

Law Libraries in the Information Age: A Critical Perspective*

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Abstract

This article traces the influence of theories of the information society, originating in the post-industrial theory of Daniel Bell, on developments in law librarianship. It argues that the main thrust of this influence has been to foster a conservative professional culture that emphasizes individual professional development and technological solutions in lieu of critical engagement with the political and economic forces responsible for eroding public and collective norms.

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I. INTRODUCTION

The trope of librarians as technologically illiterate vestiges of a bygone era, in danger of being left behind by an “information revolution” that is ushering in an “information society” is as rampant as it is unfounded. Like all stereotypes, it serves as an instrument of social control, drawing critical attention inward towards supposed individual shortcomings and away from systemic problems. The purpose of this essay is to redirect this attention outward through a critical reading of the conservative ideology embodied in information society rhetoric. The observation that the age we are living in is an Information Age; the society, an Information Society; and that we have witnessed or are witnessing an Information Revolution is often asserted as a fact almost too uncontroversial to warrant notice. Yet the Information Society is an idea with a very recent and specific theoretical vintage. In placing the idea of the Information Society back into this historical context, my aim is to further an understanding of how this idea has shaped important discussions of legal research and legal information over the past four decades to the detriment of libraries, and the people who work in and use them.

Part I will briefly trace the historical development of theories of the Information Society. The Information Society is an idea rooted in the theory of post-industrialism, a neoconservative project that sought to establish a firm intellectual argument for the abandonment of Marxism as force for revolutionary change. As it developed further over the course of the latter 20th century, information society theory has been implicated in the justification of

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neoliberalism as an emerging economic and political order, disguising crises brought about by this particularly harsh and unforgiving rearrangement of capitalism in the cloak of rational, teleological progress toward scientific enlightenment.

Part II will apply this historical foundation to developments in law librarianship. This section will show how two of the central tenets of Information Society theory—that “information professionals” are the elites of the new social order, and that information is its key commodity—have proved to be profoundly influential. Part III will describe how this influence has made itself felt in practical terms: by discouraging the identification of library closures, downsizing, etc. as labor issues; by disguising the systemic nature of the problems confronting libraries following neoliberal reforms of the public sector; and by constraining the ambitions of potential responses to these problems.

II. INFORMATION SOCIETY THEORY

Although academic and trade literature on librarianship frequently asserts that we live in an Information Society, or that society is in the process of a profound transformation brought about by the Information Revolution, the historical context for these concepts has been largely overlooked by the profession.¹ This section will present a historical account of the widely accepted ideas about the Information Society which demonstrates that these ideas are ultimately rooted in a specific historical context with conservative political goals. While not necessarily conservative in the popular sense of espousing the platform associated with a particular Right-wing political party or politician, these theories are deeply conservative in the sense that, despite futuristic rhetoric, they are centrally concerned with defending long-extant power relations.² In particular, Information Society theory has, throughout its history, been closely linked with the defense of those power relations endemic to capitalism in an era characterized by increasing public sector austerity, coupled with growing insecurity and declining standards of living for workers. The literature celebrating the Information Society became one of the central pillars in the defense of this neoliberalization of social life.

The Coming of Post-Industrial Society, published in 1973 by Harvard sociologist Daniel Bell, forms a necessary point of departure for attempting to understand these developments. Although this was not the first work to suggest that there was an epochal shift taking place due to the advancement of scientific knowledge and technology, it has enjoyed widespread and lasting influence in both the academy and popular culture.³ *The Coming of Post-Industrial Society* was largely concerned with interpreting empirical data which suggested a decline in manufacturing and corresponding growth of service sector jobs in various advanced industrial nations.⁴ Bell argued that these developments signaled a fundamentally new period of social formation in which technologically-enabled enhancements to productivity made it possible to shift the division of labor away from the production of goods.⁵ Among the influential ideas derived from his work was that of an increasing concentration of second-order or “symbolic” work in the new economy, and the increased power and influence of those in occupations based upon the creation, manipulation, and transmission of information.⁶

Bell famously declared that the post-industrial society was in fact an “information society.”⁷ In an often quoted passage, he elaborated on this idea, positing that “post-industrial society is a knowledge society because the sources of innovation are increasingly derivative from research and development and more directly, there is a

¹ MICHAEL HARRIS, STAN A. HANNAH & PAMELA C. HARRIS, INTO THE FUTURE: THE FOUNDATION OF LIBRARY AND INFORMATION SERVICES IN THE POST-INDUSTRIAL ERA IX (2nd ed. 1998). This book, which attempted to introduce librarians to the vast literature on Daniel Bell’s *The Coming of Post-Industrial Society* and its subsequent popularizations, is an important exception that proves the rule.

² This definition of conservatism owes much to the theory of conservatism articulated by COREY ROBIN, THE REACTIONARY MIND: CONSERVATISM FROM EDMUND BURKE TO SARAH PALIN 4 (2011): “conservatism is: a meditation on—and theoretical rendition of—the felt experience of having power, seeing it threatened, and trying to win it back.”

³ KRISHAN KUMAR, FROM POST-INDUSTRIAL TO POST-MODERN SOCIETY: NEW THEORIES OF THE CONTEMPORARY *World* 29 (2nd ed. 2005).

⁴ DANIEL BELL, THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING 129–134 (1973).

⁵ *Id.* at 127–128.

⁶ Kumar, *supra* note 3, at 49.

⁷ Bell, *supra* note 4, at 467.

new relation between science and technology because of the centrality of theoretical knowledge.”⁸ The focus on knowledge and information as the defining characteristic of the new era was sharpened in popularizations of Bell’s work such as Alvin Toffler’s *The Third Wave* (1980) and John Naisbitt’s *Megatrends* (1982).⁹ Toffler’s metaphor of the “Third Wave” placed an even greater emphasis on the idea of an epochal shift to the information society. The three waves of Toffler’s metaphor correspond to three periods in the development of civilization: the first was agrarian society; the second, industrial society; and the third was the (post-industrial) information society.¹⁰ Although the third wave had not yet, in Toffler’s estimation, completely swept away second wave society, the pace of techno-scientific advance—especially marked in the case of information and communication technology (ICT)—made the eventual transition all but inevitable.¹¹

This idea of an epochal shift to an information society has been widely criticized for its technological determinism, or the underlying assumption that technology is progressive and brings with it inevitable societal change.¹² Philosopher Andrew Feenberg has developed one of the leading critiques of this idea, demonstrating how the path of technological development is embedded in and shaped by social and political institutions.¹³ However, technological determinism also plays an important role in information society theorists’ response to historical materialism—the idea that social formations and thus historical change are fundamentally related to the way that a civilization meets its physical needs.¹⁴ Here, the Industrial Revolution roughly corresponds to the “bourgeois” revolutions that Marx and Engels described as replacing the feudal system with capitalist relations of production.¹⁵ However, neoconservative accounts of the information society importantly depart from Marx in their predictions about the end of the Industrial/capitalist era, replacing the historical agency of classes with an emphasis on technology as the primary cause of revolutionary historical change.¹⁶ *The Communist Manifesto* predicted that capitalism (and the rule of the bourgeoisie) would be overturned, following the development of class consciousness on the part of the proletariat (working class), revolution, and replacement of capitalism with the rule of the proletariat and communistic form of social organization.¹⁷ Bell et al., however, predicted that the industrial era was already ending due not to the coming of a revolution led by the proletariat but through the inevitable changes wrought by technology, reflecting a transition similar to the Industrial Revolution, from which the bourgeoisie is also conspicuously absent. Rather than forming revolutionary consciousness of its own historical agency, the working class was in the process of slowly being dissolved and reabsorbed into other, higher status, more satisfying, and more creative occupations made possible by the new technology.¹⁸ For Bell, the slow withering of the proletariat was signaled by the continual growth of white collar and “service sector” work in post-industrial society and its displacement of the concentrated site of class antagonism—the industrial factory shop floor.¹⁹ For Toffler, Marxism is a second wave ideology *par excellence*—the true counter-revolutionary program in his view being the one that attempts to preserve such “second wave” ideas in the face of inevitable changes being wrought by technology.²⁰ While being influenced by the materialist framing of history, Toffler posited that new information technology was undermining the very concept of materialism. It was, in Toffler’s view, the mode of industrial factory production—with capital almost entirely consisting of concrete and finite material resources such as land and machinery—that was responsible for the old conflicts between labor and capital.²¹ In the emerging information society, capital would come to be increasingly untethered from such material resources and instead centered upon an “immaterial” base consisting of

⁸ *Id.* at 212.

