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

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Abstract: *This article focuses on the importance of free and open access to legal scholarship and commentary on the law. It argues that full understanding of authoritative legal texts requires access to informed commentary as well as to the texts of the law themselves, and that free and open access to legal commentary will facilitate cross-border dialogue and foster international discourse in law. The paper discusses the obligations of scholars and publishers of legal commentary to make their work as widely accessible as possible. Examples of institutional and disciplinary repositories for legal scholarship are presented, as are the possible impacts of such initiatives as the Durham Statement on Open Access to Legal Scholarship.*

1. The Free Access to Law Movement

The Declaration on Free Access to Law states that:

> Public legal information from all countries and international institutions is part of the common heritage of humanity. Maximising access to this information promotes justice and the rule of law;
>
> Public legal information is digital common property and should be accessible to all on a non-profit basis and free of charge;
>
> Organisations such as legal information institutes have the right to publish public legal information and the government bodies that create or control that information should provide access to it so that it can be published by other parties.

The Declaration was first issued by representatives of legal information institutes (LIIs)[1] from eight areas of the world at the 2002 4th International Conference on Law via the Internet in Montreal.[2] The Montreal Declaration was issued at a time when other groups were making well-publicized statements regarding the importance of open access [3] to published scholarly and research literature in the sciences and other disciplines.[4]

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[1] A 'legal information institute' may be considered to be:

> *a provider of legal information that is independent of government, and provides free access on a non-profit basis to multiple sources of essential legal information, including both legislation and case law (or alternative sources of jurisprudence). ... They are therefore, in essence, aggregators of public legal information at a national or sometimes regional level* (Greenleaf, Chung and Mowbray 2007, 5).

[2] The history and development of the movement for free access to law can be found on the web site of the World Legal Information Institute (WorldLII).

[3] The 2002 Budapest Open Access Initiative (BOAI) defines 'open access' to scientific and scholarly research in terms of:

> *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.*

[4] The Budapest Open Access Initiative was issued in February 2002, the Bethesda Statement on Open Access Publishing in June 2003, and the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities in October 2003. For a

Today, legal information posted by fifteen national and regional legal information institutes is linked from the web site of the World Legal Information Institute (WorldLII). The site provides search capabilities for its own databases and for databases located on the sites of other legal information institutes.

In the Declaration, 'public legal information' is defined as:

> legal information produced by public bodies that have a duty to produce law and make it public. It includes primary sources of law, such as legislation, case law and treaties, as well as various secondary (interpretative) public sources, such as reports on preparatory work and law reform, and resulting from boards of inquiry. It also includes legal documents created as a result of public funding.[5]

Only a minority of legal jurisdictions world-wide offer comprehensive free electronic access to essential legal information through government web sites or by providing the data to independent sites (Greenleaf, Chung and Mowbray 2007, 6). In response, the Declaration on Free Access to Law proclaims that independent, non-profit organizations have a right to publish public legal information, and that governments should provide them access to the information so that they can publish it. Greenleaf, Chung and Mowbray argue that access to legal information through LIIs and other non-governmental publishers is essential both to fill gaps in access and 'to ensure that free access is not second-rate access' (Greenleaf, Chung and Mowbray 2007, 11).[6]

John Willinsky suggests that 'access to knowledge is a human right that is closely associated with the ability to defend, as well as to advocate for, other rights.' (Willinsky 2006, 143-154).[7] Neither the Declaration on Free Access to Law nor the other open access declarations issued in 2002-2003 argue for a right of open access to information. Nor do they discuss the possible bases for a rights-based access argument in the Universal Declaration of Human Rights ('Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits'), in the International Covenant on Economic, Social and Cultural Rights ('The States Parties to the present Covenant recognize the right of everyone: . . . To enjoy the benefits of scientific progress and its applications'), or, perhaps most explicitly, in the International Covenant on Civil and Political Rights ('Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice').

