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On File With: The Challenges of Inaccessible References

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On File With: The Challenges of Inaccessible References

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Abstract

This article examines the use of “on file with” citations in student-edited law reviews and journals and their impact on future research endeavors. It then explores potential remedies to make unpublished materials held by authors more accessible and identifies factors to consider before posting these materials online. Finally, it argues that law libraries are best suited to develop solutions for making unpublished materials more accessible and to serve as long-term stewards of these valuable resources.

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Introduction

Does reliance on authors for the stewardship of unpublished materials cited in academic articles lessen their creditability and limit the ability of others to build on their work? If “advances in knowledge depend on the open flow of information,”¹ should the standard be that all unpublished sources cited in law reviews and journals be made available for review by readers and future researchers?

Several have argued that legal scholarship should be made more widely available because of its potential impact on society.² Over the past decade, the open access movement has encouraged more authors and journals to make legal scholarship freely available through open access journals and institutional repositories.³ At the same time, authors, journals, and librarians have taken

¹ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 5 (2009), <https://doi.org/10.17226/12615>.

² See Richard A. Danner, *Applying the Access Principle in Law: The Responsibilities of the Legal Scholar*, 35 INT'L J. LEGAL INFO. 355, 357 (2007) (“In law, it can be argued as well 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.”); James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 558, 2011 LAW LIBR. J. 35, ¶ 14 (“It has been argued that the need to communicate legal information extends beyond the primary materials to include the articles of secondary scholarly commentary on those laws.”).

³ See generally Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779 (2006) (discussing the economics of open access publishing and how it enhances the dissemination of research); Richard A. Danner, Kelly Leong, Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 2011 LAW LIBR. J. 2 (discussing the current state of the Durham Statement, which called for the open access publication of law school journals); James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 2011 LAW LIBR. J. 35 (making the case that authors have responsibility to make their research available and

conscious steps to ensure that sources cited within law journal articles, especially online materials and empirical data, are preserved and cited in a way to provide long-term access to these underlying sources.⁴

In many ways, the sources cited and relied upon to produce scholarship are as important as the articles themselves. Footnotes, and the citations within them, provide authority and credibility, allow readers both to challenge the author's assertions and to draw their own conclusions, and provide a roadmap for further research exploration. Open scholarship and research benefits not just academics, but also non-academic consumers of legal scholarship, such as attorneys, judges, lawmakers, and the general public.

While significant steps have been taken to provide for more open research, there is a class of sources that remain mostly unavailable to readers and

outlining the case for how open access publishing increases citations to articles); Thomas W. Merrill, *The Digital Revolution and the Future of Law Reviews*, 99 MARQ. L. REV. 1101 (2016) (discussing the impact of technology on law review publishing); Kincaid C. Brown, *How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints*, 111 LAW LIBR. J. 551, 2019 LAW LIBR. J. 19 (studying the availability of law reviews in open access formats).

⁴ For an overview of link rot and its impact on citing to digital publications, see Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 2005 LAW LIBR. J. 42. For an overview on the need to make empirical data available for future researchers, see Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 395–398, 2012 LAW LIBR. J. 28, ¶¶ 38–41; see also NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 70 (2009), <https://doi.org/10.17226/12615> (“Limitations on the accessibility of data invariably retard, and can even block, the process of verifying the accuracy of those data.”).

researchers—unpublished sources that are kept “on file with” the author.⁵ There are many unpublished materials that are readily available to researchers, either because they are posted online or are held by an institution with an established set of practices and procedures for providing access to these materials, such as museums, archives, or libraries. However, there is less chance that unpublished materials that are held by the author will be available for other researchers.

Both Eugene Volokh and Roger Alford have previously raised the issue of “on file with” citations and their negative impact on legal scholarship. In his 2006 article “Law Reviews, the Internet, and Preventing and Correcting Errors,” Volokh raised several issues with unpublished sources not being available for readers, and he outlined potential benefits for making these materials more easily accessible by readers.⁶ Volokh argued that placing a source online would “avoid reader errors,” in that it would allow future readers to go back and review the underlying source within its full context.⁷ In addition, Volokh believed that making these materials more accessible would hold the author to a higher standard, in that the author would have to be “totally candid in characterizing it” because “any reader can easily check

⁵ Rule 17 of *The Bluebook* provides both examples of and rules for citing to unpublished materials that are commonly referenced in law review articles. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.17.1–17.4, at 169–173 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

⁶ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors> [<https://perma.cc/4DCU-RBDV>].

⁷ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

the sources and cry foul if the author’s summary of the source is biased or sloppy.”⁸ Similar to Volokh, Alford in his 2007 post blog post titled “On File With Author,” called it “absurd” that in “2006 alone, there were over 2,500 articles in the Westlaw JLR library that included this incredibly unhelpful reference.”⁹ While both Volokh and Alford acknowledged that not every source would be appropriate to be placed online due to possible restrictions related to confidentiality, privacy, or copyright, they both concluded that the majority of these unpublished sources could be placed online, with the journals taking on primary responsibility for managing online access.¹⁰

This article explores the issues and recommendations raised by Volokh and Alford and argues that not only should journals look to limit the use of “on file with” the author references, but that authors should deposit these materials with reliable stewards that will ensure their long-term preservation and accessibility¹¹

⁸ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

⁹ Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/> [<https://perma.cc/W533-5SE7>].

¹⁰ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>; Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/>.

¹¹ The term “accessibility” is used in this article as it is described by the National Academy of Sciences, in that accessibility “generally implies public access as well as availability to other researchers upon request. Accessibility does not necessarily imply free access, because providing access to data entails financial costs that must be met.” NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 26 (2009), <https://doi.org/10.17226/12615>.

for future researchers. Moreover, journals should make it an expectation that authors will either provide the unpublished source for posting or provide information on where the source has been deposited. In exploring these issues, part 1 of this article sets the stage by first looking at footnotes and their role in legal scholarship, the *Bluebook's* approach to citing to unpublished sources, and the use of “on file with” among the top law reviews and journals. Next, part 2 outlines the mechanisms in place to make these sources more accessible and the challenges journals will face in doing so. Finally, part 3 argues why accessibility alone is not enough. Instead, journals should deposit these materials with reliable stewards before publication, with law libraries being the best candidates to serve in this role. The goal of this article is draw awareness to the use of “on file with” the author references and provide a framework for making these materials more available at the time of an article’s publication.

Footnotes and the Use of “On File With”

To understand the importance of making unpublished materials more readily available to researchers, one must first understand the purpose of footnotes in legal scholarship, *The Bluebook's* role in setting expectations for authors and journals, and the prevalence of “on file with” citations throughout several major law reviews and journals.

The Role of Law Review Footnotes

Love them or hate them, footnotes are “an essential ingredient of legal scholarship.”¹² Unlike other academic disciplines, most law reviews do not include a bibliography.¹³ Instead, law reviews contain footnotes, which provide bibliographic information on the sources consulted, additional background information on a topic, and substantive commentary that may not fit within the flow of an article’s main text. In many instances, a footnote may be more valuable than the sentence it references.¹⁴

Both the quantity and length of footnotes has been well researched and critiqued over the past several decades.¹⁵ Most notably, authors have lamented the need imposed on them by student editors to cite “even the most obvious fact,”¹⁶ which leaves authors and the student editors with the general rule that “if in doubt,

¹² Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 363 (2007) (“Yes, footnotes are awkward; they take additional time to research and write and there are instances in which student editors insist upon them unthinkingly, but footnotes remain the essential ingredient of legal scholarship.”).

¹³ Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 249 (1979) (“The legal cite must substitute at times for the bibliography, which is used characteristically in much of nonlegal scholarship.”).

¹⁴ An example of this is a footnote that provides a survey of laws for a given topic. For an example of this type of footnote, see footnote 7 in Brian P. Brancato, *Blackjack or Bust: Personal Injury Suits on Riverboat Casinos*, 19 TUL. MAR. L.J. 133, 135 n.7 (1994) (citing to statutes in six states where riverboat gaming is legal).

¹⁵ Much has been written about the disdain with footnotes and over footnoting. See Larry A. DiMatteo, *Human Capital and the Search for Originality*, 16 BERKELEY BUS. L.J. 267, 273 (2019) (discussing the very need to footnote and law reviews’ “abhorrence for non-sourced statements”); Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457, 458 n.1 (2019) (discussing the idea of no original thoughts); Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 82 (2010) (discussing the use of citations for concepts that are common knowledge).

¹⁶ Richard A. Wise et al., *Do Law Reviews Need Reform: A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 17 (2013).

footnote.”¹⁷ Larry A. DiMatteo argued in “Human Capital and the Search for Originality” that the “penchant for complete attribution has led to the proliferation of footnotes,” and the way to minimize the number of footnotes is to adopt a new paradigm “where the expert author should be recognized as an intendent source.”¹⁸ Even if the scholars, editors, and the legal community were to agree that law reviews have too many footnotes,¹⁹ one should not lose sight of the fact that footnotes provide immense value to authors, readers, and future researchers.

For authors, footnotes serve as a means of showing attribution and establishing accuracy and creditability. When citing a source, authors are attributing their findings to the ideas and the work of previous authors and researchers.²⁰ This is not to say that there are no original thoughts,²¹ but the footnote’s role in conveying attribution does provide credit to those that laid the foundations for an idea. In addition, footnotes provide authors with the all-important validation that they are speaking with both authority and creditability.

¹⁷ Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 246 (1979); see also Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 361–62 (2007).

¹⁸ Larry A. DiMatteo, *Human Capital and the Search for Originality*, 16 BERKELEY BUS. L.J. 267, 273 (2019).

¹⁹ See Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457 (2019).

²⁰ Michael Bacchus, *Strung Out: Legal Citation, the Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 254 (2002).

²¹ Lori McPherson, *Law Review Articles Have Too Many Footnotes*, 68 J. LEGAL EDUC. 457, 458 n.1 (2019).

Since American law relies so heavily on precedent,²² it makes sense that any assertions made by authors must be “adequately anchored to or differentiated from existing principles and theories.”²³ As such, Edd Wheeler summarized that authors “use the footnote to bolster the credibility of their arguments by demonstrating the full range of their research or by showing what their investigations have in common with the findings of authorities with recognized clout.”²⁴ Thus, this “anxiety of authority,” as described by Michael Bacchus, almost necessitates the need to cite everything in order to authorize the authors work.²⁵ In short, footnotes provide the author with the justification that they need to express their new take or interpretation on a topic.

Even more important than the authority that they provide to the author, footnotes are an invaluable resource for readers and researchers. They ensure accuracy and serve as an essential tool for further research. Unlike other academic disciplines, the majority of legal scholarship is published through student-edited journals,²⁶ and, as part of the publication process, student editors spend numerous

²² Clyde W. Summers, *American Labor Law Scholarship - Some Comments*, 23 COMP. LAB. L. & POL'Y J. 801, 801 (2002).

²³ Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIBR. J. 233, 250, 2005 LAW LIBR. J. 14, ¶ 58.

²⁴ Edd D. Wheeler, *The Bottom Lines: Fifty Years of Legal Footnoting in Review*, 72 LAW LIBR. J. 245, 249 (1979).

²⁵ Michael Bacchus, *Strung Out: Legal Citation, the Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 250, 269, 276 (2002).

²⁶ See Michael Bacchus, *Strung Out: Legal Citation, the Bluebook, and the Anxiety of Authority*, 151 U. PA. L. REV. 245, 273 (2002); Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 563 (2007); Kincaid C. Brown, *How Many Copies Are*

hours combing through footnotes and checking the sources to ensure their accuracy.²⁷ Thus, when reviewing an article, a reader can feel confident that at a minimum, someone has checked to see if the source exists, and ideally, someone has checked the substantive accuracy of the author's statements.²⁸ While one could argue how much the students fully understand the author's arguments,²⁹ you cannot argue that by the time an article is published, every source cited has been reviewed. This then allows the reader to test the author's assessments and conclusions provided above the line by further examining the underlying information below the line.³⁰

In addition to serving as a mechanism to ensure that an author's statements are accurate, footnotes also provide readers with a tool for further research on a topic. While some would argue that the number of footnotes, especially those that cover general background on a topic, are excessive and the main culprits for increasingly longer law review articles,³¹ footnotes do provide readers with "pre-

Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints, 111 LAW LIBR. J. 551, 559, 2019 LAW LIBR. J. 19, ¶24.

²⁷ Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 610 (2004).

²⁸ Darby Dickerson, *Citation Frustrations—And Solutions*, 30 STETSON L. REV. 477, 481 (2000).

²⁹ See Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1028–29 (1990); Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 606 (2004).

³⁰ Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1012 (1990).

³¹ Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 98 (2010) (recommending that editors "Flag excess in the author's draft. It's tricky business to suggest trimming or deleting material after an author (or her research assistant) has gone to the trouble of composing lists of 'see' or 'see also' works and lengthy but unnecessary background or tangential notes."); Larry A. DiMatteo, *Human Capital and the Search for Originality*, 16 BERKELEY BUS. L.J. 267, 300 (2019) ("A subset of the legal scholarship critique is that law professors write

packaged research” on a topic.³² Joan Ames Magat characterized footnotes as sources in themselves, and explained that “a good, fat footnote is like standing at the library shelf with the book one seeks under one’s nose....”³³ In many ways, footnotes can serve as a gateway for future researchers, both educating them on the evolution of a topic, while also serving as a snapshot in time of what the author considered to be the most “appropriate and convincing authority” on the topic.³⁴

While footnotes play an integral role in legal scholarship, it’s *The Bluebook* that shapes and guides their use and sets the expectations for how materials should be cited within the footnotes.

The Bluebook and Unpublished Materials

The Bluebook holds itself out as the “definitive style guide for legal citation in the United States.”³⁵ If properly cited, the citation forms are “designed to provide the information necessary to lead the reader directly to the specific items cited,” and therefore, if a citation format is not contained within the pages of the *The Bluebook*, then authors and editors are encouraged to “provide sufficient

unnecessarily long and unhelpful law review articles. As noted earlier, articles are too long because they tend to engage in an internal dialogue with other papers, summarizing everything that has ever been said on a given topic by other law professors.”)