⁹ *Id.* at 36.

¹⁰ ALVIN TOFFLER, *THE THIRD WAVE* 4 (1980).

¹¹ *See id.* at 7–8.

¹² *See* Kumar, *supra* note 3, at 61–62.

¹³ Andrew Feenberg, *Subversive Rationalization: Technology, Power, and Democracy*, 35 *INQUIRY* 301(1992).

¹⁴ *See* Justin P. Holt, *Historical Materialism in THE SOCIAL THOUGHT OF KARL MARX*, 121–151 (2014).

¹⁵ *See* George Ross, *The Second Coming of Daniel Bell*, 11 *SOCIALIST REGISTER* 331, 333 (1974).

¹⁶ NICK DYER-WITHEFORD, *CYBER-MARX: CYCLES AND CIRCUITS OF STRUGGLE IN HIGH-TECHNOLOGY CAPITALISM* 29 (1999). *See also* Ross, *supra* note 15 at 333.

¹⁷ KARL MARX, *The Communist Manifesto*, in *THE MARX-ENGELS READER* (Robert C. Tucker, ed., 1972) 335, 341–343.

¹⁸ Dyer-Witthford, *supra* note 16, at 28–29; *see also* Bell, *supra* note 4, at 125–126.

¹⁹ Bell *supra* note 4, at 148.

²⁰ Toffler, *supra* note 10, at 91 and 415.

²¹ Dyer-Witthford, *supra* note 16, at 27.

knowledge and information.²² Everyone in the information society would then have the theoretically unbounded potential to develop themselves into little “capitals” by increasing their own knowledge and expertise—a development which supposedly tended towards the dissolution of former distinction between capital and proletariat with its attendant class conflicts.

Daniel Bell’s early writing on post-industrialism contemplated the stability and prosperity achieved by post-war welfare states.²³ At the time of the original publication of *The Coming of Post-Industrial Society*, the dominant paradigm of economic thought in the United States, Britain, and elsewhere in the West was still that of Keynesianism, in which states engaged in strong regulation of capitalist markets, with protections for consumers, trade unions, and social spending to support the “demand side” as the ultimate engine of economic growth.²⁴ Keynesianism was by far the dominant school of economic thought in the United States and Britain, from the time of its instantiation in public policy in the wake of the Great Depression until at least the 1960’s. The inflationary crises that afflicted welfare states in the early 1970s sufficiently destabilized this dominance to allow for effective inroads into public policy to be made by dedicated free-market economists such as Milton Friedman and the members of the Mont Pèlerin Society.²⁵ Of at least equal significance in the United States, was the simultaneous rise of a related and increasingly vocal conservative movement which incorporated free market critiques of the so-called culture of dependency engendered by government provision.²⁶ These developments reached a watershed transitional moment in with the election of Conservative leaders Ronald Reagan and Margaret Thatcher in 1980 and 1979, respectively.²⁷ Both Thatcher and Reagan chose as economic advisors followers of the “supply side” school of economic thought, and set about with aggressive programs to slash non-military public sector funding, deregulate the private sector, and dismantle the power of organized labor in their respective countries.²⁸ The Reagan/Thatcher era also marked the start of loosening of many international barriers on the accumulation of private capital.²⁹ One of the hallmarks of this process is the increasing mobility of capital which both opens up new (and often captive) consumer markets in the developing world and frustrates attempts by workers to organize for their mutual protection.³⁰

Information society theory developed in a dialectical relationship with these events, both influencing and being informed by the rise of neoliberal policy and ideology.³¹ Information and communication technology proved an essential adjunct permitting an unprecedented degree of capital mobility, allowing capital to operate with greater independence from state restrictions.³² Theories of the information society made significant contributions to the legitimation of these developments, becoming part of a common-sense understanding of neoliberalization as the inevitable result of technological progress. More broadly, information society theory has also served to mutually reinforce the ideological component of neoliberalism, and its conceptions and attitudes towards the state, democracy, society, and labor.

In its essential features, neoliberal ideology emphasizes the superiority of markets as the means of organizing human endeavor. In FA Hayek’s lexicon, the market is a “catallaxy,” or a self-organizing system derived from

²² *Id.* at 28.

²³ Robert Neubauer, *Information in the Neoliberal Age, or Vice Versa? Global Citizenship, Technology, and Hegemonic Ideology*, 9 TRIPLEC 195, 220; Michael Harrington, *Post-Industrial Society and the Welfare State*, in *Libraries in Post-Industrial Society*, 19 (Leigh Estabrook, ed., 1977).

²⁴ On the transition from Keynesianism to Neoliberalism in economic policy described here, see generally DANIEL STEDMAN JONES, *MASTERS OF THE UNIVERSE: HAYEK, FRIEDMAN, AND THE BIRTH OF NEOLIBERAL POLITICS* (2014); JAMIE PECK, *CONSTRUCTIONS OF NEOLIBERAL REASON* (2014).

²⁵ Peck, *supra* note 24, at 122; GODFREY HODGSON, *THE WORLD TURNED RIGHT SIDE UP* 213 (1996).

²⁶ See WILLIAM C. BERMAN, *AMERICA’S RIGHT TURN: FROM NIXON TO CLINTON* 22 (2nd ed. 2001). For a critique of the culture of poverty idea, see Adolph Reed Jr., *The Underclass Myth*, *PROGRESSIVE*, Aug. 1991, at 18.

²⁷ DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 1 (2005).

²⁸ Andre Gunder Frank, *After Reaganomics and Thatcherism, What? From Keynesian Demand Management via Supply-Side Economics to Corporate State Planning and 1984*, *CONTEMP. MARXISM*, Winter 1981/1982, at 18, 21.

²⁹ Neubauer, *supra* note 23, at 202–203.

³⁰ *Id.* at 204.

³¹ *Id.* at 212 and *passim*; see also Marko Ampuja & Juha Koivisto, *From “Post-Industrial” to “Network Society” and Beyond: The Political Conjunctures and Current Crisis of Information Society Theory*, 12 TRIPLEC 447 (2014); Eran Fisher, *Contemporary Technology Discourse and the Legitimation of Capitalism*, 13 *EUR. J. OF SOC. THEORY* 229 (2010); Dyer-Witford, *supra* note 16.

³² Neubauer, *supra* note 23 at 208–209; FRANK WEBSTER, *THEORIES OF THE INFORMATION SOCIETY* 151 (2nd ed., 2002).

the aggregation of individual preferences.³³ Hayek argued that the inherent limitations on human knowledge destined any a priori centralized economic planning to failure and worse, produced a kind of tyranny.³⁴ On the other hand, the market had ability to respond to individuals' immediate desires, resulting in a means of social organization that maximized individual freedom.³⁵ The flip-side of this celebration of self-organizing markets driven by individual consumer preference is a profound mistrust of institutions claiming to operate in the public interest. The attack on institutions of collective life has long been translated into austerity policies that undercut funding for all manner of public services and has served as a background justification for anti-union reforms.³⁶

A parallel anti-collectivist sentiment marks the transition to the information-based economy. The flourishing of the Third Wave economy meant a complementary change in governing institutions was necessary to fully realize the benefits of the new technologies, including the abandonment of centralized state regulation of economic matters. According to Toffler, Second Wave governments—nation states whose power was built around the industrial economy and which attempted to hold control through a more or less centralized bureaucracy—were increasingly hampered by the unwieldy regulatory apparatus required to keep pace with the development of scientific and technical change in an increasingly information based economy.³⁷ As Second Wave governments were becoming obsolete, what was supposedly needed to replace them was a lightweight, dispersed agglomeration of power more responsive to the pace of technological change.³⁸ Information society theory complements the idea of neoliberal society as a free, non-coercive society because government allows the economy to operate in a way that maximizes individual autonomy and allows for the aggregate results of individuals acting on their desires to take the place of conscious organization and planning. As Ampuja and Koivisto have argued, it was in this regard that “network” became a key metaphor for both knowledge and the structure of governing institutions of the Information Age.³⁹ For example, in Manuel Castells *The Rise of the Network Society*, published in 1996, and popularizations such as Kevin Kelly's *New Rules for the New Economy*, communication networks and the social structures that they enabled, were seen as emergent phenomena, generating intelligence out of a series of “dumb nodes.”⁴⁰ As such, networks strongly resembled the Hayekian idea of markets as catallaxy: achieved not through conscious planning but through an organic, evolutionary, self-regulating process.⁴¹

The way that information society theory depicts the elites of post-industrial society also developed along lines which complemented neoliberal ideology. A knowledge elite figured heavily in Bell's original version of the post-industrial society, but envisaged as the scientists and analysts employed by large centralized state, university, and corporate bureaucracies.⁴² Later protagonists of the Information Age tended to reflect narratives about the sorts of personalities believed to thrive on the individualism and competition of neoliberal capitalism. These tropes included the vaunted entrepreneurial mavericks of the tech sector,⁴³ and their closely related brethren in “creative class”—the artists, designers, writers, and programmers attracted to life in post-industrial city centers by the vibrant cultural atmosphere made possible by the success of tech start ups.⁴⁴ This discussion reflects another important shift in Information Society theory with respect to its relationship to contemporary capitalism. According to Eran Fisher, Information society theory now posits that workers in the post-industrial era have (rightly) traded the mitigation of exploitation afforded by welfare states for the mitigation of alienation afforded by technological advancements within capitalism itself.⁴⁵ The growth of knowledge work, according to this theory, is steadily increasing the

³³ 2 F.A. HAYEK, LAW LEGISLATION AND LIBERTY 108–09 (1976).