The Montreal Declaration on Free Access to Law comes closer to suggesting a rights-based justification for the subject of its concerns than do the other open access statements. The Declaration states that public legal information 'should be accessible to all on a non-profit basis and free of charge' (emphasis added), and does declare the right of 'Independent non-profit organisations . . . to publish public legal information'. Although it

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brief, but useful, introduction to the open access movement and the economics of open access publishing in disciplines other than law, see Willinsky (2009).

[5] The Montreal Declaration's distinction between primary and secondary sources of law is probably more applicable to common law jurisdictions than to civil law jurisdictions. In common law countries such as the United States, legal scholarship is usually classified as 'secondary' literature, and is distinguished from the 'primary' sources of law issued by bodies with law- or rule-making authority: legislatures, courts, and administrative agencies (See generally Ramsfield 2005, 45-61). See also Dabney (2009) (noting that the phrase '"public legal information" seems to be redundant. If it's legal information, then of course it's public').

[6] ('Governments may or may not publish the information themselves, but competition will help ensure that one or more versions are available for free access').

[7] Willinsky bases his position in Richard Pierre Claude's arguments for a 'right of access to the advancement of science' and Jacques Derrida's for a 'right to philosophy.' See also Lor & Britz (2005), 67 (basing the argument for information rights on 'the assumption that essential information is a basic resource in any society that needs to survive and develop').

In May 2011, the UN Special Rapporteur on the Promotion and Protection of the Right to Freedom of opinion and expression issued a report arguing for a right of access to the Internet based in Article 19 of the International Covenant on Civil and Political Rights (La Rue 2011).

does not argue for a right of open access to legal information, the Declaration includes language regarding human knowledge and common cultural heritage that resonates with the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights.[8]

2. Access to Legal Scholarship: The Law Journal

2.1. The Importance of Legal Scholarship

Legal scholarship is written to discuss, explain, and analyze the law, and to point researchers toward pertinent authorities in the sources of 'public legal information' identified in the Declaration on Free Access to Law and issued by legislatures, courts, and other bodies with law-making power, the sources. This literature supports and influences the professional work of judges, lawyers, and legal scholars, and explains the law to the public.

American scholars such as Michael Carroll have noted the linkages between the movement for free access to law and the calls in the sciences and other disciplines for open access to research and scholarly literature. Arguing for the importance of open access to legal scholarship, Carroll writes: 'Access to law matters. . . access to legal scholarship matters too' (Carroll 2006, 743). He also discusses 'serving the underserved'–those without access to commercial sources of legal information, suggesting that new communications technologies have also given scholars 'a duty to make [their] work available to the general (or, for the time-being, Internet-accessible) public' (Id., 756) (emphasis added).

2.2. The Law Journal

Particularly in the United States, articles published in legal journals have been the predominant form of legal scholarship since the late nineteenth century. In the U.S. some law journals, like journals in other disciplines, are faculty-edited and peer-reviewed, issued by professional and scholarly societies, and published by commercial or university presses. Most, however, are student-edited and published by law schools.[9]

Student-edited journals are uncommon outside the U.S., but faculty- and practitioner-edited journals are significant sources for legal scholarship and commentary on the law in all countries. Lawyers in civil law jurisdictions rely on legal journals not only for commentary but as sources for the full texts of court decisions and for annotations discussing their significance. In civil law countries, 'legal periodicals, which are run by professors rather than students, play a much more important role . . . than in common law countries in bringing new legislation and court opinions to the attention of the profession' (Glendon, Carozza and Picker 2008, 93). The practical value of law journals in common law jurisdictions is less certain, and challenges to their usefulness to attorneys and judges are frequent, at least in the U.S. (See, e.g., Edwards 1988, 291).[10] In recent years the Chief Justice of the U.S. Supreme Court has made clear his opinion of legal scholarship ("Interview with Chief Justice John G. Roberts Jr." 2010, 37).[11] Yet recent scholarship suggests that the U.S. federal courts, including