³² John Doyle, *The Law Reviews: Do Their Paths of Glory Lead but to the Grave*, 10 J. APP. PRAC. & PROCESS 179, 190 (2009).

³³ Joan Ames Magat, *Bottomheavy: Legal Footnotes*, 60 J. LEGAL EDUC. 65, 71 (2010).

³⁴ Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 568 (2007).

³⁵ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020); see also David J. S. Ziff, *The Worst System of Citation Except for All the Others*, 66 J. LEGAL EDUC. 668, 670 (2017).

information to allow the reader to find the cited material quickly and easily.”³⁶ This article does not need to rehash the benefits and drawbacks of such a voluminous set of standards, but needless to say, some have argued that the strict adherence to these rules often increases the number of overall footnotes in an article.³⁷

Regardless of if you admire or disdain the detail provided within *The Bluebook*, it does provide authors, editors, and readers with a consistent set of rules that readers and researchers can use to decipher the nature of a cited source and hopefully locate it, or at minimum, determine the next steps to take in order to locate the cited source. As the nature of sources evolve, *The Bluebook* adds and revises citation formats to stay current with sources that authors cite to in legal scholarship.³⁸

In 1991, *The Bluebook's* 15th Edition added many new citation forms for sources that were not previously covered within it.³⁹ As part of these additions, *The Bluebook* provided citation rules under a new rule for several types of commonly

³⁶ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020).

³⁷ Richard A. Wise et al., *Do Law Reviews Need Reform: A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 17 (2013) (“Law reviews slavishly adhere to Bluebook requirements, demanding citations even for the most obvious fact, which stifles creativity and originality and encourages the piling on of footnotes that contain meaningless minutiae.”).

³⁸ An example of keeping up with the sources that authors cite to is the addition of rules for citing to blogs under Rule 18 in the 18th Edition of *The Bluebook*. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION vi, R. 18.2.4, at 158 (Columbia L. Rev. Ass'n et al. eds., 18th ed. 2005).

³⁹ David E. B. Smith, *Just When You Thought It Was Safe To Go Back Into the Bluebook: Notes on the Fifteenth Edition*, 67 CHI.-KENT L. REV. 275, 280 (1991); THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al. eds., 15th ed. 1991).

cited unpublished materials, including unpublished manuscripts, speeches, interviews, and letters.⁴⁰ David E. B. Smith hoped that these additional rules for unpublished materials would remove the worry about citation format, and instead allow editors to “focus on talking the author into sending a copy of that preciously obscure source to the law review so that it really is ‘on file.’”⁴¹ As this article will discuss later, many important documents are still kept “on file with” the author instead of with the journals or a reliable steward, such as a library, museum, or archives.

Looking at the recently published 21st Edition, *The Bluebook* provides authors and editors with citation formats for manuscripts (R. 17.2.1); dissertations and theses (R. 17.2.2); letters, memoranda, and press releases (R. 17.2.3); email correspondence and listserv postings (R. 17.2.4); interviews (R. 17.2.5); speeches and addresses (R. 17.2.6); and forthcoming publications (R. 17.3).⁴² As part of the citation examples provided under Rule 17.1, the 21st Edition includes an example of a source that is kept on file with the journal, a university library, the law library of the journal publication, and the author.⁴³ Notably absent from Rule 17 is a

⁴⁰ David E. B. Smith, *Just When You Thought It Was Safe To Go Back Into the Bluebook: Notes on the Fifteenth Edition*, 67 CHI.-KENT L. REV. 275, 281 (1991).

⁴¹ David E. B. Smith, *Just When You Thought It Was Safe To Go Back Into the Bluebook: Notes on the Fifteenth Edition*, 67 CHI.-KENT L. REV. 275, 281 (1991).

⁴² THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.17.2.1–17.3, at 169–172 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020). Many of the unpublished sources that are covered under Rule 17 are materials that would not be readily available in print in most law libraries or accessible through general online subscription databases.

⁴³ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.17.1, 169 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020) (examples provided include “on file with the Columbia Law Review” for an

recommendation for a preferred storage and archival location for these sources. Unlike Rule 18.2.1(d), which outlines that “archiving of internet sources is encouraged, but only when a reliable archival tool is available,”⁴⁴ Rule 17.2 simply states that authors and editors should provide “if possible, information as to where the work can be located.”⁴⁵ Roger Alford went so far as to recommend that *The Bluebook* authors should modify then Rule 17.1 to “encourage (or require) law journals to scan and place unpublished documents online.”⁴⁶ Setting aside several reasons for why a blanket rule may not be feasible for all sources, a stronger recommendation from *The Bluebook* could encourage a more uniform approach for how these unpublished materials are cited, and thus, would encourage journals and authors to take the necessary steps to preserve these sources in a way that would ensure long-term accessibility.

Use of “On File With” Among Journals

The last aspect of looking at footnotes and the use of the “on file with” reference is to see the prevalence of its use among journals. In examining this use, I looked at not just journals overall, but also focused on four of the top student-

unpublished manuscript, “on file with the Harvard University Library system” for a thesis, “on file with the Harvard Law School Library” for a memorandum, and “on file with the author” for an e-mail correspondence).

⁴⁴ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.18.2.1(d), at 177 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

⁴⁵ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.17.2, at 169 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

⁴⁶ Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/>.

edited law journals.⁴⁷ Reviewing these four journals allowed me to take a deeper dive into the diverging practices among these journals and shed further light on the need for more consistent methods to be employed throughout legal scholarship. For both the overall and the journal specific searches,⁴⁸ I performed a series of searches using the advanced search function on both Lexis and Westlaw to search across the footnotes of journals in their respective databases of law reviews and journals.⁴⁹

General Use Among All Journals

⁴⁷ The four journals reviewed were *Columbia Law Review*, *Harvard Law Review*, *Stanford Law Review*, and *Yale Law Journal*.

⁴⁸ This article presents the results of the searches in the tables that follow and provides information on the search parameters used for the study in the footnotes. In addition, the results for the searches, including information not conveyed in the tables, is posted online so readers can review the results in more detail, replicate the findings, or perform additional analysis. See Austin Williams, *Replication Data for: Search Results for On File With in Law Reviews and Journals*, HARV. DATAVERSE (Mar. 21, 2021), <https://doi.org/10.7910/DVN/3NHNS2>.

⁴⁹ Significant thought went into determining which platform would produce the results most useful for this study. It is well documented that of the three primary vendors for electronic access to law reviews and journals, the coverage in Lexis is less than HeinOnline or Westlaw. See Shannon Furtak, *Top 100 Journals Comparison Across Multiple Legal Research Databases*, HeinOnline Blog (July 13, 2016), <https://home.heinonline.org/blog/2016/07/top-100-journals-comparison-across-multiple-legal-research-databases/> [https://perma.cc/3AAY-FUJA]. The Washington and Lee University School of Law Library uses Westlaw to compile and produce its W&L Law Journal Rankings. See *Ranking Methodology*, W&L LAW JOURNAL RANKINGS, <https://managementtools4.wlu.edu/LawJournals/Default3.aspx> [https://perma.cc/3QSN-SLPA] (last visited Mar. 21, 2021). I chose to use both Lexis and Westlaw because Lexis displays more than 10,000 results, while Westlaw does not return more than 10,000 results. See Shawn G. Nevers & Julie Graves Krishnaswami, *The Shadow Code: Statutory Notes in the United States Code*, 112 LAW LIBR. J. 213, 230–31 n.116, 2020 LAW LIBR. J. 7, ¶ 36 (“This brought back 10,000 results, which is Westlaw's maximum, meaning that there were more than 10,000 cases corresponding to this result.”). I chose to search across Lexis and Westlaw instead of HeinOnline because both Lexis and Westlaw allow users to limit searches to only the text of the footnotes.

In my initial searches, I focused on documents⁵⁰ published in the databases since January 1, 1992⁵¹ that contained “on file with” or one of its two common iterations, “on file in” or “on file at.” In Lexis, this search produced a total of 81,381 documents,⁵² while in Westlaw this search produced over 10,000 documents.⁵³ I also filtered the results for this search into two additional time periods: (1) January 1, 1992 to December 31, 2008; and (2) January 1, 2009 to September 19, 2020. Table 1 provides a full breakdown of the results.

⁵⁰ This article uses “documents” to describe the results within these databases because the results include all pieces published by a journal, which includes articles, essays, notes, comments, and book reviews.

⁵¹ The 15th edition of *The Bluebook* was published in 1991. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass’n et al. eds., 15th ed. 1991). To account for its adoption by journals, I restricted my searches to after January 1, 1992.

⁵² The search parameters used for Lexis were **footnote(“on file with” or “on file in” or “on file at”)** across the Lexis Law Reviews & Journals database. I then limited the results from January 1, 1992 to September 19, 2020.

⁵³ The search parameters used for Westlaw were **FOOTNOTE("on file with" or "on file in" or "on file at") & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page.

Table 1

Dates	Any “on file” ⁵⁴		“on file” Author ⁵⁵		“on file” Journal ⁵⁶		“on file” Library ⁵⁷	
	LN	WL	LN	WL	LN	WL	LN	WL
1/1/92–9/19/20	81,381	10,000+	56,894	10,000+	17,996	10,000+	4,692	4,903
1/1/92–12/31/08	45,529	10,000+	30,662	10,000+	12,138	10,000+	2,373	2,526
1/1/09–9/19/20	35,852	10,000+	26,232	10,000+	5,858	5,904	2,319	2,377

⁵⁴ The search parameters used for Lexis were **footnote(“on file with” or “on file in” or “on file at”)** across the Lexis Law Reviews & Journals database. I then limited the results for the three time periods. The search parameters used for Westlaw were **FOOTNOTE(“on file with” or “on file in” or “on file at”) & DA(aft 12-31-1991 & bef 09-20-2020); FOOTNOTE(“on file with” or “on file in” or “on file at”) & DA(aft 12-31-1991 & bef 01-01-2009); and FOOTNOTE(“on file with” or “on file in” or “on file at”) & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page.

⁵⁵ The search parameters used for Lexis were **footnote(“on file with the author” or “on file with the authors” or “on file with author” or “on file with authors”)** across the Lexis Law Reviews & Journals database. I then limited the results for the three time periods. The search parameters used for Westlaw were **FOOTNOTE(“on file with the author” or “on file with the authors” or “on file with author” or “on file with authors”) & DA(aft 12-31-1991 & bef 09-20-2020); FOOTNOTE(“on file with the author” or “on file with the authors” or “on file with author” or “on file with authors”) & DA(aft 12-31-1991 & bef 01-01-2009); and FOOTNOTE(“on file with the author” or “on file with the authors” or “on file with author” or “on file with authors”) & DA(aft 12-31-2008 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page.

⁵⁶ The search parameters used for Lexis were **footnote(“on file” pre/10 journal) or (“on file” pre/10 review))** across the Lexis Law Reviews & Journals database. I then limited the results for the three time periods. The search parameters used for Westlaw were **FOOTNOTE(“on file” +10 (journal or review)) & DA(aft 12-31-1991 & bef 09-20-2020); FOOTNOTE(“on file” +10 (journal or review)) & DA(aft 12-31-1991 & bef 01-01-2009); and FOOTNOTE(“on file” +10 (journal or review)) & DA(aft 12-31-2008 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page.

⁵⁷ The search parameters used for Lexis were **footnote (“on file” pre/10 library)** across the Lexis Law Reviews & Journals database. I then limited the results for the three time periods. The search parameters used for Westlaw were **FOOTNOTE(“on file” +10 library) & DA(aft 12-31-1991 & bef 09-20-2020); FOOTNOTE(“on file” +10 library) & DA(aft 12-31-1991 & bef 01-01-2009); and FOOTNOTE(“on file” +10 library) & DA(aft 12-31-2008 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page.

I selected January 1, 2009 as a dividing point for two reasons: (1) it was after both Volokh’s 2006 and Alford’s 2007 calls to reduce the use of “on file with” references in journal articles; and (2) it was after both the May 2008 vote by the Harvard Law School Faculty to make their research articles “free and publicly available;”⁵⁸ as well as the November 2008 meeting between several academic law library directors that resulted in the "Durham Statement on Open Access to Legal Scholarship."⁵⁹

In addition to searching across all documents for any “on file with” references, I also ran searches distinguishing where sources were kept—with the author,⁶⁰ a law review or journal,⁶¹ or a library⁶²—for the same time periods.⁶³ The results of these searches are also provided in Table 1. Even with the possibility overestimating the number of documents that included an “on file with” reference

⁵⁸ Athena Y. Jiang, *Law School Adopts Open Access for Scholarship*, THE HARVARD CRIMSON (May 7, 2008), <https://www.thecrimson.com/article/2008/5/7/law-school-adopts-open-access-for/#.X-tAbLOdubk.link> [<https://perma.cc/48QM-U55U>]; *Open Access and Scholarly Publishing*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/library/for-faculty/open-access-and-scholarly-publishing/> [<https://perma.cc/PYH7-CXEP>] (last visited Mar. 21, 2021).

⁵⁹ *Durham Statement on Open Access to Legal Scholarship*, GOODSON LAW LIBRARY, <https://law.duke.edu/lib/durhamstatement> [<https://perma.cc/45VR-92AZ>] (last visited Mar. 21, 2021).

⁶⁰ For example, see the reference to an interview in footnote 23 that is kept on file with the authors in Jessica Mantel & Leah Fowler, *A Qualitative Study of the Promises and Perils of Medical-Legal Partnerships*, 12 N.E. U. L. REV. 186, 194 n.23 (2020).

⁶¹ For example, see the reference to an e-mail in footnote 35 that is kept on file with the *Indiana Law Journal* in Denise Gilman, *To Loose the Bonds: The Deceptive Promise of Freedom from Pretrial Immigration Detention*, 92 IND. L.J. 157, 169 n.35 (2016).

⁶² For example, see the reference to a Technical Conference Smart Grid Interoperability Standard Transcript Document in footnote 10 that is kept on file with the Harvard Law School Library in Joel B. Eisen, *Smart Regulation and Federalism for the Smart Grid*, 37 HARV. ENVTL. L. REV. 1, 4 n.10 (2013).