³⁴ F.A. Hayek, *The Road to Serfdom*, in 2 THE COLLECTED WORKS OF FA HAYEK 102 (Bruce Caldwell, ed. 2008).

³⁵ *Id.*

³⁶ See Harvey, *supra* note 27, at 23.

³⁷ See Toffler, *supra* note 10, at 385–387.

³⁸ *Id.* at 409–413.

³⁹ Ampuja & Koivisto, *supra* note 31, at 454.

⁴⁰ Eran Fisher, “Upgrading” Market Legitimation: Revisiting Habermas's ‘Technology as Ideology’ in *Neoliberal Times*, 2 FAST CAPITALISM 159, 162 (2007).

⁴¹ Fisher, *Contemporary Technology Discourse*, *supra* note 31 at 236.

⁴² Ampuja and Koivisto, *supra* note 31, at 449–50.

⁴³ *Id.* at 455, 458; See also Richard Barbrook & Andy Cameron, *The Californian Ideology*, 6 SCI. AS CULTURE 44 (1996); Stewart Brand, *We Owe It All to the Hippies*, TIME, Mar. 1 1995, 125.

⁴⁴ Richard Florida, *The Rise of the Creative Class*, WASH. MONTHLY, May 2002, at 15.

⁴⁵ Fisher, *Contemporary Technology Discourse*, *supra* note 31, at 239.

ranks of happy prosumers.⁴⁶ Prosumer is a neologism coined by Alvin Toffler to describe people whose activities combine the functions of production and consumption.⁴⁷ This concept permits a reimagining of the category of labor as the activity of passionate amateurs willing to forgo the security of traditional employment relationships in exchange for the freedom and pleasure associated with pursuing personally fulfilling piecework in an increasingly “gigified” economy.⁴⁸ Typified by the popular slogan “do what you love,”⁴⁹ the prosumer is a creature unique to the post-industrial service economy. This amateurist ethic of the prosumer increasingly defines expectations of waged workers as well. With the rise of postindustrial capitalism, employers now expect workers to be fully devoted to their work, happily accepting employers’ demands for increasing productivity and encroachments into non-work time as unobjectionable due to the worker’s love of and personal identification with work he finds personally fulfilling.⁵⁰

The idea of prosumption serves to blunt Marxian critiques of the capitalist employment relationship as inherently exploitative—a necessity forced upon the worker by the economic coercion inherent in his non-ownership of the means of production. In the information economy, knowledge is regarded the key to the creation of wealth, blurring the lines between labor and capital by giving each worker the potential to take part in the ownership of the means of production through development of his so-called human capital—the acquisition of knowledge, skill, and expertise.⁵¹ The supposed total identification of the new knowledge professional with his career in turn forces critiques positing the inherently exploitative nature of waged labor into the background of discussions of work in the post-industrial economy.

In addition to this notion of the information society rendering mitigation of exploitation obsolete, there is a broader tendency of information society theory to regard capitalism as ultimately perfectible by technological means. Whereas the Keynesian paradigm regarded government as necessary to smooth market failures and other rough edges created by the operation of capitalist markets, “technology in contemporary times no longer serves as a legitimation for political power to technically manage the capitalist economy. Instead technology now serves as a legitimation for political power to take a step back from the capitalist economy.”⁵² As neoliberalism has achieved dominance in government and public policy, technology has become integral to discourses directed at stabilizing society in the face of neoliberal reforms. One of the ways it accomplishes this is to forestall a sense of crises induced by neoliberal policies with the promise that these are temporary problems that will inevitably be solved through the advance of technology. In this vision of society, political problems induced by the selection of neoliberal policies are rendered as naturally arising ahistorical phenomena, and the solutions to those problems being (just as naturally, ahistorically, and apolitically) technological solutions. This, in turn, has also helped to mute one of the least savory aspects of neoliberalism: its hostility to democratic politics.⁵³

III. LIBRARIES AND THE INFORMATION SOCIETY

The central claim of Information Society theory—that society is entering into a fundamentally new era in which knowledge and information are the most important resource in the creation of wealth—exerted widespread and nearly immediate influence on librarianship.⁵⁴ At the same time, Information Society theory has become

⁴⁶ Toffler, *supra* note 10, at 251–273.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ For a critique of the “do what you love” slogan in popular culture, see Miya Tokumitsu, *Tell Me Its Going to Be OK*, THE BAFFLER, Sept., 2018, at 6–11.

⁵⁰ BARBARA EHRENREICH, *BAIT AND SWITCH: THE (FUTILE) PURSUIT OF THE AMERICAN DREAM* (2005), 231–232.

⁵¹ Dyer-Witthford, *supra* note 16, at 29.

⁵² Fisher, “*Upgrading*” *Market Legitimation*, *supra* note 40 at 13.

⁵³ According to Neubauer, *supra* note 23 at 218,

“while empowerment is found in the technological networks of the market, traditional exercises of democratic citizenship are subject to strict techno-market discipline. In this way the legitimation strategies of neoliberalism reveal themselves as a dialectical discourse—emancipatory democratic populism for those which accept the new order, and disciplinary futility and emiseration for those which resist. Framing the new order as an inevitable and unstoppable force of history, individuals are encouraged to abandon all hope of democratic alternatives to informational-neoliberal policies which will regardless bring emancipation if left to their own devices.”

⁵⁴ Harris, Hannah, & Harris, *supra* note 1, at 29. LIBRARIES IN POST-INDUSTRIAL SOCIETY, *supra* note 23, a volume published in 1977 which includes an introductory essay by Daniel Bell, is a primary illustration of this influence.

entangled with the advancement of neoliberal ideology, and its attendant glorification of individualism and denigration of public, communal values. Not surprisingly, these attempts to adapt librarianship to Information Society-cum-neoliberal ideology have produced a deepening tension within the discipline.

This tension reflects a division between what may be understood as two competing models of the political economy of information.⁵⁵ One model, which still prevails among many librarians, is based on the tenets of liberal-democratic theory. According to this theory, information is regarded as essential to the development of democratic consciousness, and as such maintains the status of an essential public good.⁵⁶ In this view, a fully functioning democracy requires maintenance of the free flow of information, at public expense if necessary. While it is important to acknowledge that this is a description of an ideal state that has never been perfectly realized, the idea that information constitutes a public good broadly influenced the development of many aspects of the information infrastructure in the United States, from the funding of public libraries, to the creation of the Government Printing Office and depository library programs, to the creation of universal primary and secondary public education and the development of publicly supported universities.⁵⁷

The idea of knowledge as the central resource for the generation of wealth in post-industrial society forged a contrary view that regards information primarily as a commodity. This idea became a cornerstone of federal information policy under Reagan, whose administration was deeply influenced by Daniel Bell's ideas about knowledge and information as the key commodity of post-industrial society.⁵⁸ Reagan's broader agenda to reduce social spending involved cuts to federal funding for libraries, and encouraged the privatization and commodification of government-produced information through its implementation of the Paperwork Reduction Act in OMB policy.⁵⁹ While the information as commodity view is still primarily associated with Reaganite information policy, the notion that government should foster a privatized and commodified "market" for information was carried forward under subsequent administrations, led by both Democrats and Republicans. For example, one of the Clinton administration's signature programs was its plan to "build the information superhighway." Unlike the development of the actual interstate highway system, the information superhighway was conceived almost completely in terms of the development of a privatized infrastructure that continues to function to the disproportionate benefit of several highly consolidated cable and internet service providers.⁶⁰ Even the open government data programs instigated by the Obama administration, although frequently celebrated in terms of democratic participation and government transparency, can be understood as a kind of "upgrade" of the Reaganite program of privatization and commodification. Open government data focuses on the creation and release of raw data sets—basically impenetrable to individuals and non-experts but easily exploitable by private enterprise, who are under no limitation from repackaging, restricting and selling this information to consumers.⁶¹