[8] The Declaration on Free Access to Law places public legal information within 'the common heritage of humanity'; the Budapest Initiative states that open access to the literature of scientific research will 'lay the foundation for uniting humanity in a common intellectual conversation and quest for knowledge'; and the Berlin Declaration defines 'open access as a comprehensive source of human knowledge and cultural heritage that has been approved by the scientific community'.
[9] One count suggests that 655 of 992 law journals published in the U.S. are student-edited (See Law Journals: Submissions and Ranking). Research conducted at Duke in November 2010 suggests that nearly 300 scholarly journals are published at the fifty 'Best [U.S.] Law Schools' as ranked by *U.S. News & World Report* in 2010 (Danner, Leong and Miller 2011, 44).
[10] ('Law professors seem more and more often content to talk only to each other--or perhaps to a few colleagues in other academic disciplines--rather than deal with the problems facing the profession').
[11] ('What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law….it doesn't help the practitioners or help the judges').

the Supreme Court, cite legal scholarship, particularly in important and difficult cases (Petherbridge and Schwartz 2011, 22-27; Schwartz and Petherbridge 2011, 1359-1364).[12]

The continuing publication of law journals in legal systems of all types and the growth in new titles suggest both the ongoing importance of the traditional journal article and the value to scholars and others of having access to legal scholarship. In addition, the interests of legal scholars and practicing attorneys alike in blogs, wikis, and purely electronic short-form articles published on law review web sites have prompted speculation about the potential of these new forms to improve communications between academic lawyers and the bar ('Blogs and Scholars' 2007, 22) and to alter the channels of scholarly discourse in law (Leiter 2006, 53). The need for informed commentary about the law should not be in doubt, whether it is published in traditional print journal formats, in all-electronic journals (enhanced perhaps by the emerging communication tools of the web), or posted in new shorter forms using those tools.

2.3. The Access Principle

Is this literature accessible to all who will benefit from it?[13] The proposition that scholars have a responsibility to make their work widely available through open access mechanisms has been forcefully developed and argued in John Willinsky's 2006 book: The Access Principle. Willinsky's 'access principle' states that a scholarly 'commitment to the value and quality of research carries with it a responsibility to extend the circulation of such work as far as possible and ideally to all who are in interested in it and all who might profit by it.' For Willinsky, the transformation of journal formats from print to online means that researchers and scholars, scholarly societies, publishers, and libraries are obligated to 'to do as much as they can to advance and improve access to research and scholarship' (Willinsky 2006, xii).

Willinsky argues that 'open access is also public access' (Willinsky 2006, 111). 'The public's right of access to this knowledge is not something that people have to earn. It is grounded in the basic right to know' (Id., 125) In law, it can be argued that legal scholars have a particular responsibility to make their work available because of the impact of law on the daily lives of the public, and the influences of legal scholarship on those who make the laws. As put by Carroll: 'the ideas we develop, and the arguments we make, affect the interests and rights of members of the public' (Carroll 2006, 756; see also Hricik and Salzmann 2005).

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

2.4. Access to Law Journals through Commercial Databases

Most, if not nearly all, print law journals are widely available in commercial databases. The major international legal databases, LexisNexis and Westlaw each include extensive runs of U.S. law journals, with some international coverage. The U.S.-based Hein Online service provides access to a nearly comprehensive

[12] For discussion of uses of academic writings in Canadian appellate courts, see Sharpe and Proulx (2011).
[13] Some of the output of legal scholars may be so specific to the law of a particular jurisdiction that it will be of limited interest to researchers outside the jurisdiction. Yet, substantial amounts of the literature may be of broader use (See Danner 2007, 386-389).

collection of U.S. law journals, with full retrospective collections for most, and recent issues for an increasing number, as well as an extensive list of international and non-U.S. law journals. JSTOR's collection of journals in law is small, but includes full runs of major U.S. law journals and a few from outside the U.S. In other countries, where law journals are usually published by commercial publishers, current issues, some back volumes, and individual articles from new issues are frequently available for purchase on publisher web sites.[14]

