OPEN ACCESS IN LAW TEACHING: A NEW APPROACH TO LEGAL EDUCATION

by
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The "open access" movement seeks to change our approach to the distribution of scholarship in the fields of science, medicine, the social sciences, and law. This Essay argues for the application of these principles to legal education itself. Open access would mean greater flexibility, interaction, and innovation in the creation of course materials. It would lead to new teaching methods and new forms of feedback between student and professor. Open access centers on particular legal subject areas could facilitate national and international collaboration. Ultimately, the open access law school would ameliorate the growing standardization and commodification of legal education by drawing on global pools of information while at the same time providing more localized feedback to individual students.

I. INTRODUCTION

The "open access" movement has focused on freeing up access to research and scholarship, particularly in the fields of science, social science, and now law. As prices have risen for scientific journals and legal databases, more and more potential researchers are being shut out from the information they need. While the most alarming examples come from the world of medicine, where lives truly are at stake, restricting access to legal periodicals may impact the ability of a particular plaintiff to achieve a just result.[1] The efforts of the open

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[1] *See* Michael W. Carroll, *The Movement for Open Access Law*, 10 LEWIS & CLARK L. REV. 741, 742 (2006) (discussing the development of enterprise liability from a student comment in the *Fordham Law Review*). *But see* Michael J. Madison, *Open Access and the*

access movement in law will shape the future contours of how the legal academy conducts its research. Access to scholarship will determine issues such as the type of databases that we go to for scholarship, the continued viability of law reviews, and even the nature of legal scholarship itself.

My contribution to this conference, however, is to shift the focus. The open access movement has the potential to craft even greater changes to another aspect of legal academia—namely, teaching. For most law professors, whose institutions give them ready access to the legal databases they need, open access may not have much of an immediate impact on their scholarly pursuits. Open access in law teaching, however, has the potential to revolutionize our approach to the classroom. Casebooks, supplements, course coverage, feedback, and even the structure of law school itself could be completely overhauled by an open access approach. Ultimately, the classroom of the future may be as changed by open access as it was by the case method.

The following describes the ways in which an open access approach may change legal education. Part II briefly describes the basics of an open access approach. Part III discusses an open access approach to course materials. Part IV discusses an open access approach to teaching practice and methodology. Finally, Part V talks about how open access could change the nature and structure of legal education itself.

II. THE OPEN ACCESS APPROACH

I begin with a brief discussion of what open access would mean in the context of legal education. In my view, open access means three things: (1) free electronic access to the materials; (2) the chance for individuals to access, copy, and even change the materials in electronic form; and (3) the chance to collaborate with others outside the constraints of a commercial and/or copyright-protected regime.[2] These three facets are what make the open access approach so attractive, and they are necessary to produce the benefits of an open access approach. These benefits are discussed below.

Open access would facilitate exchange. One of the most important features of open access is the increased exchange of ideas. We have already seen the benefits to legal scholarship from the free electronic access to working papers through the Berkeley Electronic Press (bepress)[3] and the Social Science Research Network (SSRN).[4] Both the free and the electronic aspects of accessibility are critical. Free access means granting access to those who cannot

Idea of the Law Review, 10 LEWIS & CLARK L. REV. 901, 909-10 (2006) ("[L]aw reviews aren't supposed to help practicing lawyers solve their clients' problems.").

[2] In previous work, I used the term "open source" to describe such an approach. *See* Matthew T. Bodie, *The Future of the Casebook: An Argument for an Open-Source Approach*, 56 J. LEG. EDUC. (forthcoming Fall 2006) (manuscript at 12), *available at* http://ssrn.com/abstract=691985.

[3] Berkeley Electronic Press, http://www.bepress.com/.

[4] Social Science Research Network, http://www.ssrn.com/. *See also* Lawrence B. Solum, *Download It While It's Hot: Open Access, Intermediaries, and the Dissemination of Legal Scholarship*, 10 LEWIS & CLARK L. REV. 841 (2006).

pay, and to those who would have to incur substantial transaction costs in paying (such as seeking later reimbursement). Electronic access may be even more important, however, as it reduces the transaction costs in retrieving the information and provides near instantaneous availability. A trial transcript may be free to members of the public, but few are likely to see it if they have to pick it up at the court clerk's office, and it will probably take a while to get there in hard copy. Electronic access is necessary in order to take advantage of new technologies.

