

Open Access to Law

the practice of archiving cases /
the business of deciding cases

Potentially useful distinction #1

Transparency

optics

- public participation in decisionmaking
- democratic accountability
- disclosure
- fairness / due process
- nation of laws

Access

innovation, competition, & aggregation:

- non-ontology search
- interfaces & visualization
- better abridgements
- statistical analysis
- meta-headnotes
- machine/rule learning
- reverse indices
- cross-reference systems
- RSS / maps / mashups
- international comparison

Potentially useful distinction #1

Transparency

optics

Access

innovation, competition, & aggregation



USEFUL DISTINCTION between
democratic values & research values.

Potentially useful distinction #2

Direct court functions

- Deciding cases
- Resolving procedural issues

Indirect court functions

- Designing admin policies
- Archiving legal decisions
- Maintaining public norms

Potentially useful distinction #2

Direct court functions

- Deciding cases

Hollingsworth v. Perry: "This case, too, involves issues subject to intense debate in our society. The District Court intends not only to broadcast the attorneys' arguments but also witness testimony. **This case is therefore not a good one for a pilot program.**"

Indirect court functions

- Designing admin policies

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Indirect court functions

- Designing admin policies

Breyer, dissenting: "But the wisdom of a camera policy is primarily a matter for the proper administrative bodies [judicial councils, under 28 USC § 332] to determine. This Court has no legal authority to address that larger policy question except insofar as it implicates a question of law."

Potentially useful distinction #2

Direct court functions

- Deciding cases

Indirect court functions

- Designing admin policies

USEFUL in indicating debate over court's role in setting access policies as matter of law vs. matter of administration

LESS USEFUL in artificially separating out legal practice from legal access

Potentially useful distinction #2

Direct court functions

- Deciding cases

Indirect court functions

- Designing admin policies

motivating procedural change from within the law itself?

"I think the only time that you're going to draw sufficient interest in the legal process is when you have an issue such as the issues here, that people think about, talk about, debate about and consider."

Potentially useful distinction #3

Public archivists

- agencies producing internally collected data on their own websites
- meta-agencies collecting and aggregating data
 - data.gov
 - OIRA
- public-funded archivists

Private archivists

- entities buying or scanning gov't data and reformatting it into useful databases & research tools
 - Lexis / Westlaw
 - Google
 - Amazon
 - Law.gov

Potentially useful distinction #3

Public archivists

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Private archivists

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LESS USEFUL DISTINCTION given possibility of open privately funded archives that are better at achieving values of transparency and access

Public-private partnerships?

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 - presumed higher value of "Lexus Naive." WHY?

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- **Law.Gov** --> foundation funding / intrinsic motivations / desire for better & more equitable research tools

Collective action challenge #1

design of mechanism for representation of courts, agencies, & larger public --- in accord w/ transparency & access values.

- who is implicated by this mechanism?
- is the best design strategy to convene everyone who might be implicated, or to do this through a quieter set of administrative tweaks?
- when gov't is info-provider rather than service provider, what is source of values and norms?

Collective action challenge #1

design of mechanism for representation of courts, agencies, & larger public --- in accord w/ transparency & access values.

- two principles to keep in mind:
 - deal-striking ability and clear goal-oriented approach of well-organized private interests (more diverse than just Lexis/Westlaw)
 - Google Books Settlement: well-organized company relatively easily achieves relative privatization of all human knowledge.
 - meanwhile, public misses chance for national public cyberlibrary with *google-as-mechanism* rather than *google/publishers-as-owner*.
 - unique linguistic economies of legal archives

Open Access to Law vs. Science

Law articles

Low hanging fruit of open access archiving because student-edited, publicity-driven, tight connection to univs, etc.

Science articles

More complicated commercial interests; institutional mechanisms allegedly dependent upon cross-subsidization.

Open Access to Law vs. Science

Raw materials of law

Legal texts created within hierarchical control structures & specific jurisdictions. Thus comparative sanctity of legal texts.

- only invoking authentic and verifiable statements
- getting those statements exactly right (Wachtell's inadvertent inclusion of form lg. in JPM/Bear K)
- speech acts

Raw materials of science

Data and experiments.

