

Open Access to Legal Scholarship: Dropping the Barriers to Discourse and Dialogue*

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This paper focuses on the importance of free and open access to legal information, not only to primary sources of law, but to legal scholarship and commentary on the law. It argues that full understanding of authoritative legal texts requires access to informed commentary as well as to the texts of the law themselves, and that free and open access to legal commentary will facilitate cross-border dialogue and foster international discourse in law. The paper discusses the obligations of scholars and publishers of legal commentary to make their work as widely accessible as possible. It considers the potential benefits and drawbacks of electronic law journals and legal databases, as well as the uses of newer short forms of legal scholarship. Examples of institutional and disciplinary repositories for legal scholarship are presented and critiqued, as are the possible impacts of recent initiatives to promote all-electronic publication of legal scholarship, such as the Durham Statement on Open Access to Legal Scholarship.

I. THE FREE ACCESS TO LAW MOVEMENT

The Declaration on Free Access to Law states that:

Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;

Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge

Independent non-profit organisations have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published.¹

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¹Declaration on Free Access to Law (Oct. 3, 2002, as amended), <http://www.worldlii.org/>

The Declaration was first issued by representatives of legal information institutes (LIIs)² from eight areas of the world at the 2002 4th International Conference on Law via the Internet in Montreal.³ The Montreal Declaration was issued at a time when other groups were making well-publicized statements regarding the importance of open access⁴ to published scholarly and research literature in other disciplines, especially the sciences.⁵ Today, seven years later, twenty-one national and regional legal information institutes are linked from the web

worldlii/declaration/.

²In a paper tracing the development of the free access to law movement, Greenleaf, Chung, and Mowbray define “legal information institute” as:

a provider of legal information that is independent of government, and provides free access on a non-profit basis to multiple sources of essential legal information, including both legislation and caselaw (or alternative sources of jurisprudence). ... They are therefore, in essence, aggregators of public legal information at a national or sometimes regional level.

Graham Greenleaf, Philip Chung & Andrew Mowbray, *Emerging Global Networks for Free Access to Law: WorldLII's Strategies* 5 (March 22, 2007), <http://ssrn.com/abstract=975614>.

³The history and development of the movement for free access to law can be found on the web site of the World Legal Information Institute (WorldLII) at <http://www.worldlii.org/> (last visited Nov. 9, 2009) and in Greenleaf, Chung & Mowbray, *supra* note 2, 7-9. See also Daniel Poulin, “Open Access to Law in Developing Countries,” *First Monday*, Dec. 2004, <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1193>.

⁴The 2002 Budapest Open Access Initiative defines open access in reference to scientific and scholarly research as:

free availability on the public internet, permitting any users to read, download, copy, distribute, print, search, or link to the full texts of these articles, crawl them for indexing, pass them as data to software, or use them for any other lawful purpose, without financial, legal, or technical barriers other than those inseparable from gaining access to the internet itself.

Budapest Open Access Initiative: Frequently Asked Questions: Open Access (last revised, Oct 1, 2009), <http://www.earlham.edu/~peters/fos/boaifaq.htm#openaccess>.

Others suggest that any strict definition of open access may be too limiting: See, e.g., John Willinsky, *The Access Principle: The Case for Open Access to Research and Scholarship* 211 (2006) (“Only by working with a loosely defined approach to open access archiving and publishing can one begin to capture the variety of and variation in the means that are now being used to increase access to scholarship and research.”).

⁵ The Budapest Open Access Initiative (BOAI), <http://www.soros.org/openaccess/read.shtml>, was issued in February 2002, and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, <http://oa.mpg.de/openaccess-berlin/berlindeclaration.html>, in October 2003.

The June 2003 Bethesda Statement on Open Access Publishing focused on practical matters: “significant, concrete steps that all relevant parties ... can take to promote the rapid and efficient transition to open access publishing.” Bethesda Statement on Open Access Publishing (Apr. 11, 2003, released June 20, 2003), <http://www.earlham.edu/~peters/fos/bethesda.htm>.

site of the World Legal Information Institute (WorldLII).⁶ The WorldLII site provides a search facility for its own databases and databases located on the sites of other legal information institutes. Greenleaf, Chung and Mowbray point out that only a minority of legal jurisdictions world-wide offer comprehensive free electronic access to essential legal information through government web sites, or by providing the data to independent sites.⁷

The Declaration on Free Access to Law defines “public legal information” to be:

legal information produced by public bodies that have a duty to produce law and make it public. *It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.*⁸

The Declaration proclaims that independent, non-profit organizations have a right to publish public legal information, and that governments should provide them access to the information so

⁶See World Legal Information Institute, *supra* note 3.

⁷Greenleaf, Chung & Mowbray, *supra* note 2, at 6. In the United States, the nonprofit group, Public.Resource.org, <http://public.resource.org/index.html> (last visited, Nov. 9, 2009), is engaged in “an effort to create a report documenting exactly what it would take to create a distributed registry and repository of all primary legal materials in the United States.” The repository (Law.Gov) would provide “bulk data and feeds to commercial, non-commercial, and governmental organizations wishing to build web sites, operate legal information services, or otherwise use the raw materials of our democracy.” <http://public.resource.org/law.gov/index.html> (last visited, Nov. 9, 2009).

⁸Declaration on Free Access to Law, *supra* note 1 (emphasis added). Compare Dan Dabney, Legal Information, Public and Private, VoxPopuLII, <http://blog.law.cornell.edu/voxpath/2009/04/16/legal-information-public-and-private/> (Apr. 16, 2009) (noting that the phrase “‘public legal information’ seems to be redundant. If it’s legal information, then of course it’s public.”)

The Declaration’s distinction between primary and secondary sources of law is probably more applicable to common law jurisdictions than to civil law jurisdictions. In common law countries such as the United States, legal scholarship is usually classified as “secondary” literature, and is distinguished from the “primary” sources of law issued by bodies with law- or rule-making authority: legislatures, courts, and administrative agencies. See generally Jill J. Ramsfield, *Culture to Culture: A Guide to U.S. Legal Writing* 45-61 (2005).

In other legal systems, distinctions between primary and secondary sources of law are less clearly drawn. See Claire M. Germain, *Germain’s Transnational Law Research* § 2.07.3 (1991-) (The common law distinction between primary and secondary authority “does not exist in civil countries which give more respect to commentary on the law in books and articles.”) See also René David & John E.C. Brierley, *Major Legal Systems in the World Today: An Introduction to the Comparative Study of Law* 148 (3d. ed. 1985) (noting that in Romano-Germanic legal systems “[l]egal scholarship is ... of fundamental importance because it creates in different countries the various working tools of jurists.”). See also John Henry Merryman & Rogelio Pérez-Perdomo, *The Civil Law Tradition: An Introduction to the Legal Systems of Europe and Latin America* 56-60 (3d ed. 2007) (“The teacher-scholar is the real protagonist of the civil law tradition. The civil law is a law of the professors.” *Id.* at 56);

that they can publish it.⁹ Greenleaf, Chung and Mowbray argue convincingly that access to legal information through LIIs and other non-governmental publishers is essential not only to fill gaps in access, but “to ensure that free access is not second-rate access.”¹⁰

In his 2006 book: *The Access Principle: The Case for Open Access to Research and Scholarship*,¹¹ John Willinsky suggests that “access to knowledge is a human right that is closely associated with the ability to defend, as well as to advocate for, other rights.”¹² It should be noted that neither the Declaration on Free Access to Law nor the other open access declarations issued in 2002-2003 argue for a right of open access to information.¹³ Nor do they discuss the possible bases for a rights-based access argument in the Universal Declaration of Human Rights,¹⁴ in the International Covenant on Economic, Social and Cultural Rights,¹⁵ or

⁹Declaration on Free Access to Law, *supra* note 1.

¹⁰Greenleaf, Chung & Mowbray, *supra* note 2, at 11 (“Governments may or may not publish the information themselves, but competition will help ensure that one or more versions are available for free access.”).