Open access would facilitate individualization. When it comes to open access for scholarship, the ability to alter or change the underlying materials is less relevant. Word processing software may make it easy to incorporate electronic research into your own articles by cutting and pasting, but this is a relatively minor convenience. However, when it comes to course materials, manipulation of the materials is essential in allowing individual professors to craft their own approach. If I and my students had free access to a set of hardcover casebooks, my students would be saved the expense, but I would still be stuck with that set of materials. However, if the casebook came in an electronic format that I could edit to suit my own needs, it would allow for much more individualization. As discussed below, this level of flexibility would unleash creativity and provide professors with the ability to more finely tune their courses.

Open access would facilitate new technologies. Given free access to editable materials that are not restricted by a commercial relationship, new technologies will develop to best exploit those materials. Commercial or intellectual property restrictions, on the other hand, will impede this development. As I described in my article about open source casebooks, contractual and copyright concerns create real difficulties for the open source model, regardless of the benefits that such casebooks may bring.[5] Ironically, most of the materials in casebooks are either non-copyright-protected government documents or copyright-protected scholarly articles (which the authors would love to see in a casebook). But the layer of copyright and contractual defenses around the electronic versions of these materials creates a significant hurdle for any casebook project. This is just one example. If access restrictions could be cleared out of the way, new technologies would allow professors to use legal materials like never before. An open access approach would ensure that new technologies could be used to their best advantage, rather than trying to shoehorn new technologies into existing legal and commercial regimes.

III. OPEN ACCESS AND COURSE MATERIALS

In beginning a discussion of course materials, we should first delineate what "course materials" actually are. The centerpiece of law school course materials is the casebook. However, there are also a variety of other published materials that may be assigned by the professor or that students may purchase

[5] Bodie, *supra* note 2, at 22.

to assist in their studies. Such materials may include statutory supplements, hornbooks, commercial outlines, edited volumes (such as Foundation Press's "Foundations of . . ." series),[6] and practice materials. Additionally, there are a growing number of non-print resources: PowerPoint slides, computer programs with lessons and exercises,[7] videos, and blogs.[8] The PC and Internet revolutions continue to provide new ways to deliver content to professors and students, and by the time this Article appears there will likely be even more.

There is much to like about the current state of legal course materials. Professors have a plethora of casebooks from which to choose. The casebooks are generally written by talented and insightful professors, are carefully edited by legal publishers, and are frequently updated with supplements and new editions. Students also have a wide variety of supplements from which to choose, from traditional hornbooks to Computer-Assisted Legal Instruction (CALI) exercises. Professors can also add new materials fairly easily, either by photocopying or by posting an electronic copy on a class website. In fact, the new world of websites such as The West Education Network (TWEN) and LexisNexis web course pages offers an easier and quicker way to access class materials. Widespread use of electronic casebooks might not be too far down the road.

However, the current system also imposes legal and procedural barriers. Casebooks, hornbooks, statutory supplements, and commercial outlines all have copyright protection. In their bound and published form, such materials cannot be edited, other than by the crude method of skipping some pages and adding in other materials. Even if such materials become electronically accessible, it is not clear that they will be produced in editable form.[9] Thus, professors are stuck with choosing one of a variety of competing visions, rather than having the ability to alter an existing form to better suit their own pedagogical preferences. And as in the world of scientific publishing, there are more and more concerns about the cost of legal classroom materials. Casebooks have crept close to, and in some cases over, $100, and casebook authors have become concerned about the costs imposed on students.[10]

An open access approach to classroom materials would bring greater flexibility and individuality to class materials while greatly expanding the potential sources for such materials. Under an open access system, professors would be free to use, edit, and agglomerate class materials however they see fit. If such materials were not copyright-protected, were in electronically editable formats, and were distributed on the web, we would open up the capacity for professors to create individualized materials while at the same time receiving

[6] *See, e.g.*, FOUNDATIONS OF CORPORATE LAW (Roberta Romano ed., 1993).