Throughout the post-World War II era, libraries were major beneficiaries of the idea of information as a public good. However, the abrupt embrace by policy-makers of the information-as-commodity model convinced a number of prominent library leaders of the need to embrace the new model as well. Beginning in 1980, library director F.W. Lancaster was largely responsible for leading the charge in arguing that the information revolution was already well underway, requiring that librarians adapt in whatever way possible to this new reality.⁶² In technologically deterministic language that echoed the theories of Bell, Toffler, Guildler, et al., Lancaster argued that libraries as repositories of printed material were nearing the point of obsolescence thanks to advances in information

⁵⁵ Harris, Hannah & Harris, *supra* note 1, at 44–49. See also Samuel E. Trosow, *The Commodification of Information and the Public Good: New Challenges for a Progressive Librarianship*, 43 PROGRESSIVE LIBR. 17 (2014).

⁵⁶ Harris, Hannah & Harris, *supra* note 1, at 44.

⁵⁷ *Id.* at 60; Miriam Braverman, *From Adam Smith to Ronald Reagan: Public Libraries as a Public Good*, 107 LIBR. J. 397 (1982). For a discussion of democratic values and the public university system, see WENDY BROWN, UNDOING THE DEMOS: NEOLIBERALISM'S STEALTH REVOLUTION, 180–190 (2015).

⁵⁸ Harris, Hannah & Harris, *supra* note 1, at 61.

⁵⁹ *Id.*; Henry T. Blanke, *Libraries and the Commercialization of Information: Towards a Critical Discourse of Librarianship*, 2 PROGRESSIVE LIBR. 9, 11 (1991). For a discussion of parallel developments in Britain under Thatcher, see Webster, *supra* note 32, at 176–182.

⁶⁰ Dyer-Witthford, *supra* note 16, at 33–34.

⁶¹ Rebecca Kunkel, *The U.S. Government Manual in XML: A Case Study of a Data.gov Open Data Set*, 35 LEGAL REFERENCE SERV. Q. 256 (2016).

⁶² Harris, Hannah & Harris, *supra* note 1, at 31.

and communication technology.⁶³ To have a viable position in the post-industrial society independent of their soon to be out-dated role as custodians of books required librarians to do more than simply rename their occupation in a way that identified them as the “information professionals” that Bell et al. believed would become the elites of post-industrial society. Librarians were also exhorted to regard information as a commodity, to act “entrepreneurially,” and to think of library patrons as “customers,” and so on.⁶⁴ As John Buschman has argued, this uncritical cooption of business jargon amounted to a demand that librarians adapt to such funding opportunities as exist in an increasingly austere public sector and private market oriented economy.⁶⁵ An underlying implication of this discourse was that the position of librarians in post-industrial society could be secured but only if they were willing to abandon longstanding professional commitments such as freedom of information by means such as charging fees for services to those willing and able to pay.⁶⁶

The library scholarship produced in this vein has problematically subscribed to a rosy vision of the market for information work that has been promoted in the writing of later theorists of the Information Society such as Manuel Castells. In Castells’ version of the Information Society, the “new class” of information professional was supposed to displace not only the old industrial proletariat but also the capitalist class, as theoretical knowledge, rather than capital, became the key resource in the generation of wealth.⁶⁷ Allegedly, the hallmark of this new class of information professionals is their ability to thrive on the uncertainty and insecurity of the contemporary labor market, seeking out in lieu of tenure “the excitement and challenge of the latest development of their field.”⁶⁸

This optimism about the potential for librarians to obtain enhanced power and prestige (if only they reimagined themselves as members of the privileged class of information professionals) unfortunately contrasts with various contemporary realities: although the would-be information professional is told that he ought to enjoy the “excitement” and “flexibility” of the contemporary labor market, the sorts of secure job arrangements enjoyed by the old class are in diminishing supply. Frank Webster summarized the outlook for information workers around the turn of the millennium:

A look around at the turbo-capitalism of today suggests that most information workers are subordinate to the marketplace, far removed from the picture of the powerful brokers envisaged by Castells. Since the mid-1970s, there has been an assault on many professions (university teachers, architects, researchers, librarians, and doctors, for example), a huge expansion of higher education and a manifest decline in the returns on higher educational certification.⁶⁹

Meanwhile, as John Buschman has argued, the “realities” of post-industrial society to which librarians are being told to adapt actually reflect the dominant ideological beliefs associated with “informational capitalism”, which he summarizes as:

- The ability to pay as a major criterion determining provision of high-quality information
- Information provision on the basis of private rather than public supply
- Market criteria as the primary factors in deciding what information is made available
- Competition for funding as the appropriate mechanism for organizing the economics of librarianship
- Commodification of information is the norm
- Private information vs. public is favored⁷⁰

Owing to their partial isolation from the broader library profession, law librarians have been somewhat insulated from this broader discussion of post-industrialism which took place within librarianship. Nonetheless, the march of technological progress represented by the transition to an “Information Society” also became a popular theme in academic and professional literature targeted at law librarians, with perhaps even less critical attention directed at understanding the political significance of these ideas than in the library profession at large. As early

⁶³ *Id.* at 33.

⁶⁴ Mark T. Day, *Discourse Fashions in Library Administration and Information Management: A Critical History and Bibliometric Analysis*, 33 *ADVANCES IN LIBRARIANSHIP* 231, 279 (2015).

⁶⁵ JOHN BUSCHMAN, *DISMANTLING THE PUBLIC SPHERE*, 58 (2003).

⁶⁶ *See id.* at 92.

⁶⁷ Webster, *supra* note 32, at 113.

⁶⁸ *Id.*

⁶⁹ *Id.* at 116.

⁷⁰ Buschman, *supra* note 65, at 57–58.

as 1981, law librarians attending the annual meeting of the American Association of Law Libraries (AALL) were presented with Toffler's idea of the "Third Wave" as a *fait accompli*.⁷¹ A 1991 article published in the *Law Library Journal* by law professor Peter Martin struck familiar tones of anxiety and aspiration brought about by the "major technological shift" that Martin believed was afoot:

As reported in the *Wall Street Journal*, a major firm intends to consolidate all its information resources in a single low-rent location and use the freed-up prime office space for lawyers and the faxes, computers, and related electronic gear that will link the firm and permit access to internal as well as external information sources... Are law librarians [like] flight engineers whose professional mission will, in due course, be rendered obsolete by technology? Or are they, rather, like pilots and copilots, professionals whose capacities are being enhanced by powerful new systems?... Terry Martin, librarian at Harvard, speaking on this theme a year ago concluded: "Someone will have to manage, fund, coordinate, develop, and provide the plethora of information sources to be found in the law library of the future.... A role for the librarian seems assured...." I agree with Terry, but would add a warning, or hedge. This important future role for law librarians is far from guaranteed. It is a future that will not be realized unless law librarians (both individually and collectively as a profession) seize the opportunities opened during the current period of technological shift.⁷²

By the mid-1990s, rhetoric about the impending information revolution had kicked into high gear amid the Clinton administration's efforts to build the "information superhighway." In response, in 1996, AALL convened a special committee with the charge to bring about a "Renaissance of Law Librarianship in the Information Age."⁷³ Elsewhere, respected law librarians continued to publish think pieces worrying that the Information Revolution had already left librarians behind.⁷⁴

More recently, in a move not unrelated to the adapt or die rhetoric surrounding librarianship's flirtation with post-industrial theory, AALL leadership undertook a rebranding initiative, hiring a marketing firm at significant expense to remake the image of the association.⁷⁵ Among the marketers' recommendations (unanimously supported by the AALL Executive Board) was that the association rename itself the "Association for Legal Information." By dropping any mention of "Libraries" in the association's name, leadership hoped to address changes in the profession it attributed to advance of technology:

As digital technology has affected the way that we deliver, receive, and consume information, it also demands that law librarians become adept at learning and implementing new technologies, leveraging change, and managing ever-increasing amounts of information across multiple platforms. The role has expanded to include knowledge management, competitive intelligence, data analytics, project management, business development, and marketing. As these roles and responsibilities have changed, so have members' titles, the demands of their positions, and the expertise they bring to their work-places. Many members no longer work in a library setting; instead, they are embedded elsewhere in the organization, managing information resources, research services, data analytics, training, and teaching.⁷⁶

This statement went on to worry that the "value proposition" of the library has been "greatly diminished in recent years," and that by dropping the library from the association's title, the "Association for Legal Information will more immediately communicate the scope and importance of the work performed by our members, who are the experts in legal information."⁷⁷ Like the I-schools movement's attempt to drop the mention of libraries from

⁷¹ See Vince Giuliano, *Moving into the Information Age- New Technologies and their Implications for Law*, in *LEGAL INFORMATION FOR THE 1980S: MEETING THE NEEDS OF THE LEGAL PROFESSION*, 28 (Betty Taylor, ed 1982).

