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The Durham Statement Two Years Later: Open Access in the Law School Journal Environment*

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The Durham Statement on Open Access to Legal Scholarship, drafted by a group of academic law library directors, was promulgated in February 2009. It calls for two things: (1) open access publication of law school–published journals; and (2) an end to print publication of law journals, coupled with a commitment to keeping the electronic versions available in "stable, open, digital formats." The two years since the Statement was issued have seen increased publication of law journals in openly available electronic formats, but little movement toward all-electronic publication. This article discusses the issues raised by the Durham Statement, the current state of law journal publishing, and directions forward.

Introduction: What Is the Durham Statement?

¶1 In November 2008, the directors of the law libraries at the University of Chicago, Columbia University, Cornell University, Duke University, Georgetown University, Harvard University, Northwestern University, the University of Pennsylvania, Stanford University, the University of Texas, and Yale University met in Durham, North Carolina, at the Duke Law School. At that meeting, those directors drafted the Durham Statement on Open Access to Legal Scholarship.[1] Since it was finalized and posted in February 2009, the Durham Statement has prompted discussion on numerous blogs and listservs, and garnered over sixty-five online signatures from law librarians and other legal educators. It was the subject of a Law

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1. The Statement is posted on the web site of Harvard University's Berkman Center for Internet and Society. The site includes background information on the Statement, a list of signatories, and an FAQ. Durham Statement on Open Access to Legal Scholarship (Feb. 9, 2009), *available at* http://cyber.law.harvard.edu/publications/durhamstatement [hereinafter Durham Statement].

Librarian BlogTalkRadio show in February 2010,[2] a program at the Annual Meeting of the American Association of Law Libraries in July 2010,[3] and a workshop at Duke Law School in October 2010 under the title "Implementing the Durham Statement: Best Practices for Open Access Law Journals."[4] It has a Wikipedia entry.[5]

¶2 The Durham Statement calls for two things: (1) open access publication[6] of law school–published journals; and (2) an end to print publication of law journals, coupled with a commitment to keeping the electronic versions available in "stable, open, digital formats."[7] Neither action is dependent on the other: current articles from many law journals are now freely accessible on the web while their print issues are still offered to libraries and other subscribers; journals can also be offered in fee-based electronic formats without print equivalents.[8]

¶3 This article examines the key issues arising from the Durham Statement's calls for open access publication of law journals and for ending their publication in print.

Open Access to Legal Scholarship

¶4 Few commentators have objected to the Durham Statement's call for open access publication of law journals. Not many U.S. law reviews are registered with

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2. *Happy Birthday, Durham Statement!*, BlogTalkRadio: The Law Librarian (Feb. 4, 2010), http://www.blogtalkradio.com/thelawlibrarian/2010/02/04/happy-birthday-durham-statement.

3. "The Durham Statement on Open Access One Year Later: Preservation and Authentication of Legal Scholarship," presentation at the 103rd Annual Meeting of the American Association of Law Libraries, Denver, Colorado, July 13, 2010. The program was moderated by Margaret Maes (Legal Information Preservation Alliance); the panelists were Margaret Leary (University of Michigan), Michelle Pearse (Harvard University), and Wayne Miller (Duke University). Information and a link to the audio file of the presentation are available at http://www.softconference.com/aall/sessionDetail.asp?SID=208487 (audio available free to meeting registrants only).

4. *See Implementing the Durham Statement: Best Practices for Open Access Law Journals*, Duke Law Sch., http://www.law.duke.edu/libtech/openaccess/conference2010. The workshop site provides an archived webcast of the proceedings as well as links to readings and other resources.

5. *Durham Statement on Open Access to Legal Scholarship*, Wikipedia, http://en.wikipedia.org/wiki/Durham_Statement_on_Open_Access_to_Legal_Scholarship (last visited Nov. 14, 2010).

6. The drafters of the Statement expressed general agreement with the definition of *open access* in the 2002 Budapest Open Access Initiative, which calls for

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

Budapest Open Access Initiative (Feb. 14, 2002), http://www.soros.org/openaccess/read.shtml. For a brief, but useful, introduction to the open access movement, see John Willinsky, *The Stratified Economics of Open Access*, 39 Econ. Analysis & Pol'y 53, 53–55. For a discussion of the economics of open access publication in disciplines other than law, see generally *id.*

7. Durham Statement, *supra* note 1.

8. Berkeley Electronic Press publishes a number of electronic journals in law and other subjects that are available via subscription. *See Law Journals*, Berkeley Electronic Press, http://www.bepress.com/journals/law.html (last visited Nov. 14, 2010). There also are a few law school–sponsored print journals that charge for electronic access. *See, e.g.*, *Journal of Legal Studies*, Chicago Journals, http://www.journals.uchicago.edu/toc/jls/current (last visited, Nov. 14, 2010) (published by the University of Chicago Press for the University of Chicago Law School).

either the Directory of Open Access Journals (DOAJ)[9] or the Science Commons Open Access Law Program.[10] An increasing number, however, post at least their current issues in freely accessible formats on their journal web sites, despite the risks of reducing revenue from print subscriptions and royalty income from HeinOnline, LexisNexis, Westlaw, and other online aggregators.