¹¹Willinsky, *supra* note 4, at 143. The full text of the book can be downloaded in PDF format without charge at: <http://mitpress.mit.edu/catalog/item/ebook.asp?type=2&tid=10611> (last visited Nov. 8, 2009). Willinsky is the founder and principal investigator for the Public Knowledge Project (PKP), a partnership of several institutions “dedicated to exploring whether and how new technologies can be used to improve the professional and public value of scholarly research,” <http://pkp.sfu.ca/about> (last visited Feb. 18, 2008). Among other products, PKP has developed free open source journal publishing software, Open Journal Systems (OJS), which is used by over 2500 journals worldwide. See Journals Using Open Journal Systems by continent, <http://pkp.sfu.ca/ojs-geog> (last visited Nov. 9, 2009). The OJS software is used by African Journals Online (AJOL), <http://www.ajol.info/> (last visited Nov. 9, 2009).

¹²Willinsky bases his position in Richard Pierre Claude’s arguments for a “right of access to the advancement of science” and Jacques Derrida’s for a “right to philosophy.” *Willinsky, supra* note 4 at 143-154. See also Peter Johan Lor & Johannes Britz, “Knowledge Production from an African Perspective: International Information Flows and Intellectual Property,” 37 *Int’l. Info. & Libr. Rev.* 61, 67 (2005) (basing the argument for information rights on “the assumption that essential information is a basic resource in any society that needs to survive and develop.”).

¹³In contrast to the open access statements, the 1999 International Federation of Library Associations and Institutions (IFLA) Statement on Libraries and Intellectual Freedom includes a declaration “that human beings have a fundamental right to access to expressions of knowledge, creative thought and intellectual activity, and to express their views publicly.” International Federation of Library Associations and Institutions, Statement on Libraries and Intellectual Freedom (approved Mar. 25, 1999), <http://www.ifla.org/faife/policy/iflastat/iflastat.htm>.

Yet, IFLA’s own 2003 Statement on Open Access to Scholarly Literature and Research Documentation does not attempt to argue for a right of access to information. Nor does it refer back to the right of access declared in the IFLA Statement on Libraries and Intellectual Freedom. Instead, the IFLA open access statement simply “affirms that comprehensive open access to scholarly literature and research documentation is vital to the understanding of our world and to the identification of solutions to global challenges and particularly the reduction of information inequality.” International Federation of Library Associations and Institutions, Open Access to Scholarly Literature and Research Documentation (adopted Dec. 5, 2003), <http://www.ifla.org/V/cdoc/open-access04.html>.

¹⁴Universal Declaration of Human Rights Article 27 (1), G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948), available at <http://www.un.org/en/documents/>

perhaps most explicitly in the International Covenant on Civil and Political Rights.¹⁶

Perhaps because of its emphasis on primary sources of law issued by “public bodies that have a duty to produce law and make it public,” the Montreal Declaration on Free Access to Law comes closer to suggesting a rights-based justification for the subject of its concerns than do the other open access declarations.¹⁷ Although it does not argue for a right of open access to legal information, the Declaration includes language regarding human knowledge and common cultural heritage that resonates with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.¹⁸

II. ACCESS TO LEGAL SCHOLARSHIP: THE LAW JOURNAL

A. The Importance of Legal Scholarship

Michael Carroll has noted the linkages between the movement for free access to law and the calls for open access to research and scholarly literature in the sciences and other disciplines. Arguing for the importance of open access to legal scholarship, Carroll writes: “Access to law matters. . . . access to legal scholarship matters too.”¹⁹ Carroll outlines the benefits for legal scholars who make their work accessible on the public internet and the improvements in scholarly communication that will result.²⁰ But, he also discusses “serving the underserved”—those without access to commercial sources of legal information-- suggesting that new communications technologies have also given scholars “a *duty* to make [their] work available to

udhr/. (“Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits”)

¹⁵International Covenant on Economic, Social and Cultural Rights Article 15, §1(a), Dec. 16, 1966, 993 U.N.T.S. 3; S. Exec. Doc. D, 95-2 (1978); 6 I.L.M. 360 (1967), available at <http://www2.ohchr.org/english/law/cescr.htm>. Rights (“The States Parties to the present Covenant recognize the right of everyone: . . . To enjoy the benefits of scientific progress and its applications”)

¹⁶International Covenant on Civil and Political Rights Article 19.2., Dec. 16, 1966, 999 U.N.T.S. 171; S. Exec. Doc. E, 95-2 (1978); 6 I.L.M. 368 (1967), available at <http://www2.ohchr.org/english/law/ccpr.htm>. (“Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”).

¹⁷The Declaration states that public legal information “*should* be accessible to all on a non-profit basis and free of charge” (emphasis added), and does declare the right of “Independent non-profit organisations . . . to publish public legal information.” Declaration on Free Access to Law, *supra* note 1.

¹⁸The Declaration on Free Access to Law places public legal information within “the common heritage of humanity,” *supra* note 1; the Budapest Initiative states that open access to the literature of scientific research will “lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge,” *supra* note 5; and the Berlin Declaration defines “open access as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community,” *supra* note 5.

¹⁹Michael W. Carroll, “The Movement for Open Access Law,” 10 *Lewis and Clark L. Rev.* 741, 743 (2006).

²⁰*Id.* at 755-757.

the general (or, for the time-being, Internet-accessible) public.”²¹

Legal scholarship is written to discuss, explain, and analyze the law, and to point researchers toward pertinent authorities in the sources issued by legislatures, courts, and other bodies with law-making power, the sources of “public legal information” in the Declaration on Free Access to Law. This literature supports and influences the professional work of judges, lawyers, and legal scholars, and explains the law to the public. The relative importance of specific forms of legal scholarship (treatises, journal articles, commentaries, etc.) varies between the Romano-Germanic, or civil law, tradition and that of the common law;²² and among countries classified within one or the other of those systems.²³

B. The Law Journal

Particularly in the United States, articles published in specialized legal journals have been the predominant form of legal scholarship at least since the late nineteenth century. The law student-edited *Harvard Law Review* began publication in 1887, and was soon followed by similar student-edited journals and reviews at other U.S. law schools.²⁴ Although often criticized,²⁵ student-edited journals remain the dominant forum for publication of legal scholarship in the United States. Some law school journals are faculty-edited and peer-reviewed, issued by professional and scholarly societies, and published by commercial or university presses,²⁶ but most are published by law schools.²⁷

²¹Id. at 756 (emphasis added).

²²See *supra* note 8.

²³See David & Brierley, *supra* note 8, at 148 (“What troubles the French jurist when he studies German law is the difference in form, rather than of substantive law, between the legal works of French and German jurists. The latter, as well as the Swiss, prefer a form of annotated codes (*Kommentaire*) The preferred instrument of the French jurist is the more systematic treatise (*traité*) or manual . . .”).

The importance of specific forms of legal scholarship can also vary over time. *See e.g.*, A.W. B. Simpson, “The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature,” 48 *U. Chi. L. Rev.* 632 (1981) (discussing the changing roles of legal treatises in common law jurisdictions, focusing on England and the U.S.).

²⁴For a history of early student-edited law journals in the U.S., see generally Michael I. Swygert & Jon W. Bruce, “The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews,” 36 *Hastings L.J.* 739 (1985). The earliest U.S. law journal is considered to be the *American Law Journal and Miscellaneous Repertory*, which was published irregularly from 1808 to 1817 and included reports of decisions, plus some commentary. *See* Frederick C. Hicks, *Materials and Methods of Legal Research* 197-198 (3d rev. ed. 1942).

²⁵The criticisms are well-described in Stephanie L. Plotin “Legal Scholarship, Electronic Publishing, and Open Access: Transformation or Steadfast Stagnation?,” 101 *Law Libr. J.* 31, 35-36 (2009). *See e.g.*, Leah M. Christensen & Julie A. Oseid, “Navigating the Law Review Article Selection Process: An Empirical Study of Those With All the Power - Student Editors,” 59 *S.C. L. Rev.* 175 (2008); Michael J. Madison, “The Idea of the Law Review: Scholarship, Prestige and Open Access,” 10 *Lewis & Clark L. Rev.* 901 (2006).

²⁶*See, e.g.*, *Journal of Legal Studies* (1972-), a peer-reviewed journal edited by members of the University of Chicago Law School faculty; *Law and History Review* (1983-), published by the University

The law school-published, student-edited journal is uncommon outside the U.S.,²⁸ but faculty- and practitioner-edited journals are significant sources for legal scholarship and commentary on the law in all countries. Law journals became important vehicles for legal scholarship in England and in South Africa at about the same time as in the U.S.,²⁹ but in those countries, as elsewhere, almost all law journals are published by commercial or university presses rather than directly by law schools.³⁰

In civil law countries, “legal periodicals, which are run by professors rather than students, play a much more important role . . . than in common law countries in bringing new legislation and court opinions to the attention of the profession.”³¹ Lawyers in civil law jurisdictions rely on legal journals not only for commentary but as sources for the full texts of decisions and for annotations discussing their significance.³² The practical value of law journals in common law jurisdictions is less certain, and challenges to their usefulness to practicing attorneys are frequent, at least in the U.S.³³

of Illinois Press for the American Society for Legal History; *Law & Social Inquiry* (1988-), published by Blackwell Publishing for the American Bar Foundation.