- less dependent upon integrity of textual invocation; text as artifact of experiment
- can fly more by seat of pants, inventing-around and employing whatever research tool seems appropriate

Open Access to Law vs. Science

Consequences of relative differences in linguistic economies.

- More value to be derived through restricting access to common legal vocabulary.
 - **legal information providers**: oligopoly rents through non-marginal pricing of necessary communication tools
 - **law schools**: teaching the vocabulary
 - **bar associations**: limiting those who can *use* the vocabulary
 - fluency isn't enough for accreditation
 - preventing automation of standard legal processes
 - **law firms**
 - collect interpretive & insurance fees from clients deemed unable to use language on their own

Open Access to Law vs. Science

Consequences of relative differences in linguistic economies.

- Less free-wheeling use of research tools; more concern in getting things right, both at point of production & point of use of text.
- More of a need to
 - employ hybrid of indirect administrators & direct actors
 - implicate not just librarians and administrators but the players themselves
 - open access: faculty
 - open law: lawyers & judges (day-to-day mgmt of vocabulary)

Collective action challenge #2

design of archival tools for agencies/courts with common interests but disparate archiving traditions:

- *ex ante* standardization and archival of cases with common metadata / protocols / principles of redaction / document structuring tools.

and / or

- *ex post* use of data-harvesting, transcription, & OCR tools to recognize patterns and chunk documents into component parts.

Collective action challenge #2

design of archival tools for agencies/courts with common interests but disparate archiving traditions:

- how to get info to flow into common standards & repositories
 - esp when building stds & metadata protocols from ground-up.
 - to what extent is there even agency or authority to impose such a std in the fed or state cts systems?
 - judicial conferences vs. OMB/OIRA
 - also: not having © can make things *harder*, given lack of ability to build out rough standardized repository thru K/licensing restrictions or upstream funders

What's the value that Lexis & Westlaw provide?

- clearly formatted data (enables easy linkage analysis)
- rich metadata
- standardization / interoperability
- reliability / insurance (rigorous data entry & triple-checking)
- authoritativeness (Shepard = not relying on out-of-date law)

= normalization of raw data into common resource.

= authenticated registry & repository of primary/secondary legal materials.

= \$4 billion revenues for Lexis (2009)

Harvard Law School OA Policy

The Faculty of the Harvard Law School is committed to disseminating the fruits of its research and scholarship as widely as possible. In keeping with that commitment, the Faculty adopts the following policy: Each Faculty member grants to the President and Fellows of Harvard College permission to make available his or her scholarly articles and to exercise the copyright in those articles. More specifically, each Faculty member grants to the President and Fellows **a nonexclusive, irrevocable, worldwide license to exercise any and all rights under copyright relating to each of his or her scholarly articles**, in any medium, and to authorize others to do the same, provided that the articles are not sold for a profit.

NIH Public Access Policy

The policy is intended to:

1. create a stable archive of peer-reviewed research publications resulting from NIH-funded research to ensure the permanent preservation of these vital published research findings;
2. secure a searchable compendium of these peer-reviewed research publications that NIH and its awardees can use to manage more efficiently and to understand better their research portfolios, monitor scientific productivity, and ultimately, help set research priorities; and
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Disentangling public-private partnerships, or starting fresh?

Disentangling

Extract public domain material from privatized databases.. even in face of clickwrap contracts & © assertions? See Grimmelmann, bit.ly/cm42vx.

Starting Over

Courts themselves, or interested lawyers, design mechanisms for collecting & distributing caselaw.

- Direct: PACER.
- Indirect: RECAP.

Question: Westlaw & Lexis already have lots of well-formatted data and have solved authenticity, reliability, standardization, & metadata problems. To what extent can these solutions or practices be borrowed?

Design Principles

implicate not just technical archivists & computer scientists, but also on-ground attorneys, clerks, & judges themselves. what's the "rough consensus & running code" around which diff levels & branches of gov't can congregate? and how to convince individuals within this system to think about digital preservation and downstream digital implications of what they do?



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