¶5 This suggests there is general agreement in the legal academy with the idea that "[s]cholarship, and hence the content of scholarly journals, is a public good"[11] and perhaps with John Willinsky's proposition that in the age of the Internet, a commitment to research and scholarship carries with it a responsibility to circulate one's work as widely as possible.[12]

¶6 Because scholarly research in law requires access not only to other scholarship, but also to legal authorities—the primary sources of law—open access to legal scholarship must be discussed within the context of electronic access to other types of legal information. In the United States, widespread use of what were first called computer-assisted legal research (CALR) systems began (at least for those who could pay premium fees) with the introduction of the full-text primary source legal information services by LexisNexis and Westlaw in the mid-1970s.[13]

¶7 Since then, a number of competitors have entered the electronic legal information market with less robust products at lower costs;[14] courts and governments have made legislation and court decisions freely available on official web sites;[15] and dedicated open-access sites such as that of Cornell's Legal Information Institute[16] have been developed to provide aggregated access to large bodies of U.S. legal information. In addition, the Law.Gov movement is working toward developing mechanisms to improve free access to authenticated primary legal information.[17]

¶8 Outside the United States, there are many examples of improved, free electronic access to legal information made available through government action.[18] Elsewhere, the Free Access to Law Movement, which is based in the cooperative activities of fourteen national and regional legal information institutes (like that at

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9. Directory of Open Access Journals, http://www.doaj.org (last visited Nov. 14, 2010).

10. *Open Access Law Program*, Sci. Commons, http://sciencecommons.org/projects/publishing/oalaw/ (last visited Nov. 14, 2010).

11. Richard Edwards & David Shulenburger, *The High Cost of Scholarly Journals (And What to Do About It)*, Change, Nov./Dec. 2003, at 10, 12.

12. John Willinsky, The Access Principle xii (2005). For an exploration of the implications of Willinsky's ideas for legal scholarship, see Richard A. Danner, *Applying the Access Principle in Law: The Responsibilities of the Legal Scholar*, 35 Int'l J. Legal Info. 355 (2007).

13. *See generally* William G. Harrington, *A Brief History of Computer-Assisted Legal Research*, 77 Law Libr. J. 543 (1984–1985).

14. For a discussion of "Alternative CALR Services," see Kendall F. Svengalis, Legal Information Buyer's Guide & Reference Manual 154–58 (2010).

15. *See, e.g.*, THOMAS, http://thomas.loc.gov (last visited Nov. 14, 2010).

16. *Legal Information Institute*, Cornell Univ. Law Sch., http://www.law.cornell.edu (last visited Nov. 14, 2010).

17. Law.Gov: A Proposed Distributed Repository of All Primary Legal Materials of the United States, http://resource.org/law.gov (last visited Nov. 14, 2010).

18. *See* Claire M. Germain, *Digitizing the World's Laws*, *in* International Handbook of Legal Information Management (Richard A. Danner & Jules Winterton eds., forthcoming 2011).

Cornell), now provides free access to nearly 1200 databases from about 125 jurisdictions worldwide.[19]

¶9 As a result, much legal information created by governments, courts, and other bodies with law-making authority is now available (at least for English-speaking jurisdictions) through sources that meet the general requirements for open access. In the United States and elsewhere, however, there has been less open access to legal scholarship, commentary, and other explanatory materials—the things that we in common law jurisdictions call secondary sources. In other parts of the world, this is because law journals (like many other scholarly journals) are generally published by commercial publishers. In the United States, this is not the case.

¶10 Like scholarly journals in other fields, U.S. law reviews provide forums for faculty to gain promotion, tenure, and other professional rewards; disseminate new scholarship; provide space for scholarly discourse; showcase new knowledge; and produce print copies of articles for access and archiving. But they are also unusual among scholarly journals in a number of ways:

- Most are published by educational institutions—individual law schools—rather than by scholarly societies or professional organizations, or by commercial publishers;
- For the most part, they are managed and edited by students and are not peer-reviewed;
- There are so many of them;[20] and
- One of their primary purposes is to provide both educational experiences for students and credentials for new law school graduates entering the job market.[21]

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19. *See* World Legal Info. Institute (WorldLII), http://www.worldlii.org (last visited Nov. 14, 2010). Access is provided through regional and national sites, and through the WorldLII web site. For a history of the Free Access to Law Movement, see Graham Greenleaf, *The Global Development of Free Access to Legal Information*, *in* A History of Legal Informatics 53 (Abdul Paliwala ed., 2010).

20. One source suggests that there are presently about 650 student-edited journals published at U.S. law schools and 980 legal journals in all, counting those published by societies, bar associations, and commercial publishers. *See Law Journals: Submissions and Rankings*, Wash. & Lee Univ. Sch. of Law, http://lawlib.wlu.edu/lj/index.aspx (last visited Nov. 14, 2010) (searches were conducted by selecting "United States" as the country, and then selecting the category "Student-edited").

Some sense of the number of new law journals being published can be gained by looking at the list of journals selected for indexing by the American Association of Law Libraries' Committee on Indexing of Periodical Literature. From mid-2008 through mid-2010, the Committee selected 130 "substantive law school journals" and other periodicals "that primarily deal with common law" and publish articles that are "predominately legal and substantive in nature." Title List, AALL Indexing of Periodical Literature Committee, http://www.aallnet.org/committee/ipl/AALL_Indexing_of_Periodical_Committee/Title_List.html (last visited Nov. 14, 2010); Submit a Journal, AALL Indexing of Periodical Literature Committee, http://www.aallnet.org/committee/ipl/AALL_Indexing_of_Periodical_Committee/Submit_a_journal.html (last visited Nov. 14, 2010).

21. John Doyle calls the educational benefits and credentialing "inefficient by-products" of the law review system and notes that the "abundance of law reviews . . . show[s] the breadth of subsidization that law schools are willing to fund." John Doyle, *The Business of Law Reviews*, Conn. L. Rev. Conntemplations, Spring 2007, at 30, 30, 33, *available at* http://works.bepress.com/doylej/1.