⁶³ I purposely did not include searches for archives or museums because I consider them to be a reliable source for providing these types of materials to researchers.

that was held by a journal or a library,⁶⁴ Table 1 clearly shows that the practice of the author retaining stewardship over sources is a more common practice than these files being retained by the journal or a library.⁶⁵

As this article will discuss later on in part 3,⁶⁶ allowing the author to maintain stewardship over these sources does raise several concerns in terms of accessibility to future researchers and the long-term preservation of the underlying sources. It is for this reason that when exploring the practices of a smaller subset of journals, I focused on their use of “on file with” references that were kept with the author.

Use Among Top Journals

To explore the practices of a smaller subset of journals, I ran similar searches as above, but also looked to see if there were underlying practices, policies, or resources employed by the journals related to unpublished materials. The four journals that I reviewed were *Columbia Law Review*, *Harvard Law Review*, *Stanford Law Review*, and *Yale Law Journal*. I chose these four journals

⁶⁴ I ran two different searches for journals and libraries. For journals, I looked for either “journal” or “review” within 5 terms and 10 terms of “on file” in both Lexis and Westlaw. For libraries, I looked for “library” within 5 terms and 10 terms of “on file” in both Lexis and Westlaw. In both instances, the searches that looked for “on file” preceding by 5 terms of the desired keyword returned less results than those with “on file” preceding by 10 terms of the desired keyword. For purposes of comparison, I provided the results for within 10 terms in Table 1 to be more encompassing, even though the results are likely to include some results that are not applicable. For example, the search for journals returned results where “journal” appeared at the beginning of a sentence immediately after the “on file” reference. See footnote 548 in Barbara Hanson Nellermeoe, *50 Years of Excellence: A History of the St. Mary's Law Journal*, 50 ST. MARY'S L.J. 1, 109 n.548 (2019).

⁶⁵ See *supra* Table 1.

⁶⁶ See *infra* section discussing possible stewards—authors and original researchers.

because they were the same top four listed by both HeinOnline's ScholarRank's Top 250 Journals⁶⁷ and the W&L Law Journal Rankings.⁶⁸

By focusing in on these four journals, I was hoping to get a better picture of how often the journals used “on file with” references when compared to the number of documents published. In addition, I was also hoping that this would shed light on if journals were following different practices with regards to unpublished materials. For these four journals, I specifically focused on their use of “on file with” references that were kept by the author. Tables 2, 3, and 4 provide the results for searches across the databases of law reviews and journals on Lexis and Westlaw for all documents published within the given time periods, documents with any “on file with” reference, and documents with an “on file with” the author reference.

⁶⁷ *Law Journals – Most Cited*, HEINONLINE, <https://heinonline.org/HOL/Index?collection=journals> [<https://perma.cc/MC6L-LYMS>] (last visited Mar. 21, 2021) (after arriving at the Law Journal Library landing page, click on “Most Cited” and then click on “ScholarRank's Top 250 Journals” for the list of top journals. ScholarRank is calculated “based on Bluebook citation analysis across all of the titles available in HeinOnline.”).

⁶⁸ W&L LAW JOURNAL RANKINGS, <https://managementtools4.wlu.edu/LawJournals/Default.aspx> [<https://perma.cc/PE53-8MWB>] (last visited Mar. 21, 2021).

Table 2

All searches restricted from Jan. 1, 1992 to Sept. 19, 2020										
Journals	Total Docs ⁶⁹		Any "on file" ⁷⁰		% of "on file" w/n Total Docs ⁷¹		"on file" Author ⁷²		% of "on file" author w/n Total Docs ⁷³	
	LN	WL	LN	WL	LN	WL	LN	WL	LN	WL
<i>Columbia Law Review</i>	1,556	1,412	1,127	1,012	72.43%	71.67%	56	58	3.60%	4.11%
<i>Harvard Law Review</i>	3,910	3,583	690	687	17.65%	19.17%	83	77	2.12%	2.15%
<i>Stanford Law Review</i>	1,235	1,218	500	521	40.49%	42.78%	338	354	27.37%	29.06%
<i>Yale Law Journal</i>	2,187	1,628	732	670	33.47%	41.15%	610	565	27.89%	34.71%

⁶⁹ For each journal, I navigated to the database or content page for that individual journal and pulled all documents published between January 1, 1992 and September 19, 2020.

⁷⁰ The search parameters used for Lexis were **footnote("on file with" or "on file in" or "on file at")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 1992 to September 19, 2020. The search parameters used for Westlaw were **FOOTNOTE("on file with" or "on file in" or "on file at") & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁷¹ I calculated this by taking the number of results with any "on file" reference and dividing it by the total number of results for each journal in the given time period.

⁷² The search parameters used for Lexis were **footnote("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 1992 to September 19, 2020. The search parameters used for Westlaw were **FOOTNOTE("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors") & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁷³ I calculated this by taking the number of results with any "on file" with the author reference and dividing it by the total number of results for each journal in the given time period.

Table 3

All searches restricted from Jan 1, 1992 to Dec. 31, 2008										
Journals	Total Docs ⁷⁴		Any "on file" ⁷⁵		% of "on file" w/n Total Docs ⁷⁶		"on file" Author ⁷⁷		% of "on file" author w/n Total Docs ⁷⁸	
	LN	WL	LN	WL	LN	WL	LN	WL	LN	WL
<i>Columbia Law Review</i>	873	889	536	549	61.40%	61.75%	48	50	5.50%	5.62%
<i>Harvard Law Review</i>	2,142	2,184	433	463	20.21%	21.20%	24	31	1.12%	1.42%
<i>Stanford Law Review</i>	872	860	352	368	40.37%	42.79%	198	210	22.71%	24.42%
<i>Yale Law Journal</i>	1,214	1,031	409	411	33.69%	39.86%	315	322	25.95%	31.23%

⁷⁴ For each journal, I navigated to the database or content page for that individual journal and pulled all documents published between January 1, 1992 and December 31, 2008.

⁷⁵ The search parameters used for Lexis were **footnote("on file with" or "on file in" or "on file at")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 1992 to December 31, 2008. The search parameters used for Westlaw were **FOOTNOTE("on file with" or "on file in" or "on file at") & DA(aft 12-31-1991 & bef 01-01-2009)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁷⁶ I calculated this by taking the number of results with any "on file" reference and dividing it by the total number of results for each journal in the given time period.

⁷⁷ The search parameters used for Lexis were **footnote("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 1992 to December 31, 2008. The search parameters used for Westlaw were **FOOTNOTE("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors") & DA(aft 12-31-1991 & bef 01-01-2009)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁷⁸ I calculated this by taking the number of results with any "on file" with the author reference and dividing it by the total number of results for each journal in the given time period.

Table 4

All searches restricted from Jan. 1, 2009 to Sept. 19, 2020										
Journals	Total Docs ⁷⁹		Any "on file" ⁸⁰		% of "on file" w/n Total Docs ⁸¹		"on file" Author ⁸²		% of "on file" author w/n Total Docs ⁸³	
	LN	WL	LN	WL	LN	WL	LN	WL	LN	WL
<i>Columbia Law Review</i>	683	523	591	463	86.53%	88.53%	8	8	1.17%	1.53%
<i>Harvard Law Review</i>	1,768	1,399	257	224	14.54%	16.01%	59	46	3.34%	3.29%
<i>Stanford Law Review</i>	363	358	148	153	40.77%	42.74%	140	144	38.57%	40.22%
<i>Yale Law Journal</i>	973	597	323	259	33.20%	43.38%	295	243	30.32%	40.70%

⁷⁹ For each journal, I navigated to the database or content page for that individual journal and pulled all documents published between January 1, 2009 and December 31, 2008.

⁸⁰ The search parameters used for Lexis were **footnote("on file with" or "on file in" or "on file at")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 2009 to December 31, 2008. The search parameters used for Westlaw were **FOOTNOTE("on file with" or "on file in" or "on file at") & DA(aft 12-31-2008 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁸¹ I calculated this by taking the number of results with any "on file" reference and dividing it by the total number of results for each journal in the given time period.

⁸² The search parameters used for Lexis were **footnote("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors")** across the Lexis Law Reviews & Journals database for each individual journal. I then limited the results from January 1, 2009 to December 31, 2008. The search parameters used for Westlaw were **FOOTNOTE("on file with the author" or "on file with the authors" or "on file with author" or "on file with authors") & DA(aft 12-31-2008 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for each individual journal.

⁸³ I calculated this by taking the number of results with any "on file" with the author reference and dividing it by the total number of results for each journal in the given time period.

There are a number of observations based on the search results. First, the results show that there is a clear contrast between *Columbia Law Review* and *Harvard Law Review* when compared to *Stanford Law Review* and *Yale Law Journal* in regards to the number of documents that included at least one reference that was kept with the author.⁸⁴ Second, while *Columbia Law Review* was the highest in terms of documents that contained an “on file with” reference, in both number (Lexis – 1,127; Westlaw – 1,012) and percentage of the documents (Lexis – 1,127 out of 1,556, 72.43%; Westlaw – 1,012 out of 1,412, 71.67%), it was the lowest in terms of the number of documents that contained an “on file with” the author reference (Lexis – 56; Westlaw – 58), and second lowest in terms of percentage of the total documents (Lexis – 56 of 1,556, 3.60%; Westlaw – 58 out of 1,412, 4.11%).⁸⁵ Finally, all but *Columbia Law Review* saw an increase in the percentage of documents that contained at least one “on file with” the author reference when comparing the first observation period (January 1, 1992 to December 31, 2008) in Table 3 to the second observation period (January 1, 2009 to September 19, 2020) in Table 4.⁸⁶ This is significant because it is counter to what I expected, in that, with more resources available to make these materials accessible through other means, there was instead an increase in allowing authors to keep these materials in their possession. Without deeper study of the individual uses across all

⁸⁴ See *supra* Table 2.

⁸⁵ See *supra* Table 2.

⁸⁶ See *supra* Tables 3 & 4.

of the documents published since 1992⁸⁷ in these four journals or just the documents that contained an “on file with” the author reference,⁸⁸ the initial reasons for the difference between these journals could be the nature of the articles that they published or the policies and resources employed by the journals.

After looking at the number of instances between the four journals, I also wanted to determine if there were specific policies, practices, or resources in place to handle unpublished materials. *Yale Law Journal*, specifically sets out a policy related to unpublished resources in their style guide.⁸⁹ Under S.R. 17: “On File with” in *Yale Law Journal’s Volume 130 Style Guide*, the policy states the following:

We do not store manuscripts. Accordingly, do not cite manuscripts as being “on file with the *Yale Law Journal*.” If a cited manuscript is available in a library or other public location, cite it as being on file at that location; otherwise, cite it as “on file with author(s).”⁹⁰

⁸⁷ In Lexis, 8,888 documents were published across the four journals between January 1, 1992 and September 19, 2020. *See supra* Table 2. In Westlaw, 7,841 documents were published across the four journals between January 1, 1992 and September 19, 2020. *See supra* Table 2.

⁸⁸ In Lexis, 1,087 documents were published across the four journals between January 1, 1992 and September 19, 2020 that contained an “on file with” the author reference. *See supra* Table 2. In Westlaw, 1,054 documents were published across the four journals between January 1, 1992 and September 19, 2020 that contained an “on file with” the author reference. *See supra* Table 2.

⁸⁹ THE YALE LAW JOURNAL, VOLUME 130 STYLE GUIDE 19, https://www.yalelawjournal.org/files/Volume130StyleGuide_gg1owczh.pdf [<https://perma.cc/2N5U-CWNM>] (last visited Mar. 21, 2021).

⁹⁰ THE YALE LAW JOURNAL, VOLUME 130 STYLE GUIDE 19, https://www.yalelawjournal.org/files/Volume130StyleGuide_gg1owczh.pdf (last visited Mar. 21, 2021).

This clarifies why *Yale Law Journal* published the most documents since 1992 that contain at least one reference to a source that is maintained by the author.⁹¹

Harvard Law Review, which had the lowest percentage of documents that contained an “on file with” the author reference since 1992 (Lexis – 83 out of 3,910 documents, 2.12%; Westlaw – 77 out of 3,583 documents, 2.15%),⁹² looks to have taken advantage of a service to retain unpublished materials offered by the Harvard Law School Library’s Historical & Special Collections Department.⁹³ When compared to the number of documents published since 1992 that contained an “on file with” reference (Lexis – 690, Westlaw – 687),⁹⁴ a significant number of documents contained a reference that was kept “on file with” the Harvard Law School Library (Lexis – 534; Westlaw – 535).⁹⁵ The Documents on File program allows student journals to deposit “unpublished, difficult to access, or ephemeral sources” that are cited by journals.⁹⁶ After depositing materials under this program,

⁹¹ See *supra* Table 2.

⁹² See *supra* Table 2.

⁹³ See *Tools for Student Journals*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/dept/dos/student-journals/tools-for-student-journals/> [<https://perma.cc/RPA2-5WE6>] (last visited Mar. 22, 2021); *Library Services to Journals for Fall 2020*, HARVARD LAW SCHOOL LIBRARY, <https://guides.library.harvard.edu/law/journalservices20> [<https://perma.cc/GCX9-34RN>] (last updated Oct. 9, 2020) (see information under the “Documents on File (Documents, Print)” subheading).

⁹⁴ See *supra* Table 2. The reference could be “on file with,” “on file in,” or “on file at.”

⁹⁵ The search parameters used for Lexis were **footnote ("on file with" pre/2 "Harvard Law School Library")** across the Lexis Law Reviews & Journals database for *Harvard Law Review*. I then limited the results from January 1, 1992 to September 19, 2020. The search parameters used for Westlaw were **FOOTNOTE("on file with" +2 "Harvard Law School Library") & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for *Harvard Law Review*.