Although much of the content of important journals in law is available in commercial databases, it is important to bear in mind that those works are typically accessible only to researchers affiliated with institutions with the resources to pay for licensed access to the databases, or in some cases on a pay-per-article basis from the publisher of the journal. There are programs to provide low cost or free access to journals in selected subjects to researchers in developing countries. Research4forLife is a partnership of the WHO, FAO, UNEP, Cornell and Yale Universities, and the International Association of Scientific, Technical & Medical Publishers designed to provide free or low cost access to academic and professional peer-reviewed content online to developing countries. The partnership includes three programs: HINARI, the World Health Organization's Health InterNetwork Access to Research Initiative; AGORA (Access to Global Online Research in Agriculture), a program of the Food and Agriculture Organization of the UN; OARE (Online Access to Research in the Environment), a consortium coordinated by the United Nations Environment Programme (UNEP) (See generally Willinsky 2006, 101-103). Each of these programs focuses on the sciences and provides access to few law journals.[15] The long term benefits of these programs are questioned by some open access advocates (see infra sec. 5).

In counterpoint to programs that make available journals published in the developed countries of the North to developing countries, but do not foster creation and distribution of local journals, the Public Knowledge Project's Open Journals Systems (OJS) program makes open source software freely available worldwide for the purpose of making open access publishing a more viable option for journals with limited resources. (see Esseh 2006). Its January 2010 list of journals using OJS software includes 678 journals in Asia, 429 in Africa, 96 in Oceania, and 1537 in South America (see Journals Using Open Journal Systems by Continent).

2.5. Open Access to Law Journals

Lund University's Directory of Open Access Journals (DOAJ) suggests that few law journals are freely available on the web. Of over 7,150 journals listed on DOAJ, only 123 are listed under law. Of those, 29 are published in the U.S. In addition, only a few journals have signed on to the principles of the Science Commons Open Access Law Program (OALP), a project to promote open access in law journal publishing. Since OALP's Open Access Law Journal Principles were promulgated in 2005, fewer than 50 law journals (nearly all from the U.S.) have either adopted the principles or indicated that they are operating under policies consistent with them.

The number of open access journals listed for law is surprisingly low, particularly for the U.S., where over 650 law journals are published at law schools, not for profit, but for the purposes of disseminating scholarship and providing educational experiences for student editors. Yet, although few law journals are listed in the

[14] In South Africa, for example, the articles in most major law journals are generally accessible electronically through the Sabinet ePublications Law Collection via pre-paid subscriptions or individual article purchases.

[15] Somewhat greater access to law journals is provided through the activities of the International Network for the Availability of Scientific Publications (INASP) and EIFL (Electronic Information for Libraries). INASP works with about 50 international publishers to facilitate access to their publications in in 23 partner countries in Africa, the Asia Pacific region, and Latin America. Publishers with significant law content include: Cambridge University Press, EBSCO, Gale (Cengage), JSTOR, Oxford Journals, Project Muse, Sage, and the University of Chicago Press. EIFL negotiates electronic journal subscriptions on a multi-country consortia basis, working with nearly 50 member countries, and 20 publishers and aggregators, including Cambridge University Press, JSTOR, Oxford University Press, and Project Muse.

There has been some sense that non-commercial (professional and society) publishers are less aware of these programs than large commercial publishers (See E-journals: Developing Country Access Survey, 2002 (2003), 6). On open access issues for society publishers generally see Cooney-McQuat, Busch and Kahn (2010).

Directory of Open Access Journals (or as signatories to the Open Access Law Project), many have significant web presences and (at least in the U.S.) make the texts of at least some articles available in PDF format on the journal web sites.

