MIGNANELLI, *supra* note 15 at 11 n. 61. Noting Nicholas Stump’s “loose framework of CLR methods and strategies for movement lawyers and others engaged in the project of law reform and gives this framework practical application in the struggle for environmental justice in Appalachia,” citing Nicholas F. Stump, *Following New Lights: Critical Legal Research Strategies as a Spark for Law Reform in Appalachia*, 23 AM. U. J. GEN. & SOC. POL’Y & L. 573 (2015); Nicholas F. Stump, *Mountain Resistance: Appalachian Civil Disobedience in Critical Legal Research Modeled Law Reform*, 41 ENVIRONS: ENV’T L. & POL’Y J. 69 (2017); Nicholas F. Stump, *COVID, Climate Change, and Transformative Social Justice: A Critical Legal Research Exploration*, 47 WM. & MARY ENV’T L. & POL’Y REV. 147 (2022).

<sup>115</sup> Mignanelli, *supra* note 90 at 108.

<sup>116</sup> NANCY LEVIT & ROBERT R. M. VERCHICK, *FEMINIST LEGAL THEORY: A PRIMER* 1 (2d ed. 2016).

<sup>117</sup> *Id.* at 12.

<sup>118</sup> ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT: ANOTHER TIME, A GREATER TASK* 4 (2015).

<sup>119</sup> *Id.* at 5, 8.

<sup>120</sup> *Id.* at 24.

<sup>121</sup> Virginia Wise, *Of Lizards, Intersubjective Zap, and Trashing*, 8 LEG. REF. SERV. Q. 7, 8 (1988).

attacks legal research.”<sup>122</sup> Similarly, critical theory “involves challenging the status quo through intellectual analysis.”<sup>123</sup> As a response to the dismantling of civil rights gains, Critical Race Theory began in the 1970s.<sup>124</sup> In 1989, scholars held the first Critical Race Theory workshop in Madison, Wisconsin. Critical Race Theory gathered insights from CLS and radical feminism and expanded on them.<sup>125</sup> Critical Race Theory has principles that while not necessarily agreed on by every critical race theorist, are considered principles of the movement.<sup>126</sup> These principles are “racism is ordinary, not aberrational,” “interest convergence” (dominant groups help oppressed groups when helping is in the interest of the dominant group), “social construction” (race is a socially constructed category, not a biological category), “differential racialization and its consequences” (the dominant society racializes groups according to its needs), “intersectionality and antiessentialism” (one person has multiple characteristics that may apply to different groups), “a unique voice of color” (people of color can inform white people about things the white people did not know and use their stories “to assess law’s master narratives”).<sup>127</sup>

Richard Delgado and Jean Stefancic address the “sameness” of legal scholarship in their seminal article on what has come to be known as Critical Legal Research, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*.<sup>128</sup> They refer to the Library of Congress Subject Headings, the Index to Legal Periodicals, and the West Digest System as functioning as a triple helix that replicates concepts that then appear throughout scholarship and cause the “sameness.”<sup>129</sup> Moreover, they note that people can “break free from the constraints of preexisting thought and offer striking and effective new approaches” and that people who do escape the sameness of thought are often from outside the mainstream.<sup>130</sup> Delgado and Stefancic revisited the concept of sameness in legal scholarship in a subsequent article, *Why Do We Ask the Same Questions – The Triple Helix Dilemma Revisited*. In this article, they note that computerized research, instead of having the potential to cause new ideas to flourish may actually “impede the search for new legal ideas, slow the pace of law reform, and make the legal system less, not more just.”<sup>131</sup> They assert that people who use computer research may experience the following problems: “Drowning in a sea of facts (perseverating)” (finding cases with certain facts, however, these cases do not align with an overarching theory), “Losing the opportunity to browse or frame a metaphor” (print research facilitates looking at nearby categories which can encourage making analogies), “Unwarranted confidence” in computers when computers cannot sense that something is missing, “Formalism and perseveration” (computer research hides the fact that judges could have decided the case in a different way), and “Driving us apart” (people’s tendency to go to websites that share their views and opinions creates a polarizing effect on society).<sup>132</sup> In addition, they propose turning off the computer and thinking “outside the box” as a solution to these problems.<sup>133</sup> Robert Berring asserts that legal

<sup>122</sup> Steven M. Barkan, *Deconstructing Legal Research: A Law Librarian’s Commentary on Critical Legal Studies*, 79 LAW. LIBR. J. 617, 618 (1987).