⁹⁶ *Tools for Student Journals*, HARVARD LAW SCHOOL, <https://hls.harvard.edu/dept/dos/student-journals/tools-for-student-journals/> (last visited Mar. 22, 2021).

journals are able to note in the explanatory parenetical that the materials are kept with the library.⁹⁷ Of note, the Documents on File program only accepts documents that do not have “access restrictions” or are not available at “other libraries or archival repositories.”⁹⁸ Moreover, any documents transferred to the library as part of this program “will be freely accessible to all patrons and subject to HSC Reading Room policies.”⁹⁹

While not publicly posted, both *Columbia Law Review* and *Stanford Law Review* appear to be following a predetermined set of practices for how they maintain and cite to unpublished materials. *Columbia Law Review* has clearly taken the stance that most unpublished materials will be maintained by the journal. When compared to the number of documents published by the journal since January 1, 1992 that contained at least one reference that was kept “on file with” (Lexis – 1,217; Westlaw – 1,012)¹⁰⁰ a significant number of documents contained a reference that was kept “on file with” the law review (Lexis – 1,094; Westlaw – 990).¹⁰¹ On the other hand, *Stanford Law Review* appears to have taken an approach

⁹⁷ *Library Services to Journals for Fall 2020*, HARVARD LAW SCHOOL LIBRARY, <https://guides.library.harvard.edu/law/journalservices20> (last updated Oct. 9, 2020).

⁹⁸ *Library Services to Journals for Fall 2020*, HARVARD LAW SCHOOL LIBRARY, <https://guides.library.harvard.edu/law/journalservices20> (last updated Oct. 9, 2020).

⁹⁹ *Library Services to Journals for Fall 2020*, HARVARD LAW SCHOOL LIBRARY, <https://guides.library.harvard.edu/law/journalservices20> (last updated Oct. 9, 2020).

¹⁰⁰ See *supra* Table 2. The reference could be “on file with,” “on file in,” or “on file at.”

¹⁰¹ The search parameters used for Lexis were **footnote("on file with" pre/2 "Columbia Law Review")** across the Lexis Law Reviews & Journals database for *Columbia Law Review*. I then limited the results from January 1, 1992 to September 19, 2020. The search parameters used for Westlaw were **FOOTNOTE("on file with" +2 "Columbia Law Review") & DA(aft 12-31-**

more similar to *Yale Law Journal*, where the majority of unpublished materials are maintained by the author, with a few materials maintained by the journal. When compared to the number of documents published by *Stanford Law Review* since January 1, 1992 that contained at least one reference that was kept “on file with” (Lexis – 500; Westlaw – 521),¹⁰² a significant number of documents contained a reference that was kept “on file with” the author (Lexis – 338; Westlaw – 354),¹⁰³ while far fewer during this time period contained a reference that was kept “on file with” the law review (Lexis – 169; Westlaw – 181).¹⁰⁴

These four journals serve as an interesting case study for the different approaches that they have taken with regards to citing and maintaining unpublished materials. While *Yale Law Journal* and *Stanford Law Review* appear to rely more on the author to maintain stewardship over these materials, *Harvard Law Review* has relied on its institution’s law library to serve in this stewardship role, while *Columbia Law Review* relies on the journal itself to serve in this role. These four journals provide different examples for how student-edited journals are citing to, and ultimately, providing access to the most common unpublished materials cited

1991 & bef 09-20-2020) across the Westlaw Law Reviews & Journals content page for *Columbia Law Review*.

¹⁰² See *supra* Table 2. The reference could be “on file with,” “on file in,” or “on file at.”

¹⁰³ See *supra* Table 2.

¹⁰⁴ The search parameters used for Lexis were **footnote("on file with" pre/2 "Stanford Law Review")** across the Lexis Law Reviews & Journals database for *Stanford Law Review*. I then limited the results from January 1, 1992 to September 19, 2020. The search parameters used for Westlaw were **FOOTNOTE("on file with" +2 "Stanford Law Review") & DA(aft 12-31-1991 & bef 09-20-2020)** across the Westlaw Law Reviews & Journals content page for *Stanford Law Review*.

within the articles they publish, such as unpublished manuscripts¹⁰⁵ and emails.¹⁰⁶ Each journal provides a different example of who ultimately should be responsible for making these unpublished materials accessible to future researchers and who should exercise long-term preservation of these materials. Part 3 of this article will explore each of these types of stewards in further detail to determine which one is best placed to serve in this role.¹⁰⁷

¹⁰⁵ Unpublished manuscripts are common sources that are cited as “on file with.” While most journals will cite to a version that is available online by providing the link to SSRN or including a Perma.cc link, those that are not available online are either retained by the author, held by the journal, or deposited with the library. *Stanford Law Review* and *Yale Law Journal* tend to keep these materials on file with the author. For an example from *Stanford Law Review*, see footnote 165 in David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1, 26 n.165 (2020) (unpublished manuscript kept on file with the authors). For an example from *Yale Law Journal*, see footnote 30 in Jonathan S. Gould, *Law within Congress*, 129 YALE L.J. 1946, 1957 n.30 (2020). *Columbia Law Review* tends to maintain unpublished manuscripts on file with the journal. For an example, see footnote 151 in Daphna Renan, *The President's Two Bodies*, 120 COLUM. L. REV. 1119, 1150 n.151 (2020) (unpublished manuscript is held on file with the *Columbia Law Review*). *Harvard Law Review* deposits most unpublished manuscripts with the Harvard Law School Library. For an example, see footnote 19 in Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1823 n.19 (2020) (unpublished manuscript is held on file with the Harvard Law School Library).

¹⁰⁶ Emails are another example of the different practices followed by these journals. While it does vary some between articles, *Harvard Law Review* does appear to place most emails cited within their articles in their Documents on File program. For an example, see footnote 7 in Alexandra Natapoff, *Atwater and the Misdemeanor Carceral State*, 133 HARV. L. REV. F. 147, 147 n.7 (2020) (email from Mac Haas to author that is kept on file with the Harvard Law School Library). *Columbia Law Review* tends to keep emails on file with the journal. For an example, see footnote 547 in Anne Joseph O'Connell, *Actings*, 120 COLUM. L. REV. 613, 714 n.547 (2020) (email from Alan Morrison, Lerner Family Assoc. Dean, Pub. Interest & Pub. Service Law, George Washington Law Sch., to author that is held on file with the *Columbia Law Review*). *Yale Law Journal* follows the practice that emails are retained by the author. For an example, see footnote 147 in Peter Damrosch, *Public Rights of First Refusal*, 129 YALE L.J. 812, 843 n.147 (2020) (email from Fred Salvucci, former Sec'y of Transp. for Mass. that is held on file with the author). *Stanford Law Review* follows the same practice as *Yale Law Journal* and allows emails to remain on file with the author. For an example, see footnote 157 in Bijal Shah, *Executive (Agency) Administration*, 72 STAN. L. REV. 641, 674 n.157 (email from Cary Coglianese, Professor, Univ. of Pa. Law Sch., to author that is held on file with the author).

¹⁰⁷ See *infra* section discussing possible stewards.

It should be noted that the results and examples above are simply meant to show that the use of the “on file with” reference is a common practice, and specifically, the use of “on file with” the author is used at such a rate that authors and journals should consider if it is appropriate for these materials to be preserved by the author. A more complete study would require pulling all of the footnotes for all of the journals and analyzing the total number of citations that are kept “on file with” to determine just how prevalent the use of this parenthetical is, how and when it is most commonly used, and the importance that the unpublished materials have on the authors’ overall arguments and conclusions.

Foundations for Change

In the preceding sections, I outlined both the role of footnotes in aiding future researchers and the current practices employed by journals for citing unpublished materials. In proceeding sections, I will summarize the steps journals have taken over the past decade to make research more accessible for readers at the time of publication, layout the mechanisms that authors and journals could employ to make unpublished materials more accessible for future readers, and then outline the issues that authors and journals must consider before taking steps to make these resources available online.

Open Access Scholarship and Research

Making materials traditionally kept “on file with” the author more accessible at the time of publication is a continuation of the efforts taken over the

last 15 years to make legal scholarship more accessible through open access publications.¹⁰⁸ As the “primary repositories of legal scholarship,”¹⁰⁹ law reviews and journals serve a vital role in communicating the legal information needs of both academics and practitioners.¹¹⁰ Since 2008, when both the Harvard Law School faculty voted to make their scholarship available for free online and the directors of several major law libraries met to discuss what would become the “Durham Statement on Open Access to Legal Scholarship,” open access publishing of law journals has become the expectation instead of the exception.¹¹¹ There has been such an increase in the number of journals published online since these two events that now many journals are published exclusively online,¹¹² and it has spawned the creation of new online journal formats, such as supplements and companions.¹¹³ A

¹⁰⁸ See Jessica Litman, *The Economics of Open Access Law Publishing*, 10 LEWIS & CLARK L. REV. 779 (2006); Richard A. Danner, Kelly Leong, Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 2011 LAW LIBR. J. 2; James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 2011 LAW LIBR. J. 35; Thomas W. Merrill, *The Digital Revolution and the Future of Law Reviews*, 99 MARQ. L. REV. 1101 (2016); Kincaid C. Brown, *How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints*, 111 LAW LIBR. J. 551, 2019 LAW LIBR. J. 19.

¹⁰⁹ Richard A. Wise et al., *Do Law Reviews Need Reform: A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 3 (2013).

¹¹⁰ Larry A. DiMatteo, *Human Capital and the Search for Originality*, 16 BERKELEY BUS. L.J. 267, 317 (2019).

¹¹¹ See John R. Beatty, *Revisiting the Open Access Citation Advantage for Legal Scholarship*, 111 LAW LIBR. J. 573, 581, 2019 LAW LIBR. J. 20, ¶ 25; see also James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 554, 2011 LAW LIBR. J. 35, ¶ 2.

¹¹² For a list of online only journals, see the W&L LAW JOURNAL RANKINGS, <https://managementtools4.wlu.edu/LawJournals/Default.aspx> [<https://perma.cc/AZ4M-ZXKA>] (last visited Mar. 22, 2021) (select “Online Only” in the Format field).

¹¹³ Bradley Scott Shannon, *Naming Online Law Review Supplements (or Whatever They Are Called)*, 165 U. PA. L. REV. ONLINE 109, 109 (2017).

study by Kincaid Brown between 2016 and 2018 found that “more than three-quarters of all law reviews and journal articles were current in open access and half of all law review historical content is available via open access.”¹¹⁴

At the same time that journal publications have become more accessible to readers, librarians and legal scholars have pushed for the sources cited within them to be preserved and made available for future access, review, and critique. The efforts to combat link rot and provide readers with access to an author’s underlying empirical research data serve as prime examples of how authors, journals, and libraries have worked together to make not just the articles themselves more accessible, but also provided the infrastructure to make the underlying research accessible at the time of publication.

Ensuring that links and electronic documents referenced in footnotes are accessible has long been a topic of discussion in *Law Library Journal*.¹¹⁵ In 2005, Susan Lyons noted that “As readers we may value the sources more highly than the commentary. An article with dead sources is a dead end.”¹¹⁶ Likewise, in 2012,

¹¹⁴ Kincaid C. Brown, *How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints*, 111 LAW LIBR. J. 551, 553, 2019 LAW LIBR. J. 19, ¶ 6.

¹¹⁵ See generally Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 2005 LAW LIBR. J. 42 (a study of prevalence of broken links and the need for citing to persistent identifiers of electronic documents); Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 391–93, 2012 LAW LIBR. J. 28, ¶¶ 27–30 (as part of a series of recommendations for how librarians can support student journals, the authors dedicate a section to preventing link rot).

¹¹⁶ Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 684, 2005 LAW LIBR. J. 42, ¶ 10. Dead sources happen when uniform resource locators (URLs) become “dead” or “broken” links, meaning that the link provided no

Benjamin Keele and Michelle Pearse stated that, in regards to broken links, they are “at best, an annoyance for researchers who must find the resource through another access point. At worst, broken links undermine an article’s soundness by removing support for its assertions.”¹¹⁷

In many ways these dead sources are similar to “on file with” materials that are kept with the author. If a researcher is not able to track down the author or if the author did not retain the materials in a way that they could be shared, then the source is effectively “dead.” Some approaches to resolving this issue for linked sources have been to use web archiving services that preserve a copy of the website for long term access, or only citing to stable URLs for documents contained within a platform that is built for long-term preservation.¹¹⁸ As this article will discuss later, similar approaches could and should be taken for sources cited as “on file with” the author.

In addition to combating link rot, there has also been a push to adopt similar publication standards for law journal articles that include empirical research data as those articles published in scientific, engineering, and medical journals. As law journal authors have continued to incorporate interdisciplinary approaches to

longer directs the reader to the cited resource, or when the underlying document linked to from the footnote no longer exists online. See Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 684, 2005 LAW LIBR. J. 42, ¶ 10.

¹¹⁷ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 391, 2012 LAW LIBR. J. 28, ¶ 27.

¹¹⁸ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 402, 2012 LAW LIBR. J. 28, ¶ 47.

analyzing the law instead of purely doctrinal approaches,¹¹⁹ there has been a growing desire to ensure that the data created by the author or others is not just preserved, but also made available for future researchers.¹²⁰ Without access to the underlying data sets for empirical projects, future researchers are not able to question or verify the accuracy of the study.¹²¹

In one notable instance highlighted by Michele Landis Dauber in her article “The Big Muddy,” the inability to access the underlying data used to support an article made it impossible to subject the underlying evidence of the piece to “different tests,” and thus, made it so that no one was in a position to “dispute” the authors interpretation of the data.¹²² Not providing access to underlying research data both limits other researchers from subjecting the data to different tests and prevents researchers from determining if the “original authors has made some coding errors or controversial coding judgement calls.”¹²³ While welcoming the trend towards more interdisciplinary scholarship, Dauber believed additional safeguards needed to be in place to ensure empirical work was properly vetted.¹²⁴

¹¹⁹ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 395, 2012 LAW LIBR. J. 28, ¶ 38.

¹²⁰ See Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 395–398, 2012 LAW LIBR. J. 28, ¶¶ 38–41.

¹²¹ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 70 (2009), <https://doi.org/10.17226/12615>.