[7] *See, e.g.*, Center for Computer-Assisted Legal Instruction, CALI Lessons Home, http://www2.cali.org/index.php?fuseaction=lessons.home.

[8] *See, e.g.*, Legal Theory Lexicon, http://legaltheorylexicon.blogspot.com/.

[9] For example, electronic casebooks could arrive in .pdf form, which is generally not editable by the reader.

[10] Ian Ayers, *Just What the Professor Ordered*, N.Y. TIMES, Sept. 16, 2005, at A27.

an extraordinary amount of feedback from other professors about those materials.

In my prior article on casebooks, I described how such a system might work.[11] Essentially, creators of an open source casebook would create a database with all of the individual components of a casebook. The database would contain editable files with cases, statutes, regulations, model codes, restatements, case notes, problems, and pieces of explanatory text. Professors could then pick and choose their materials and assemble them into a package for the course. Along with the individual components, the database could also allow individual professors to upload their own final compilations, either whole or in sections, to give other professors a starting point for their own casebooks. As more and more professors contributed materials to the database, ultimately it would contain all the materials a professor could want (updated daily by users).

Such open source casebook projects would not need to be limited to the materials traditionally found in casebooks.[12] As currently constituted, casebooks are a mélange of primary and secondary sources: cases, statutes, regulations, restatements, commentaries, problems, case notes, and snippets from books and law reviews. By putting the casebook into electronic form, an even greater variety of materials could be put into the course's "casebook." Professors could post PowerPoint slides, audio clips, or even videos as part of the course's set of materials. Moreover, an open access approach would facilitate greater incorporation of primary materials into law school courses. Once casebooks had been deconstructed into their (electronic) components, it would be simple to add the latest complaint that had been filed in a high-profile case, or even link to court transcripts and evidence. During the federal prosecutions of Enron executives Kenneth Lay and Jeffrey Skilling, the government created a website with press releases and trial exhibits in .pdf form.[13] It would be easy to add certain exhibits to the electronic casebook during the course of the semester, a task that is more cumbersome when dealing with a set of hard-copy course materials.

Of course, legal publishers could adopt an electronic format for their casebooks, which would allow for many of the improvements discussed above. Moreover, three of the biggest casebook publishing houses are owned by the same companies that own the two legal database providers, making integration of online electronic materials even easier.[14] What benefits would an open access approach bring?

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[11] *See* Bodie, *supra* note 2, at 14.

[12] *Id*. at 15.

[13] U.S. Department of Justice, Enron Trial Exhibits and Releases, http://www.usdoj.gov/enron/index.html.

[14] Foundation Press and West Group are owned by Thomson West, which also owns the Westlaw database. *See* Foundation Press, http://www.westacademic.com/professors/foundationpress/default.aspx. LexisNexis Publishing is owned by Reed Elsevier, which also owns the LexisNexis database. *See* LexisNexis, Copyright, http://www.lexisnexis.com/terms/copyright.asp.

As discussed in Part I, open access has three advantages over the publishers' traditional approach. First, open access would facilitate exchange. Free access to legal materials would enable professors, administrators, editors, lawyers, and even students to develop a variety of different projects that could be used in developing course materials for law students. The inherent flexibility in constructing a casebook project allows for a wide variety of perspectives. However, if electronic casebooks remain the province of legal publishers, top-down projects will remain the norm. It will be harder to exchange within these closed systems, both because the publishers will control the systems and because copyright will protect the materials. Under an open access system, participants can freely exchange all the different course components through any system they can create.

Second, open access will foster greater individualization. Publishers need to establish some framework for the course materials in order to sell their product, and they are more likely to rely on their already-established frameworks in developing new approaches. Thus far, many electronic course materials are simply existing casebooks which have been put online or onto CD-ROMs.[15] Open access would give professors greater individualization depending on the approach they wanted to follow. Professors could start with an existing approach and modify it, or they could start from scratch.

Third, open access would allow for speedier adoption of new technologies. Rather than wait for a publisher to develop new technologies, tech-savvy professors—working with IT departments, open source resources, or open access centers[16]—could develop their own materials for dissemination across the Internet. Given the success of law professor blogs, largely independent of any commercial or institutional facilitation, there is reason to think that independent producers would act more quickly in developing new approaches.