<sup>123</sup> Jennifer Allison & Harvard Law School Library, *Research Guides: Critical Legal Studies: You Are Welcome Here*, (Nov. 1, 2022), <https://guides.library.harvard.edu/c.php?g=890571&p=6403206> [<https://perma.cc/B7V8-3BU5>].

<sup>124</sup> RICHARD DELGADO & JEAN STEFANCIC, CRITICAL RACE THEORY: AN INTRODUCTION 4 (2023).

<sup>125</sup> *Id.* at 5–6.

<sup>126</sup> *Id.* at 8.

<sup>127</sup> *Id.* at 8–11.

<sup>128</sup> Delgado & Stefancic, *supra* note 25 at 207.

<sup>129</sup> *Id.* at 207–08, 214.

<sup>130</sup> *Id.* at 222–23.

<sup>131</sup> Delgado & Stefancic, *supra* note 26 at 310.

<sup>132</sup> *Id.* at 319–24.

<sup>133</sup> *Id.* at 328.

classification systems create a “world of thinkable thoughts”<sup>134</sup> and that researchers who do not have their origins in research in the world of print and enter law school with their Internet searching skills “are shaping legal information to their existing information world.”<sup>135</sup> Berring asserts that there is so much information now that machine assistance is needed to organize it and moreover, there is a need for individuals to “reconceptualize the structure of legal information” just as Blackstone did many years ago.<sup>136</sup> Yasmin Sokkar Harker suggested that the helix described by Delgado and Stefancic is actually quadruple, with the fourth part being algorithms and artificial intelligence that use the same categories as the triple helix, rank search results in the order that the majority has used them (crowdsourcing), and are created by people who are biased.<sup>137</sup> Thus, the algorithms and AI are biased.<sup>138</sup>

Nicholas F. Stump coined the term “Critical Legal Research”<sup>139</sup> and noted that “critical research, as an inherently *creative* process, by its very nature resists a formulaic application” and offers search methods as “just one potential version of a reconstructed legal research process.”<sup>140</sup> These methods include “internaliz[ing] critical insights” (which includes “de- and reconstruct[ing] legal concepts”), doing “concept-based research” (which involves a search for relevant categories, not just research based on the facts of a situation), using “alternative legal resources” (which include open access and government resources which may present the law without as much commentary as the commercial databases do), engage in “legal scholarly and multidisciplinary research” (which allows the researcher to see outside the legal context), and engage in “unplugging and brainstorming sessions” (which allow researchers to think and to engage with people of diverse outlooks to revolutionize the law).<sup>141</sup> Using these points, Nicholas Mignanelli has suggested strategies for dealing with artificial intelligence in the legal research context. These strategies include “decolonizing the algorithm” (which consists of understanding the algorithms in databases, requiring database vendors to explain how their algorithms work, developing audits of algorithms, and encouraging students to question the objectivity of algorithms), “looking beyond” (which consists of contextualizing the law within the framework of legal and non-legal scholarship, news reports, social media, and the arts), and “unplugged brainstorming” (which means thinking about information found without using artificial intelligence or the assistance of computers).<sup>142</sup>

Noting how subject matter is or is not classified is a key concept in Critical Legal Research because classification affects the way people think and may also be a limiting force when thinking of ways to remedy legal issues. For example, the Library of Congress Subject Headings consist of an interdisciplinary classification scheme that is used worldwide and due to its

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<sup>134</sup> In *Commentaries on the Laws of England*, William Blackstone organized and categorized the common law and later Christopher Columbus Langdell, a past Dean of Harvard Law School, created a first-year curriculum of law study inspired by Blackstone’s categories. The West Publishing Company created the American Digest System which placed legal topics into categories and these categories were inspired by Langdell’s categories. Since people begin to think in alignment with classification systems, “[r]esearchers mature using it, organize their thoughts around it, and it then defines the world of ‘thinkable thoughts.’” Berring cites Dan Dabney as the person he first heard use the term “thinkable thoughts.” Berring, *supra* note 25 at 307–10, 311, n. 13.

<sup>135</sup> *Id.* at 313.

<sup>136</sup> *Id.* at 314–15.

<sup>137</sup> Sokkar Harker, *supra* note 27 at 18–20.

<sup>138</sup> *Id.*

<sup>139</sup> Nicholas Mignanelli, *Critical Legal Research: Who Needs It?*, 112 LAW LIBR. J. 327, 327 (2020).