²⁷One count suggests that 627 of 959 law journals published in the U.S. are student-edited. See Law Journals: Submissions and Ranking, <http://lawlib.wlu.edu/LJ/index.aspx> (last visited Nov. 5, 2009). The site, maintained at the Washington & Lee Law School, excludes “[m]ost bar journals, magazines, and newsletters.”

²⁸*But see, e.g., Bucerius Law Journal* (2007-), http://www.law-journal.de/About_us.171.0.html (last visited Nov. 9, 2009), a student-edited journal published at the Bucerius Law School in Hamburg, Germany. The relative ease of publishing journals on the web may make student-edited journals more common.

²⁹See Simpson, *supra* note 23, at 662 (“Although legal periodicals had been in existence for some time, they did not provide an outlet for scholarly writing [in England] until the *Law Quarterly Review* was inaugurated in 1885 . . .”). According to Hicks, the first English law journal was the *Lawyers’ Magazine*, which was published from 1761-1762. Hicks, *supra* note 24, at 197. In South Africa, the *South African Law Journal* began publication in 1884 under the title: *Cape Law Journal*.

³⁰A recent ranking of U.K. law journals indicates that the twenty most highly ranked journals are all published by commercial presses. For the list of journals, see Kevin Campbell, Alan Goodacre & Gavin Little, “Ranking of United Kingdom Law Journals: An Analysis of the Research Assessment Exercise 2001 Submissions and Results,” 33 *Journal of Law and Society* 335, 356 (2006) (Table 6: Ranking of Law Journals by the Implied Rating Metric). For a list of South African law journals, see Shirley Gilmore, Open Access Law Journals in South Africa – Feasibility and Advisability Thereof 3-4 (Sept. 2009) (on file with author).

For an historical perspective, see George S. Grossman, *Legal Research: Historical Foundations of the Electronic Age* 287-288 (1994).

³¹Mary Ann Glendon, Michael Gordon & Paolo Carozza. *Comparative Legal Traditions* 91(2nd ed. 1999).

³²“Such legal periodicals are an indispensable tool of legal research.” *Id.* at 92.

³³See, e.g., Harry T. Edwards, “The Role of Legal Education in Shaping the Profession,” 38 *J. Legal Educ.* 285, 291 (1988) (“Law professors seem more and more often content to talk only to each other--or perhaps to a few colleagues in other academic disciplines--rather than deal with the problems facing the profession.”)

The continuing publication of law journals in legal systems of all types and the introduction of new journals suggest the ongoing importance of the traditional journal article and the value to scholars and others of having access to the legal scholarship. In addition, the growing interest of legal scholars and practicing attorneys alike in blogs,³⁴ wikis,³⁵ and law review companions, as well as in purely electronic short-form law journals,³⁶ has prompted speculation about the potential of these new forms to improve communications between academic lawyers and the bar,³⁷ and to alter the channels of scholarly discourse in law.³⁸ As a result, the need for informed commentary about the law should not in doubt, whether it is published in traditional print journal formats, in all-electronic journals (enhanced perhaps by the emerging communication tools of the web), or posted in new shorter forms using those tools.

C. The Access Principle

Is this literature accessible to all who will benefit from it?³⁹ The proposition that scholars have a responsibility to make their work widely available through open access mechanisms has been forcefully developed and argued by John Willinsky.⁴⁰ Willinsky's "access principle" states that "A commitment to the value and quality of research carries with it a responsibility to extend the circulation of such work as far as possible and ideally to all who are interested in it and all

³⁴See, e.g., Brian Leiter's Legal Philosophy Blog, <http://leiterlegalphilosophy.typepad.com/> (last visited Nov. 9, 2009); The Volokh Conspiracy, <http://volokh.com/> (last visited Nov. 9, 2009). See generally Margaret A. Schilt, "The Future of Legal Scholarship" *Legal Times*, July 9, 2007, at 27; Some Evidence for the Assimilation of Blogs into the Structure of Legal Literature, http://lawprofessors.typepad.com/law_librarian_blog/2008/02/the-assimilatio.html (Feb. 5, 2008).

³⁵A well-known example is the collaborative wiki used by Lawrence Lessig in writing his book *Code: Version 2.0* in 2006. The wiki can be found at: <http://www.socialtext.net/codev2/index.cgi> (last visited Feb. 18, 2008). A discussion of legal wikis and a representative list is at Robert J. Ambrogi, "Legal Wikis Are Bound to Wow You," *Law Tech. News*, May 7, 2007, <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1178541412778>.

³⁶See, e.g., *Duke Law and Technology Review*, <http://www.law.duke.edu/journals/dltr/> (last visited Feb. 18, 2008), which publishes short "issue briefs."

³⁷See, e.g., "Blogs and Scholars: The Impact of Legal Blogging on the Bench and Bar," *Nat'l. L.J.*, Oct. 8, 2007, at 22 (discussion among legal educators, judges and practitioners).

³⁸See Brian Leiter, "Why Blogs are Bad for Legal Scholarship," 116 *Yale L.J. Pocket Part* 53 (2006), <http://yalelawjournal.org/2006/09/20/leiter.html>, available on the site in PDF format. Page references are to the PDF version. Although a prominent blogger himself, Leiter argues that "blogs have been bad for legal scholarship, leading to increased visibility for mediocre scholars and half-baked ideas and to a dumbing down of standards and judgments." *Id.* at 57.

³⁹Some portion of the output of legal scholars may be so specific to the law of a particular jurisdiction that it will be of limited interest to researchers outside the jurisdiction. Yet, substantial amounts of the literature may be of broader use. See Richard A. Danner, Applying the Access Principle in Law: The Responsibilities of the Legal Scholar, 35 *Int'l. J. Legal Information* 355, 386-389 (2007) (describing the geographic spread of downloaded papers from the Duke Law School Scholarship Repository). See also Greenleaf, Chung & Mowbray, *supra* note 2, at 155-157.

⁴⁰See generally, Willinsky, *supra* note 4.

who might profit by it.”⁴¹ For Willinsky, the transformation of journal formats from print to online means that researchers and scholars, scholarly societies, publishers, and libraries are obligated to “to do as much as they can to advance and improve access to research and scholarship.”⁴²

For Willinsky, “open access is also public access.”⁴³ He argues that “proving that the public has sufficient interest in, or capacity to understand, the results of scholarly research is not the issue. The public’s right of access to this knowledge is not something that people have to earn. It is grounded in the basic right to know.”⁴⁴ Applying this logic to law, it can be argued that scholars have a particular responsibility to make their work available because of the impact of law on the daily lives of the public, and the influences of legal scholarship on those who make the laws. As put by Carroll: “If acted upon, the ideas we develop, and the arguments we make, affect the interests and rights of members of the public.”⁴⁵

If Willinsky is correct in his point that the responsibilities of the access principle should be taken seriously by all participants in the scholarly communications process, it is important then to consider seriously how to implement them. Those discussions must include not only the creators of scholarship, but also the institutions that support their work. What should law schools, law librarians, legal information technologists, and advocates for free access to legal information do to ensure that legal scholarship is as widely accessible as possible? What means are available for making this literature freely and openly accessible?

D. Open Access to Law Journals

Presently, about 50 LII law journal databases, mostly from the Australian Legal Information Institute (AustLII), are listed and linked on the WorldLII site.⁴⁶ In addition, the WorldLII site’s Catalog and Websearch facilities link to and search over 350 journal web sites world-wide.⁴⁷ In their 2007 paper, Greenleaf, Chung and Mowbray acknowledge that, while only a small number of journals are available in LII databases, law journals too can be considered “public legal information” and are an area of possible expansion for the LIIs.⁴⁸ In describing legal information institutes as providers of “essential legal information,”⁴⁹ they emphasize that:

⁴¹ *Id.* at xii (emphasis omitted).