¶11 Law may also differ from other disciplines in the extent to which its scholarship is written, not only for other scholars, but also for audiences of practicing professionals. Law professors, students, and other scholars write to promote legal reform and improve access to justice, to critique legislation and court decisions, and to influence the practicing bar, the courts, legal decision-makers, and the public. In addition, much of what they write, like law itself, is jurisdiction-based and limited in its direct applicability to specific national legal systems, or, in federal systems, to the law of states, provinces, or other more localized jurisdictions.

¶12 Michael Carroll, a professor at American University, has argued that "[a]ccess to law matters . . . . [and] access to legal scholarship matters too."[22] But is free and open access to legal scholarship important to others outside the academy? Critics of legal scholarship (and of the law review as an institution) have long claimed that what appears in law reviews is written only for other professors and is of little value to judges or the practicing bar. Such criticism has taken many forms, often focusing on law schools' increasingly closer ties to their universities than to the practicing bar, as seen by the numbers of Ph.D. holders on law school faculties, faculty interest in interdisciplinary study at the expense of doctrinal research, and the tendency of schools to place less value on practice experience than they once did when hiring new professors.[23] Does legal scholarship actually have the impact on legal decision-making that we might like to claim for it?

¶13 In 2007, the *New York Times* reported on a Cardozo School of Law symposium discussing an apparent decline in judicial citations to law review articles. The article opened with the statement by a federal court of appeals judge that: "I haven't opened up a law review in years. . . . No one speaks of them. No one relies on them."[24] In 2010, Chief Justice John Roberts reportedly said that "he doesn't pay much attention to academic legal writing. Law review articles are 'more abstract' than practical, and are not 'particularly helpful for practitioners and judges.'"[25]

¶14 Is there any evidence that what is published in law journals influences the courts? Schwartz and Petherbridge's 2010 empirical study of nearly 300,000 reported decisions of the federal courts of appeal from 1950 to 2008 suggests that appellate court citations to law review articles have increased over time. The num-

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22. Michael W. Carroll, *The Movement for Open Access Law*, 10 Lewis & Clark L. Rev. 741, 743 (2006).

23. Some of the literature regarding the purposes of legal scholarship and its use by appellate courts is summarized in David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study* 3–8 (Loyola-LA Legal Studies Paper No. 2010-38), *available at* http://ssrn.com/abstract=1640681 (forthcoming in 96 Cornell L. Rev. (2011)). *See also* Leah M. Christensen & Julie A. Oseid, *Navigating the Law Review Article Selection Process: An Empirical Study of Those with All the Power—Student Editors*, 59 S.C. L. Rev. 175 (2007). For a pointed critique of law reviews and legal scholarship, see Michael J. Madison, *The Idea of the Law Review: Scholarship, Prestige and Open Access,*10 Lewis & Clark L. Rev. 901 (2006).

24. Adam Liptak, *When Rendering Decisions, Judges Are Finding Law Reviews Irrelevant*, N.Y. Times, Mar. 19, 2007, at A8 (quoting Chief Judge Dennis G. Jacobs).

25. Jess Bravin, *Chief Justice Roberts on Obama, Justice Stevens, Law Reviews, More*, Wall St. J. Law Blog (Apr. 7, 2010, 7:20 p.m.), http://blogs.wsj.com/law/2010/04/07/chief-justice-roberts-on-obama-justice-stevens-law-reviews-more/ (reporting the Chief Justice's answers to questions following a speech at Indiana University's law school).

bers are not high, but opinions citing articles have grown to 4.8% of reported opinions between 1980 and 2008 from 3.4% in the period from 1950 to 1979, and to 6.21% from 1999 to 2008.[26]

¶15 Why are they rising? Among the reasons suggested by the authors of the study is "ease of finding and access to scholarship, perhaps brought about by ease of Internet publication (e.g., SSRN, bepress, HeinOnline, LexisNexis, Westlaw, etc.) . . . ."[27] Because the study closed with 2008, it could not take fully into account the increasing availability and accessibility of law journal articles on law school web sites, as well as the other sources the authors list. How many law journals now post their articles?

¶16 The ABA's *Free Full-Text Online Law Review/Law Journal Search Engine* web site indicates that the texts of articles in over 350 online law reviews and law journals are now available on freely accessible law school web sites.[28] Our own research suggests that articles in 177 of the 296 scholarly journals published at the top fifty "Best Law Schools" as ranked by *U.S. News & World Report* in 2010[29] are accessible through law school web sites in PDF or HTML format.[30]

¶17 The use (and presumably the usefulness) of legal scholarship published in law journals has increased since their content has become accessible electronically; it can only be further enhanced as more journals make their articles freely and openly accessible by law schools directly on their own web sites, and as more schools and journals understand the limitations and delays of print publication.

¶18 In August 2010, in a speech before the Ninth Circuit Judicial Conference, Justice Anthony Kennedy bemoaned the lack of student-written case notes in contemporary law reviews. In his earlier years on the U.S. Supreme Court, Kennedy found law journal case notes discussing cases appealed to the Court to be useful in deciding whether or not to grant certiorari. Now, he finds that, if published at all, case notes often appear too late to be of help, because of the time taken for print publication. As a result, Kennedy's clerks look to blogs for comments on pending cases. The blog discussions may meet his needs, but Kennedy pointedly expressed his concerns about the effects of the decline of case notes on law schools' continued relevance to the appellate process: "It's perfectly possible and feasible, it seems to me, for law review commentary immediately to come out with reference to important three-judge district court cases, so we have some neutral, detached, critical, intellectual commentary and analysis of the case. We need that."[31]

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26. Schwartz & Petherbridge, *supra* note 23, at 20.