<sup>140</sup> Stump, *supra* note 28 at 573.

<sup>141</sup> *Id.* at 618–23.

<sup>142</sup> Mignanelli, *supra* note 139 at 340–43.



connection to powerful people, it privileges the views of those with power.<sup>143</sup> After much controversy, the Library of Congress discontinued use of the subject heading “illegal aliens” to describe people and replaced it with “noncitizens” and “unauthorized immigration.”<sup>144</sup> The term “illegal aliens” was outdated as well as dehumanizing.<sup>145</sup> Even John West criticized the classification system in the *American Digest*, a system that was part of providing the foundation of classification schemes in the database known today as Westlaw and said that the *American Digest* exemplified “the false theory that cases and propositions dealing with changing conditions may be made to fit a rigid classification instead of permitting the classification to change gradually with the growth of case law.”<sup>146</sup> Kimberlé Crenshaw noted that a person’s identification or membership in different categories can intersect and be the basis for a type of discrimination that includes all those categories.<sup>147</sup> Traditional anti-discrimination doctrine only allows the selection of one protected class, thus a black woman bringing a discrimination lawsuit must choose the protected class of sex or the protected class of race.<sup>148</sup> Connecting Crenshaw’s theory of intersectionality to Critical Legal Research, lawyers or anyone who wants to effect a change in the law can use a variety of research strategies such as stepping away from the research process to think of new classifications and theories.

## Applying Critical Legal Information Literacy Concepts in the Legal Research Classroom

This article is primarily concerned with critical legal information literacy, however, insights from Critical Legal Research overlap with and inform practices of critical legal information literacy. Librarians who teach legal research can break away from positivism and encourage students to look at the issues behind the production of information and the use of information by interrogating the information structures themselves. Critical legal information literacy is taught in a variety of ways and these different ways begin with problem-posing.<sup>149</sup> Problem-posing deals with discussing issues (communication).<sup>150</sup> While there are many ways to embed critical legal information literacy into a legal research course, the following four ways are a starting point.

### 1. Show the indeterminacy in the law through research problems

While noting that he is using the concept of indeterminacy in law “in a less radical form” than scholars of the Critical Legal Studies movement, Spencer Simons provides suggestions for

<sup>143</sup> Grace Lo, *Biases in Law Library Subject Headings* 101 B.U. L. REV. ONLINE 26, 26–7 (2021).

<sup>144</sup> *Id.* at 30 citing LIBR. OF CONG., LIBRARY OF CONGRESS TO CANCEL THE SUBJECT HEADING “ILLEGAL ALIENS” (2016), <https://www.loc.gov/catdir/cpsol/illegal-aliens-decision.pdf> [<https://perma.cc/A7YU-9SD5>]; *Summary of Decisions, Editorial Meeting Number 03*, LIBR. OF CONG. (Mar. 21, 2016), <https://www.loc.gov/aba/pcc/saco/cpsol/psd-160321.html> [<https://perma.cc/HT7Y-JL2R>].

<sup>145</sup> *Id.* at 34 citing Grace Lo, “Aliens” vs. Catalogers: Bias in Library of Congress Subject Heading, 38 LEG. REF. SERV. Q. 170, 188–89 (2019); Edwin F. Ackerman, *The Rise of the “Illegal Alien,”* CONTEXTS, Summer 2013, at 72, 72–74.

<sup>146</sup> Lo, *supra* note 143 citing John B. West, *Multiplicity of Reports*, 2 LAW LIBR. J. 4, 7 (1909).

<sup>147</sup> Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139–168 (1989).

<sup>148</sup> *Id.*

<sup>149</sup> Ward, *supra* note 96 at 55–56 citing Heidi L. M. Jacobs, *Information Literacy and Reflective Pedagogical Praxis*, 34 THE J. OF ACAD. LIBRARIANSHIP 256, 261 (2008), <https://www.sciencedirect.com/science/article/pii/S0099133308000414> and Eamon Tewell, *The Practice and Promise of Critical Information Literacy: Academic Librarians’ Involvement in Critical Library Instruction*, 79 COLL. & RSCH. LIBR. 10, 27–28 (2018), <https://crl.acrl.org/index.php/crl/article/view/16616/18453> [<https://perma.cc/4FQ2-MYBS>].