Are the legal information institutes a likely force for providing greater access to legal scholarship? In 2007, Greenleaf, Chung and Mowbray acknowledged that, while only a small number of journals are available in LII databases, law journals can be considered 'public legal information' and are an area of possible expansion for the LIIs (Greenleaf, Chung and Mowbray, 2007 at 25.) In 2011, they reported a major expansion of legal scholarship content in the Australasian Legal Information Institute (AustLII) Legal Scholarship Library (Greenleaf, Mowbray and Chung 2011, 103). Presently, about 60 LII law journal databases, mostly from the Australian Legal Information Institute (AustLII), are listed and linked on WorldLII's Law Journals Databases page. In addition, WorldLII's Catalog and Websearch facilities link to and search over 350 journal web sites world-wide.

Yet, in a 2009 posting comparing the roles of the LIIs with the major commercial legal information publishers and lower cost commercial legal information services, Tom Bruce, director of the Cornell Law School Legal Information Institute, notes:

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

If Bruce is correct in his sense that the intended audiences for the legal information institutes both differ from those of commercial services and vary among the LIIs themselves, will the LIIs be the best platforms of making legal scholarship openly accessible? How else can the articles published in traditional print law journals be made fully accessible?

2.6. The Durham Statement on Open Access to Legal Scholarship

One answer, at least for journals published at academic institutions, is through action by the journals themselves. In February 2009, the directors of the law libraries at a dozen major U.S. law schools issued the Durham Statement on Open Access to Legal Scholarship, which calls for all law schools to stop publishing their journals in print format and to rely instead on electronic publication. The Durham Statement notes that legal researchers now prefer to access and use information of all sorts electronically, rather than in print, and that it is increasingly uneconomical both for law libraries to collect journals in digital and print formats, and for U.S. law schools to continue printing and mailing print issues of their student-edited journals.

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

The Durham Statement thus endorses the goals of Willinsky's access principle by urging the publishers of legal scholarship to make the works they publish publicly available to audiences who would otherwise not have access to them. Because it goes further than most calls for open access to scholarship by calling for an end to print publication of journal issues and complete reliance on digital formats, the Statement forces consideration of preservation issues as well as improved access to legal scholarship (See generally Danner, Leong and Miller 2011).

3. Repositories of Legal Scholarship

The idea of replacing the traditional profit-driven journal publishing system with freely available open access journals is sometimes referred to as 'the gold road' to open access. Another approach, 'the green road' relies not on reforming the journal system, but on encouraging authors of scholarly works to self-post (or self-archive) versions of their works on open sites (See generally Guédon 2004).[16] In some disciplines, including law, electronic posting in digital repositories makes new scholarship available much more quickly than it would be otherwise.

3.1 Disciplinary Repositories

Digital repositories generally fall into one of two categories. Disciplinary repositories focus on specific fields of study and are open to papers on the covered subject areas from researchers anywhere.[17] Legal scholars in the U.S. and elsewhere have taken to disseminating their works through postings in the Social Science Research Network (SSRN), which provides repository services for law through its Legal Scholarship Network. The BePress Legal Repository, part of the Berkeley Electronic Press (BePress), offers similar services.

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

In law, because they are less commonly grant-funded, author postings of research papers to open access repositories are driven less than in other fields by requirements of funding agencies or government mandates. Posting new works in law helps authors make their new works widely available quickly and supports law school interests in showcasing their faculties' scholarly efforts. Bu, is it enough to rely on the initiative of individual authors to post their own works to such disciplinary repositories as SSRN and BePress? If law schools and other institutional publishers of legal scholarship take the responsibilities of the access principle seriously, what more can they do to help scholars meet those responsibilities? In particular, what can law schools do to ensure that legal scholarship is freely and openly available?

3.2 Institutional Repositories

In addition to disciplinary repositories, open access advocates also promote institutional repositories: 'digital collections capturing and preserving the intellectual output of a single or multi-university community'. Institutional repositories are intended to showcase scholarship and other materials produced at specific institutions (Crow 2002, 4, 6). The best-known platform for large multi-disciplinary repositories designed to house a variety of digital objects is DSpace, which was developed at the Massachusetts Institute of Technology. Smaller scale institutional repositories established at the school or departmental levels in universities are often supported by platforms such as E-Prints, developed at the University of Southampton.