27. *Id.* at 30.

28. *Free Full-Text Online Law Review/Law Journal Search Engine*, Am. Bar Ass'n, http://www.abanet.org/tech/ltrc/lawreviewsearch.html (last visited Nov. 14, 2010).

29. *Schools of Law*, *in* America's Best Graduate Schools 28 (2010). Because of ties, the list includes 51 schools, ranked 1 through 48.

30. With the help of Duke Law research assistant Lila Zhao '11, Kelly Leong examined the web presences of scholarly journals published at the top fifty schools. Newsletters, reprint journals, and journals that had not yet published issues were not counted.

31. Remarks by Associate Justice Anthony M. Kennedy, Ninth Circuit Judicial Conference (Aug. 19, 2010), video *available at* http://www.youtube.com/watch?v=xeQRpNQmWOU (discussion of law journals begins at 22:00; quote begins at 23:11).

¶19 It appears that the Supreme Court and the world of the law may move too quickly to wait for the slow process of print law review publication.

Ending Print Publication of Law Journals

¶20 The Statement's call to end print publication of law reviews was more controversial than that regarding open access, prompting a number of concerns, mostly from law librarians. The Statement argued that: "If stable, open, digital formats are available, law schools should stop publishing law journals in print and law libraries should stop acquiring print law journals," reasoning that:

> It is increasingly uneconomical to keep two systems afloat simultaneously. The presumption of need for redundant printed journals adds costs to library budgets, takes up physical space in libraries pressed for space, and has a deleterious effect on the environment . . . .
>
> In a time of extreme pressures on law school budgets, moving to all electronic publication of law journals will also eliminate the substantial costs borne by law schools for printing and mailing print editions of their school's journals, and the costs borne by their libraries to purchase, process and preserve print versions.[32]

¶21 The major objections to the call to end print publication focused on the Statement's reliance on the need for "stable, open, digital formats" in order to make the transition to all-electronic publishing feasible. In a posting to a discussion list for law library directors under the heading "Why I Did Not Sign the Durham Statement," Margaret Leary wrote:

> The answer is simple: I do not agree with the call to stop publishing in print, nor do I think we have now or will have in the foreseeable future the requisite "stable, open, digital formats." As long as we believe legal scholarship is worthy of permanent retention, we should encourage the existence and retention of paper, in addition to digital, copies.[33]

¶22 In his blog *The Life of Books*, Richard Leiter focused on the roles of print and paper in the scholarly process:

> In the end, ceasing to publish in print the-already-too-many-journals is only going to dilute their importance further . . . .
>
> The bottom line is this: Part of the value of articles published in these journals is that they are a record of a scholar's ideas and thoughts about a legal issue. The ideas may be inspirational, challenging, enlightening, wrong, controversial, revolutionary, evolutionary, or all of the above and more. But, part of the process of scholarship is committing them to "paper", or some medium in which the author can be held accountable and called to defend them. It doesn't necessarily have to be paper. But it must be in a format that is permanent. To date, nothing in any computer format can even begin to approach anything resembling the permanence of a printed book.[34]

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32. Durham Statement, *supra* note 1.

33. Margaret A. Leary, Why I Did Not Sign the Durham Statement, LawLibDir Archives (Mar. 6, 2009), http://lists.washlaw.edu/mailman/private/lawlibdir/2009-April/005968.html (private listserv; username and password required for access) (on file with author).

34. Richard Leiter, *The Durham Statement*, Life of Books (June 25, 2009, 2:34 p.m.), http://thelifeofbooks.blogspot.com/2009/06/durham-statement.html.

¶23 Access to legal information of all types is essential for lawyers and other legal professionals, and also for citizens whose lives are affected by legislation, precedential court decisions, and administrative rulings and regulations. To be understood and applied, however, legal authorities need to be explained and interpreted, as well as easily accessible. Both the texts of legal authorities and commentary on them must also be preserved for future users. The issues involved in access and preservation of electronic legal information are closely intertwined, but they are not new. As Harvard University Librarian Robert Darnton puts it, "Information has never been stable."[35] But they have changed in an age when much valuable information will never be formally published in print.

¶24 For hundreds of years, libraries have not only provided access to books and other printed materials, but tried to preserve them for future users. Publishers of books and journals were not expected to maintain permanent back stock of their publications; preserving the works they published was a responsibility taken on by libraries. Because one could reasonably assume that more than one library held a copy of a printed work, it was unlikely that an item's disappearance from a particular library meant the work was lost forever. Yet printed information does not preserve itself. It requires paper manufactured so that it will not rapidly deteriorate over time, storage under appropriate temperature and humidification regimes, and proper shelving so that items are not lost. Kevin Guthrie notes: "One does not have to spend much time in a large library to find paper volumes and documents that cannot be used for much longer."[36] And Bob Berring has written: "One of the sad failures of librarianship has been the inability to develop reasonably priced means of preserving books."[37]

¶25 As noted above, publication of legal scholarship in the United States is for the most part a small-time, decentralized industry. Law school–published journals operate along with authors and libraries within a gift economy, in which earning a profit is not a primary goal for any participant. As described by Jessica Litman:

> We rely on few commercial publishers. The majority of law journals depend on unpaid students to undertake the selection and copy editing of articles. . . . At the same time, the first-copy cost of law reviews is heavily subsidized by the academy to an extent that dwarfs both the mailing and printing costs that make up law journals' chief budgeted expenditures and the subscription and royalty payments that account for their chief budgeted revenues.[38]

¶26 Under this long-standing model, law libraries purchase the journals at low cost, provide indexes to access them, and preserve them.[39] Although subscription costs for individual law journals are generally significantly lower than for journals

35. Robert Darnton, The Case for Books 29 (2009).

36. Kevin M. Guthrie, *Archiving in the Digital Age: There's a Will, But Is There a Way?*, EDUCAUSE Rev., Nov./Dec. 2001, at 56, 58.