⁴² *Id.*

⁴³ *Id.* at 111.

⁴⁴ *Id.* at 125.

⁴⁵ Carroll, *supra* note 19, at 756. See also David Hricik & Victoria S. Salzmann, “Why There Should be fewer Articles Like This One: Law Professors Should Write More for Legal Decision-Makers and Less for Themselves,” 38 *Suffolk U. L. Rev.* 761 (2005).

⁴⁶ <http://www.worldlii.org/int/journals/> (last visited October 30, 2009).

⁴⁷ <http://www.worldlii.org/catalog/2303.html> (last visited Feb. 18, 2008). For a description of these tools, as well as WorldLII’s “Law on Google” search option, see Greenleaf, Chung & Mowbray, *supra* note 2, at 38-41.

⁴⁸ Greenleaf, Chung & Mowbray, *supra* note 2, at 25.

⁴⁹ The phrase “essential legal information” is not used in the Montreal Declaration.

We are not suggesting that the LIIs should *only* provide essential legal information. They are likely to be involved in the provision of other types of secondary material such as law journals. . . . These sources require different considerations from ‘essential’ legal information, particularly because their publication is less likely to be pursuant to a duty to publish, or public subsidies to do so.⁵⁰

In a recent posting comparing the roles of the LIIs both with the major commercial legal information publishers and with the lower cost commercial legal information services, Tom Bruce, director of the Cornell Law School Legal Information Institute, notes:

When we talk about [commercial] services, we are talking about services primarily intended for lawyers. The aim of an LII — or at least this LII, for my colleagues elsewhere do very different things — is to provide legal information for everyone... . And that means that we serve a type of legal research that is very different — not naive, necessarily, but different.⁵¹

Are the legal information institutes the best platforms of making the legal scholarship openly accessible? Where else are the articles published in traditional print law journals accessible electronically?

Lund University’s Directory of Open Access Journals (DOAJ) suggests that few law journals are freely available on the web.⁵² Of over 4,400 journals listed on DOAJ, only 76 are listed under law.⁵³ Of those, 23 are published in the U.S. The number of open access journals listed for law is surprisingly low, particularly for the U.S., where nearly all law journals are published at law schools, not for profit, but for the purposes of disseminating scholarship and providing educational experiences for student editors.⁵⁴ In addition, only a few journals have

⁵⁰Greenleaf, Chung & Mowbray, *supra* note 2, at 5, n. 9.(emphasis added)

⁵¹Thomas R. Bruce, What Are We About?, VoxPopuLII, <http://blog.law.cornell.edu/tbruce/2009/04/17/what-are-we-about/> (Apr. 17, 2009). In the same posting, Bruce notes that “In fact, most of our users are people making use of legal information in a professional context, not people having traumatic, episodic encounters with the legal system.” Elsewhere, he points out that “Some of [LIIs] — notably in Canada and Australia — have built open-access systems that are the de facto national resources for their respective countries.” Thomas R. Bruce, Barring on the Merits, <http://blog.law.cornell.edu/tbruce/> (Nov. 2, 2009).

⁵²<http://www.doaj.org/doaj> (last visited Nov. 6, 2009) (“This service covers free, full text, quality controlled scientific and scholarly journals. We aim to cover all subjects and languages.”).

⁵³<http://www.doaj.org/doaj?func=subject&cpid=46> (last visited Nov.6, 2009).

⁵⁴Stephanie Plotin explains U.S. law journals disinterest in open access publishing in terms of a lack of economic incentives, coupled with the pressures of an academic value system in law favoring publication in prestigious journals that, so far, have not moved toward open access, *supra* note 25 at 43-45.

signed on to the principles of the Science Commons Open Access Law Program (OALP),⁵⁵ a project to promote open access in law journal publishing. Since OALP's Open Access Law Journal Principles were promulgated in 2005, fewer than 50 law journals (nearly all from the U.S.) have either adopted the principles or indicated that they are operating under policies consistent with them.⁵⁶

Yet, although few law journals are listed in the Directory of Open Access Journals or as signatories to the Open Access Law Project, many others have significant web presences and (at least in the U.S.) do make the texts of at least some articles available in PDF format on the journal web sites.⁵⁷

E. Commercial Access

Most, if not nearly all, print law journals are widely available in commercial databases. The major international legal databases, LexisNexis and Westlaw each include extensive runs of U.S. law journals, with some international coverage. Hein Online provides access to a nearly comprehensive collection of U.S. law journals, with full retrospective collections for most, and recent issues for an increasing number, as well as an extensive list of international and non-U.S. law journals.⁵⁸ JSTOR's collection of journals in law is small, but includes full runs of major U.S. law journals and a few from outside the U.S.⁵⁹ In other countries, where law journals are usually published by commercial publishers, current issues, some back volumes, and individual articles from new issues are frequently available for purchase on publisher web sites.⁶⁰

Although much of the content of important journals in law is available in commercial

⁵⁵<http://sciencecommons.org/projects/publishing/oalaw/> (last visited Nov. 9, 2009).

⁵⁶<http://sciencecommons.org/projects/publishing/oalaw/oalawjournals/> (last visited Nov. 9, 2009).

⁵⁷See, e.g., the links to law journal sites in the WorldLII journals catalog, <http://www.worldlii.org/catalog/54588.html> (last visited Nov. 9, 2009), and those linked from Washington & Lee's Law Journals Submissions and Ranking page, *supra* note 27. See also Plotin, *supra* note 25 at 45-50 for data on web site access to articles in the top law journals and the posted open access policies of several of those journals.

⁵⁸See <http://www.heinonline.org/home/content/Browse.html> (last visited Nov. 9, 2009). Hein's list of over 500 "International & Non-U.S. Law Journals" includes U.S. law journals focusing on foreign, international, and comparative law.

⁵⁹See <http://www.jstor.org/action/showJournals> (last visited Nov. 9, 2009). JSTOR does not include either current issues or usually the most recent completed volumes for many of the journals it covers, but has announced plans to include current content from University of California journals starting in 2011. See Doug Lederman, Adding Currency to JSTOR, *Inside Higher Ed.*, (Aug. 13, 2009), <http://www.insidehighered.com/layout/set/print/news/2009/08/13/jstor>.

⁶⁰See, e.g., the law journals listed on the Cambridge University Press web site at <http://journals.cambridge.org/action/bySubjectArea#subject20> (last visited Nov. 9, 2009). In South Africa, the articles in most major law journals are generally accessible electronically through SA ePublications via pre-paid subscriptions. See Sabinet Law Collection, http://www.journals.co.za/collections/collect_law.html (last visited Nov. 9, 2009). For current electronic availability of South African law journals, see Gilmore, *supra* note 30 at 3-4.

databases, it is important to bear in mind that those works are accessible only to researchers affiliated with institutions with the resources to pay for licensed access to the databases, or in some cases on a pay-per-article basis from the publisher of the journal. There are a number of programs to provide low cost or free access to journals in selected subjects to researchers in developing countries. Typically, however, they focus on the sciences and provide access to few law journals.⁶¹

F. The Durham Statement on Open Access to Legal Scholarship

In November 2008, the directors of the law libraries at a dozen major U.S. law schools met in Durham, North Carolina at the Duke Law School and drafted the "Durham Statement on Open Access to Legal Scholarship," which calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication with a commitment to keep the electronic versions available in stable, open, digital formats.⁶² The Durham Statement notes that

⁶¹HINARI, the World Health Organization's Health InterNetwork Access to Research Initiative, provides free or very low cost online access to journals in biomedical and related social sciences, but few of HINARI's nearly 6,500 journals deal with law. *See* <http://www.who.int/hinari/about/en/> (last visited Nov. 9, 2009). AGORA (Access to Global Online Research in Agriculture), a program of the Food and Agriculture Organization of the UN provides access to resources in the fields of food, agriculture, environmental science and related social sciences, but does not include a subject category for law and includes only one or two law journals under the heading Economics/Social Sciences in its current list of over 1,200 journals. *See* <http://www.aginternetwork.org/agorasearch/search/subjectCategory.do?subjectCategorySelected=econ&subjectCategoryLabel=Economics/Social%20Science> (last visited Nov. 9, 2009). OARE (Online Access to Research in the Environment), a consortium coordinated by the United Nations Environment Programme (UNEP), provides free access to about 1,300 environmental science journals, only a few of which focus on environmental law. *See* http://oare.oaresciences.org/content/en/browse_journal_subject.php?subj=env_st_pol (last visited Nov. 9, 2009).

