
USING PRINCIPLES OF CRITICAL INFORMATION THEORY TO TEACH PROGRESSIVE APPROACHES TO REGULATORY RESEARCH

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My article, “Critical Information Theory: A New Foundation for Teaching Regulatory Research,” which appeared in *The Boulder Statements on Legal Research Education: The Intersection of Intellectual and Practical Skills*, edited by Professor Susan Nevelow Mart, attempted to offer a pathway to break away from categorical thinking in legal research instruction.¹ It was also an opportunity to revisit and offer a strategy to address the concerns presented by Professors Richard Delgado and Jean Stefancic in their 1989 essay, “Why Do We Tell the Same Stories?”² and again in their 2007 follow-up, “Why Do We Ask the Same Questions?”³ Delgado and Stefancic challenge us to ask questions without relying on the categories that have been predetermined by legal doctrines, the legal academy, and the commercial legal publishing enterprise. My answer was found in administrative law research.

Regulatory research taught from the perspective of critical information theory is a pathway for the consideration of (1) regulatory transparency, (2) agency accountability, (3) due process and fundamental fairness in the context of agency adjudication and rulemaking, (4) private-public partnerships, and (5) agency expertise and discretion. Underlying these questions are concerns about how government works, which entities have power, and which entities are privileged by the modern administrative state. Put simply, what and whose interests are at play.

In my article, I drew from critical information studies, which, at the time of my article, was

an emerging discipline “that considers the ways in which culture and information are regulated” Critical information theory calls attention

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¹ Julie Graves Krishnaswami, *Critical Information Theory: A New Foundation for Teaching Regulatory Research*, in *THE BOULDER STATEMENTS ON LEGAL RESEARCH EDUCATION: THE INTERSECTION OF INTELLECTUAL AND PRACTICAL SKILLS* 175 (Susan Nevelow Mart ed., 2014).

² Richard Delgado & Jean Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 *STAN. L. REV.* 207 (1989).

³ Richard Delgado & Jean Stefancic, *Why Do We Ask the Same Questions? The Triple Helix Dilemma Revisited*, 99 *LAW LIBR. J.* 307 (2007).

to culture, and specifically to documents, sources, and materials as well as access to and the cost of such materials.

The theory prompts users to ask questions not only about access and costs but also whether the structures for using information have a chilling effect on certain groups of users.⁴

Regulatory research can be taught outside the gates of the commercial legal publishing enterprise by relying on government materials and open access materials, many of which come from fields other than the law. Using these materials allows students to consider how members outside the legal academy access legal and non-legal information and how that information can be used to construct arguments to advocate for change. With Westlaw and LexisNexis dominating legal research, the onus is on legal research teachers to expose students to research strategies outside of these publishers, namely government and open access sources. Working outside of LexisNexis and Westlaw gives students practice finding, analyzing, and evaluating other forms of information.

Using government materials in this way also helps students consider the successes and failures of e-government initiatives in the United States. Nearly all agencies engage in e-rulemaking which is “the use of digital technologies in the development and implementation of regulations.”⁵ E-rulemaking exists not only to leverage technology, streamline processes, and increase efficiency but also to increase public awareness, access, and involvement in rulemaking. To be sure, transparency in rulemaking has increased with the advent of digital materials and electronic research systems, but that increase has been uneven. E-rulemaking provides an appropriate context for thinking about publication distribution and transparency.

In teaching regulatory research as part of my Advanced Legal Research course at Yale Law School, I often focus on the formation of an agency and ask students to research that very question. This research involves finding and understanding an agency’s enabling legislation and the power of the agency as well as the crisis that created the agency or the problems that the agency set out to remedy. It provides students with the opportunity to see that there are unforeseen outcomes to legal action even when actors have the best intentions. It is my hope that this question breaks students away from predetermined ideas about how to research, which sources to synthesize, and which stories to recount about the law. Furthermore, I hope to activate students’ imaginations and allow them to ask what *could* this agency do and how? More specifically, what is it empowered to do to improve the lives and health of individuals? How is it empowered to preserve the environment? How can the agency work to end systematic racism?

⁴ Krishnaswami, *supra* note 1, at 177 (footnotes omitted) (quoting Siva Vaidhyanathan, *Afterword: Critical Information Studies: A Bibliographic Manifesto*, 20 CULTURAL STUD. 292, 293 (2006)).

⁵ *Id.* at 194 (quoting Cary Coglianese, *E-Rulemaking: Information Technology and the Regulatory Process*, 56 ADMIN. L. REV. 353, 355 (2004)).

Critical information theory pulls from multiple disciplines.⁶ In regulatory research, looking outside of the legal academy with a multidisciplinary lens is especially helpful. Students can draw on historical materials, news, political science statistics and data, and health and science, among other fields. Frequently, one regulatory issue will contain aspects of each and every academic field and discipline. Again, this is an opportunity to release students from the categorical thinking caused by the legal academy and the beloved legal research systems. As Delgado and Stefancic observed, the legal academy generally and legal research specifically funnel students' attention into one category, one discipline, or one area.⁷ Indeed, students often collapse questions into a single keyword. Yet administrative law research demands that students couple and combine disciplines and categories. Most, if not all, regulatory issues overlap in multiple areas. For instance, environmental concerns often overlap with health concerns; housing concerns often overlap with small business concerns; and transportation and employment concerns often overlap with civil rights and equality concerns. Likewise, there are overlapping jurisdictions to address. Looking beyond one idea or one category gives students access to which ideas and groups are on the periphery. The challenge here is massive volumes of information as well as students' tendencies to graze information.

In teaching students the basics of regulatory research, teachers must ensure that students learn how to find and read rules in their various forms. This is important for basic searching, but it is also important as a way to get students to consider the context in which rules are drafted. For instance, I like to ask students to consider which groups were involved in the rulemaking process: Whose voices were considered and who had access to the materials that the agency relied on in making its determination? In other words, who were the stakeholders sitting around the regulatory table? Similarly, I like to explore what types of materials would be used for commenting on behalf of a certain individual or group harmed or impacted by the regulation.

Delgado and Stefancic observed in their 2007 article that "[t]hat act of imagination requires stepping back and pondering history, politics, and the development of case law over time."⁸ Further, "[i]t requires a conceptual advance that sees old material in a new light."⁹ I hope this Symposium continues to move legal research in that direction.

⁶ Krishnaswami, *supra* note 1, at 175.

⁷ Delgado & Stefancic, *supra* note 2, at 219.

⁸ Delgado & Stefancic, *supra* note 3, at 321.

⁹ *Id.* at 328.