37. Robert C. Berring, *Legal Information and the Search for Cognitive Authority*, 88 Cal. L. Rev. 1673, 1684 n.29 (2000).

38. Jessica Litman, *The Economics of Open Access Law Publishing*, 10 Lewis & Clark L. Rev. 779, 783 (2006).

39. Historically, law journals have also shipped excess copies to jobbers such as William S. Hein & Co., which provided hard copy, microform, and eventually electronic versions to customers on behalf of the law school publishers.

in other disciplines,[40] in a time of tight budgets, the sheer number of journals produced at U.S. law schools makes them costly for law libraries to purchase, process, and preserve. Because most academic law libraries have traditionally striven toward comprehensiveness in their journal collections, the long runs of many journals and subscriptions to multiple copies of the most important ones mean that journal collections also take up large amounts of space in library facilities.

Access Issues

¶27 In recent years, the primary audiences for law journal articles—legal academics and the legal profession—have enjoyed increased and improved electronic access to both current and older legal scholarship through the primary legal databases, LexisNexis and Westlaw, and the extensive collections offered by HeinOnline, JSTOR, and other aggregators of journal content. For those in the academy, this access is funded by libraries and comes without direct individual cost. In addition, new law journal articles are increasingly freely available prior to formal publication via electronic working paper series, such as those supported by the Social Science Research Network (SSRN) and bepress (which for most users are also usually library-funded services and appear to be free to law faculty).

¶28 As a result, electronic access has become the preferred means for locating legal scholarship at the same time as law libraries are facing increased pressures on their budgets and their parent institutions are looking to library facilities to provide space for expanding programs. Both factors have placed under stress the library's traditional role as purchaser and preserver of print law journals. Should print versions of journals available electronically be purchased and preserved by libraries if print is already no longer the primary means for accessing their contents? Can we rely on digital files for long-term access and preservation of legal scholarship?

¶29 The format in which a journal is digitally published matters. Both archiving and presentation formats are inadequately addressed by the customary solution in use today, the Portable Document Format, or PDF. It is no accident that the format itself was initiated by Adobe, a company known for its printing software.[41] PDF reliably recreates the print experience, both on the screen and when the document is replicated across diverse printers. In doing so, it fulfills a key function in the redistribution of published text.[42] However, if all it does is replicate the reader's experience of the printed page, the PDF format fails to fully exploit the promise of digital media.

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40. For comparative prices by discipline, see Kittie S. Henderson & Stephen Bosch, *Periodicals Price Survey 2010: Seeking the New Normal*, LIBR. J., Apr. 15, 2010, at 36.

41. Adobe's core product at its founding was Postscript, which was made the software printing engine for Apple's LaserWriter in 1985. Adobe Photoshop was added in 1990 and Acrobat was released in 1993. *See* Adobe History, http://www.adobe.com/aboutadobe/pressroom/pdfs/timeline_090501.pdf (last visited Nov. 14, 2010).

42. But, as Joe Hodnicki points out, "On law reviews, even current 'proven' technologies being used need enhancement. The ubiquitous PDF does not accommodate researchers with sight disabilities unless properly tagged and most are not." Joe Hodnicki, *Time to Move Forward: On the First Anniversary of the Durham Statement on Open Access to Legal Scholarship*, LAW LIBRARIAN BLOG (Feb. 11, 2010), http://lawprofessors.typepad.com/law_librarian_blog/2010/02/time-to-move-forward-first-anniversary-of-the-durham-statement-on-open-access-to-legal-scholarship.html.

¶30 In privileging the print layout, PDF documents force the on-screen reader into imperfect situations. Printed media are sized for natural eye-scanning of lines of text, but these same lines may become unreadable or, at best, awkwardly readable on a small handheld screen. While we can move our eyes freely around a single printed page, page delineation becomes little more than an inconvenience on most screens. Print documents also use footnotes and other conventions that are predicated upon the page format, but are cumbersome in the digital world and represent only one possible solution for isolating a footnote's content.

¶31 The reader's experience of a printed page is rich and multifaceted because of the experience we bring to it. We recognize titles, footnotes, citations, and parentheticals. The same experience can be had by the reader of a digital document on a screen, but for digital documents, scanning with our eyes is not the ultimate measure of usability. A digital document will not only be read with our eyes. It will be searched, parsed, and marked up in the digital realm by software of various types and stripes, from search engines to language parsers to style analyzers to categories of future software that we cannot now imagine. Because we cannot know to what uses a digital document will be put in the future, an essential principle in preserving digital collections must be to retain information already encoded in the document. There are many ways in which software can intelligently rediscover the information that our eyes see, but other information may never be recovered if a digital format loses it.

¶32 Most legal information is composed in digital documents with word processors such as Microsoft Word. The documents themselves contain a good deal of information that is interpreted by the software to enable title styles, footnote delineations, cross-references, and other features of the documents. Articles formatted for print are usually highly structured in both page elements and additional styles that define the functions of different sections of text. This information needs to be captured and made available for the future.

¶33 Historically, in common practice, PDF files have had none of the structural information that word processing files possess. The only information about the text and images was presentational, and most of the presentation detail was unavailable for searching or parsing.[43] The recently added ability to embed XML metadata in the form of tags in the PDF standard means that the format is itself becoming viable for the storage of digital documents.[44] Still, the primary place it gives to the print layout remains a limitation in understanding the potential of

43. *See* Mark Gross, *Data Capture and Conversion*, *in* THE COLUMBIA GUIDE TO DIGITAL PUBLISHING 179, 198 (William E. Kasdorf ed., 2003).