Somewhat greater access to law journals is provided through the activities of the International Network for the Availability of Scientific Publications (INASP) <http://www.inasp.info/> (last visited Nov. 9, 2009) and Electronic Information for Libraries (eIFL.net). <http://www.eifl.net/cps/sections/home/> (last visited Nov. 9, 2009). INASP works with about 50 international publishers to facilitate access to their publications in over 40 developing countries. Publishers with significant law content include: Blackwell Publishing, Cambridge University Press, Oxford Journals, Project Muse, and the University of Chicago Press. *See* Publishers Working with INASP, <http://www.inasp.info/file/186/publishers-working-with-inasp.html> (last visited Nov. 9, 2009). eIFL.net negotiates electronic journal subscriptions on a multi-country consortial basis, working with nearly 50 member countries and nearly 30 publishers and aggregators including Cambridge University Press, JSTOR, Oxford University Press, and Project Muse. *See* <http://www.eifl.net/cps/sections/services/negotiations> (last visited Nov. 9, 2009).

See generally Willinsky, *supra* note 4, at 101-103. There is some sense that non-commercial (professional and society) publishers are less aware of these programs than large commercial publishers. *See* E-journals: Developing Country Access Survey, 2002 at 6 (2003), <http://www.inasp.info/file/360/e-journals-developing-country-access-survey-2002.html>.

⁶²*See* Durham Statement on Open Access to Legal Scholarship, About, <http://cyber.law.harvard.edu/publications/durhamstatement> (last visited Nov. 9, 2009). The statement can be signed at: <http://cyber.law.harvard.edu/publications/durhamstatement#signatories> (last visited, Nov. 9, 2009).

legal researchers now prefer to access and use information of all sorts electronically, rather than in print, and that it is increasingly uneconomical both for law libraries to collect journals in digital and print formats, and for U.S. law schools to continue printing and mailing print issues of their student-edited journals. And:

Additionally, and potentially most importantly, a move toward digital files as the preferred format for legal scholarship will increase access to legal information and knowledge not only to those inside the legal academy and in practice, but to scholars in other disciplines and to international audiences, many of whom do not now have access either to print journals or to commercial databases.⁶³

The Durham Statement thus endorses the goals of Willinsky's access principle by urging the publishers of legal scholarship to make the works they publish publicly available to audiences who would otherwise not have access to them. Because it goes further than most calls for open access to scholarship by calling for an end to print publication of journal issues and complete reliance on digital formats, the Statement forces consideration of preservation issues as well as improved access to legal scholarship.

III. REPOSITORIES OF LEGAL SCHOLARSHIP

The idea of replacing the traditional profit-driven journal publishing system with freely available open access journals is sometimes referred to as “the gold road” to open access. Another approach relies not on reforming the journal system, but on encouraging authors of scholarly works to self-post (or self-archive⁶⁴) versions of their works on open sites.⁶⁵ Herbert Van de Sompel has identified the functions of scholarly communication as: registration, certification, awareness, archiving, and rewarding. He argues that in the electronic environment the awareness function—helping participants in the system to be aware of new claims and findings—can be accomplished both by publishing new research in journals and by author postings of papers in digital repositories of scholarship. Electronic postings fulfill “the awareness function by making manuscripts freely available via the network, by allowing search engines to index content, and by sending alerts to interested scholars.”⁶⁶ In addition, in some

⁶³ Durham Statement on Open Access to Legal Scholarship (Feb. 11, 2009), <http://cyber.law.harvard.edu/publications/durhamstatement>.

⁶⁴Although the term “self-archiving” is frequently used by proponents of this approach to describe authors’ posting of their works in open access sites, it is important to note that “archiving” is defined to include access to and usage of the works, but not long-term preservation. *See, e.g.*, Stevan Harnad, *Against Conflating OA Self-Archiving With Preservation-Archiving*, <http://users.ecs.soton.ac.uk/harnad/Hypermail/Amsci/5500.html> (July 11, 2006).

⁶⁵*See generally* Jean-Claude Guédon, “The “Green” and “Gold” Roads to Open Access: The Case for Mixing and Matching,” 30 *Serials Rev.* 315 (2004). Without those labels, the two strategies are also set forth in the Budapest Open Access Initiative, *supra* note 5.

⁶⁶Herbert Van de Sompel, et al, “Rethinking Scholarly Communication: Building the System that Scholars Deserve,” *D-Lib Mag.*, Sept. 2004, <http://www.dlib.org/dlib/september04/vandesompel/09vandesompel.html>. Van de Sompel identifies the functions of scholarly communication as:

disciplines, including law, electronic posting makes new scholarship available much more quickly than it would be otherwise. Stevan Harnad of the University of Southampton has been an early and persistent advocate of author self-archiving, at least for pre-publication (or pre-print) versions of scholarly papers.⁶⁷

Digital repositories for the posting of new scholarship generally fall into one of two categories. *Disciplinary* repositories focus on specific fields of study and are open to papers from researchers anywhere on the covered subject areas.⁶⁸ The best known example is arXiv.org at Cornell University,⁶⁹ which hosts author-submitted papers in physics, mathematics, computer science, quantitative biology, and statistics.

Legal scholars in the U.S. and elsewhere have taken to disseminating their works through postings in the Social Science Research Network (SSRN), which provides repository services for law through its Legal Scholarship Network.⁷⁰ The BePress Legal Repository, part of the Berkeley Electronic Press (BePress), offers a similar platform and services.⁷¹

Both SSRN and BePress encourage individual scholars to post their works without charge,⁷² and allow anyone to view and download papers posted on their sites. Papers posted on the sites can be found through search engines on each site, as well as through Google and other general search engines. Each legal repository provides a number of fee-based services, such as subscriptions to email announcements of new papers in selected subjects or written by faculty members at designated law schools.⁷³ SSRN makes free subscriptions to its email announcements (called “abstracting journals”) available to users in developing countries.⁷⁴

registration, certification, awareness, archiving, and rewarding.

⁶⁷The full texts of many of Harnad’s many publications on author-archiving and open access can be found at: <http://users.ecs.soton.ac.uk/harnad/intpub.html> (last visited Feb. 18, 2008). See, e.g., Stevan Harnad, *India, Open Access, the Law of Karma and the Golden Rule* (2007), <http://eprints.ecs.soton.ac.uk/14432/>.

⁶⁸The uses of repositories and other means for sharing documents and other information vary by discipline. See Christine L. Borgman, *Scholarship in the Digital Age: Information, Infrastructure, and the Internet* 180-226 (2007) at, for a comparative discussion of disciplinary practices for disseminating information in the sciences, the social sciences, and the humanities. Borgman does not discuss law.

⁶⁹<http://arxiv.org/> (last visited Nov. 9, 2009).

⁷⁰<http://www.ssrn.com/> (last visited Nov. 9, 2009).

⁷¹<http://law.BePress.com/repository/> (last visited Nov. 9, 2009).

⁷²At present, however, neither repository provides the sorts of opportunities for collaboration and comment provided by law review companions and other short form legal publications. See Beth Simone Noveck, “Wikipedia and the Future of Legal Education,” 57 *J. Legal Educ.* 3, 3-4 (2007) (describing how SSRN’s policy against including links to wikis or other outside sources in the abstracts for posted papers changed the author’s plans for using her draft article as the basis for readers to share experiences about using wikis in law teaching).

⁷³SSRN hosts working paper series in law for about 20 law schools or other legal institutions outside the U.S.

⁷⁴See SSRN’s Objective and Commitments to Users (Aug. 2007), <http://www.ssrn.com/index.cfm>.

In law, author postings of papers to open access repositories are driven less than in other fields by the requirements of funding agencies⁷⁵ or government mandates.⁷⁶ Posting new works in law helps authors make their new works widely available quickly and supports law school interests in showcasing their faculties' scholarly efforts. The repositories respond to these interests by tallying the download counts for posted papers. SSRN posts public totals for the number of times the abstract for a paper has been viewed and the paper has been downloaded;⁷⁷ BePress reports numbers of downloads directly to the author.

Researchers can find papers posted to SSRN and BePress through Google and other general search engines.⁷⁸ However, is it enough to rely on the initiative of individual authors to post their own works to disciplinary repositories such as SSRN and BePress?⁷⁹ If we take the responsibilities of the access principle seriously, what more can be done to help scholars meet their responsibilities? In particular, what can law schools do to ensure that legal scholarship is freely and openly available?