⁷² Peter W. Martin, *The Future of Law Librarians in Changing Institutions, or the Hazards and Opportunities of New Information Technology*, 83 *LAW LIBR. J.* 419, 420 (1991).

⁷³ RICHARD A. DANNER, *TOWARD A RENAISSANCE IN LAW LIBRARIANSHIP: THE REPORT, RECOMMENDATIONS AND MATERIALS OF THE AMERICAN ASSOCIATION OF LAW LIBRARIES SPECIAL COMMITTEE ON THE RENAISSANCE OF LAW LIBRARIANSHIP IN THE INFORMATION AGE* (1997).

⁷⁴ See Giuliano Cicco, *Have Law Librarians Missed the Information Age?* *N.Y. L. J.*, Jul. 10, 1995, at 7; Robert Berring, *An Embattled Profession Faces New Challenges*, *NAT. L. J.*, July 12, 1993, at 26.

⁷⁵ Jamie J. Baker, *AALL Rebranding Initiative*, *THE GINGER (LAW) LIBRARIAN* (Nov. 17, 2015), www.gingerlawlibrarian.com/2015/11/aall-rebranding-initiative.html.

⁷⁶ *AALL Rebranding Initiative: Why the Association for Legal Information?*, *AALL SPECTRUM*, Nov.-Dec. 2015, at 11, 13 (2015).

⁷⁷ *Id.*

the training of “information professionals,” AALL’s rebranding also proved an opportunity to distance law librarians from the stereotypical, non-technical, connotation of the term librarian.⁷⁸ Roma Harris attributes this stereotype to the historical association of librarianship as “women’s work,” and credits it for the lasting impression of librarianship as non-technical and therefore low-value work in the technologically driven post-industrial economy, despite librarianship’s core activities long having been defined by the activities of collecting and organizing information.⁷⁹ However, as the AALL leadership’s citation of ROI research demonstrates, the move may reflect a deeper anxiety surrounding the “library” and “librarian” label: libraries are now suspect as relics dependent on Second Wave-style government largesse, unable to hold their own in the cutthroat hyper-capitalism of the neoliberal era by proving their “value proposition” in direct monetary terms.

IV. CONSEQUENCES FOR THE PROFESSION

A. Professionals or Workers?

Technological determinism has functioned to stoke anxieties that society, due to the adoption of new technologies, is moving inexorably away from any need of libraries and librarians. Underpinning these accounts is an unflattering image of librarians as technologically backward, unwilling or unable to handle the pace of technological change. Despite the prevalence of this stereotype, even a cursory inspection reveals that its basis in reality is tenuous.⁸⁰ Like all stereotypes, the persistence of the librarian-as-Luddite trope owes more to its usefulness as an instrument of social control than its basis in fact. The trope of the technologically illiterate librarian left behind by the information revolution, serves to draw critical attention inward, towards self-examination for one’s own supposed shortcomings. In this way, the idea of the information society has become an integral part of the rhetorical and ideological framework of “responsibilization,” which pushes the full burden for survival in the face of widespread systematic problems onto atomized individuals.⁸¹ For the responsibilized subject, job insecurity is perceived as a punishment visited on individuals for inadequate investment in their human capital—in this case, proof of development of individual facility with or expertise in the most recent developments in information technology.

While there may be good reason for anxiety over job security in libraries, the inward-looking, individualist orientation of much writing on the subject detracts from the ability to view this as a systemic issue.⁸² Keynesian policies of the mid-twentieth century attempted to mitigate the ravages of unemployment through welfare and public jobs programs in the interest of keeping other structural features of capitalism intact.⁸³ However, as neoliberal policies displace Keynesianism, this so-called safety net for unemployed workers grows more threadbare, and the disciplining force of prospective under- or unemployment has been reinvigorated.⁸⁴

The diversity of institutional arrangements within the library world, along with the fine gradations between levels of middle management, librarian, and paraprofessional staff positions,⁸⁵ has helped to disguise what is in fact a widespread phenomenon facing workers in all sectors: diminishing prospects for stable and well-paid employment.

⁷⁸ Roma Harris, “*Their Little Bit of Ground Slowly Squashed into Nothing*”: *Technology, Gender, and the Vanishing Librarian*, in *INFORMATION TECHNOLOGY IN LIBRARIANSHIP: NEW CRITICAL APPROACHES*, 175 (Gloria J. Leckie & John Bushman eds., 2009).

⁷⁹ *Id.* at 168–69.

⁸⁰ *Id.*

⁸¹ Brown, *supra* note 57, at 132–33.

⁸² The systemic view of unemployment as a structural feature of capitalist relations is at least as old as *Capital*, Vol. I, in which Marx theorized that what he called “surplus population,” or “reserve army” of unemployed workers as a necessary adjunct required by capital for the discipline of the working class: “The law, finally, that always equilibrates the relative surplus-population, or industrial reserve army, to the extent and energy of accumulation, this law rivets the labourer to capital more firmly than the wedges of Vulcan did Prometheus to the rock.” Karl Marx, *Capital, Vol. 1*, in *THE MARX-ENGELS READER* (Robert C. Tucker, ed., 1972). at 310–11.

⁸³ See RACHEL S. TURNER, *NEO-LIBERAL IDEOLOGY: HISTORY, CONCEPTS, AND POLICIES*, 58 (2008).

⁸⁴ Loic Wacquant, *The Penalization of Poverty and the Rise of Neo-Liberalism*, 9 *EUR. J. CRIM. POL’Y & RES.* 401 (2001).

⁸⁵ See Amanda Bird and Braden Cannon, *From Steam Engine to Search Engines: Class Struggle in an Information Economy*, in *CLASS AND LIBRARIANSHIP: ESSAYS AT THE INTERSECTION OF INFORMATION, LABOR, AND CAPITAL*, 54–56 (Erik Estep & Nathaniel Enright eds., 2016).

This process has been manifested alternately in private-sector special libraries affected by budget cuts in a frenzy of profit driven downsizing;⁸⁶ as attacks on public sector unions and restrictions on public sources of funding;⁸⁷ or as declining rates of tenure in academia.⁸⁸ In addition to these declining expectations of job security, public sector austerity has contributed to the legitimate sense of anxiety for workers in many libraries. As institutions which have long claimed to operate in the public interest with substantial public support, cuts in public funding have resulted in closures and downward pressure to reduce hours, services, staffing, and collections.⁸⁹ Neoliberalism's anti-collectivism has diminished the perception that such demands for robust public services are justified without adequate "return on investment" in direct monetary terms, a belief system that many librarians have internalized and which influences perceptions of their self-worth and the sustainability of libraries as institutions.