<sup>150</sup> PAULO FREIRE, *PEDAGOGY OF THE OPPRESSED* 79 (30th anniversary ed. 2000).

making a legal research exercise emphasize the indeterminacy of the law. These suggestions include not basing the research problem closely on one case,<sup>151</sup> omitting facts that would be necessary for a rule to apply,<sup>152</sup> creating a fact pattern to which no test applies,<sup>153</sup> finding or creating research problems which allow students to compare what courts say they are doing to what the courts actually do in practice,<sup>154</sup> finding or creating a research problem from an area of law in which the judge has a lot of discretion such as bankruptcy,<sup>155</sup> finding or creating a research problem for a statute that requires measuring or valuing something (the students can evaluate what standard to apply),<sup>156</sup> and “hav[ing] issues in the problem for which relevant authority in the jurisdiction is very thin or inconsistent so that the students must look to authority outside the jurisdiction for cases on point, or to other areas of the law for analogies, for guidance to the court.”<sup>157</sup> Emphasizing the indeterminacy of the law is a way to draw attention to the behind-the-scenes information that may play a role in judicial decisions and the social construction of the law. Simons asserts, “Inevitably bound with the subjectivity of the judge however, is the reality that, as perceiving human beings, judges will see many things in the people and facts before them, which, while perhaps beyond the purview of the formal rule in hand, may influence their decision. The influence may be totally invisible in the written decision, or visible only between the lines to the sensitive reader. Developing our students’ awareness of this facet of indeterminacy is essential both to their training as perceptive researchers and as astute strategists.”<sup>158</sup> While average researchers may not have access to all the same information as the judges, thinking about the discretion that judges have in finding answers to legal questions and asking questions about the information that researchers do not have access to is a form of critical legal information literacy.

## 2. Discuss how all relevant information may not be cited or available in a database or collection and why

Another part of critical legal information literacy is thinking about how some topics receive acclaim and amplification and the factors behind the fact of their prominence. Instructors should ask students to think about whose scholarship “gets applauded and whose gets ignored.”<sup>159</sup> Scholars have studied who gets cited and who does not<sup>160</sup> and that such patterns form a “canon of accepted thought.”<sup>161</sup> When homogenous scholars primarily cite themselves when writing

<sup>151</sup> Spencer L. Simons, *Navigating through the Fog: Teaching Legal Research and Writing Students to Master Indeterminacy through Structure and Process*, 56 J. LEGAL EDUC. 356, 370–71 (2006). When there is a case on point on which the research problem is modeled, Simons notes that the students will do research that is only “a glorified treasure hunt.”

<sup>152</sup> *Id.* at 371.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 371–72.

<sup>155</sup> *Id.* at 372. Simons provides an example of a legal research problem involving a judge’s determination on whether an asset is “necessary to an effective reorganization” (citing 11, U.S.C. § 3 62(d)(2)(B)).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 373.

<sup>158</sup> *Id.*

<sup>159</sup> “Finally, we should be teaching about the politics of peer review and how it relates to social policy, how in an information society not even just who writes and researches and publishes but who gets the recognition for doing so; whose work gets applauded and whose gets ignored.” These words were from Caroline Ball’s remarks which were read by Naomi Smith during the live webinar *Librarians for Critical Digital Justice* on March 23, 2023. A recording of the webinar is available on YouTube. UCL Information Studies, *Librarians for Critical Digital Justice*, YouTube (Mar. 24, 2023), <https://www.youtube.com/watch?v=d8h1AREn5t0> [<https://perma.cc/Y86A-SCMC>].

<sup>160</sup> Farmer, *supra* note 85 at 401 citing Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561-62, 576 n. 71 (1984). Delgado found that minority scholars and radical feminist writers were cited less often.

<sup>161</sup> *Id.* citing Fred R. Shapiro, *The Most-Cited Articles from The Yale Law Journal*, 100 YALE L.J. 1449, 1457 (1991).