¹²² Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1907–09 (2005).

¹²³ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

¹²⁴ Michele Landis Dauber, *The Big Muddy*, 57 STAN. L. REV. 1899, 1913–14 (2005).

Journals, authors, and institutions have taken steps to make research data more accessible through online preservation tools. Harvard University’s Dataverse is a prime example of a service that journals and authors can use to store datasets for preservation and access.¹²⁵ In addition, authors and journals can upload data sets to their institution’s online repositories for preservation and future access.¹²⁶ One journal in particular, *New York University Law Review*, requires authors, unless an exception is made or the data is already published in the paper, to provide datasets for publication on their website to ensure “transparency and reproducibility in papers that use methodologies typically employed by the social sciences.”¹²⁷

As exhibited above, if the information is relied upon to support arguments and conclusions, then there should be an expectation that readers and researchers will be able to access it. Without providing readers and researchers with a means to access these materials, the footnote fails to meet its “basic function,” which is “to allow ‘the interested reader to test the conclusions of the writer and to verify the

¹²⁵ HARV. DATAVERSE, <https://dataverse.harvard.edu/> [<https://perma.cc/Q6G5-T8YW>] (last visited Mar. 22, 2021). The support page states that “Open to those outside of the Harvard Community, Dataverse allows researchers to set some restrictions on access to the data, terms of use, and provides a Digital Object Identifier (DOI), which is a stable and persistent identifier that can be used in citations to direct readers and future researchers to the data set.” *Dataverse Support*, HARV. DATAVERSE, <https://support.dataverse.harvard.edu/> [<https://perma.cc/L8YX-F9MF>] (last visited Mar. 22, 2021). For a discussion on Dataverse and similar services, see Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 396–97, 2012 LAW LIBR. J. 28, ¶¶ 40–41.

¹²⁶ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 392–93, 2012 LAW LIBR. J. 28, ¶ 30.

¹²⁷ *Submissions*, NEW YORK UNIVERSITY LAW REVIEW, <https://www.nyulawreview.org/submissions/> [<https://perma.cc/NLX2-E9NE>] (last visited Mar. 22, 2021).

source of a challengeable statement.”¹²⁸ As the next section will layout, the technology and infrastructure are now in place to make that happen for many unpublished materials.

Tools and Methods for Preservation and Access

Since Volokh’s and Alford’s calls for posting “on file with” materials online,¹²⁹ there have been significant tools and methods developed to support open access scholarship that would allow for these materials to be preserved in an online format and made widely available to readers and researchers. As I will outline below, it’s not enough that the technology is in place to make this happen. In addition, authors and journals have to take deliberate steps to make these documents available prior to the final publication of the articles.

Online repositories provide stable, easy to use platforms that could easily support hosting “on file with” materials. In 2011, there were 30 law schools with institutional repositories.¹³⁰ At the time of writing this article, 81 law schools maintained institutional repositories through the bepress Digital Commons

¹²⁸ Arthur Austin, *Footnote Skulduggery and Other Bad Habits*, 44 U. MIAMI L. REV. 1009, 1012 (1990) (quoting Carolyn O. Frost, *The Use of Citations in Literary Research: A Preliminary Classification of Citation Functions*, 49 LIBR. Q. 399, 399 (1979)).

¹²⁹ See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>; Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/>.

¹³⁰ Kincaid C. Brown, *Law School Institutional Repositories: A Survey*, 25 TRENDS INTERACTIVE 21, 21 (2015).

platform.¹³¹ Platforms like bepress or DSpace allow users to upload materials to an online repository that provides researchers with a unique identifier, reducing the chance of broken links or link rot compared to simply posting these materials on a standard website.¹³² Because so many journals are now published on these platforms, they have the potential to be an ideal place for authors to post “on file with” materials right along with the articles. Platforms similar to Harvard’s Dataverse can be utilized by authors or journals to host “on file with” materials separate from the journal’s publication platform. Dataverse’s use of digital object identifiers (DOI)¹³³ makes it even more likely that the document will be preserved online indefinitely and will reduce the likelihood of broken links. In addition, platforms for posting working papers and pre-prints like SSRN or LawArXiv will also allow authors to post their own working papers and unpublished manuscripts, which they can then cite back to using a DOI or a persistent URL.¹³⁴

¹³¹ *Law Schools*, BEPRESS, https://bepress.com/categories_wdc/law-schools/ [<https://perma.cc/N59B-HL4Y>] (last visited Mar. 22, 2021) (AccessLex and New England Law Library Consortium appear on the list but are not counted as part of the 81 law schools identified).

¹³² Kincaid C. Brown, *How Many Copies Are Enough Revisited: Open Access Legal Scholarship in the Time of Collection Budget Constraints*, 111 *LAW LIBR. J.* 551, 562, 2019 *LAW LIBR. J.* 19, ¶ 29; Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 *LAW LIBR. J.* 383, 392–93, 2012 *LAW LIBR. J.* 28, ¶ 30.

¹³³ For an overview of DOIs, see Benjamin J. Keele, *A Primer on Digital Object Identifiers for Law Librarians*, 20 *TRENDS L. LIBR. MGMT. & TECH.* 35 (2010).

¹³⁴ See SSRN, <https://www.ssrn.com/index.cfm/en/> [<https://perma.cc/HK5E-L7FX>] (last visited Mar. 22, 2021); LAWARXIV, <https://osf.io/preprints/lawarxiv> [<https://perma.cc/NN5Q-C5XT>] (last visited Mar. 22, 2021); *About, LAWARXIV INFO*, <http://lawarxiv.info/about> [<https://perma.cc/KN62-QCSD>] (last visited Mar. 22, 2021). During the original drafting of this article in the fall of 2020, LawArXiv was still accepting author submissions. As reported by Gary Price on *InfoDocket*, LawArXiv stopped accepting submissions at the beginning of 2021. Gary Price, *Preprints: Statement on Why LawArXiv is No Longer Accepting Submissions*, INFODOCKET (Feb. 2, 2021), <https://www.infodocket.com/2021/02/02/preprints-statement-on-why-lawarxiv->

In addition to online repositories, web archiving tools make it easy for authors, journals, and libraries to capture online content and preserve it for long-term use. Perma.cc in particular is a popular tool that many in the law field have embraced as a way to capture webpages and other online content that may disappear or change from the time of its citing by the author.¹³⁵ While commonly used for archiving webpages, Perma.cc can be employed in combination with online repositories. For example, an article author could cite to the repository page for the cited document and also provide a Perma.cc link that includes a PDF version of the document.¹³⁶ Posting the unpublished materials to a stable online platform, providing the DOI or a persistent URL to the page, and then also providing a

repository-is-no-longer-accepting-submissions/ [https://perma.cc/DU5Q-TERR]. I chose to continue to use LawArXiv as an example for this article for two reasons: (1) the possibility that it could be relaunched at a later time; and (2) it provides an example of a non-profit alternative to SSRN.

¹³⁵ *About Perma.cc*, PERMA.CC, https://perma.cc/about [https://perma.cc/XH85-D5TS] (last visited Mar. 22, 2021).

¹³⁶ Perma.cc allows users to upload their own image or PDF file if the standard capture method does not work. *Perma Records & Links*, PERMA.CC, https://perma.cc/docs/perma-link-creation [https://perma.cc/E85D-JBTE] (last visited Mar. 22, 2021). This allows authors to upload the unpublished resource that they are citing to in their articles. An example of this is found in footnote 33 of Kate Klonick, *The Facebook Oversight Board: Creating an Independent Institution to Adjudicate Online Free Expression*, 129 YALE L.J. 2418, 2430 n.33 (2020) (the author cites to *Automation in Moderation* by Hannah Bloch-Wehba and provides both the SSRN link (https://ssrn.com/abstract=3521619) and a Perma.cc link (https://perma.cc/66NP-WE6Y) that provides the PDF of the document that was housed on SSRN). Simply providing a Perma.cc link to the SSRN page alone will only preserve the SSRN record, not the document itself. An example of this is footnote 28 in Michael Coenen, *Rules against Rulification*, 124 YALE L.J. 644, 655 n.28 (2014) (the author cites to *The Rule of Law as a Law of Law* by Steven G. Calabresi & Gary Lawson and provides both the SSRN link (http://ssrn.com/abstract=2412025) and a Perma.cc link (http://perma.cc/B7U5-TGVW), but Perma.cc link only captures the SSRN page).

Perma.cc link to the PDF will make it more likely that these materials will be accessible online in some form for future readers.¹³⁷

For materials that are sensitive in nature, the underlying methods used to make controlled digital lending possible could be an option for making these materials more accessible for future researchers without the worries that the materials could be altered or duplicated.¹³⁸ Allowing researchers to gain access to an encrypted, protected document that they would be able to view could provide the necessary access needed to review and critique the original author's assessment of the work without posting the materials for large-scale, simultaneous use.¹³⁹ Using this method, authors or journals would need to ensure that a copy is digitized and retained in a format that could be shared with future researchers.

¹³⁷ While not an unpublished document, for an example of a Perma.cc link that captures the PDF version of an article hosted on a bepress Digital Commons platform, see Austin Martin Williams, *Researching Georgia Law (2015 Edition)*, 31 GA. ST. U. L. REV. 741 (2015), <https://readingroom.law.gsu.edu/gsulr/vol31/iss4/4> [<https://perma.cc/7373-9V3N>] (last visited Mar. 22, 2021) (the Perma.cc link provided in this example archives the entire article that was opened after clicking on the "Download" button on the article's repository landing page). The bepress Legal Repository is marketed as a system that can host, among other things, working papers, pre-prints, and other unpublished materials. See *FAQ for Authors*, BEPRESS LEGAL REPOSITORY, <https://law.bepress.com/faq-authors.html> [<https://perma.cc/GHJ3-HR3P>] (last visited Mar. 22, 2021). Depending on how the repository is structured and administered, this platform does provide authors and journals with opportunities for posting unpublished materials that can be archived in multiple ways.

¹³⁸ See generally DAVID R. HANSEN & KYLE K. COURTNEY, A WHITE PAPER ON CONTROLLED DIGITAL LENDING OF LIBRARY BOOKS (2018), <https://doi.org/10.31228/osf.io/7fdyr> (discussing the use of digital rights management (DRM) to prevent wholesale copying and distribution of materials scanned for controlled digital lending).

¹³⁹ Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 LAW LIBR. J. 527, 535, 2011 LAW LIBR. J. 34, ¶ 27.

By uploading materials prior to publication, authors would be able to cite to a document in their journal article, which would allow readers to quickly access the file when reviewing the articles.¹⁴⁰ Posting materials prior to publication provides many benefits, most notably that a link would be available in the published article, which not only makes it easier for researchers to find when reviewing the article, but will also mean that the link will show up in more places as the article is added to legal research databases, such as Lexis, HeinOnline, and Westlaw.

While it would be ideal to post the materials prior to publication, there are other options that can serve a similar purpose. Simply creating the landing page or a record on a platform like bepress or Dataverse will allow the author to provide the link in their article to where the materials will eventually reside after publication. The value of a platform like Dataverse is not just that it serves as a preservation tool and a way to provide stable and reliable access, but it also allows uploaders to restrict access to the data.¹⁴¹ A researcher could post information initially to preserve it, and then wait until a later time to make it available for review. This could be beneficial if the researcher is trying to use the data or a document for a subsequent publication, or could be useful if there is a moratorium

¹⁴⁰ An example of this is found in footnote 121 in Maggie Wittlin, Lisa Larrimore Ouellette & Gregory N. Mandel, *What Causes Polarization on IP Policy*, 52 U.C. DAVIS L. REV. 1193, 1217 n.121 (2018) (authors cited to the codebook where the results of their research could be found and linked to Dataverse using a DOI).

¹⁴¹ *Dataset + File Management*, DATAVERSE PROJECT, <http://guides.dataverse.org/en/latest/user/dataset-management.html#> [https://perma.cc/9FQK-87Z2] (last updated Oct. 6, 2020) (“When you restrict a file in Dataverse it cannot be downloaded unless permission has been granted.”).

on the publication of the information based on the nature of the materials. There are already a few examples in Dataverse of authors using it for interviews,¹⁴² which an author might want to restrict access to until after publication. For authors that have already published an article and wish make their research available post-publication, they can still post the data to a platform like Dataverse after the fact.¹⁴³ Posting after publication does create more friction for finding the information, but it at least makes the information more readily available than simply letting it reside with the author.

In the past, calls have been made to make underlying materials that are kept “on file with” the author available online. In the years since then, more resources and systems have been put in place to ensure that these materials can be uploaded for long-term preservation and access. While the technology is in place to make these materials available, there are still issues authors and journals must consider before making resources available online.

Issues to Consider

¹⁴² See Oliver Taherzadeh, *Interview Transcripts*, HARV. DATAVERSE (Oct. 25, 2016), <https://doi.org/10.7910/DVN/4C9KFK>; Valerie Flax, *Food log in-depth interviews*, HARV. DATAVERSE (Sept. 30, 2020), <https://doi.org/10.7910/DVN/SK6GWF>; Vanessa Williamson, *Transcripts of Read My Lips interviews*, HARV. DATAVERSE (Feb. 27, 2017), <https://doi.org/10.7910/DVN/6WQIOY>.

¹⁴³ Lisa Lisa Larrimore Ouellette posted the data for the article “Do Patents Disclose Useful Information” after its publication. See Lisa Larrimore Ouellette, *Do Patents Disclose Useful Information*, 25 HARV. J.L. & TECH. 545 (2012) (the article); Lisa Ouellette, *Data for “Do Patents Disclose Useful Information?”*, HARV. DATAVERSE (Oct. 24, 2018), <https://doi.org/10.7910/DVN/GOC0FV> (the data).