44. Acrobat 5.0 first introduced the ability to tag PDFs in 2003, but the tagging enterprise remains a work in progress. *See* PDF Reference Fourth Edition: Adobe Portable Document Format Version 1.5, at 752 (2003), *available at* http://www.adobe.com/content/dam/Adobe/en/devnet/pdf/pdfs/pdf_reference_archives/PDFReference15_v5.pdf. Version 9 of Acrobat still frequently requires human intervention to capture document structure accurately. *See* ADOBE ACROBAT 9 PRO ACCESSIBILITY GUIDE: CREATING ACCESSIBLE PDF FROM MICROSOFT WORD 13 (2008), *available at* http://www.adobe.com/accessibility/products/acrobat/pdf/A9-accessible-pdf-from-word.pdf ("Once you have converted the document, you will still need to check the results in Adobe Acrobat.").

digital publishing. A more widely embraced XML schema is the best way to represent the text, if we are willing to de-privilege the printed page.[45]

¶34 As we begin to publish law journals digitally and come to grips with access to digitally published articles, will we abandon the primacy of the "printed" page? Are there more useful and logical ways to anchor citations to references needed to understand the work? Are there more effective and efficient ways than footnotes to store and present references and asides? What hypertextual and multimedia elements should become part of the publishing process in a fully digital environment? These questions need resolution in ways that will maximize the usefulness of our documents now and in the future.

¶35 At the moment, though, they are far from resolution, even as more journals make their articles available on law school web sites. In April 2010, Sarah Glassmeyer described her frustrations as she attempted to review the searchability of the journals listed in the ABA's *Free Full-Text Online Law Review/Law Journal Search Engine*,[46] concluding with her concern "that these online journals are becoming PDF dumping grounds with little to no metadata or access points contained within them to assist with the 'access' part of 'open access.'"[47] Tom Boone has written: "If metadata, structure, and permanence are vital to the success of the Durham Statement's desired action, librarians must do more than simply ask their institutions to create digital access systems for law reviews. What the Durham Statement asks schools to create are digital libraries."[48] In a comment noting the first anniversary of the Durham Statement, Joe Hodnicki wrote:

> Hopefully the objective of the Durham Statement will be realized by following the suggestion made by ALA and ACRL. In their OSTP comments regarding public access policies for science and technology funding agencies across the federal government, ALA and ACRL called for across-the-board format standardization as being crucial to long-term public access. Instead of PDF files, authorized repositories should provide support for file conversion to a standard mark-up language (e.g., XML) because the PDF format "does not support robust searching, linking, text-mining, or reformatting over the long-term, nor does it provide full accessibility for the blind and reading impaired."[49]

¶36 Not only the formats, but the forms of legal scholarship itself are changing to take advantage of the potential of electronic publishing, just as they are in other

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45. A standards-based approach to structuring PDF is in committee with the ISO organization at the time of this writing. *See* ISO/AWI 14289-1, http://www.iso.org/iso/iso_catalogue/catalogue_ics/catalogue_detail_ics.htm?ics1=35&ics2=240&ics3=30&csnumber=54564 (last visited Nov. 14, 2010). Regardless, we believe that the choice of an XML schema for article and journal publishing should be a more robust replica of the original—suggesting the use of a word processor's native XML, such as Open Document or Office Open XML—or more useful to content providers and consumers, as in the case of journal publishing standards such as the National Library of Medicine's schema modules. *See* NLM Journal Archiving and Interchange Tag Suite, NCBI, http://dtd.nlm.nih.gov (last visited Nov. 14, 2010).

46. *Free Full-Text Online Law Review/Law Journal Search Engine*, *supra* note 28.

47. Sarah Glassmeyer, *Getting to Durham Compliance*, SarahGlassmeyer(dot)com (Apr. 26, 2010), http://sarahglassmeyer.com/?p=442.

48. Tom Boone, *Librarians Key to Open Access Electronic Law Reviews,* Library Laws Are Meant to be Broken (Sept. 3, 2009, 3:57 p.m.), http://tomboone.com/library-laws/2009/09/librarians-key-open-access-electronic-law-reviews.

49. Hodnicki, *supra* note 42.

fields. Increasingly, law journal web sites now feature online-only companions, blogs, or other vehicles for "short form" legal scholarship, which offer timely discussion of current issues because they bypass print and can be published quickly. Our own examination of journals published at the top fifty law schools[50] suggested that at least seventy-nine include one or more online-only features such as short essays, discussion forums, blogs, access to a Facebook page or Twitter feed, video of conferences, access to drafts of articles under review, or RSS notifications of new issues. Perhaps it is not yet possible to say in law (or in other social sciences and the humanities) that electronic versions of journals are primary, as they seem now to be in the sciences,[51] but we cannot be far away from that point.

Preservation Issues

¶37 In February 2010, the Harvard Law School Library issued a new collection development policy for law journals, which states that the library will acquire in print and maintain print archives only for Harvard Law School publications, publications that are only available in print, and publications where the library has library of record responsibilities for Harvard University. Harvard will acquire law journals available on HeinOnline or JSTOR in print only if current issues are not available from those sources, but will retain them for only five years and not bind them.[52] If the nation's largest academic law library no longer plans to preserve print versions of electronically available journals, need we worry about the Durham Statement's insistence on the availability of "stable, open, digital formats"? Other law libraries are making similar decisions: some not to purchase new law journals, others to rely on outside sources for long-term access to back files.