There are three primary concerns about an open source or open access approach to course materials: lack of motivation, lack of manageability, and copyright concerns.[17] First, law professors may lack the motivation to contribute to an open access project because there would be no remuneration for such work. For many casebook authors, however, money is not the motivating factor behind their casebook. Instead, what they really want is to develop their own materials and then share them with the rest of the academic community. The open access approach would facilitate this. As other open source projects have demonstrated, volunteers are willing to contribute their time if they can do it in small pieces. Those pieces are then easily integrated with other pieces, and the contributors then benefit from the project as a

[15] Some professors have taken steps to create new online resources for their casebooks. *See, e.g.*, Foundation Press, Business Associations: Agency, Partnerships and Corporations (6th Edition), http://www.business-associations.com/.

[16] The potential for nationwide "open access centers" focused on particular subject areas or pedagogical approaches is discussed further in Part IV.

[17] *See* Bodie, *supra* note 2, at 15.

whole.[18] Open access course material projects would fit well within this model.[19]

Second, an open source casebook project may prove too successful for its own good. Manageability is a real issue: no one wants to wade through 100 edited versions of *Pennoyer v. Neff* to develop one's own civil procedure materials. However, with proper database management, professors would be able to navigate through the materials and even pass on their thoughts about which materials were most useful. In that way, the project could take in enormous amounts of content while providing some context for users to follow.[20] Third, copyright and related contractual concerns present real difficulties for an open access approach.[21] However, at this conference at least, we can assume away such concerns by stipulating the adoption of open access principles.

The benefits of an open access approach go beyond course materials for existing courses. Perhaps even more importantly, open access would allow for the creation of new courses much more easily and effectively. When a professor proposes a new course, he or she has tremendous start-up costs in assembling the materials for the course. Instead of managing such a project individually, professors could use an open access approach to collaborate with other professors across the country. Even if only a handful of professors participated, there would still be significant reductions in professorial time and effort, as well as informational gains from the expanded pool of knowledge applied to the task.[22]

There is a glimpse of the open access approach to new course materials in the set of materials for the "Deals" course that can currently be found on the web. Officially called "Deals: The Economic Structure of Transactions and Contracting," the course is the central component of the Transactional Studies Program at Columbia Law School. As described by Victor Fleischer, at the time the inaugural Research Fellow in Transactional Studies at Columbia,[23] the Deals course is quite different than other law school classes in that it seeks to teach actual transactional skills using fact-intensive case studies. The first part of the course teaches students the theoretical tools necessary to evaluate

[18] *See* Yochai Benkler, *Coase's Penguin, or, Linux and* The Nature of the Firm, 112 YALE L.J. 369, 435 (2002).

[19] *See* Bodie, *supra* note 2, at 16.

[20] *See id*.

[21] Obviously, copyright protections limit the use of law review articles, restatements, and other commentary. Copyright does not protect government documents such as cases, statutes and regulations; however, Westlaw and LexisNexis reportedly have contractual protections which prevent users from taking electronic versions of government documents off the database for their own use. *See id.* at 10.

[22] *See, e.g.*, John E. Dunsford, *In Praise of Casebooks (A Personal Reminiscence)*, 44 ST. LOUIS U. L.J. 821, 825–28 (2000) (discussing the efforts of the Labor Law Group in developing collaborative casebooks).

[23] Victor Fleischer, *Deals: Bringing Corporate Transactions into the Law School Classroom*, 2002 COLUM. BUS. L. REV. 475, *available at* http://ssrn.com/abstract=305340. Fleischer is now an Associate Professor of Law at University of Colorado Law School.

contractual regimes, such as transaction costs, risk sharing, property rights, and finance.[24] The second part of the course asks students to apply these concepts to actual cases. Students are asked to present the cases to class, paying particular attention to the deal structure. Then attorneys who worked on the deal attend the following class session to discuss their thinking behind the transaction.[25] In a related course called the "Deals Workshop," students are given a particular transactional problem and then asked to work together to develop a contractual solution. Examples of particular problems include a sale of a coffee shop business, an investment in a service firm that rates securities analysts, a music industry recording contract, and a venture capital financing.[26]