about other groups, their writings have the potential to obscure the viewpoints that these other groups would convey.<sup>162</sup> A history of racial exclusion in institutions of higher learning has fostered biased citation patterns.<sup>163</sup> Exclusion based on gender also exists. As a response to finding out that work by four of their members was “inadequately cited or entirely omitted in other relevant publications,” 12 Women Scholars developed a list of best practices for journals to use in the review process to ensure citations to diverse people.<sup>164</sup> The goal is to recognize knowledge from diverse people even when the knowledge is not recognized by the mainstream society.<sup>165</sup> Students should think about using a variety of sources and consider many viewpoints to view research problems from a variety of angles which may help them come up with novel ideas. Using a variety of sources aligns with the Critical Legal Research practices of using “alternative legal resources” and “engaging in “legal scholarly and multidisciplinary research.”<sup>166</sup> While Farmer speaks in the context of special libraries when she asserts that librarians “can also help their clientele understand that what they are able to find is not equivalent to a whole universe of information or even a random subset, but rather to that particular universe found economically, politically, and/or personally expedient or essential to publishers, editors, and librarians,”<sup>167</sup> her observations are applicable to other areas of research. In research, databases may have limitations on their content coverage that relate to dates and subject matter, algorithms in databases affect what results are returned in response to search terms, collection development policies at libraries may exclude items or perhaps there are items that a library cannot obtain, and publishers may be motivated by the potential to make money and neglect publishing on topics where the profit-making potential is not as great. Researchers should think of all of this when conducting research.

### **3. Discuss the implications of using subscription databases and the reification of legal categories within these databases**

Critical legal information literacy challenges researchers to think about why information is presented in a certain way or the factors behind the interface. In legal research courses, students may consider the comprehensiveness and relevancy of search results and tools. The editorial annotations (headnotes, key numbers, synopses, etc.) provided by commercial publishers provide information about the law yet these annotations are also capable of characterizing the law in a certain way or being biased. Susan Nevelow Mart’s exercise on algorithms has students conduct the same search in Google Scholar, Lexis, and Westlaw and then compare the results.<sup>168</sup> Sokkar Harker suggests problem-posing and discussing the West Topic and Key Number System, how it is used, and who creates algorithms and how algorithms function.<sup>169</sup> Stump states that using open access resources without all the editorial enhancements presents the law in a less biased way and

<sup>162</sup> Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. OF PA. L. REV. 561–578 (1984). Delgado was discussing white scholars’ writing about civil rights law affecting people of color.

<sup>163</sup> Victor Ray, *The racial exclusions in scholarly citations (opinion)*, INSIDE HIGHER ED (Aug. 26, 2019), <https://www.insidehighered.com/advice/2018/04/27/racial-exclusions-scholarly-citations-opinion> [<https://perma.cc/CM6G-JFHT>].

<sup>164</sup> 12 Women Scholars, *A Disturbing Pattern: The entrenched inequity of not appropriately citing the scholarship of women and people of color (opinion)*, INSIDE HIGHER ED (Aug. 26, 2021), <https://www.insidehighered.com/advice/2021/08/27/entrenched-inequity-not-appropriately-citing-scholarship-women-and-people-color> [<https://perma.cc/HA8X-3CTF>].

<sup>165</sup> See Cite Black Women, *OUR PRAXIS*, CITE BLACK WOMEN, <https://www.citeblackwomencollective.org/our-praxis.html> [<https://perma.cc/C24P-KN2R>]. “Citation as a practice allows us to engage with voices so often silenced or left behind.”

<sup>166</sup> Stump, *supra* note 28 at 619–21.

<sup>167</sup> Farmer, *supra* note 85 at 402.

<sup>168</sup> Susan Nevelow Mart, *The Algorithm as a Human Artifact: Implications for Legal [Re]Search*, 109 LAW LIBR. J. 387, Appendix A (2017).

<sup>169</sup> Sokkar Harker, *supra* note 27 at 23–24.

can even provide different search results than those found by using Westlaw's algorithms.<sup>170</sup> Along with other exercises, Krishnaswami suggests that students compare how subscription databases present regulatory information with how open access databases present regulatory information in addition to thinking about the parties, both hidden and visible, in the regulatory rulemaking process.<sup>171</sup> Editorial annotations in subscription databases can influence researchers' perceptions of the law. Krishnaswami states, "Introducing students to regulatory resources on government websites is a viable starting point. Students' surprise about using this resource reveals their assumptions about the production of information, the quality of information sources, and intellectual property. Beginning the lesson with a discussion about the fact that government information is not protected by copyright and can therefore be manipulated by private publishers is a good starting point. Students can contrast how Westlaw or Lexis reuses these primary materials with how free resources like govpulse.us, regulations.gov, or federalregister.gov present primary materials. Comparing the breadth of resources on an agency website with resources on a private publisher's site pushes students to question and contrast these resources, drawing their own conclusions and critiques about the sources of information."<sup>172</sup> Teaching students to analyze how the information is presented and what information is presented is key. Analyzing the presentation of the information is related to the Critical Legal Research task of "concept-based research"<sup>173</sup> in which researchers look for categories and classifications and then contemplate the search results may lead to the development of new categories and classifications to deal with legal issues more effectively.<sup>174</sup>