⁷⁵On December 17, 2007, the Scientific Council of the European Research Council (ERC) released an open access policy requiring that:

all peer-reviewed publications from ERC-funded research projects be deposited on publication into an appropriate research repository where available, such as PubMed Central, ArXiv or an institutional repository, and subsequently made Open Access within 6 months of publication.

ERC Scientific Council Guidelines for Open Access (Dec. 17, 2007), available at http://erc.europa.eu/pdf/ScC_Guidelines_Open_Access_revised_Dec07_FINAL.pdf

⁷⁶ In January, 2008, the United States enacted legislation stating requiring that:

all investigators funded by the [National Institutes of Health] submit or have submitted for them to the National Library of Medicine's PubMed Central an electronic version of their final, peer-reviewed manuscripts upon acceptance for publication to be made publicly available no later than 12 months after the official date of publication."

Consolidated Appropriations Act of 2008, Pub. L. No.110-161, § 218, 121 Stat 1844, 2187

⁷⁷SSRN also lists its most frequently downloaded papers. See Top 10 Papers for Legal Scholarship Network, <http://papers.ssrn.com/sol3/topten/topTenResults.cfm?groupingtype=2&groupingId=201> (last visited Nov. 9, 2009).

⁷⁸Although both SSRN and BePress are ".com" sites, SSRN's stated objective "is to provide worldwide distribution of research to authors and their readers and to facilitate communication among them at the lowest possible cost." SSRN's Objective and Commitments to Users, *supra* note 74; the BePress mission statement says that it "produces tools to improve scholarly communication. These tools provide innovative and effective means of content production and dissemination." Berkeley Electronic Press, Mission Statement, <http://www.bepress.com/aboutbepress.html> (last visited Nov. 9, 2009).

⁷⁹ My 2007 look at the current issues of top U.S., U.K., and South African law journals found that versions of only 11 of the 30 lead articles in those journals were posted to either SSRN or BePress (or to both), and that two of those articles were available only on a fee basis.

In addition to disciplinary repositories, open access advocates also promote *institutional* repositories, which are: “digital collections capturing and preserving the intellectual output of a single or multi-university community.”⁸⁰ Institutional repositories are intended to showcase scholarship and other materials produced at specific institutions, as well as to reform scholarly communication.⁸¹ They often not archive only scholarship in its usual forms, but also other information (course materials, data sets, etc.) created at the institution.⁸² The best-known platform for large multi-disciplinary repositories designed to house a variety of digital objects is DSpace, which was developed at the Massachusetts Institute of Technology.⁸³ Smaller scale institutional repositories of the sort more likely to be established at the school or departmental levels in universities are often supported by other platforms. The best known is probably EPrints, developed at the University of Southampton and now in use at 269 institutions worldwide.⁸⁴

Institutional repositories are also hosted by outside services such as BePress’s Digital Commons.⁸⁵ BePress Digital Commons customers include universities in Australia, Japan, New Zealand, and Europe, as well as colleges and universities in the U.S., and a growing number of U.S. law schools.⁸⁶ In 2009, new law school repositories were established on the Digital Commons platform by the Cornell, Georgetown, and Yale law schools, and the Duke Law School moved its four year old repository to Digital Commons.⁸⁷

As noted above, legal scholars are not as likely to be required to post their works by funding agencies or governments as are scholars in other areas. Postings of new scholarship may be

⁸⁰Raym Crow, *The Case for Institutional Repositories: A SPARC Position Paper 4* (2002). For a current picture of institutional repositories in the U.S., see Soo Young Rieh et al “Census of Institutional Repositories in the U.S.: A Comparison Across Institutions at Different Stages of IR Development,” *D-Lib Mag.*, Nov./Dec. 2007, <http://www.dlib.org/dlib/november07/rieh/11rieh.html>.

⁸¹See Crow, *supra* note 80, at 6.

⁸²See Clifford A. Lynch, “Institutional Repositories: Essential Infrastructure for Scholarship in the Digital Age,” *ARL Bimonthly Report* (Feb. 2003), <http://www.arl.org/resources/pubs/br/br226/br226ir.shtml>.

⁸³<http://www.dspace.org/> (last visited Nov. 9, 2009). For background, see MacKenzie Smith et al., “DSpace: An Open Source Dynamic Digital Repository,” *D-Lib Mag.*, Jan. 2003, <http://www.arl.org/resources/pubs/br/br226/br226ir.shtml>.

⁸⁴<http://www.eprints.org/> (last visited Nov. 9, 2009). Like DSpace, EPrints is an open source software product.

⁸⁵See <http://www.bepress.com/ir/> (last visited Nov. 9, 2009). Smaller school- or departmental-level repository services can also be established using outside hosts. Selected Works, <http://works.bepress.com/> (last visited Feb. 18, 2008), hosts customized pages for smaller institutions, that wish to showcase and provide full-text access to the works of their faculties without maintaining their own on-site repository. See, e.g., Selected Works @ Chicago-Kent College of Law, <http://works.bepress.com/kentlaw/> (last visited Nov. 9, 2009).

⁸⁶See <http://www.bepress.com/ir/customers.html> (last visited Nov. 7, 2009)

⁸⁷The four schools joined the University of Georgia and University of Maryland law schools on Digital Commons through the New England Law Library Consortium (NELLCO) and are part of the NELLCO Legal Scholarship Repository, <http://lsr.nellco.org/> (last visited Nov. 7, 2009).

required or at least strongly encouraged, however, by new policies at some universities requiring faculty to provide electronic copies of the final versions of their articles for deposit in an open access repository. In May 2008, the Harvard Law School faculty voted unanimously to make each faculty member's articles freely available in an online repository.⁸⁸

In supporting scholars' efforts to fulfill their obligations under access principle, is there a role to be played by *institutional* repositories hosted at individual law schools jointly at remote sites? Some sense of the possibilities might be found in looking at the experiences of one law school that for over ten years has pursued an open access agenda both for its journals and to expose the works of its faculty to larger audiences.

IV. DUKE LAW SCHOOL

The Duke University School of Law in Durham, North Carolina, is a privately funded institution with about 650 students enrolled in its three year juris doctor program, an additional 85-100 students each year in its international LLM program, several SJD students, and a full-time faculty of 55. In 2009, Duke Law publishes eight traditional student-edited print law journals⁸⁹ and one all-electronic journal.⁹⁰ Articles published in the print journals are available through LexisNexis, Westlaw, Hein Online, and other databases, as well as on the Duke Law web site.

A. Web Journals

In 1998, Duke began posting new articles from its then six print journals on the law school web site,⁹¹ after considering the possible effects on print subscriptions of making free versions of the journals available electronically. A faculty task force developed the project, concluding that the benefits of providing greater exposure for the Duke journals to scholars in other disciplines

⁸⁸See "Harvard Law Faculty Votes for 'Open Access' to Scholarly Articles" (May 7, 2008), <http://www.law.harvard.edu/news/spotlight/faculty-research/hls-faculty-votes-for-'open-access'-to-articles.html>. In addition to the Law School, the Harvard University faculties of Arts and Sciences, the Kennedy School of Government, and the Graduate School of Education have enacted open access policies. See Harvard Open-Access Policies, <http://osc.hul.harvard.edu/OpenAccess/policytexts.php> (last visited, Nov. 9, 2009).

For skeptical looks at university open access mandates, see Walt Crawford, "Library Access to Scholarship," *Cites & Insights*, Nov. 2009, at 1, 1-3; Stuart Shieber, University Open-Access Policies as Mandates, *The Occasional Pamphlet*, (June 30, 2009), <http://blogs.law.harvard.edu/pamphlet/2009/06/30/university-open-access-policies-as-mandates/>.

⁸⁹They are: the *Duke Law Journal* (1951-); *Law & Contemporary Problems* (1933-); the *Alaska Law Review* (1984-); the *Duke Journal of Comparative & International Law* (1991-); the *Duke Environmental Law & Policy Forum* (1991-); the *Duke Journal of Gender Law & Policy* (1994-); and the *Duke Constitutional and Public Law Journal* (2006-); and the *Duke Law Forum for Law & Social Change* (2009-)

⁹⁰*Duke Law & Technology Review* (2001-), *supra* note 36.