These innovative approaches to teaching transactional skills are very labor-intensive, particularly to start up. Professors must develop their own materials essentially from scratch, given the dearth of teaching materials currently provided by the law publishing market. However, Fleischer's article provides a blueprint for professors or schools interested in developing their own Deals curriculum. Available for free on SSRN, Fleischer's article has been downloaded almost a thousand times.[27] In addition, Fleischer himself has contributed three case studies that could be used in a deals-oriented course. One concerns a transaction between a medical fund and a venture capital group; the case study includes a memo for students, a memo for teachers, and a sample term sheet.[28] The second concerns a start-up company choosing between two forms of financing,[29] while the third is a case study of the Google IPO.[30] Other professors have also contributed case studies based on transactions studied in Deals courses.[31] SSRN has served to facilitate the availability of these case studies for academics and students in an open-access manner.

The materials on Deals represent only the beginning of what an open access approach can do.[32] As open access makes it easier to create new courses,

[24] *See id*. at 491.

[25] *Id*.

[26] *Id*. at 492.

[27] *See* "Paper Stats" at http://ssrn.com/abstract=305340.

[28] Victor Fleischer & Geoffrey W. Smith, *Columbia Venture Partners—MedTech Inc.* (Columbia Law & Econ. Working Paper No. 229, 2003), *available at* http://ssrn.com/abstract=417520.

[29] Victor Fleischer, *Streetwatch* (Columbia Law & Econ. Working Paper No. 227, 2003), *available at* http://ssrn.com/abstract=407140.

[30] Victor Fleischer, *Branding the Google IPO (Teaching Case)*, (UCLA Sch. of Law, Law-Econ Research Paper No. 06-04, 2006), *available at* http://ssrn.com/abstract=881607.

[31] *See, e.g.*, David Millstone & Guhan Subramanian, Oracle v. PeopleSoft*: A Case Study*, 12 HARV. NEGOT. L. REV. (forthcoming Spring 2007), *available at* http://ssrn.com/abstract=816006.

[32] Another fascinating project is being headed up by Professors James Fanto and Lawrence Solan. They are creating a new course entitled "The Business Firm as Social Entity" and putting many of the materials online. They intend the course to be usable in law schools, business schools, and social science graduate departments. An electronic version of the course materials can be found at the website for the Center for the Study of Law, Language, and Cognition at Brooklyn Law School, http://www.brooklaw.edu/centers/cognition/.

it would facilitate changes in the coverage of existing courses or even efforts to completely alter the law school curriculum. Under new dean Edward L. Rubin, Vanderbilt University Law School is undertaking a complete overhaul of its curriculum, including first-year courses.[33] Such an overhaul would be significantly easier if professors set their course materials using an open access approach. Instead of having to develop an entirely new set of casebooks, professors would merely have to establish new databases, move materials from existing courses into those databases, and then add new materials using open access methods.[34] An open access process would make the changes significantly easier and would allow other schools to join in on the reforms.

IV. OPEN ACCESS AND LAW SCHOOL PEDAGOGY

The traditional law school class provides students with only two forms of feedback. The first comes in class, as students are quizzed about the facts, holdings, and ramifications of different cases. As students respond in a back-and-forth with the professor, they gain insights into how to approach a case and how to apply those cases to new hypothetical situations. The second form of feedback comes through the grade on the final exam.

Law students often bemoan the lack of feedback in their classes. First-year students in particular often find themselves at sea in the first semester, wondering whether their preparations are leading them in the right direction. Many professors have taken steps to improve feedback by providing practice exams, midterms, and/or open office hours to answer student questions about the material. But with classes of over 100 students, professors may not have the time to provide the level of feedback they aspire to.

New tools may change this.[35] Discussion boards and class blogs allow for professors and students to keep the conversation going outside of the class room.[36] Discussion boards serve to expand the access to particular questions and answers. Instead of merely talking to one or two students about the answer to a question, professors can provide answers that serve as a resource for the

[33] Grace Renshaw, *A Memorable Year: The Launch of a New Ph.D Program is Just One of Dean Edward Rubin's First-Year Accomplishments*, VAND. LAW., Summer 2006, *available at* http://law.vanderbilt.edu/alumni/lawyer/V35N2/memorable_year.html.