#### 4. Discuss Information Hegemony and Surveillance

Critical legal information literacy challenges researchers to think about who profits from the buying and selling of legal information and the provision of legal information by data analytics companies that also provide background information on people to government agencies. Instructors and students could discuss the consolidation of commercial legal publishing into a few hands over a period of time, how three companies (Thomson Corporation, RELX, and Wolters Kluwer) dominate commercial legal publishing,<sup>175</sup> and implications for the future of legal information. Reflecting on information hegemony overlaps with the Critical Legal Research process of internalizing the insight that a handful of commercial legal publishers exerts a major influence over the legal information products that are in the market of legal information.<sup>176</sup>

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<sup>170</sup> "On these more neutral, alternative legal resources [GPO FDsys and Cornell Legal Information Institute], a researcher may then analyze the retrieved primary authorities with the commercial channeling agents removed." Stump, *supra* note 28 at 640. Govinfo replaced GPO FDsys in December 2018. Government Publishing Office, *About Us*, (n.d.), <https://www.govinfo.gov/about> [https://perma.cc/V57F-JSAM].

<sup>171</sup> Krishnaswami, *supra* note 28 at 200.

<sup>172</sup> *Id.* at 197. The creators of GovPulse.us, Andrew Carpenter, Bob Burbach, and Dave Augustine, partnered with the Office of the Federal Register to create Federal Register 2.0 for its launch on July 26, 2010. David S. Ferriero, *Coming Soon: Federal Register 2.0* (July 22, 2010), <https://aotus.blogs.archives.gov/2010/07/22/coming-soon-federal-register-20/> [https://perma.cc/5PFM-ZEXR].

<sup>173</sup> Stump, *supra* note 28 at 619.

<sup>174</sup> See Delgado & Stefancic, *supra* note 26 at 328 "Such lawyers need to practice thinking 'outside the box,' reinventing, modifying, flipping, and radically transforming legal doctrines and theories imaginatively and in brainstorming sessions with other reformist lawyers."

<sup>175</sup> Arewa, *supra* note 31 at 821. Arewa states, "The legal publishing industry is characterized by three major players: the Thomson Corporation, which owns Westlaw, Reed Elsevier, which owns Lexis, and Wolters Kluwer," citing Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 CAL. L. REV. 1673, 1698 (2000). Arewa goes on to state, "Industry concentration is by no means a recent phenomenon, and the legal publishing market has typically included dominant firms." As stated above, the company Reed Elsevier became RELX Group in 2015. SVENGALIS, *supra* note 36.

<sup>176</sup> Stump, *supra* note 28 at 618. Stump states, "Additionally, a reformist-minded attorney ought to familiarize herself with the historical development of the legal publishing industry. That a transnational triumvirate of legal publishers almost exclusively controls the

Those who teach legal research should discuss with students the meanings of using subscription databases when the parent companies that provide these databases have been accused of selling personally identifiable information of people without permission.<sup>177</sup> Lamdan has asserted that search terms and other information used by researchers in Westlaw and LexisNexis could be made available to government agencies such as Immigration and Customs Enforcement.<sup>178</sup> One of many questions to ask is, "What is going on behind-the-scenes with the information that lawyers enter into a database?" Lawyers owe their clients a duty of confidentiality.<sup>179</sup> Lamdan asks, "Are Westlaw and LexisNexis keeping records of lawyers' research and, through their parent companies, making it available to their law enforcement clients? And if so, does exposing your legal search terms constitute a breach of confidentiality?"<sup>180</sup> Students should discuss the implications of using legal research resources that are distributed by corporations involved in surveillance and what surveillance of legal research tools means for attorneys who have ethical obligations to their clients.