While the technology is in place to make more unpublished materials available online for future researchers, there are still some factors that authors and journals must consider before posting these materials online. Both Volokh and Alford noted some exceptions to making everything available online.¹⁴⁴ While there are sure to be other issues to consider, this article will focus on issues from three different perspectives, with special attention given to those unpublished materials that are listed under Rule 17 in *The Bluebook*.¹⁴⁵ First, this article will explore the main challenges imposed by copyright law related to unpublished materials. Second, this article will discuss challenges that may be put in place by the author and the sources of the information, such as privacy and confidentiality. Finally, this article will look at the challenges imposed by the ever-changing nature of the technology that is used to preserve online materials. Taken together, each of these areas present both unique and overlapping challenges that authors, journals, and libraries must take into account prior to developing a plan for posting materials online.

¹⁴⁴ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors> (“Naturally, there’ll need to be some exceptions for sources that pose potential privacy or copyright problems (e.g., interviews with sources who were promised anonymity, or drafts of unpublished articles.)”); Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/> (“Subject to confidentiality or similar concerns, there is no reason that most unpublished documents cited in law review articles are not accessible to readers.”).

¹⁴⁵ THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R.17.1–17.4, at 169–173 (Columbia L. Rev. Ass’n et al. eds., 21st ed. 2020).

Copyright

Copyright law possess significant challenges when it comes to posting unpublished manuscripts, working papers, dissertations and theses, and forthcoming publications online. With each of these types of publications, the source itself may not be online and the article author may not own the copyright to the cited source. This means that the article author would be limited in the steps that she could take in making these materials available through one of the solutions discussed above.¹⁴⁶ While the source may very well be published in an accessible format in the future, either on an online repository or in print, future researchers might want access to the version used by the author.

One way to address this would be to engage with the authors of the cited works to see if they would make such sources available through their own institutional repository or a platform for posting working papers and pre-prints like SSRN.¹⁴⁷ This would then allow the article author to cite to these documents using a DOI or a persistent URL, and then also potentially use Perma.cc to capture the PDF version of the document in the web browser. One potential barrier to this could be where access to the pre-print is restricted by the publisher.¹⁴⁸ If the author of the

¹⁴⁶ See *supra* section discussing tools and methods for preservation and access.

¹⁴⁷ See SSRN, <https://www.ssrn.com/index.cfm/en/> (last visited Mar. 22, 2021).

¹⁴⁸ While most publishers will allow for authors to post pre-prints, authors need to review their author's agreement to determine what version they are allowed to post. The Help Center on ResearchGate notes that "Some publishers let authors share copies of their preprints without restrictions, while others allow it, but with limitations. Because publishers and journals differ on what they allow, you should always check your licensing agreement or publisher conditions before you share any of your work." *Preprints*, RESEARCHGATE, <https://explore.researchgate.net/display/support/Preprints> [<https://perma.cc/X9EW-UK4P>] (last

cited work is not willing or able to post the entire unpublished work on the web for online linking and archiving, the article author could work with the author of the cited source to seek permission to engage in some limited scanning and posting of the cited materials to an online repository or provide mediated access to single users at a time without the ability to download or copy the materials.

In cases where the author might be citing to older unpublished materials where the original author is not available to grant permission or the article author is not able to ascertain the actual author of the cited work,¹⁴⁹ the author citing the work could potentially engage in the same limited scanning and posting of the cited materials, and include along with the posting a notice that the author of the cited work can contact a designated party to request that the materials be taken down.¹⁵⁰

visited Mar. 22, 2021). Bonnie Swoger has noted that “Generally speaking, publishers are more likely to be okay with authors posting copies of pre-print versus other manuscript versions. But each journal is different, and authors need to be aware of what they can do. The copyright transfer agreement is the best place to find this information.” Bonnie Swoger, *Understanding your rights: pre-prints, post-prints and publisher versions*, SCIENTIFIC AMERICAN (Dec. 16, 2013), <https://blogs.scientificamerican.com/information-culture/understanding-your-rights-pre-prints-post-prints-and-publisher-versions/> [<https://perma.cc/J95R-B3DS>]. Some publishers will have detailed rules on their websites about what versions can be “self-archived” and when they can be posted to these platforms. For example, see *Self-archiving for non-open access books and chapters*, PALGRAVE, <https://www.palgrave.com/gp/rights-permissions/our-policy-on-archiving-in-institutional-or-funding-body-reposit/6629030> [<https://perma.cc/4GR5-NX5E>] (last visited Mar. 22, 2021); *Wiley’s Self-Archiving Policy*, Wiley, <https://authorservices.wiley.com/author-resources/Journal-Authors/licensing/self-archiving.html> [<https://perma.cc/B3AB-MVWF>] (last visited Mar. 22, 2021).

¹⁴⁹ An example of this is grey literature. See generally Taryn L. Rucinski, *The Elephant in the Room: Toward a Definition of Grey Legal Literature*, 107 LAW LIBR. J. 543, 2015 LAW LIBR. J. 26 (provides an overview of grey literature and its application to legal resources).

¹⁵⁰ For an example of this type of notice, see the rights field for *A growing concern : protecting the food supply in an era of pharmaceutical and industrial crops*, LEGAL INFORMATION ARCHIVE, https://lipa.access.preservica.com/uncategorized/IO_f8251e57-6c15-422c-95fa-e20f0620dd77/ [<https://perma.cc/82PM-JM58>] (last visited Mar. 22, 2021) (“This work may be protected by copyright. If you are a copyright owner who objects to the preservation of your work in this

While these options may not solve every situation, they could be a step towards making more of these unpublished materials accessible to researchers.

Privacy and Confidentiality

In addition to copyright concerns, potentially posting materials online can also raise privacy and confidentiality issues, especially related to letters and memorandums, email correspondences, and interviews.

In terms of privacy, posting online correspondences between parties, no matter the form, opens up the possibility that personal information might be shared with a wider audience. For example, if an unredacted version of an email is posted online without restrictions in place, then anyone would be able to access the contents of that email, which could include email addresses, phone numbers, and physical addresses—all information that is commonly found in email signatures. The same can be true with formal memorandums and letters exchanged between two or more parties. In these situations, a possible solution might be to redact any personal information in the correspondences, such that the only information that remains is the information that would be needed by the researcher to determine the authenticity of the document, such as names, dates, and the content relied upon by the article author. Doing this would add to what some authors already do when they provide an explanatory parenthetical that includes either a direct quote from an

fashion, or if you believe that your copyright has been violated by the project's efforts, please contact the Legal Information Archive.”).

email or letter or a summary of the information contained within the correspondence.¹⁵¹

In addition to privacy concerns, confidentiality is an issue that comes up with regards to some correspondences and interviews. In both situations, an author could let the other parties know ahead of time that the communications will be posted online or made available as part of the publication of the article. The drawback to this would be that parties may be less likely to participate if they know the information will be posted more widely, potentially creating a chilling effect that may result in people being less willing to talk with the researcher. Some authors have specifically mentioned in their articles that they provided anonymity or confidentiality for the interviewees to facilitate a “candid discussion.”¹⁵² Redacting some information and masking the names of the participants could be a way to still post the bulk of the information online for future review while maintaining anonymity. Masking the names of email correspondents¹⁵³ and interviewees¹⁵⁴ are

¹⁵¹ For examples of where an author provides a summary of information contained within a letter and an email, see footnotes 153 and 154 in Emma Kaufman, *The Prisoner Trade*, 133 HARV. L. REV. 1815, 1840 n.153–54 (2020).

¹⁵² See Diego A. Zambrano, *The States' Interest in Federal Procedure*, 70 STAN. L. REV. 1805, 1822 n.84 (2018) (author stated in footnote 84 that “I granted the interviewees anonymity to facilitate candid discussion”); Abbe R. Gluck & Nicole Huberfeld, *What Is Federalism in Healthcare for*, 70 STAN. L. REV. 1689, 1701 n.29 (2018) (author stated in footnote 29 that “Because many interviewees were sitting officials, or formerly sitting officials, we granted all of them confidentiality to allow for more candid discussion”).

¹⁵³ See Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside - an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 742 n.31 (2014) (footnote 31 is cited as “E-mail from confidential respondent to author (Oct. 14, 2013) (on file with authors)”).

¹⁵⁴ See James M. Anderson & Paul Heaton, *How Much Difference Does the Lawyer Make: The Effect of Defense Counsel on Murder Case Outcomes*, 122 YALE L.J. 154, 161 n.17 (2012)

steps that some authors have already taken when citing to these types of materials in articles. This same information could be redacted or masked in the full document so that future researchers would be able to review the bulk of the materials.

While there would be drawbacks to redacted versions of the materials, they would at least provide some level of proof of the authenticity of the source and allow a future researcher to review the source from a fresh perspective.¹⁵⁵ Moreover, redacting personally identifiable information or confidential information may allow for letters and email correspondences to be digitized and placed online, either through a publicly available platform, or in a manner that could more easily facilitate the transfer of these materials in a controlled manner.

Everchanging Technology and Long-Term Preservation

In addition to copyright, privacy, and confidentiality, another issue that must be addressed at the frontend is how to take steps to ensure long-term preservation in light of everchanging and evolving technology and preservation standards. In the case of materials in electronic formats, they are not “self-perpetuating,” and therefore require a steward that will ensure that they are

(footnote 17 is cited as “Interview with Anonymous # 1 (Mar. 3, 2011) (notes on file with authors).”).

¹⁵⁵ An example of an online repository of resources that includes a number of redacted documents is the Foreign Intelligence Law Collection at Georgetown University Law Center. See *Foreign Intelligence Law Collection*, GEORGETOWN UNIV., <https://repository.library.georgetown.edu/handle/10822/1052698> [<https://perma.cc/4BXZ-4H9H>] (last visited Mar. 22, 2021).

“actively backed up” and “consistently converted to current technologies.”¹⁵⁶ Think of research from past decades that was kept on floppy disks.¹⁵⁷ Without someone there to ensure the smooth transfer of these materials from one medium to another, most of the information will be inaccessible or lost to future researchers. The same can happen to materials posted online.

While there are standards in place for online archives and digital repositories,¹⁵⁸ many online repository platforms are propriety systems owned by commercial enterprises, meaning their long-term use is subject to the viability of the company and contract negotiations between the company and the subscribing institution.¹⁵⁹ It is therefore imperative that someone has an exit strategy in place if the time comes that these materials need to be migrated to a new platform.

¹⁵⁶ Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIBR. J. 233, 244, 2005 LAW LIBR. J. 14, ¶ 37.

¹⁵⁷ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 96–97 (2009), <https://doi.org/10.17226/12615>.

¹⁵⁸ For a general overview of repository standards, see THE CENTER FOR RESEARCH LIBRARIES, TRUSTWORTHY REPOSITORIES AUDIT & CERTIFICATION: CRITERIA AND CHECKLIST (2007), https://www.crl.edu/sites/default/files/d6/attachments/pages/trac_0.pdf [<https://perma.cc/G6GK-323B>]; see also *Levels of Levels of Digital Preservation*, NATIONAL DIGITAL STEWARDSHIP ALLIANCE, <https://ndsa.org/publications/levels-of-digital-preservation/> [<https://perma.cc/HU4A-XCR9>] (last visited Mar. 22, 2021).

¹⁵⁹ For general information on proprietary versus open-source software, see Hillary Corbett, Jimmy Ghaphery, Lauren Work & Sam Byrd, *Choosing a Repository Platform: Open Source vs. Hosted Solutions*, in MAKING INSTITUTIONAL REPOSITORIES WORK (2016), https://scholarscompass.vcu.edu/libraries_pubs/33/ [<https://perma.cc/WW9P-ZYDT>] (last visited Mar. 22, 2021) (case study of two university libraries moving repository platforms); Ayla Stein & Santi Thompson, *Taking Control: Identifying Motivations for Migrating Library Digital Asset Management Systems*, D-LIB MAG., Sept.–Oct. 2015, <https://doi.org/10.1045/september2015-stein> (discussing the results from a survey that analyzed reasons for libraries migrating from one system to another, with most moving to open source platforms).

Even with an exit strategy, it's rare that online repositories are able to maintain the same persistent link when moving from one platform to another.¹⁶⁰ In instances where uploaded materials are migrated from one platform to another, any link that is included within a published article might be broken, even if the author intended for that link to be the one that would lead to the long-term landing page for the materials. For that reason, it may be prudent to not only encourage users to post materials on stable platforms, but also provide a Perma.cc link to the document so that future readers have a “double back-up” of the source.¹⁶¹ This way, if the materials disappear from the online repository, researchers will have an additional way to attempt to access the materials through the Perma.cc link.

In order to overcome limitations imposed by copyright, privacy, confidentiality, technology, and preservation standards, authors and journals should think about the steps they can take on the front end to make these materials more accessible to researchers. While there may not be a perfect solution in place for all scenarios, there are certainly solutions that can be employed to make more of these unpublished materials available online.

¹⁶⁰ This was the case when the materials in the former Chesapeake Project (now Legal Information Archive) were migrated from CONTENTdm to Preservica. *See generally* Caroline Hill, *LIPA signs as first customer of new Preservica consortia offering*, LEGAL TECH. (Jan. 24, 2018), <https://legaltechnology.com/lipa-signs-as-first-customer-of-new-preservica-consortia-offering/> [<https://perma.cc/KWB7-2R39>] (announcement for the Legal Information Preservation Alliance becoming a customer of Preservica); Jesse Lambertson, *Shucking Metadata for the Sake of Preservation: A Tiny Case Study of Dublin Core*, 43 TECHNICAL SERVICES L. LIBR. 14 (2018), (discussing the migration of metadata from Qualified Dublin Core (CONTENTdm) to Simple Dublin Core (Preservica)).

¹⁶¹ *See supra* notes 135–37 and accompanying text.

Stewardship of Unpublished Materials

The final aspect to look at when analyzing how to make these unpublished materials more accessible to readers and researchers is to examine who can ensure the long-term accessibility of these materials. In order to realize the full value of the research on a topic, these underlining documents must be “accessible to the community of researchers and others who might be able to use them.”¹⁶² Simply scanning and uploading these materials to a webpage or storing them in a filing cabinet will not ensure that these materials will be readily accessible for future researchers. In order for true long-term accessibility to happen, reliable stewardship must be in place for these resources.