[34] A school could limit access to these databases to its own professors, or it could open up its process to contributions from across the academy. A more open process would not only lead to richer materials, it would also enable other schools to follow, leading to more sweeping changes across the academy.

[35] *See, e.g.*, Paul L. Caron & Rafael Gely, *Taking Back the Classroom: Using Technology to Foster Active Student Learning*, 54 J. LEG. EDUC. 551, 560–69 (2004) (describing the Classroom Performance System, a new technology involving handheld devices for classroom use).

[36] For some examples of class blogs, see Copyfutures, http://lsolum.typepad.com/copyfutures/; LC CyberBlog, http://lawlib.lclark.edu/blog/cyberlaw/; ip + internet, http://ipinternet.blogspot.com/. Mike Madison has posted on the phenomenon of law school blogs at Madisonian.net. *See* Michael Madison, Madisonian.net, Law Teaching and Social Sof[t]ware (Jan. 22, 2006), http://madisonian.net/archives/2006/01/22/law-teaching-and-social-sofware/ [sic].

entire class. Blogs are similar to discussion boards but are often used for short discussions or for links to relevant outside materials of current interest. The professor may ask students to post blog entries as part of the course requirements and may provide feedback on the posts as well. In some cases even outsiders can post their thoughts on the blog, providing another avenue for feedback.

Of course, blogs—like other technologies—could be used outside an open access approach. What would open access mean in this area? The same principles would apply: free access, individualized content, and collaboration without commercial or copyright barriers. Thus, an open access class blog would be freely accessible, would allow for individuals to take content off the blog and use for their own purposes (with attribution), and would allow professors and students to cross-fertilize with each other. For example, instead of simply having a closed class discussion board on a legal publisher's website, an open access approach would counsel for blogs that are widely accessible and allow students and professors across the country to participate. Allowing the technology to develop without the need to fit within a certain commercial product line would allow for greater creativity. Perhaps blogs will begin to bleed into one another, with participants in one Contracts class blog jumping over to participate in another. Some of these interactions may be planned by professors, while others may start at the student level. Ultimately, we could see nationwide student blogs devoted to puzzling over the intricacies of various legal doctrines. In effect, nationwide "study groups" could provide another avenue for the eager student to get feedback. An open access environment is necessary, however, for such collaborations to flourish.

Professors could also pursue an open access approach to exams. While some professors' exams are available on the web, there is no national repository of such exams, and many are accessible only to students at their particular school. An open access approach would counsel free access to these exams. By expanding the pool of available exams, professors would give students more opportunities for practice. Students could use web-based study groups to work on past exams and develop answers, which could then be bounced off other students for feedback. Professors would also benefit from the greater number of sample exams from which to draw. The exams could even be studied to determine what professors are actually teaching in their courses, and whether the exams they are using are the best tools for testing that knowledge. A nationwide pool of exams would be an invaluable resource for professors, students, and administrators. An open access approach would insure that the exams were freely available for all those who wish to use them.[37]

[37] Although outside the provenance of law schools, the administration of the bar exam would also benefit from an open access approach. Students would be better able to understand what the bar was looking for if the exam administrators more regularly offered prior exams, as well as answer keys showing what the exam graders were looking for. Such an approach would demystify the exam, help students and law schools better prepare for the exam, and foster more discussion about the purpose and effectiveness of the exam itself.

Faculty can also better manage their own pedagogical effectiveness through an open source approach. Law school professors generally enter academia without any particularized educational or pedagogical training. Often, the only guide for a new professor is his or her own law school experiences. Expanding the pool of available mentors for professors junior as well as senior would be possible through an open access approach to pedagogy. Professors could form "study groups" of their own to work on different teaching questions, such as Socratic questioning methods or effective hypotheticals.[38] In addition, professors have been forced into a world of open access student feedback through websites like RateMyProfessors.[39] Although faculty may object to the open access and anonymity of the feedback, sites like RateMyProfessors do allow for a wider range of feedback—to both professors and students—about the quality of a professor's teaching. Rather than fighting such sites, professors should co-opt them by allowing for more detailed feedback on their own sites and by openly addressing students' concerns.[40]

Open access does not mean anything goes. Strong website managers will be needed to facilitate discussions and ensure that readers are not swamped in a morass of content. Filters and software structure are important in directing readers to the most useful information. Privacy concerns may also counsel that certain discussions on sensitive topics be kept within a closed zone.[41] But particularly at the beginning, an open access approach will offer the best environment for the creativity and flexibility necessary to develop these new methods of interaction. And they may ultimately lead to a completely changed law school environment—one in which the borders between students, professors, and schools become ever more porous.