In the debates over AALL's renaming initiative (ultimately rejected in a vote by the membership), many detected a split between law firm librarians and librarians in academic and government/public law libraries. For law firm librarians many saw the need to "rebrand" as a matter of survival, as cost-cutting law firm leadership were thought to see libraries as a drag on firm resources.⁹⁰ While it may be true that librarians employed in the private sector face particular challenges, it both overstates and understates the difference between the prospects confronting librarians in these different sectors. The difference is understated in the sense that law firm libraries, as organizational adjuncts to private sector firms, have long been defined by their contribution to the bottom line of the firm's profitability. As such, the law firm library is an organization that has already developed along the lines suggested by Lancaster and other library boosters of Information Society ideology. The logic of profit-maximization is therefore unsurprisingly compelling further outsourcing, insecurity, and instability on workers within such organizations. At the same time, the perceived split also overstates the differences between academic/government sector workers and private sector workers. As the influence of neoliberalism has spread, even those institutions which formerly justified their existence based on theories of public good are finding it necessary to translate these ideas to the language of profitability and return on investment.⁹¹

Ultimately, high profile library leaders have used their positions to push a narrative—derived from an uncritical reading of neoconservative theories of the information age—that librarians can win their way into the elite class of information professionals, if only they focus more intently on developing their human capital in terms of acquisition of "high tech" skills. The irony is that the promise of elite status has taken place against the backdrop of decreasing security for all workers, facts that information society ideology helps to obscure through its presentation of information work as inherently creative and fulfilling and class interests of workers having no coherent identifiable structure in the information economy. For librarians, this has served to occlude the potential for understanding their positions as service workers with interests in line with those of other workers both inside and outside of their institutions.⁹²

⁸⁶ See Toby Pearlstein & James Matazzaro, *Survival Lessons for Libraries: Corporate Libraries: A Soft Analysis and Warning*, SEARCHER, Jun. 1, 2009, at 15; Susan Smith DiMattia, *Time, Inc. Closes Its Research Center*, LIBR. J., Jul. 2001, at 15.

⁸⁷ See sources, *infra* note 89.

⁸⁸ See Christine M. Stouffer, *A Job for Life? Tenure and other Sticky Situations*, AALL SPECTRUM, Sep.-Oct. 2011, at 11; see also *Loosening the Ties that Bind: Academic Librarians and Tenure*; COLLEGE RES. LIBR., Mar. 2006 at 164.

⁸⁹ See, e.g., Michael Kelley, *The New Normal*, LIBR. J., Jan. 1, 2012 at 37; Michael Kelley, Meredith Schwartz, & Michelle Lee, *Johnson County Faces Cuts, Possible Closure*, LIBR. J., Mar. 15, 2012 at 16; Michael Kelley & David Rapp, *Detroit PL to Shutter Four Branches*, LIBR. J. Jan 1, 2012 at 14; Lynn Blumenstein & Norman Oder, *Minneapolis PL Closures on*, LIBR. J., Nov. 11, 2007 at 17; Amy Jordan, *Pratt Library Announces Which Branches to Close*, AMER. LIBR., Sep. 2001 at 20; Norman Oder, *Buffalo System to Close 20 Libraries*, LIBR. J., Jun. 6, 2005 at 16; Gordon Flagg, *State Budgets Hammer Public Libraries Nationwide*, AMER. LIBR., Aug.-Sept. 2009 at 19.

⁹⁰ See Jean Grady, *The "No's" Have It: AALL Members Embrace Tradition and Reject Transformative Rebranding*, DEWEY B. STRATEGIC (Feb. 12, 2016) <https://www.deweybstrategic.com/2016/02/the-nos-have-it-aall-members-embrace.html>.

⁹¹ See e.g., Taylor Fitchett, James Hambleton, Penny Hazelton, Anne Klinefelter & Judith Wright, *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91 (2011); Roberta F. Studwell, *The Strategic Academic Law Library Director in the Twenty-First Century*, 109 LAW LIBR. J. 649 (2017)(stating that "Just as businesses **employ** process improvement techniques' to predict costs, increase return on investment (ROI), and improve predictability and efficiency of outcomes, so must library directors."); Genevieve Blake Tung, *Academic Libraries and the Crisis in Legal Education*, 105 LAW LIBR. J. 275, 304 (2013); James G. Milles, *Legal Education in Crisis, and Why Law Libraries Are Doomed*, 106 LAW LIBR. J. 507, 520 (2014).

⁹² Leigh Estabrook, *Labor and Librarians: The Divisiveness of Professionalism*, LIBR. J., Jan. 15, 1981 at 125.

B. Librarians and Information Capitalism

The framework provided by Information Society theory—with librarianship needing redefinition to fit itself to the post-industrial information economy—has engendered a professional culture focused intently on individual professional development, often couched in terms of the need to develop computing skills using the latest technology. This focus on professional development has simultaneously functioned to crowd out critical analysis of how broader economic forces are shaping libraries as institutions and the practice of librarianship. There have been some notable exceptions exploring the link between high technology boosterism with theories of the capitalist labor process, and examining how technology has contributed to outsourcing, deskilling, and automation of library work.⁹³ However, what one encounters far more frequently is what John Buschman describes as the “simplistic aping of business management trends,”⁹⁴ and the concomitant identification of librarians with the interests of an elite segment of managers. This managerial discourse typically repeats major themes of the information society as it has been employed to reinforce neoliberal austerity policies: realization of “efficiency” through implementation of technology; the importance of providing good “return on investment”; and an emphasis on worker flexibility in accommodating new technologies.⁹⁵

This status anxiety has combined with widespread perceptions of “objectivity” underlying emerging technologies in a way that largely serves to reinforce the prerogatives of a few monopolistic vendors of database platforms.⁹⁶ The technologies alluded to in professional exhortations to enthusiastically embrace new technologies are not necessarily public domain standards or open source software, but specific products of information vendors looking to turn a profit.⁹⁷ Even where new information technologies transparently serve the interests of capital accumulation,⁹⁸ through their association with science and theoretical knowledge, new technologies present a plausible claim as an objective description of non-social reality.⁹⁹

This uncritical attitude towards the purveyors of information as commodity is exemplified by the almost universal acceptance of marketing in the law school classroom, especially through vendor presence in the first-year legal research and writing curriculum. Respected law library director Robert Berring was among those who argued in favor of expanding the first year curriculum to include a more prominent role for legal research focused on the sorts of “critical skills” required to conduct effective computer assisted legal research.¹⁰⁰ His argument both served to normalize the law school marketing strategies employed by database vendors, and to help librarians identify their ambitions to elite status with acceptance and furtherance of these strategies. While law librarians still debate whether librarians or vendor representatives do a better job of teaching computer assisted legal research, few seriously question the presence vendors in the classroom.¹⁰¹

⁹³ Michael F. Winter, *Librarianship and the Labor Process: Aspects of the Rationalization, Restructuring, and Intensification of Intellectual Work*, in *INFORMATION TECHNOLOGY AND LIBRARIANSHIP: NEW CRITICAL APPROACHES*, 143–164 (Gloria F. Leckie & John Buschman eds., 2008). James F. Tracy & Maris L. Hayashi, *A Librarianship? Labor, Technology, and Librarianship in the Information Age*, in *KNOWLEDGE WORKERS IN THE INFORMATION SOCIETY*, 53–67 (Catherine McKercher & Vincent Mosco, eds. 2007).

⁹⁴ Buschman, *supra* note 65, at 87.

⁹⁵ Henry T. Blanke, *Librarianship and Public Culture in the Age of Information Capitalism*, 5 *J. INFO. ETHICS* 54, 63.

⁹⁶ John Dethman, *Trust v. Antitrust: Consolidation in the Legal Publishing Industry*, 21 *L. REF. SERVICES Q.* 123 (2002); Olufunmilayo B. Arewa, *Open Access in a Closed Universe*, 10 *LEWIS & CLARK L. REV.* 797 (2006); Leslie A. Street & David R. Hansen, *Who Owns the Law? Why We Must Restore Public Ownership of Legal Publishing*, 26 *J. INTELL. PROP.* 205 (2019).

⁹⁷ See, e.g., Robert Berring, *On Not Throwing Out the Baby: Planning the Future of Legal Information*, 83 *CALIF. L. REV.* 615 (1995).

⁹⁸ An example of such a technology which should be familiar to most librarians is the development of Digital Rights Management software, technology whose sole function is to protect private property interests in information. Although the ostensible purpose of DRM software is to thwart potential copyright infringement, information publishers frequently go beyond the bounds of copyright law to prevent even what the law would otherwise protect as fair use by consumers. Jason Puckett, *Digital Rights Management as Information Access Barrier*, *PROGRESSIVE LIBR.*, Fall-Winter 2010, at 11, 13.

⁹⁹ See *infra*, notes 114 to 118 and accompanying discussion.

¹⁰⁰ Robert C. Berring, *Collapse of the Structure of the Legal Research Universe*, 69 *WASH. L. REV.* 9 (1994).

¹⁰¹ See e.g. Shawn G. Nevers, *Candy, Points, and Highlighters: Why Librarians, Not Vendors, Should Teach CALR to First-Year Students*, 99 *L. LIBR. J.* 757.