¶38 The 2005 Legal Information Preservation Alliance report *Preserving Legal Materials in Digital Formats* includes a discussion of the risk factors for digital materials.[53] In summary, the factors are

- *Storage Media Obsolescence*: Because storage media (hardware) for digital materials change quickly, storing digital materials requires an ongoing commitment to moving the data from one storage medium to another. This is known as "refreshing the data." It can be costly and time consuming, especially for large quantities of data.

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50. *Supra* note 30.

51. As described in 2008 by a representative of a major publisher in the sciences:

> In STM [scientific, technical, and medical publishing], the migration of journals online is so advanced that the electronic version is effectively primary and print secondary. This is true in two senses. The online version is now commonly published ahead of print, an important factor when speed to publication is critical. Perhaps more significantly, the electronic article will often be richer than its print version, containing more data and certainly more functionality.

Bill Cope & Angus Phillips, *Introduction*, *in* The Future of the Academic Journal 1, 2 (Bill Cope & Angus Phillips eds., 2009) (quoting Philip Carpenter, "Journals, Science and the Future of Books in the Humanities and Social Sciences" (paper presented at "A Challenge to the Book in Scholarship and Higher Education," Amsterdam, Oct. 13, 2008)).

52. Harvard Law Sch. Library, Collection Development Policy 2 (Feb. 17, 2010), *available at* http://www.law.harvard.edu/library/about/collections/collection_development_policy.pdf.

53. Judith Cobb & Joan Allen-Hart, Preserving Legal Materials in Digital Formats 11–13 (2005), *available at* http://www.aallnet.org/committee/lipa/LIPA_White_Paper_Final.pdf.

- *Software Obsolescence*: Like storage media, the software needed to access stored data also changes. File formats change, and software programs may not be compatible with older files. Proprietary formats may not always have full documentation; licensing agreements are subject to change; restrictions for use and modification may apply. Open formats and systems may be preferable for preservation purposes.
- *Organizational and Cultural Challenges*: Digital preservation is not solely a technical problem. Concerns over the quality of management of digital materials by creators and other caretakers of digital collections highlight other risks posed by high rates of technological change. Materials may be published on the web, then removed and deleted. Publishers cannot assure that their materials will be available in the long term.
- *Access*: The emphasis on digitizing materials to improve electronic access to information may lead librarians and others to focus on access, without addressing issues of preservation. Over time, there will be no access without a focus on preservation.

¶39 How will these risks be overcome? Any new model for preserving legal scholarship in digital formats has to acknowledge that a range of stakeholders will have larger roles to play than they might have played under the print-based, purchase-and-preserve model. In addition to law libraries, these include the providers of legal databases like LexisNexis and Westlaw; the aggregators of journal content, such as HeinOnline and JSTOR; the disseminators of working papers and pre-prints, such as SSRN and bepress; and the printers of law journals, such as Joe Christensen, Inc.,[54] which will continue to be needed for formatting and print-on-demand services.

¶40 It is important to recognize, however, that for the most part those stakeholders are not the actual publishers of most legal scholarship, but are pre-publishers or re-publishers of content that is formally published in the first instance by the law schools themselves. The schools provide the imprimatur of formal publication. There is little reason to expect the institution-based publication model that has characterized publication of legal scholarship in the United States since the late nineteenth century[55] to change as print publication declines and ends. For student editors, the apparent credentialing and educational benefits of law journal editing will continue regardless of publishing format, as will legal scholars' interests in publishing in the journals of prestigious law schools.

¶41 Yet the formats in which legal scholarship is published will change. As more law journals provide some variety of web access to articles, and libraries stop buying print versions of journals, editors and deans will not see the need to continue publishing a journal in print. Student editors will be looking to improve accessibility to new articles, deans to reduce costs. It is unlikely that, left to their own resources as

54. JOE CHRISTENSEN, INC., http://jci.mightydrake.com/public/index.htm (last visited Nov. 14, 2010).

55. *See generally* Michael I. Swygert & Jon W. Bruce, *The Historical Origins, Founding, and Early Development of Student-Edited Law Reviews*, 36 HASTINGS L.J. 739 (1985) (providing a detailed history of the American law review).

they make these decisions, either group will have the time or inclination to think much about the relationships of access to preservation or the need for effective search capabilities. As Tom Boone has pointed out, even the recent growth in posting article PDFs on journal web sites

> is hardly a universal movement, and such open availability can vary wildly even among publications produced at the same school. . . . While the initiative of such student staffers deserves our praise, there are certainly limits to what they can realistically accomplish. For example, given the transitory nature of law review staffs, there is little incentive to look beyond the digitization of the current volume, let alone establish a consistent system for subsequent years or plan a long term effort to digitize previous volumes.[56]

¶42 In the unique environment of law review publishing, there is both more need and more opportunity for law schools, law journals, law libraries, and others involved in the publication and dissemination of legal scholarship to collaborate in developing standards for access to and preservation of electronically published journal literature. There is also more risk if we do not. In the words of Pogo: "We shall meet the enemy, and not only may he be ours, he may be us."[57]

What Can Law Schools and Their Libraries Do?

¶43 The Durham Statement calls for law schools to end print publication of law journals in a planned and coordinated effort led by the legal education community, focused on ensuring access to and preservation of the electronic journal literature. Without that effort, in an economic environment in which external factors are more than ever impacting libraries' collection decisions and law school budgets, what can we do to assure that electronically published legal scholarship will remain available to future scholars?