V. OPEN ACCESS AND LEGAL EDUCATION

A. Michael Froomkin's "Nightmare" Vision

In 2000 at the AALS conference, Michael Froomkin presented a new model for the law school based on the sweeping technological changes of the late 1990s. His presentation is preserved as a series of PowerPoint slides available on his website.[42] Although only a skeletal version of his presentation,

[38] Subject-oriented listservs are an example of technological uses that address classroom questions.

[39] RateMyProfessors.com, http://www.ratemyprofessors.com/.

[40] Of course, anonymous sites like RateMyProfessors may suffer from abuse at the hands of those with a vendetta. But professors should be open to the possibility for constructive feedback as well, and should work with students to channel such feedback into meaningful discussions.

[41] *See, e.g.*, Avi Salzman, *Symposium Guest's Word Stirs Controversy at Yale*, N.Y. TIMES, Mar. 8, 2006, at B7 (discussing a forum at Yale Law School on racism which was closed to outsiders).

[42] Michael Froomkin, The Virtual Law School? Or, How the Internet Will De-Skill The Professoriate, and Turn Your Law School into a Conference Center (Jan. 28, 2000), http://personal.law.miami.edu/%7Efroomkin/articles/aals/index.htm. Froomkin describes the

the slides are sufficient to describe what for most law schools and law professors would be a nightmare vision of the future.

Froomkin's presentation is entitled "The Virtual Law School? Or, How the Internet Will De-Skill the Professoriate, and Turn Your Law School into a Conference Center." Froomkin notes that law teaching is a business,[43] and that the business is experiencing several problems, such as rising tuition and complaints about the quality of education provided.[44] Distance learning through classes conducted via the Internet may provide a solution to some of these problems. Although creating such courses may entail high fixed costs to develop, once the course is developed students can be added at a very low marginal cost.[45] Thus, the law school model would be significantly altered; instead of classes as large as the lecture hall, classes could have hundreds or even thousands of participants.

Given this new model, Froomkin predicts that there will be a premium placed on "superstar" teachers—namely, those who are particularly effective at conveying the course material.[46] Schools with prestigious brand names will also be at an advantage in selling distance-learning course packages.[47] Given their ability to leverage their own name and educational programs over a much larger pool of students, elite schools will dominate the market.[48] Low-cost upstarts will also succeed with low tuition prices and minimalist campuses.[49] State schools may also survive if they get the necessary funding to keep tuition lower while developing their own brands.[50] However, Froomkin predicts that private law schools in the middle of the pack will be the real losers, as their market for students is eroded from above and below.[51] As a result, the need for professors will sharply decline. As traditional law school courses are replaced with virtual ones, famous professors or "super adjuncts" will be in demand to conduct those courses.[52] Law schools will no longer need professors to fill every course. Grading could be outsourced to instructors who work for the school or who work for independent grading contractors. The law school as we know it will largely cease to exist.

Froomkin acknowledges that his vision of the future is only a vision at present. Current ABA regulations would not allow for an entirely virtual J.D. program. However, he posits that the ABA will not be able to stand in the way for too long.[53] Ultimately, law schools could become a completely virtual

slideshow as "an only slightly tongue-in-cheek set of PowerPoint slides" on his homepage, http://www.law.tm.

[43] Froomkin, *supra* note 42, at slide #3.

[44] *Id.* at slide #4.

[45] *Id.* at slides #13–14.

[46] *Id.* at slide #17.

[47] *Id.* at slide #18.

[48] *Id.* at slide #25.

[49] *Id.* at slide #26.

[50] *Id.* at slide #27.

[51] *Id.* at slide #28.

[52] *Id.* at slide #29.