Whether taught by vendor representatives, librarians, or other members of the faculty, the centrality of commercial databases in the legal research curriculum has an ideological valence that is often overlooked. While the importance of research tools in shaping the epistemic outlook of researchers has been addressed by a number of authors, there has been a relative dearth of critical reflection on the significance of particular research tools in socializing young lawyers.¹⁰² This is perhaps surprising because for at least a generation, outside of casebooks, commercial databases paradigmatically represented by Lexis and Westlaw are where most young lawyers have had their initial encounter with the written law. Unlike the databases for many academic disciplines Westlaw and Lexis do not attempt to reproduce the experience of reading a publication originally produced in a print medium, as do many other academic databases that privilege PDF documents capturing the image of the print publication as the primary means of document transmittal. Instead, the contents of Westlaw and Lexis have been extracted from the diverse array of original sources and placed into HTML files with standardized fonts, colors, and formatting. Conversion to HTML permits the insertion of hyperlinks to other documents, but both publishers choose to link only to documents that exist within their own database, as opposed to redirecting users to resources that exist in free government publications or elsewhere online.

While these aesthetic elements of the research medium tend to blend into the background, they generate an experience that serves to reinforce the impression that what is contained in the database is the whole of “the law” in its natural state. In other words, the law as most American lawyers now encounter it, does not reside in the form in which it is published by the government (and is maintained in the public domain); or even in the motley collections of print materials from various sources collected by a law library, but in a highly mediated, commodified, “value added” product.¹⁰³ “Value added” of course translates into expense, and this too becomes a naturalized component of the law: premium access to those who can pay; limited, inconvenient, or non-existent access for those who cannot.

A consequence of this naturalized view of privatized information is that it becomes difficult to see as a system that could be constituted differently. The rise of information capitalism has had some well well-known negative effects for libraries, but these are experienced as discrete problems that librarians must work around, rather than as part of an overarching system. Consolidation in the publishing industry has sharpened the power asymmetry between publishers and libraries as customers, giving publishers unprecedented discretion to set prices and contract terms.¹⁰⁴ Libraries are under pressure to provide materials in a variety of formats, although the cost of databases as well as print materials has increased exponentially. In an attempt to economize, many libraries have opted to electronic-only subscriptions, although licensing agreements with electronic publishers prevent libraries from actual ownership of the electronic materials in question: access to materials may cease whenever the subscription is canceled and continuing payments to the vendor are ceased.¹⁰⁵

This arrangement has had some particularly troubling consequences for law libraries. Many libraries have foregone print materials in favor of electronic only access; but many law libraries are catering to increasing numbers of pro se litigants already fighting the uphill battle of conducting research with an untutored understanding of the law.¹⁰⁶ These are patrons who would particularly benefit from having more format options or who may be blocked (by licensing agreements) from using materials contained in electronic subscriptions.¹⁰⁷ The latter is a problem especially for academic libraries open to the public; however, as more public law libraries associated with courthouses close their doors in response to budget pressures, law school libraries act as the de facto public

¹⁰² Arguable exceptions are two articles by Richard Delgado and Jean Stefancik written nearly 20 years apart: *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 *STANFORD L. REV.* 207 (1989); and *Why Do We Ask the Same Questions: The Triple Helix Dilemma Revisited*, 99 *LAW LIBR. J.* 307 (2007). The former considered the digest system and the latter addressed CALR, both concluded that these tools typically assert a conservative influence by focusing attention on what has already been written and is already known rather than encouraging leaps of intuition or emergent modes of analysis.

¹⁰³ Blanke, *supra* note 95, at 64.

¹⁰⁴ Wilhelm Peekhaus, *A Call to Reclaim Control Over Scholarly Publishing*, *J. INFO. ETHICS*, Fall 2016, at 20, 24; Greg Lambert, *Why Lexis' Sales Approach Should Concern Law Firm Management and Leadership*, 3 *GEEKS AND A LAW BLOG*, Jun. 11, 2018, <https://www.geeklawblog.com/2018/06/lexis-sales-approach-concern-law-firm-management-leadership.html>.

¹⁰⁵ Scott Matheson, *Access Versus Ownership: A Changing Model of Intellectual Property*, 21 *L. REF. SERVICES Q.* 153, 168 (2002).

¹⁰⁶ Kimberly Mattioli, *Access to Print, Access to Justice*, 110 *LAW LIBR. J.* 31, 38 (2018).

¹⁰⁷ *Id.* at 48.

law library in many locations.¹⁰⁸ The rising cost of research may in turn be one of the factors contributing to the increasing numbers of litigants who are going it alone in court.¹⁰⁹

The ability of publishers to force take it or leave it contractual arrangements has given vendors the ability to force what many librarians regard as unacceptable ethical compromises on the profession. The American Library Association's Code of Ethics names patron privacy as a paramount value.¹¹⁰ AALL has articulated a similar principle for law librarians: the duty to "develop service policies that respect confidentiality and privacy."¹¹¹ However, electronic subscriptions may invisibly undermine this principle, permitting the collection of patron data in a manner that is largely opaque and ultimately out of the library's hands. This problem was recently and dramatically illustrated for law librarians when it came to light that the parent companies of both Lexis and Westlaw had contracts with Immigration and Customs Enforcement (ICE) to share data on people ICE was investigating for deportation.¹¹² There remains uncertainty around whether data on researchers accessing Lexis or Westlaw is being utilized for these purposes, in violation of not only librarian ethics but, potentially, in transgression of norms of attorney client confidentiality.¹¹³ While some librarians may be prepared to take the word of vendor representatives on this point, the fact remains that what vendors do with information gathered from users remains a black box, opaque, unregulated, and ultimately out of the library's control.

C. Technological Solutionism and the Open Access Alternative

As critical theorists of technology have observed, the 20th century saw the marriage of technological developments to abstract theoretical knowledge, allowing technology to take on the luster of objectivity generally accorded to science.¹¹⁴ Conservatives like Bell tended to see this development as a legitimate displacement of ideologically driven power politics with rationalist, technocratic management principles, and an actual resolution of former class conflicts.¹¹⁵ However, as Bell's numerous critics have argued, technological developments may have merely enabled capital to reorganize itself in ways that make confrontation difficult to engage and conflicts difficult to see.¹¹⁶

Habermas theorized that "technocratic consciousness" and the apparent neutrality of technology had inappropriately enabled the technical to displace public debate or "symbolic interaction" in disputes of a social or political nature.¹¹⁷ In a recent book, Evgeny Morozov has elaborated on this theme, identifying instances of what he calls "technological solutionism," or the invocation of and inherent faith in technology to provide solutions to all manner of problems, from pollution to homelessness.¹¹⁸ The persistence of technocratic consciousness makes it possible to

¹⁰⁸ See Jennifer Dalglis, Daniel Cordova & Mark E. Estes, *Managing Government Law Libraries Today: Challenges and Opportunities*, AALL SPECTRUM Nov./Dec. 2016, 25.

¹⁰⁹ The obvious proximate cause is the decline in public support for legal services for individuals that meet the definition of indigence. See Rebecca Kunkel, *Rationing Justice in the 21st Century: Technology and Technocracy in the Access to Justice Movement*, 18 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 366, 371 (2018). However, there is evidence that middle income litigants are also forgoing professional assistance due to the cost involved; to the extent that research costs are factored into attorney fees, this may be one reason that these litigants are being "priced out." See Nazareth A.M. Pantaloni, *Legal Databases, Legal Epistemology, and the Legal Order*, 86 LAW LIBR. J. 679, 704 (1993).

¹¹⁰ American Library Association, *Professional Ethics*, <http://www.ala.org/tools/ethics>, par. 3.

¹¹¹ American Association of Law Libraries, *AALL Ethical Principles*, <https://www.aallnet.org/about-us/what-we-do/policies/public-policies/aall-ethical-principles/>

¹¹² Sam Biddle, *Thomson Reuters Defends Its Work for ICE, Providing Identification and Location of Aliens*, THE INTERCEPT (Jun. 27, 2018), <https://theintercept.com/2018/06/27/thomson-reuters-defends-its-work-for-ice/?comments=1>; Sarah Lamdan, *Surveillance and Legal Research Providers: What You Need to Know*, LAW LIBRARIAN BLOG (Jul. 9, 2018), <https://llb2.com/2018/07/09/surveillance-and-legal-research-providers-what-you-need-to-know/>.