⁹¹<http://www.law.duke.edu/scholarship/journals> (last visited Feb. 18, 2008)

and to international readers would outweigh any potential reductions in income from print subscriptions or in royalties from the versions available through the legal databases. In fact, as discussed in my earlier article, after more than ten years of providing and promoting free access, the impacts on print subscriptions to the journals have been minimal. In addition, royalty income received from databases that provide access to articles published in the Duke journals has remained stable.⁹²

New issues of each journal are mounted on the Duke web site in HTML and PDF formats before their publication in print. On the site, back issues extend to 1996 or 1997, with links to Hein OnLine for older volumes. All Duke Law journals are listed in the Directory of Open Access Journals and are signatories to the principles of the Science Commons Open Access Law Program.⁹³

B. Duke Law Scholarship Repository

Duke Law is also committed to maximizing access to all scholarship created at the law school, whether or not it is published in a Duke journal. The law library assists Duke Law faculty in posting post new works to SSRN and publishes a Duke Law School Working Papers Series on BePress.⁹⁴ Most members of the faculty provide their new papers for posting to SSRN and BePress without prompting; others do so in response to regular reminders to make their works available for posting.

Since December 2005, Duke Law also has maintained its own institutional repository.⁹⁵ A joint project of the law library, and the law school's academic technologies and communications departments, the Duke Law Scholarship Repository aims to include comprehensive holdings of the final versions of all works by current Duke faculty members, and over time to extend coverage retrospectively to cover works by everyone who has taught at Duke. The repository holds over 1600 papers and is searchable on the Duke Law web site, as well as through Google and other general web search engines. Originally run at the law school, since October 2009 the repository now runs on Digital Commons software and is hosted by BePress. Because the repository complies with the standards and protocols of the Open Access Initiative, its holdings are also searchable through OAIster and other harvesters of open access repositories, as well as through Google and other search engines.

As noted in my 2007 article, the repository's download data suggest that it is a popular source for locating works of Duke Law authors and that the papers are being downloaded by substantial audiences around the world.⁹⁶ Although recent papers are downloaded most often,

⁹²See Danner, *supra* note 39, at 386.

⁹³See *supra* text accompanying notes 53-56.

⁹⁴<http://lsr.nellco.org/duke/fs/> (last visited Feb. 18, 2008).

⁹⁵Duke Law Scholarship Repository, <http://scholarship.law.duke.edu/> (last visited Nov. 9, 2009).

⁹⁶See Danner, *supra* note 39, at 387-389. All raw download figures should be treated cautiously. See BePress Download Totals: Numbers You Can Count On, http://www.bepress.com/download_counts.html (last visited Nov. 9, 2009).

six of the top 20 most-downloaded papers in 2007 were published in 2002 or earlier. This suggests that the “long tail” phenomenon⁹⁷: the idea that older products (in this case pieces of scholarship) thought to be in low demand will continue to be used if they are made accessible, inexpensive, and findable, and can make up a significant share of the market for legal scholarship.

V. DROPPING THE BARRIERS TO DISCOURSE AND DIALOGUE

In the United States, the possibilities for successfully promoting greater open access to legal scholarship are no doubt made easier in the U.S. by the unique circumstances under which legal scholarship is published. The predominant publishing model, based on student-edited, institutionally-published journals, largely removes the profit-making interests of commercial publishers as a barrier to open posting of papers in institutional and disciplinary repositories, or to publishing them in open access journals. Legal scholars in the U.S. feel free to post their work in the SSRN and BePress repositories without compromising their chances to publish new works in leading law journals. Infrastructure, bandwidth, and other technological issues are of little concern to authors, publishers, or those seeking to access and use legal scholarship. In other parts of the world, law journals are more likely to be published by commercial or society publishers with financial considerations limiting their incentives to provide immediate open access to the works they publish. And, in much of the rest of the world, limited bandwidth and infrastructure concerns create significant obstacles for all participants in the scholarly communications system (creators, disseminators, and users).⁹⁸

World-wide, the prospects for improved access to legal scholarship (as well as to scholarship in other fields) are affected by long-standing and persistent obstacles to free flow of information and knowledge between the developed countries of the North and the countries of the South. There is a substantial literature on this subject, much of which focuses on Africa. It is notable in this literature that the explosive development of information and communications technologies in recent decades and their expansion to the South are often cited as widening the information gaps between researchers in the North and in the South, and for making it harder for

⁹⁷The use of the phrase “long tail” to describe this phenomenon is usually attributed to Chris Anderson, “The Long Tail,” *Wired Mag.* (Oct. 2004), <http://www.wired.com/wired/archive/12.10/tail.html>.

⁹⁸See Williams E. Nwagwu & Allam Ahmed, “Building Open Access in Africa”, 45 *International Journal of Technology Management* 82, 93-97 (2009); Michael Wines, “Toiling in the Dark: Africa's Power Crisis,” *N.Y. Times*, July 22, 2007, at A10; Ron Nixon, “Africa Offline: Waiting for the Web,” *N.Y. Times*, July 29, 2007, at BU.1. See generally The Bandwidth Consortium: Opening the Power of the Internet to African Universities (updated Sept 5, 2008), <http://foundation-partnership.org/pubs/press/bandwidth.php>; Ezra Ondari-Okemwa, “Scholarly Publishing in Sub-Saharan Africa in the Twenty-First Century: Challenges and Opportunities,” *First Monday*, Oct. 2007, <http://www.uic.edu/htbin/cgiwrap/bin/ojs/index.php/fm/article/view/1966/1842>; Y.Z. Ya’u, “The New Imperialism & Africa in the Global Electronic Village,” 99 *Rev. Afr. Pol. Econ.* 11, 16-17 (2004).

For a generally optimistic view of worldwide developments in access to information and communications technologies see *World Information Society Report 2007: Beyond WSIS* (2007).

researchers and scholars in developing countries to participate fully in scholarly discourse.⁹⁹

Pippa Smart has pointed out that the imbalance in what is published and accessible to researchers in the sciences between North and South results in duplication of research, waste of resources, and biased interpretations of findings,¹⁰⁰ and that poor dissemination and indexing of African research outside the African continent compounds the problem of low investment in local research: “the results of research are not made visible and potentially lose value—giving a lower return on investment for research institutes, and less rationale to invest in future research.”¹⁰¹ Others have pointed out the threats that improved electronic access to international journals poses to local publishers. Diana Rosenberg asks “whether the ‘flooding’ of local markets with free or low-cost information from international sources might wipe out local publishers,” noting that locally published journals in Africa are often “the natural channels for the publication of research relevant and valuable to the country concerned but not necessarily of interest to the main clients of research world-wide.”¹⁰²

Colin Darch has asked whether the developed countries of the North will “continue to refuse to cooperate in the establishment of an equitable world information order, based on entrenched principles of full disclosure and free flow.”¹⁰³ Have international programs to make electronic versions of scholarly journals from Europe and the U.S. available free or at discounted rates to scholars in developing countries,¹⁰⁴ done enough to make the scholarship of the South more visible outside the countries or regions where it is produced? As put by Subbiah Arunachalam, “research conducted in developing countries lacks visibility. Nobody notices it. Nobody quotes it. It gets buried in an obscure corner of the world output of literature.”¹⁰⁵

⁹⁹See, e.g., Subbiah Arunachalam, “Information for Research in Developing Countries—Information Technology, a Friend or Foe?” 35 *Int'l. Info. & Libr. Rev.* 133, 135-137 (2003); Paul Tiyambe Zeleza, “Manufacturing and Consuming Knowledge: African Libraries and Publishing,” 6 *Development in Practice* 293, 296 (1996) (“basic infrastructural development is essential, and . . . in themselves the advanced technologies offer no magic solution to the challenges of information dissemination and scholarly communication facing Africa.”).

¹⁰⁰Pippa Smart, “Increasing the Visibility of Published Research: African Journals Online,” *Africa Today*, Winter 2005, at 39, 42. For a discussion of the obstacles faced by authors from the South wishing to contribute to international journals in the sciences, see Johannes J. Britz & Peter J. Lor, “A Moral Reflection on the Information Flow from South to North: An African Perspective,” 53 *Libri* 160, 163 (2003). See also Ondari-Okemwa, *supra* note 98.

¹⁰¹Smart, *supra* note 100, at 43.