[53] *Id.* at slide #10.

experience, one without the need for buildings, classrooms, or a cadre of professors. Instead, all students will be able choose from a wide variety of courses from a small group of nationally prominent professors who can demand large sums for their superstar status.

B. An Alternative: The Open Access Law School

Froomkin's vision for the virtual law school of the future is a top-down model in which a handful of elite schools and professors dominate and the rest are put out of business. However, I'd like to posit a different vision of the future: one in which law schools and their faculty remain integral to the learning process despite the continued change in technology. In my vision of the open access law school, technology fosters greater collaboration rather than crushing it. Rather than eliminating the need for professors, technology may even heighten their role. An open access approach would create a more flexible, outwardly focused school and student body, but it would not replace the need for the individualized attention, instruction, and direction that law schools and law professors provide.

Take, for example, the virtual course. Schools could replace law school lectures with video presentations and allow students to submit their work and even exams over the Internet. But such a course would have even less feedback than the traditional law school course, which provides in-class feedback through the Socratic method. Moreover, there would be no stopping by to chat after class, no office hours, no human interaction. Perhaps law schools could manage discussion boards or email interactions by outsourcing such responsibilities to adjuncts or teaching assistants, but the quality of the feedback would not be the same. Feedback on exams would be less instructive as well; mass production of grading would presumably hurt quality, and there would be no opportunity to meet with the professor to go over the exam.

Instead of replacing the current system with a mass-produced virtual substitute, law schools could use open access principles to enhance the current system. Online discussion boards and study groups would broaden the opportunities for feedback but would also require more input from professors. If interaction is to happen on a national level, professors still need to be there in order to provide instruction and guidance. A purely student discussion group has its benefits, but a discussion group with students and professors takes the education to another level. True collaboration needs professorial involvement. Open access facilitates the collaboration; it by no means eliminates the need for professors.

Open access would also facilitate a new approach to the law school curriculum. Froomkin's model envisions law school entrepreneurs who market their classes from the top down. An open access approach would allow new approaches to bubble up from the bottom. Professors who have a new class in mind could collaborate on the materials from across the country—with professors in a range of disciplines. Open access would allow all levels of participation, from managing the website to merely making a comment about potential course topics. Professors could share their collective wisdom while

still retaining the flexibility to use their own individual approaches. Similar systems could be used by law schools contemplating a complete overhaul of their curriculum. Instead of going it alone, they could work with other schools in developing courses and course materials. Again, schools could share in a national or even international deliberative process while ultimately retaining their independence.

One potential institutional development could be nationwide "open access centers" devoted to certain elements of the curriculum. For example, an Open Access Center for the Study of Contracts could serve as a national repository for Contracts courses. The Center could run an open access Contracts casebook. It could host conferences (live and virtual) about the content of Contracts courses. It could work with the ABA and state bar associations to coordinate subject coverage. Perhaps the Center would focus on developing more transactional skills courses, or would focus on bringing more statutory law into Contracts courses. There need not be only one—different schools could host Contracts centers with different ideological or pedagogical foci. But professors could participate on a national level, and open access would insure that the participation remained free with low transaction costs.

Advances in technology will change the very nature of legal education. In the Froomkin "nightmare" scenario, technology wipes out the vast majority of law school faculty and replaces them with a small collection of teaching stars and the elite institutions that support and manage them. This top-down approach would consolidate the provision of legal education and depersonalize the law school experience. Technology need not have these effects. An open access approach would leverage technology to allow for levels of feedback and collaboration previously impossible. But professors must still be there to provide the feedback and collaborate on the curriculum. In my view, this grass-roots approach is far more preferable to a system in which education is imposed from above, rather than developed from within.

VI. CONCLUSION

The open access movement is about breaking down barriers to information so as to free up opportunities for greater insight and collaboration. While the movement has focused primarily on academic scholarship, open access principles could facilitate the transformation of legal education. An open access approach would mean new pools of course materials for professors to draw on, new means of interaction and collaboration between professors and students, and new possibilities for restructuring the law school curriculum. To be certain, an open access approach will take resources and institutional support, and existing educational and commercial institutions will try to retain their control. But by starting now to create an open access approach, we stand the best chance of allowing for the incredible growth that new technologies could engender. I'm excited by the possibilities, and I hope you are too.