¹¹³ Joe Hodnicki, *Does WEXIS Use Legal Search User Data in Their Surveillance Search Platforms?*, LAW LIBRARIAN BLOG (Jul. 16, 2018) <https://llb2.com/2018/07/16/does-wexis-use-legal-search-user-data-in-their-surveillance-search-platforms/>.

¹¹⁴ See, HERBERT MARCUSE, *ONE DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY*, (2nd ed., 1991), 144; JURGEN HABERMAS, *Technology and Science as "Ideology," in TOWARD A RATIONAL SOCIETY*, (trans. Jeremy J. Shapiro, 1970), 104.

¹¹⁵ See *supra*, notes 4 to 21 and accompanying discussion.

¹¹⁶ See Dyer-Witheford, *supra* note 16 at 142–144 (discussing the nature of technologically-driven globalization as an instance of class decomposition).

¹¹⁷ HABERMAS, *supra* note 114 at 111–13.

¹¹⁸ EVGENY MOROZOV, *TO SAVE EVERYTHING, CLICK HERE: THE FOLLY OF TECHNOLOGICAL SOLUTIONISM* (2013).

avoid the experience of such problems as instances of historical agents engaged in a dispute over the control of society and its resources, that is, as class struggle.

Although librarians have for some time been aware of the problems generated by information as commodity outlook, we have also been accustomed to viewing technology as providing an adequate corrective for these problems, if not now then at some point in the near future. It is in this context that one frequently hears calls to develop open access resources as an alternative to commodified information.¹¹⁹ Open access to law is like open access scholarship, open source software, and other recent attempts to build information “commons” in that it uses network technology in an attempt to overcome limitations posed by restrictive intellectual property regimes.¹²⁰ To some, the idea of information commons inherently challenges to mode of production and alternative to commodified, privately owned closed software: work is contributed to the open source project free of charge outside of the wage labor market, with the understanding that the fruits of the collaboration will be preserved and put to use for the public good.¹²¹ Open access draws on this ethos to create free information sources assisted by the application of emerging information and communication technology.¹²²

Although open access to law initiatives have helped many people by providing free access to legal materials, it is important to recognize what open access is not: it is not an attempt to restructure the fundamental social and legal apparatus that allows legal information vendors to retain private control of database contents, to treat legal information as a commodity, or to operate for the sake of profit rather than the public interest. Any amelioration that occurs as the result of open access takes place within the existing framework of relations of production, not as a result of restructuring those relations. “Democratization” occurs not through coming together of a democratic public in the name of the common good but in the sense frequently used by neoliberals to denote an extension of the range individual choices in the market. Open access therefore does not present a break with information capitalism but takes place within its strictures.

Despite the several decades long history of the open access to law movement, consolidation within legal publishing industry has continued apace.¹²³ The same factors that make it difficult for new for-profit competitors to make a go in the legal publishing market also have made it difficult for non-profits to present a viable alternative to the contents of commercial databases: the protection of the intellectual property for the organization systems used by established vendors (such as the West Digest system), the superior position of those firms to acquire comprehensive collections of legal publications (including respected secondary sources that are also protected by IP),¹²⁴ are factors that cannot seriously be challenged even by a small non-profit upstart, even one that operates on a shoestring and gives away content for free.

The logic of the market limits Legal Information Institutes and others who are attempting to provide free access to law in other ways: they must continually justify their existence in financial terms by raising donated funds and even selling advertising space. LIIs are operated as non-profit NGOs relying on a combination of funding from a parent institution, solicited donations, or bar dues.¹²⁵ The oldest LII started at Cornell University

¹¹⁹ See e.g. Richard A. Danner, *Defining International Law Librarianship in an Age of Multiplicity, Knowledge, and Open Access to Law*, in THE IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT 15 (Richard A. Danner, ed. 2016); Daniel Poulin, Andrew Mowbray, & Pierre-Paul Lemyre, *Free Access to Law and Open Source Software*, in SOFTWARE APPLICATIONS: CONCEPTS, METHODOLOGIES, TOOLS, AND APPLICATIONS, 373, 374 (Pierre F. Tiako, ed. 2009); Richard Zorza, *The Sustainable 21st Century Law Library: Vision, Deployment and Assessment for Access to Justice* (2012) at 10, <http://www.zorza.net/LawLibrary.pdf>

¹²⁰ See Charlotte Hess & Elinor Ostrom, *Introduction: An Overview of the Knowledge Commons*, in *Understanding Knowledge as a Commons: From Theory to Practice*, 3, 14 (Charlotte Hess & Elinor Ostrom eds., 2006).

¹²¹ However, as Faith Agostinine-Wilson notes, there is a significant difference within the open source software community with adherents of “Free” software and “Free/Libre Open Source Software” movements, the latter being open to pursuing business partnerships and consequently, refusing to restrict downstream business uses from restrictive repackaging and resale of software developed using the FLOSS mode. *A Critical Overview of the Digital Knowledge Commons from a Marxist Perspective*, 4 KNOWLEDGE CULTURES 176, 183 (2016).

¹²² Graham Greenleaf, Andrew Mowbray & Philip Chung, *The Meaning of ‘Free Access to Legal Information’: A Twenty Year Evolution*, 1 J. OPEN ACCESS L. 6, (2013).

¹²³ See references, *supra* note 96.

¹²⁴ See Arewa, *supra* note 96, at 822–23.

¹²⁵ Graham Greenleaf, *Free Access to Legal Information, LIIs, and the Free Access to Law Movement*, in IALL INTERNATIONAL HANDBOOK OF LEGAL INFORMATION MANAGEMENT, 201, 219 (R. Danner and J. Winterton, eds., 2011).

in 1992 now also runs ads to make up funds, thus adopting one of the earliest strategies used by information capitalists to “monetize” free content online. LEXUM (not an LII but a member of the “free access to law movement” that develops and manages software used by CanLII and other legal information institutes) began in academia but has spun off into a for-profit venture.¹²⁶ LEXUM now develops interactive products such as Lexbox, which enable more sophisticated data collection about users which in turn generates revenue for the company via remarketing,¹²⁷ thus incorporating the more advanced strategies for exploiting the unpaid labor of users of “free” internet content that arose with web 2.0.¹²⁸

Despite the quarter century history of open access projects, they have existed comfortably alongside the greater accumulation of power by commercial database vendors. As one admirer of the Open Access to Law movement put it:

“The effect of the public legal information movement has not been to supplant commercial services, but to drive them to innovate. If basic legal information is freely available, the only way to make money in the segment is to offer more. If the goal of the LII is to put Westlaw and Lexis out of business, LII is bound to fail. But LII can, and does, make legal information better and more available. The new low-end providers like Loislaw are pushed to provide more because they need to be better than LII. Lexis has been pushed to offer more, because it has to be better than Loislaw. And Westlaw has been pushed to offer more because it has to be better than Lexis.”¹²⁹

Andrew Feenberg stated the problem succinctly when he said that “the choice of a technical, rather than moral or political solution to a social problem is politically and morally significant.”¹³⁰ The technological solution of providing a free internet service takes attention and energy away from direct confrontation with existing powers, instead channeling it into “competition” that is easily absorbed into the current arrangement.

CONCLUSION

At bottom, the ideology of the Information Society presents the current distribution of power as the natural outcome of the teleological process of advancing technology. Theories of the Information Society have exerted a profoundly conservative influence on librarianship, by encouraging librarians to view themselves as the potential elites of the new social order; to view information as a commodity; and to view systemic power imbalances as a natural if temporary condition that will ultimately be corrected by technology without need of further political engagement. Decoupling technology from the notion of social progress is an essential first step in being able to actually confront the problems that face libraries and the students and patrons, we serve.

¹²⁶ <https://lexum.com/en/about-lexum/our-company/>

¹²⁷ See <https://lexum.com/en/lexbox-privacy-policy/>

¹²⁸ Asunción Esteve, *The Business of Personal Data: Google, Facebook, and Privacy Issues in the EU and the USA*, 7 INT’L DATA PRIVACY L. 36 (2017).

¹²⁹ Dan Dabney, *Legal Information, Public and Private*, VOXPOPULI, (Apr. 16, 2009), <https://blog.law.cornell.edu/voxpop/2009/04/16/legal-information-public-and-private/>

¹³⁰ Andrew Feenberg, *Critical Theory of Technology, an Overview*, in INFORMATION TECHNOLOGY IN LIBRARIANSHIP: NEW CRITICAL APPROACHES, 33 (Gloria Leckie & John Buschman eds, 2009).