[16] Without the labels, the two strategies are also set forth in the Budapest Open Access Initiative. One recent commentator notes: 'we're rapidly approaching the point where green OA is the default for new research articles, even if it coexists with TA [toll access, or subscription access] from conventional journals. Green OA is already the default for physics worldwide, and for medicine in North America, for different reasons' (Poydner, 2011, 36).

[17] The uses of repositories and other means for sharing documents and other information vary by discipline (See Borgman 2007, 180-226).

Institutional repositories are also hosted by outside services such as BePress's Digital Commons. BePress Digital Commons customers include universities in Australia, Japan, New Zealand, and Europe, as well as colleges and universities in the U.S. and a growing number of U.S. law schools, many of whose papers can be searched as part of the NELLCO Legal Scholarship Repository.

As noted above, legal scholars are not as likely to be required to post their works by funding agencies or governments as are scholars in other areas. Postings of new scholarship may be required or at least strongly encouraged, however, by new policies at some universities requiring faculty to provide electronic copies of the final versions of their articles for deposit in an open access repository. As one example, in May 2008, the Harvard Law School faculty voted unanimously to make each faculty member's articles freely available in an online repository (See 'Harvard Law Faculty Votes for 'Open Access' to Scholarly Articles' 2008).

In supporting scholars' efforts to fulfill their obligations under access principle, is there a role to be played by institutional repositories hosted at individual law schools or operated jointly by several schools? Some sense of the possibilities might be found in looking at the experiences of one law school that for nearly 15 years has pursued an open access agenda not only for its journals but to expose the scholarship of its faculty to larger audiences, wherever those works are published.

4. Duke Law School

The Duke University School of Law in Durham, North Carolina, is a privately-funded institution with about 650 students enrolled in its three year juris doctor program, 85-100 students each year in its international LLM program, several SJD students, and a full-time faculty of 58. Duke Law publishes eight traditional student-edited print law journals [18] and one all-electronic journal.[19] Articles published in the print journals are available through LexisNexis, Westlaw, Hein Online, and other databases, as well as on the Duke Law web site.

4.1. Web Journals

In 1998, Duke began posting new articles from its print journals on the law school web site, after deciding that the benefits of providing free access to the journals outweighed the possible effects on print subscriptions. New issues of each journal have typically been available on the Duke Law web site in HTML and PDF formats before their publication in print. Since 2011, all back issues of the journals are available in the Duke Law Scholarship Repository. All Duke Law journals are listed in the Directory of Open Access Journals and are signatories to the principles of the Science Commons Open Access Law Program.

4.2. Duke Law Scholarship Repository

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

[18] They are: the *Duke Law Journal* (1951-); *Law & Contemporary Problems* (1933-); the *Alaska Law Review* (1984-); the *Duke Journal of Comparative & International Law* (1991-); the *Duke Environmental Law & Policy Forum* (1991-); the *Duke Journal of Gender Law & Policy* (1994-); and the *Duke Constitutional and Public Law Journal* (2006-); and the *Duke Law Forum for Law & Social Change* (2009-)
[19] *Duke Law & Technology Review* (2001-).

The Duke Law Scholarship Repository aims to include comprehensive holdings of the final versions of all works by current Duke Faculty members, and over time to extend coverage retrospectively to cover works by everyone who has taught at Duke. The repository holds over 2000 papers and is searchable on the Duke Law web site, as well as through Google and other general web search engines. The repository runs on Digital Commons software, hosted by BePress. Because the repository complies with the standards and protocols of the Open Access Initiative, its holdings are searchable through harvesters of open access repositories, as well as through Google and other search engines.