In this part, I will first define what stewardship is and describe why it is essential to ensuring long-term accessibility of these materials. I will then outline the different parties that could play a role in serving as a reliable steward for these materials and explain the advantages and the disadvantages of these parties serving in this role from the perspective of a future researcher. I will then propose a model that authors, journals, and libraries could implement to make these materials more accessible to future researchers.

¹⁶² NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 27, 95 (2009), <https://doi.org/10.17226/12615>.

Reliable Stewardship Ensures Accessibility

In order for a source to be truly accessible, meaning that it is readily available to future researchers upon request, it has to be preserved for long-term use and made available in a way that researchers can gain access to it.¹⁶³ As already noted in the discussion above on the technologies that can be used to provide easy online access,¹⁶⁴ simply posting these materials on a website is not enough to ensure their long-term accessibility to researchers. Long-term accessibility requires someone that will not simply scan and store these materials in repositories, but also someone that will take steps to preserve these materials and add metadata so that future researchers will be able to access these materials.¹⁶⁵ Metadata and appropriate finding tools will ensure that these materials can be “found easily, understood in context, and used appropriately.”¹⁶⁶

In addition, stewardship requires someone that will engage in the curation and the preservation of these materials for as long as the materials are useful for

¹⁶³ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 26–27 (2009), <https://doi.org/10.17226/12615>.

¹⁶⁴ See *supra* section discussing tools and methods for preservation and access.

¹⁶⁵ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 27, 95 (2009), <https://doi.org/10.17226/12615>.

¹⁶⁶ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 95 (2009), <https://doi.org/10.17226/12615>.

research or historical value.¹⁶⁷ This means that the steward must have the expertise and the time to account for format changes and move materials from one storage platform to another.¹⁶⁸ For materials that are retained in print, stewards might look for ways to scan those materials—taking into account appropriate copyright, confidentiality, and privacy measures—in order to make them more accessible for researchers that are unable to view these materials in person.

Regardless of material type, those responsible for maintaining these files will have to take an active and ongoing role in ensuring materials are accessible for future use. The stewardship required to ensure that these materials are accessible for future researchers will treat these resources as “vital components of the research infrastructure.”¹⁶⁹

Possible Stewards

When considering who could serve as a steward for these materials, the three that are most likely to serve in this role based on current practices among student-edited journals are the original researchers or authors (e.g., on file with author), the journals (e.g., on file with *Harvard Law Review*), or research

¹⁶⁷ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 27, 95 (2009), <https://doi.org/10.17226/12615>.

¹⁶⁸ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 96–97 (2009), <https://doi.org/10.17226/12615>.

¹⁶⁹ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 27 (2009), <https://doi.org/10.17226/12615>.

institutions, which would include academic law libraries (e.g., on file with the Harvard Law School Library).¹⁷⁰ Each of these parties have an interest in preserving these materials. For the authors, access to these materials allows them to show that they are speaking with authority and accuracy. For journals, access to these materials will demonstrate that they are publishing articles that are backed by sound research methods. For research institutions and libraries, access to these materials will provide the fruit for future research endeavors and enhance their own stature within the academy.

Where the duty to preserve and make these materials accessible ultimately lies is one that simply cannot be placed on one individual or entity. An author should have a duty to provide as much underlying research information to the journals as possible, barring some of the issues already discussed above in part 2.¹⁷¹ The journals should have a duty to hold authors accountable for providing this information, and push back on authors that are less forthcoming with these materials. Research institutions and libraries have a duty to ensure that the appropriate infrastructure is in place, such as stable platforms and partnerships, to ensure that valuable research information is not only captured and preserved using

¹⁷⁰ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 109 (2009), <https://doi.org/10.17226/12615>.

¹⁷¹ See *supra* section discussing issues to consider.

appropriate methods, but also migrated to new platforms when necessary to prolong the life of these materials.

When examining each party, this article will analyze the suitability for serving as a steward from two perspectives: (1) does the party have the resources to both preserve these materials for long-term access and respond to future requests for access to these materials; and (2) does the party's mission align with preservation and access? Ultimately, the party best suited to serve as a reliable steward will be the one that's mission is not only focused on preservation and access, but one that has the expertise, know-how, and capability of providing long-term access to these materials.

Authors and Original Researchers

Since so many articles include citations to resources that are kept with the author, it would seem that the authors are the easy choice to serve in this stewardship role. While authors should have the greatest stake in ensuring long-term access to the underlying sources that they use to produce their scholarship, they may not have a strong interest in taking on the task of ensuring long-term preservation to these materials.¹⁷² At the end of an article or project, authors and

¹⁷² NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 99 (2009), <https://doi.org/10.17226/12615>.

researchers may move on to other projects with little interest in long-term preservation of the materials they used to complete their last project.¹⁷³

By entrusting these materials to the author or original researcher, it becomes more likely that these materials will be left unorganized, degrade over time, or worse, discarded.¹⁷⁴ Even with the best intentions, authors may simply not be equipped to ensure long-term preservation of materials because they lack the tools, the knowledge, or the time to implement best practices for preserving these materials. A prime example of this is Roger Alford, who in his own post about “on file with” materials, took it up on himself to post materials cited in one of his articles to a website instead of citing them as “on file with the author.”¹⁷⁵ In his 2008 article titled “Arbitrating Human Rights,” Alford cited to three documents that he posted on his website.¹⁷⁶ While laudable for Alford to take steps to make these materials available online for others, this does provide an excellent example for why preservation is so important. As of October 2020, these documents were no longer

¹⁷³ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 99 (2009), <https://doi.org/10.17226/12615>.

¹⁷⁴ NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 96 (2009), <https://doi.org/10.17226/12615>.

¹⁷⁵ Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/>.

¹⁷⁶ See Roger P. Alford, *Arbitrating Human Rights*, 83 NOTRE DAME L. REV. 505, 512 n.24, 513 n.25, 526 n.102 (2008) (the documents in question were the Declaration of Christopher Greenwood (footnote 24), the Declaration of James Crawford (footnote 25), and a Demand for Arbitration and Statement of Claim in the ChevronTexaco Corp. v. Empresa Estatal del Ecuador case (footnote 102)).

accessible through the links provided in the article or on the website they were posted on, *Opinio Juris*.¹⁷⁷ This further demonstrates the need to ensure that materials are appropriately stored and cited to in journal articles.

Taking aside the fact that the author would be tasked with the preservation of these materials, the author would also be on call to respond to individuals requesting access to these materials. Materials that are not made available online would need to be digitized or made available on demand. In addition, for those that are available online, authors would need to ensure continued maintenance of those materials or deal with issues that come with maintaining online resources, such as broken links or requests for materials that are in formats that are accessible for users with disabilities. In general, most authors would not have the time to process these requests, even if the total number of requests is of a nominal amount.

One issue that may arise from the author not serving as a steward for these materials is the author relinquishing control of them to another party. Letting go of these materials could be hard from some authors because of the connection that they feel with the materials. With correspondences and interviews, authors may not want to give up materials that they have spent significant time developing and gathering. Authors may feel, based on their own expertise and authority, that they are the only parties that would be truly invested in ensuring the long-term care of

¹⁷⁷ While these are case file materials that could be found through alternative sources, this requires additional work on the part of the researcher after discovering that the documents are no longer available on the author's website.

these materials. In these situations, stewards may be able to work with authors to allow them to retain the originals of certain materials, while maintaining electronic versions that are stored for preservation and access purposes. This would allow the author to retain these materials for their own personal use, while at the same time making these materials available for other researchers.

Journals

As with authors, journals could also be seen as candidates to serve as reliable stewards. Many sources that are cited as “on file with” are kept with the journal of publication.¹⁷⁸ Moreover, like the author, journals do have a stake in ensuring long-term access to the underlying sources that are used to produce the scholarship that they publish.

While staff size has been mentioned when critiquing student-edited journals,¹⁷⁹ the size of many student journals could provide them with the necessary staffing to both engage in large scale preservation efforts and respond to post-publication requests for materials by future researchers. Because student-edited journals already perform a number of tasks and services for authors outside of what is provided by peer-reviewed journals, one could argue this is one additional service

¹⁷⁸ See *supra* Table 1.

¹⁷⁹ See Richard A. Posner, *Law Reviews*, 46 WASHBURN L.J. 155, 156–57 (2006) (“The author, indeed, is likely to suffer, because the student editors, having a great deal of time to devote to each article because law journal staffs are so large, often torment the author with stylistic revisions.”).

that they could take on that has the potential to provide additional value to legal scholarship.¹⁸⁰

Through their own recommendations, both Volokh and Alford inferred that journals or a consortium of journals could develop a platform for uploading and preserving content that is often kept “on file with” the author.¹⁸¹ As journals transition to more digital first publishing, this type of preservation of materials might integrate well with the changing nature of journal publishing. Journals that already publish on institutional repositories could use these same platforms to post these materials for future access. While there are benefits to allowing journals to take this on, there are several risks with entrusting them with the type of stewardship that is needed for these materials.

One of the main risks with entrusting student-edited journals with taking on sole stewardship over these materials is the nature of how student-edited journals are staffed. Student editorial boards turnover every year,¹⁸² which can lead to a lack

¹⁸⁰ See Richard A. Posner, *Law Reviews*, 46 WASHBURN L.J. 155, 156 (2006) (“The size of law review staffs enables them not only to check the author’s citations but also to make many substantive comments and also engage in line-by-line copyediting.”); Jonathan Mermin, *Remaking Law Review*, 56 RUTGERS L. REV. 603, 609 (2004) (outlining the five labors that students perform, including tracking down omitted citations and correcting citation forms).

¹⁸¹ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors> (“To solve that problem, law reviews might put together a consortium that would store all the items using URLs that are sure not to change (e.g., <http://lawreview.org/yalelj/107/2431/sourcename.pdf>).”); Roger Alford, *On File With Author*, OPINIO JURIS (Dec. 11, 2007), <http://opiniojuris.org/2007/11/12/on-file-with-author/> (“As a matter of course every law journal should eliminate as many “On File With Author” references and replace them with uploaded documents available to its readers with the new reference.”).

¹⁸² See Richard A. Wise et al., *Do Law Reviews Need Reform: A Survey of Law Professors, Student Editors, Attorneys, and Judges*, 59 LOY. L. REV. 1, 9 (2013); Benjamin J. Keele &

of continuity and information sharing—both critical to ensuring that these materials are preserved for an appropriate length of time. Without proper administrative support and transition procedures in place, there is a risk that information will simply not be passed down between the editorial boards. This could cause numerous issues, with the worst being that materials are lost before being properly filed away. In addition, without having a defined set of procedures in place for dealing with requests for materials, there could be discrepancies in the journal’s handling of these requests. The lack of consistency could lead to either rejecting requests from researchers that are warranted, or providing access to materials that may be protected by copyright or an agreement that restricts how someone can access the materials.

In addition to lack a of continuity, student-edited journals are not experts in long-term preservation methods. While more journals are moving their publications to institutional repositories,¹⁸³ long-term preservation has not been the major driver of this movement. Instead, the call for open access publishing led to the push to publish journals online.¹⁸⁴ Many journals have historically left the long-term

Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 403, 2012 LAW LIBR. J. 28, ¶ 48; Cameron Stracher, *Reading, Writing, and Citing: In Praise of Law Reviews*, 52 N.Y. L. SCH. L. REV. 349, 363, 365 (2007); Christian C. Day, *The Case for Professionally-Edited Law Reviews*, 33 OHIO N.U. L. REV. 563, 573 (2007).

¹⁸³ *Law Schools*, BEPRESS, https://bepress.com/categories_wdc/law-schools/ (last visited Mar. 22, 2021).

¹⁸⁴ See John R. Beatty, *Revisiting the Open Access Citation Advantage for Legal Scholarship*, 111 LAW LIBR. J. 573, 581, 2019 LAW LIBR. J. 20, ¶ 25; see also James M. Donovan & Carol A. Watson, *Citation Advantage of Open Access Legal Scholarship*, 103 LAW LIBR. J. 553, 554, 2011 LAW LIBR. J. 35, ¶ 2.

preservation of their own published articles to vendors for online access and law libraries for print access.¹⁸⁵

While journals may very well have a strong interest in ensuring that unpublished materials are retained and made accessible for future researchers, they may not be best suited to serve as stewards for these materials because of their turnover and inexperience with long-term preservation needs and mechanisms.

Research Institutions and Libraries

Research institutions also have a stake in ensuring the long-term accessibility of these materials and could fill the role of being a reliable steward through their libraries. Maintaining long-term access to underlying research supports the creditability of scholarship, which could further boost the reputation of the institution. Libraries are best positioned to take the lead on institutional stewardship because of their general purpose, missions, and non-commercial nature; their experience with long-term preservation tools and challenges; their staffing models; and their ability to navigate issues related to posting these types of materials online. Taken together, all of these qualities enable law libraries to not only meet the requirements of knowing how to preserve these materials, but also respond to future requests for access to these materials.

¹⁸⁵ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 390, 2012 LAW LIBR. J. 28, ¶ 20.

The very nature of libraries and their mission make them an ideal candidate to serve as stewards of these materials. As Michelle Wu has previously stated, “the core purpose of an academic law library is to serve the needs not only of today’s users but also tomorrow’s.”¹⁸⁶ In doing such, libraries have always sought to preserve materials for “future users,” even at times when the very publishers of those materials were not expected to maintain a “permanent back stock of their publications.”¹⁸⁷ If journals are not in a place where they can serve in this stewardship role, then it is incumbent upon law libraries to step in and take on this responsibility. Unlike private enterprises that have to factor in profits and the commercial value of maintaining these resources, law libraries are able to focus on the long-term needs of researchers.¹⁸⁸

In addition to their purpose and mission, law libraries are also best placed to serve in this stewardship role because the expertise they already possess with the tools required to preserve and make these materials accessible through online platforms. Law libraries are keenly aware of the dangers imposed by link rot and the fleeting lifespan of resources that are posted on websites.¹⁸⁹ In addition, libraries

¹⁸⁶ Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIBR. J. 233, 235, 2005 LAW LIBR. J. 14, ¶ 5.