While the four practices above were designed for teaching law students to do legal research, they are applicable in any information setting. Some public libraries have legal information resources available in print, through subscription databases, and through open access databases or through some combination of the three. For example, the Austin Public Library in Austin, Texas provides access to *Gale OneFile: Insurance and Liability*, a subscription database as well as a legal research guide and Texas legal forms.<sup>181</sup> The Henrico County Public Library in Henrico, Virginia, provides links to legal information at its website.<sup>182</sup> In the past, there has been a presentation on conducting legal research for non-lawyers or the general public, at the Tuckahoe Area Branch of the Henrico County Public Library.<sup>183</sup> In addition, the American Association of Law Libraries provides an online, open access, Public Library Toolkit which has state-specific resources for public librarians.<sup>184</sup> When researchers use databases and generative AI tools to find legal information, they should think about what behind-the-scenes factors have influenced the information they are able to gather or not gather in addition to the helpfulness of the information

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means of commercial legal resource production, and that West in particular has held a century-long hegemony over legal categorizations, is extraordinarily pertinent to the attorney attempting to transcend existing systems of legal-conceptual constraint," citing See Ian Gallacher, "Aux Armes, Citoyens! " *Time for Law Schools to Lead the Movement for Free and Open Access to the Law*, 40 U. TOL. L. REV. 1, 51 (2008).

<sup>177</sup> Complaint & Demand for Jury Trial, Maria Fernanda Castellanos et al v. LexisNexis Risk Solutions, No. 2022CH07984 (Circuit Court of Cook County, Illinois County Department, Chancery Division Aug. 16, 2022), *supra* note 29; Order Granting in Part and Denying in Part Defendant's Motion to Dismiss, Cat Brooks et al v. Thomson Reuters Corporation, No. 21-cv-01418-EMC (N.D. Cal. Aug. 16, 2021), *supra* note 79; Class Action Complaint and Demand for Jury Trial, Cat Brooks and Rasheed Shabazz v. Thomson Reuters Corporation, No. Rg20082878 (Superior Court of California Dec. 3, 2020), *supra* note 29.

<sup>178</sup> Cora Currier, *Legal Scholars to LexisNexis, Thompson Reuters: Stop Helping ICE*, THE INTERCEPT (Nov. 14, 2019), <https://the-intercept.com/2019/11/14/ice-lexisnexis-thomson-reuters-database/> [<https://perma.cc/U99V-Y5Y4>]; Lamdan, *supra* note 58.

<sup>179</sup> American Bar Association Center for Professional Responsibility, *Rule 1.6: Confidentiality of Information*, (n.d.), [https://www.americanbar.org/groups/professional\\_responsibility/publications/model\\_rules\\_of\\_professional\\_conduct/rule\\_1\\_6\\_confidentiality\\_of\\_information/](https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/) [<https://archive.is/aHdA5>].

<sup>180</sup> Lamdan, *supra* note 58.

<sup>181</sup> Austin Public Library, *Legal | Austin Public Library*, (n.d.), <https://library.austintexas.gov/digital/legal> [<https://web.archive.org/web/20231228225218/https://library.austintexas.gov/digital/legal>].

<sup>182</sup> Henrico County Public Library, *Legal Research Resources*, HCPL (2023), <https://henricolibrary.org/news/library-news/entry/news-and-events/2023/11/09/legal-research-resources> [<https://web.archive.org/web/20231228231036/https://henricolibrary.org/news/library-news/entry/news-and-events/2023/11/09/legal-research-resources>].

<sup>183</sup> Henrico County Public Library, *Legal Research 101*, LIBCAL, <https://henricolibrary-va.libcal.com/event/10748046> [<https://web.archive.org/web/20231228231038/https://henricolibrary-va.libcal.com/event/10748046>].

<sup>184</sup> Marsha Thomas, Betsy Sandison, & American Association of Law Libraries Legal Information Services to the Public Special Interest Section, *Public Library Toolkit*, LEGAL INFORMATION SERVICES TO THE PUBLIC SIS, <https://www.aallnet.org/lispsis/resources-publications/public-library-toolkit/> [<https://web.archive.org/web/20231228231156/https://www.aallnet.org/lispsis/resources-publications/public-library-toolkit/>].

found.

## Conclusion

Critical legal information literacy is key for both researchers in any context and for the lawyers who conduct legal research for client matters. Critical legal information literacy involves asking, “why?”, evaluating legal information as a social construct, and investigating the behind-the-scenes factors that affect information one receives. Acknowledging information hegemony and how it affects the results of research as well as moving beyond positivism are key. When navigating the legal-information industrial complex, one needs to ask critical questions. The four practices above: designing legal research problems with indeterminacy of the law built-in (or even just thinking about the indeterminacy of the law), discussing how relevant information may not be cited or available and why, discussing the implications of using subscription databases and the reification of legal categories within these databases, and discussing information hegemony and surveillance is something all researchers should do.

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