¹⁰²Diana Rosenberg, “African Journals Online: Improving Awareness and Access,” 15 *Learned Publishing* 51, 55 (2002). See also Britz & Lor, *supra* note 100, at 164 (“Local journals play an essential role in the ecology of scientific communication. They publish material which, while not necessarily of interest in the developed North, may be of direct relevance and utility to the country of origin and its neighbors.”).

¹⁰³Colin Darch, *The Shrinking Public Domain and the Unsustainable Library* 12 (1998) (Paper presented at the conference on the Electronic Library: Gateway to Information: Resource Sharing and User Services in the Electronic Library, Lund, Sweden, 2-6 June 1998) (on file with author).

¹⁰⁴See *supra* text accompanying note 61.

¹⁰⁵Arunachalam, *supra* note 99, at 137. See also Lor and Britz, *supra* note 12, at 71-72.

In *The Access Principle*, John Willinsky suggests that open access publishing models hold promise “for broadening the circulation and exchange of knowledge . . . [and] of moving knowledge from the closed cloisters of privileged, well-endowed universities to institutions worldwide.”¹⁰⁶ For Willinsky, locally managed open access publishing systems, with searchable *global* access to their contents, will provide greater visibility for scholarship produced in developing countries, the promise for greater intellectual autonomy for scholars everywhere, and the opportunity for all to participate on an equal basis with others in their field.¹⁰⁷ The access principle calls not only for a freer flow of information from developed to developing nations, but (and more importantly in the long term), for creating the means for scholars everywhere to contribute to the discourse of their discipline.

In general, the literature about improving information flow between North and South has spoken less about how open access repositories might increase the visibility of research and scholarship in the South than about how improving journal publishing and indexing systems might achieve those ends. A 2002 article by Leslie Chan and Barbara Kirsop points out that repositories and other archiving initiatives provide opportunities for researchers in developing countries :

to contribute to the global knowledge base by archiving their own research literature, thereby reducing the south to north knowledge gap and professional isolation . . . [and employing] an increasingly available means to distribute local research in a way that is highly visible and without the difficulties that are sometimes met in publishing in journals (e.g. biased discrimination between submissions generated in the north and south).¹⁰⁸

In their article, Chan and Kirsop cite the significant world-wide usage of the high-energy physics site, arXiv.org,¹⁰⁹ to show the benefits of disciplinary repositories in providing opportunities to participate to researchers from “research institutions that would otherwise be excluded from the front line of science for economic and sociological reasons.”¹¹⁰

Joined in a 2005 paper by Subbiah Arunachalam, Chan and Kirsop noted that research generated in developing and emerging countries is “ ‘missing’ to the international knowledge base because of financial restrictions affecting its publication and distribution,” with “both North to South and South to North knowledge gaps” being the result.”¹¹¹ The paper argues that open

¹⁰⁶Willinsky, *supra* note 4, at 33

¹⁰⁷*Id.* at 104-105.

¹⁰⁸Leslie Chan & Barbara Kirsop, “Open Archiving Opportunities for Developing Countries: Towards Equitable Distribution of Global Knowledge,” *Ariadne* (Dec. 2002), <http://www.ariadne.ac.uk/issue30/oai-chan/>. See also Arunachalam, *supra* note 99, at 140-142; Lor & Britz, *supra* note 12, at 72.

¹⁰⁹See *supra* text accompanying note 69.

¹¹⁰Chan & Kirsop, *supra* note 108.

¹¹¹Leslie. Chan, Barbara Kirsop and Subbiah Arunachalam, “Open Access Archiving: The Fast Track to Building Research Capacity in Developing Countries,” *SciDevNet*, Feb. 5, 2005, at 1, 1, <http://www.esocialsciences.com/data/articles/Document12552006250.931698.pdf>.

archiving is the solution and urge awareness-raising and sharing of technical knowledge regarding creating and maintaining archives.¹¹²

Few writers on issues of access to scholarship in Africa and other parts of the developing world comment directly on legal scholarship or on issues of information flow for legal literature. Although legal journals are generally less costly than scientific, technology, and medical journals, other characteristics of scholarly communication in law are similar to those of other disciplines, at least those in the social sciences. The responsibility to make their work widely accessible should be as applicable to legal scholars as it is to scholars and researchers in other fields. What should law schools, law librarians, technologists working in legal institutions, open access advocates, and the editors of law journals do to assist legal scholars in meeting their responsibilities? In light of what we know about how legal scholarship is created, published and distributed throughout the world, it is essential to consider which strategies will be most effective in improving access to legal commentary and ensuring the free flow of published scholarship between North and South.

Duke Law School's open access initiatives have been successful in improving access to scholarship published at Duke Law and to works of the Duke faculty, and making those works more visible to readers outside the U.S., to scholars in other disciplines, and to policy-makers in government and elsewhere. Since 1998, free and open web access to Duke's journals has improved the visibility of articles published in the law school's smaller, specialized journals by making them readily accessible through standard search engines. In its fourth year, the Duke Law Faculty Scholarship Repository seems to be generating substantial traffic from both domestic and international readers, for older works as well as those more recently posted. Although many faculty articles are available in commercial databases, as well as in the SSRN and BePress legal repositories, they are heavily-used from the Duke Law repository as well.

Duke Law's projects have also afforded opportunities for faculty, students, law librarians, and information technologists to collaborate successfully with other law school offices and interested members of the faculty. Through their joint efforts, the school has established mechanisms to ensure that new works are posted to SSRN and BePress, and to the faculty repository after they are published. The student editors of Duke's journals proudly post their commitment to open access on the journals' web page.¹¹³ Duke Law's ongoing commitment to these activities has assisted its faculty in making their works widely, openly, and freely available, and in meeting the responsibilities encompassed in the access principle.

The experience suggests the following actions that legal scholars, librarians, and technologists can take to create broader access to legal scholarship:

¹¹² *Id.* at 9. Examples of such sharing can be found in the presentations of speakers at a November 2007 conference in Gaborone, sponsored by the Southern African Regional Universities Association. Open Access Leadership Summit <http://www.sarua.org/?q=content/open-access-leadership-summit-gaborone-botswana> (last visited Nov. 9, 2009).

¹¹³ See Journals, <http://www.law.duke.edu/scholarship/journals> (last visited Nov. 9, 2009).

Insist that the journals which publish legal scholarship are openly accessible or at least allow authors to post their accepted works freely in institutional or disciplinary open access repositories. Librarians and others who support the work of legal scholars should actively assist them in locating open access journals and encourage them to publish in accessible venues.

Post new works to disciplinary repositories such as SSRN and BePress, and negotiate agreements with publishers that will allow authors to post versions of their works in local or in disciplinary repositories. Scholars, librarians, and others should encourage SSRN and BePress to develop common standards and policies to ensure long term open access to their holdings.¹¹⁴

Work locally to convince journals affiliated with their institutions to post their contents electronically in compliance with open access standards to help ensure that the content is picked up in search engines and open access harvesters, and urge affiliated journals to post their policies regarding open access and author postings of accepted articles, whether or not the journal operates under open access principles.¹¹⁵

Raise local consciousness about open access publishing alternatives and work to establish registered OAI compliant repositories to showcase local scholarship.¹¹⁶

As the success of the Duke repository shows, even small institutional repositories can demonstrate the benefits of Willinsky's "publishing systems that can be installed and controlled locally, but have a global presence." They can make local scholarship not only more visible, but readily available to anyone who will benefit from access to it. In accomplishing those goals, they go far toward promoting what Colin Darch has called "the establishment of an equitable world information order, based on entrenched principles of full disclosure and free flow."¹¹⁷

¹¹⁴See Gene Koo, Harvard's Open Publishing Policy and the Outlook for Law Schools, <http://lsi.typepad.com/lsi/2008/02/harvards-open-p.html> (Feb. 19, 2008).

¹¹⁵See Peter Suber, "Journals: Please Post Your Access Policies," *SPARC Open Access Newsletter*, Nov. 2, 2004, <http://www.earlham.edu/~peters/fos/newsletter/11-02-04.htm#postpolicies>.

¹¹⁶Much information about open access and institutional repositories can be found at Open Access Scholarly Information Sourcebook, <http://www.openoasis.org/> (last visited Nov. 9, 2009). The site includes briefing papers on topics including using repositories for institutional research management and the business issues involved in developing and running a repository,

¹¹⁷Darch, *supra* note 103, at 12.