¶44 Sarah Rhodes, digital collections librarian at the Georgetown Law Center, has written:

> Frankly speaking, our current digital preservation strategies and systems are imperfect—and they most likely will never be perfected. That's because digital preservation is a field that will be in a constant state of change and flux for as long as technology continues to progress. Yet, . . . libraries today have a number of viable tools, services, and best practices at our disposal for the preservation of digital content.
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> . . . .
>
> Keep in mind that no system will perfectly accommodate your needs. . . . And there is no use in waiting for the "perfect system" to be developed. We must use what's available today. In selecting a system, consider its adherence to digital preservation standards, the stability of the institution or organization providing the solution, and the extent to which the digital preservation system has been accepted and adopted by institutions and user communities.[58]

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56. Boone, *supra* note 48.

57. This is usually quoted as "We have met the enemy and he is us." Walt Kelly, *Zeroing In on Those Polluters: We Have Met the Enemy and He Is Us*, *in* THE BEST OF POGO 224 (Mrs. Walt Kelly & Bill Crouch Jr. eds., 1982).

58. Sarah Rhodes, *Preserving Born-Digital Legal Materials . . . Where to Start?*, VOXPOPULII (Jan. 12, 2010), http://blog.law.cornell.edu/voxpop/2010/01/10/preserving-born-digital-legal-materials.

¶45 Rhodes's comments suggest two things: first, that the Durham Statement's reliance on the eventual development of "stable, open, digital formats" is misplaced. We may never have stable, open, digital formats. Second, her points remind us that we cannot afford to wait to begin developing approaches for preserving and ensuring access to electronically published legal scholarship. Some suggestions:

1. It is time for law librarians to explore alternatives for preserving legal scholarship by working in concert with the other stakeholders, including
   - Existing efforts to preserve legal information, such as the Legal Information Preservation Alliance (LIPA),[59] which in 2010 established the Legal Information Archive as "a collaborative digital archive . . . to preserve and ensure permanent access to vital legal information currently published in digital formats."[60]
   - Legal publishers holding extensive libraries of law journal content in electronic format—LexisNexis and Westlaw, and perhaps primarily HeinOnline, with its extensive retrospective collections. Will their interests in preserving access to law journals for their commercial value mean they will now preserve digital content as libraries have traditionally preserved print content?
   - Established preservation and electronic archiving programs such as Portico[61] and LOCKSS,[62] which have worked mostly with libraries and publishers outside of law.
   - The Library of Congress, which already receives copies of all law journals whether published in print or electronic format under the mandatory deposit requirements of the Copyright Act,[63] and works to establish best practices for digital preservation through the National Digital Information Infrastructure and Preservation Program (NDIIPP).[64]
   - Institutional repositories, such as Harvard University's local Digital Access to Scholarship at Harvard (DASH),[65] or services such as the

59. LIPA is an "organization of libraries working on projects to preserve print and electronic legal information. It provides the opportunity for libraries to work collaborativ[e]ly on preservation projects at low cost and to take advantage of the partnerships created by the organization." Legal Information Preservation Alliance, http://www.aallnet.org/committee/lipa/ (last visited Nov. 14, 2010).

60. Legal Information Archive, http://www.aallnet.org/committee/lipa/LIA.asp (last visited Nov. 14, 2010).

61. Portico works with libraries, publishers, and funding sources to preserve e-journals, e-books, and other electronic scholarly content. *Portico Services, Value & Benefits*, PORTICO, http://www.portico.org/digital-preservation/services/ (last visited Nov. 14, 2010).

62. LOCKSS (Lots of Copies Keep Stuff Safe) "provides libraries with digital preservation tools and support so that they can easily and inexpensively collect and preserve their own copies of authorized e-content." LOCKSS, http://lockss.stanford.edu/lockss (last visited Nov. 14, 2010).

63. 17 U.S.C. § 407 (2006). *See also* U.S. COPYRIGHT OFFICE, MANDATORY DEPOSIT OF COPIES OR PHONORECORDS FOR THE LIBRARY OF CONGRESS (2010), *available at* http://www.copyright.gov/circs/circ07d.pdf.

64. *See Digital Preservation*, LIBRARY OF CONG., http://www.digitalpreservation.gov (last visited Nov. 14, 2010).

65. DASH: DIGITAL ACCESS TO SCHOLARSHIP AT HARVARD, http://dash.harvard.edu (last visited Nov. 14, 2010).

bepress Digital Commons,[66] which hosts repositories for a number of law schools and supports law review publication.[67]
- Printers of law journals, in order to forge the future role of print for preservation or print-on-demand services for legal scholarship.

2. It is also necessary to promote the use of common standards for formatting the files of the documents. Joe Hodnicki has noted ALA's and ACRL's calls for across-the-board format standardization, and the use of a standard mark-up language (e.g., XML) instead of PDF.[68] Wayne Miller has proposed developing mutually agreed-upon law journal formats for archiving, preservation, and other uses.[69]
3. It is time as well to take the initiative to create opportunities for dialogue with law school deans, law review editors, interested faculty, and legal information vendors on the need for concerted action regarding access to and preservation of electronically published law journals.

¶46 These activities do not answer all of the concerns raised regarding the Durham Statement's call to end print publication of law journals, but they should at least provide a start for action toward meeting those concerns.

66. Digital Commons, http://www.bepress.com/ir/ (last visited Nov. 14, 2010).

67. *See, e.g.,* Marquette L. Rev., http://epublications.marquette.edu/mulr (last visited Nov. 14, 2010).

68. Hodnicki, *supra* note 42.

69. Wayne V. Miller, *A Foundational Proposal for Making the Durham Statement Real* 2–3 (Duke Law Working Papers no. 29, 2010), *available at* http://scholarship.law.duke.edu/working_papers/29.