¹⁸⁷ Richard A. Danner, Kelly Leong, Wayne V. Miller, *The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*, 103 LAW LIBR. J. 39, 46, 2011 LAW LIBR. J. 2, ¶ 24.

¹⁸⁸ Michelle M. Wu, *Building a Collaborative Digital Collection: A Necessary Evolution in Libraries*, 103 LAW LIBR. J. 527, 544–45, 2011 LAW LIBR. J. 34, ¶¶ 60–62.

¹⁸⁹ See generally Susan Lyons, *Persistent Identification of Electronic Documents and the Future of Footnotes*, 97 LAW LIBR. J. 681, 2005 LAW LIBR. J. 42 (a study of the prevalence of broken links and the need for citing to persistent identifiers of electronic documents); Benjamin J. Keele &

have taken the lead on developing, supporting, and promoting institutional repositories.¹⁹⁰ In doing so, law libraries have provided platforms not just for student-edited open access journal publications,¹⁹¹ but also platforms that researchers can use to post materials and to cite to using “consistently designed” links that are “less likely to change than URLs for academic or commercially hosted web sites.”¹⁹²

Law libraries are also well placed to take on this role because of the continuous stewardship that they can provide compared to student-edited journals. The turnover of student editorial boards makes it unlikely that they would be able to effectively ensure that materials are not only made available to researchers at the outset, but also ensure that materials are available for long-term use. In order to ensure that materials are available for long-term use, those serving as stewards must

Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 391–93, 2012 LAW LIBR. J. 28, ¶¶ 27–30 (as part of a series of recommendations for how librarians can support student journals, the authors dedicate a section to preventing link rot).

¹⁹⁰ See Carol A. Parker, *Institutional Repositories and the Principle of Open Access: Changing the Way We Think about Legal Scholarship*, 37 N.M. L. REV. 431 (2007); James M. Donovan & Carol A. Watson, *Will an Institutional Repository Hurt my SSRN Ranking: Calming the Faculty Fear*, AALL SPECTRUM, Apr. 2012, at 12; David Brian Holt & Erik Beck, *Rethinking the Scholarly Legal Publishing Life Cycle*, AALL SPECTRUM, May/June 2020, at 44; see also NATIONAL ACADEMY OF SCIENCES, NATIONAL ACADEMY OF ENGINEERING & INSTITUTE OF MEDICINE, ENSURING THE INTEGRITY, ACCESSIBILITY, AND STEWARDSHIP OF RESEARCH DATA IN THE DIGITAL AGE 103 (2009), <https://doi.org/10.17226/12615> (“Many repository efforts are led by university libraries, which have begun exploring the new issues posed by research data and other digital information as increasingly central components of the scholarly record.”).

¹⁹¹ Kincaid C. Brown, *Law School Institutional Repositories: A Survey*, 25 TRENDS INTERACTIVE 21, 21 (2015).

¹⁹² Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 392–93, 2012 LAW LIBR. J. 28, ¶ 30.

be prepared to deal with format changes and new technologies.¹⁹³ Law libraries do not experience the same level of turnover as student-edited journals, and as organizations that are built to preserve materials, have an interest in ensuring that steps are taken to facilitate knowledge transfer between departing and incoming employees. This continuity would further minimize issues from not properly backing up resources and transitioning them to new systems.¹⁹⁴

Unlike journals and authors, law libraries are also best positioned to work through issues that come with potentially posting these materials online, most notably embargos and copyright issues. Many sources that are kept “on file with” the author or the journals may very well need to be embargoed for a period of time for privacy protections or to ensure that the authors can benefit from their work. Some law libraries are adept at navigating these types of issues because they already deal with them on a regular basis related to special collections and archival materials. Librarians would be able to help the student-edited journals navigate the complexities that surround publishing articles that contain references to embargoed sources, and ensure that these materials are available at the end of the embargo period. Similar to what happens with other embargoed materials, librarians could

¹⁹³ Michelle M. Wu, *Why Print and Electronic Resources Are Essential to the Academic Law Library*, 97 LAW LIBR. J. 233, 241–242, 2005 LAW LIBR. J. 14, ¶¶ 26–28.

¹⁹⁴ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

provide a landing page that includes information about the source, and then provide the full source on the same page at the end of the embargo period.¹⁹⁵

Additionally, librarians are equipped to work through the copyright issues that will arise with providing online access to these materials.¹⁹⁶ Many common “on file with” materials present issues in terms of making them available online, such as unpublished manuscripts, working papers, dissertations, and theses. The questions of if something can be digitized, can it be posted online for broader consumption, and what type of controlled access or digital rights management might be needed are all questions that librarians will be better equipped to address than individual authors and journals. Moreover, in serving as stewards for these materials, law libraries will also be in the position to address situations where rights holders take action through takedown notices.

Even though law libraries are best placed to serve in this stewardship role, one has to wonder how they can take it on given the complexities of managing this on top of what continues to be a growing list of changing expectations, new

¹⁹⁵ Georgetown Law Library embargos S.J.D. dissertations for three years before posting them on its institutional repository, *Digital Georgetown*. Prior to posting a dissertation, the library creates a landing page for the dissertation on the repository that includes the name of the author, the subjects covered, and the abstract for the dissertation. For an example of a landing page for a dissertation that was not posted at the time of the drafting of this article, see Andrew Jensen Kerr, *Essays on Culture, Art, and Authority* (2020) (S.J.D. dissertation, Georgetown University Law Center), <http://hdl.handle.net/10822/1061131> [<https://perma.cc/S7CC-9R94>].

¹⁹⁶ Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 *LAW LIBR. J.* 383, 402–03, 2012 *LAW LIBR. J.* 28, ¶ 47.

responsibilities, and shrinking budgets and staff.¹⁹⁷ Providing this type of support for journals and authors could be a long-term growth area for law libraries. As more materials are published online, law libraries could pivot from supporting print materials and electronic databases, and instead become active partners in the publication process.

The question that still remains is how preserving formerly “on file with” the author materials would work in practice?

Model for Ensuring Long-Term Accessibility

As already outlined above, law libraries are better suited than authors or journals to take on the stewardship role for unpublished materials previously held “on file with” the author. However, just saying that libraries will take this on is easier said than done. How this could be implemented raises several questions about the range of resources and expertise among academic law libraries. Some libraries will be better suited to take on this role because of their previous experience with special collections, archives, and digitization. This raises the question then of should it ultimately be the library of the author or the library of the journal that

¹⁹⁷ See generally Taylor Fitchett, James Hambleton, Penny Hazelton & Anne Klinefelter, *Law Library Budgets in Hard Times*, 103 LAW LIBR. J. 91, 2011 LAW LIBR. J. 5 (discussing library budgets in the post financial crisis); Ursual Gorham & Paul T. Jaeger, *The Law School Library or the Library at the Law School: How Lessons from Other Types of Libraries Can Inform the Evolution of the Academic Law Library in the Digital Age*, 109 LAW LIBR. J. 51, 2017 LAW LIBR. J. 2 (discussing the challenges that libraries face, including budget and staffing cuts); Lynne F. Maxwell, *The Emperor's New Law Library: The Decline and Fall of Academic Law Libraries Or a New Chapter*, 44 RUTGERS L. REC. 46 (2016-2017) (discussing library budgets, staffing, and new services).

serves as the steward of these materials? Without clear guidance, libraries could end up duplicating efforts, or worse, find themselves in a situation where no one takes responsibility. Without a clear path forward, authors, journals, and libraries may develop their own standards and workflows, which could ultimately lead to materials falling through the cracks. To get on the same page, authors, journals, and libraries must work together.

Regardless of if the library of the author or the library of the journal is the one that serves in this stewardship role, authors and journals must commit to a new set of expectations when it comes to citing to unpublished materials. First, authors must commit to the principle that as much research should be open as possible. This requires efforts on the front end, such as communicating with interviewees or authors of unpublished materials, to ensure that as much information as possible can be captured, preserved, and made accessible prior to publication. Second, journals must serve as gatekeepers and enforce similar standards that they do now with articles that include empirical research data.¹⁹⁸ If articles are submitted with footnotes that cite to sources that are held by the author, journals should engage with the author to determine if appropriate steps can be taken to make these materials accessible during the editorial process. In these situations, a journal could have an initial discussion with a librarian at their institution to talk through issues

¹⁹⁸ See *supra* notes 119–27 and accompanying text.

they should consider, such as copyright and privacy, so that the journals can provide the authors with options that are suitable for their unique situation. Both the authors and the journals taking these steps improves the chances that materials will be available for preservation and made accessible prior to the publication of an article. The only remaining piece is how to capture and preserve these materials in a way that will lead to long-term accessibility by future researchers.

When determining which library will serve the stewardship role, there are clear advantages and disadvantages for either the library of the author or the library of the journal. First, the library of the author has the advantage of already working quite closely with the author during the research process. This would allow them to engage with the author at the beginning of the process, and they would be able to provide options for making the materials accessible prior to the submission of the article for publication. Second, depending on the level of research support the library provides to the author, library staff may have already digitized the materials during the research process, shortening the efforts needed to post these materials online. Third, where the author writes on similar topics, the library has the ability to connect materials from multiple papers, potentially building a more useful database for researchers. Finally, if the author does hold onto the original unpublished materials, it would be easier for the library to engage with the author if for some reason duplicates or electronic versions were somehow lost or destroyed.

While relying on the library of the author has its advantages, it also has several critical disadvantages. First, given how long it takes for articles to be published, it is possible for an author to move during the writing of the article or the publication of it. This could create confusion over which library would be expected to support preservation and accessibility efforts. Second, not all journal article authors come from academic institutions that are supported by a law library. Law journal articles are written by a variety of authors, including practitioners and judges. Finally, as already stated, not all institutions possess the inhouse expertise to support the authors, nor do they have the resources to maintain such files.

The library of the journal also presents several advantages and disadvantages as well. In terms of advantages, first, the library of the journal might be a logical steward because they would have a strong relationship with the journals. They would be able to offer a similar service that is provided by Harvard Law, where journals are provided with a process by which materials can be preserved and maintained for future reference by researchers.¹⁹⁹ Second, by working with their home libraries, an individual journal would be able to follow a consistent set of practices, so frequent readers of the same publication would become familiar with how to locate materials cited within these journals. Third, because of the close relationship between the journal and their home library, they

¹⁹⁹ See *supra* notes 93–99 and accompanying text.

would be better placed to not only navigate content migration, but also add in features to their publications such that readers are notified of new ways to access content previously cited in an individual journal article.²⁰⁰ Finally, if all journals adopted the same approach, then duplication would be limited, as the repository would be clear in every circumstance.

In spite of the advantages of relying on the library of the journal, there are some notable disadvantages. First, relying on the library of the journal could mean missing out on materials with certain restrictions because the library was not engaged at the front end of the research process. Second, as with library of the author, the library of the journal may also lack the resources and expertise to perform the necessary stewardship functions.

With no perfect solution in sight, what then could be a possible third approach that would ensure that these materials are preserved without having to worry about the expertise and resources of the individual libraries? As already stated, authors and their home libraries must work together at the beginning of the research process to ensure that steps are taken to address copyright, privacy, and

²⁰⁰ Similar to Eugene Volokh's proposal to put "an author's correction on a separate web page" in order to create a "pocket part" like service for articles, student-edited journals that publish articles on a journal hosted website or institutional repository could include links on the landing page to where researchers can find cited content that was either held on file with the author at the time of publication or migrated to a new platform since publication (e.g., migrated from author hosted website to Dataverse). See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors> (see article section titled "Allowing Corrections or Updates of Articles").

confidentiality issues so that there is the potential that the unpublished materials can be preserved and made available to other researchers. Moreover, journals have to serve as gatekeepers and hold authors to a higher standard, as well as work with their home libraries to identify solutions that can be employed to capture unpublished materials, preserve them in stable platforms, and make them available to readers and researchers by including citations that point to online formats. No matter the solutions that libraries put in place, the success of making these materials available to future researchers hinges on the initial efforts of the authors and the journals.

In order for this to be successful, libraries must work together to adopt solutions and practices that will work for all libraries, regardless of their expertise and resources. To do this, libraries need to either create a shared repository for posting unpublished materials or identify stable, non-profit platforms that can be utilized for posting unpublished materials that will appear in law journal articles. If unable to develop their own shared platform, law libraries could provide financial support for existing platforms and work together to provide centralized training for librarians on how to best utilize these platforms. Librarians could also develop a set of best practices that would include not just posting materials to stable platforms, like Dataverse, but also backing up these materials through Perma.cc. Together, this set of practices could meet the ideals that Volokh recommended when he imagined that “law reviews might put together a consortium that would store all the

items using URLs that are sure not to change.”²⁰¹ Instead of law reviews forming a consortium to store these materials, it would be libraries coming together to develop consistent practices that can be utilized across the board. With consistent practices in place, libraries will be able to more easily monitor resources and determine when steps should be taken to migrate them to new platforms.

The ultimate goal is to ensure that more underlying materials are added to established online repositories or platforms prior to the publication of an article so that consistent links are provided at the time of publication. In taking on these initiatives, libraries will be able to step in and support long-term preservation for materials that until now were destined to be lost, misplaced, or worse, destroyed.

Conclusion

Legal scholarship’s potential impact on society requires authors, journals, and libraries to take steps to make articles and the underlying sources within them more accessible for readers and future researchers. Significant steps have been taken over the past decade to make articles more widely available through online repositories. Moreover, improvements have been made to ensure that online resources cited within articles are accessible through the use of web archiving tools and persistent links. The last step fully unlocking legal scholarship is to make more unpublished materials that have been traditionally held “on file with” the author

²⁰¹ Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART 4 (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

available through stable online platforms that are maintained by reliable stewards. To do this, authors, journals, and libraries must work together through all phases of the scholarship production process—research, editing, and publication—to ensure that unpublished materials are captured, preserved, and made available in a way that will make them accessible for future researchers. By allowing future researchers seamless access to these underlying sources, they will be able to test the author’s assessment, draw their own conclusion, and build on the work of past legal scholars.