5. Dropping the Barriers to Discourse and Dialogue

In the United States, the possibilities for successfully promoting greater open access to legal scholarship are no doubt made easier by the unique circumstances under which legal scholarship is published. The predominant publishing model, based on student-edited, institutionally-published journals, largely removes the profit-making interests of commercial publishers as a barrier to open posting of papers in institutional and disciplinary repositories, or to publishing them in open access journals. Legal scholars in the U.S. feel free to post papers in the SSRN and BePress disciplinary repositories without compromising their chances to publish new works in leading law journals. Infrastructure, bandwidth, and other technological issues are of little concern to authors, publishers, or those seeking to access and use legal scholarship. In other parts of the world, law journals are more likely to be published by commercial or society publishers with financial considerations limiting their incentives to provide immediate open access to the works they publish. And, in much of the rest of the world, limited bandwidth and infrastructure concerns create significant obstacles for all participants in the scholarly communications system (creators, disseminators, and users) (Nwagwu and Ahmed 2009, 84-87).

World-wide, the prospects for improved access to legal scholarship (as well as to scholarship in other fields) are affected not only by technological limitations, but by other long-standing and persistent obstacles to free flow of information and knowledge between the developed countries of the North and the countries of the South. There is a substantial literature on this subject, much of which focuses on Africa.[20] It is notable in this literature that the explosive development of information and communications technologies in the North is often cited as widening the information gaps between researchers in the North and in the South, and making it harder for researchers and scholars in developing countries to participate fully in scholarly discourse (See, e.g., Arunachalam 2003, 135-137; Chan, Kirsop and Arunachalam 2011, 1).

Colin Darch has asked whether the developed countries of the North will 'continue to refuse to cooperate in the establishment of an equitable world information order, based on entrenched principles of full disclosure and free flow' (Darch 1998, 2-6). Have international programs done enough to make the scholarship of the South more visible outside the countries or regions where it is produced? As put by Subbiah Arunachalam, 'research conducted in developing countries lacks visibility. Nobody notices it. Nobody quotes it. It gets buried in an obscure corner of the world output of literature' (Arunachalam, 2003, 137; see also Lor and Britz 2005, 71-72).

Pippa Smart has pointed out that in the sciences the imbalance in what is published and accessible to researchers between North and South results in duplication of research, waste of resources, and biased interpretations of findings, and that poor dissemination and indexing of African research outside the African continent compounds the problem of low investment in local research (Smart 2005, 42, 43). Others note the threats that improved electronic access to international journals poses to local publishers. Diana Rosenberg asks 'whether the 'flooding' of local markets with free or low-cost information from international sources might wipe out local publishers' (Rosenberg 2002, 55).

[20] Much is reviewed and listed in Nwagwu and Ahmed (2009).

In addition, Leslie Chan, Barbara Kirsop and Subbiah Arunachalam have questioned whether the Research4Life programs (HINARI, AGORA, and OARE) organized in partnership between commercial publishers and UN agencies to provide free or low cost access to journals in developing countries 'may be serving as a marketing device to prepare the ground for national site licenses in the countries with rising FNP or growing research needs' (Chan, Kirsop and Arunachalam 2011, 1).[21] They note as well that because these programs come 'with the blessings of the UN agencies and powerful commercial publishers, it has been hard to wean research communities off dependency systems and onto true open access (OA) resources' (Id.).

In The Access Principle, John Willinsky suggests that open access publishing models hold promise 'for broadening the circulation and exchange of knowledge . . . [and] of moving knowledge from the closed cloisters of privileged, well-endowed universities to institutions worldwide'(Willinsky 2006, 33). For Willinsky, locally managed open access publishing systems, with searchable global access to their contents, will provide greater visibility for scholarship produced in developing countries, the promise for greater intellectual autonomy for scholars everywhere, and the opportunity for all to participate on an equal basis with others in their field. (Id., 104-105). In a 2011 article, Chan, Kirsop and Arunachalam suggest that that open access also 'provides an unprecedented opportunity for South-South exchange', noting that 'research findings from regions with similar socio-economic conditions may be far more relevant than research from the richer countries' (Chan, Kirsop and Arunachalam 2011, 1-2).

How might open access repositories increase the visibility of research and scholarship in the South? A 2002 article by Chan and Kirsop points out that repositories and other archiving initiatives provide opportunities:

> to contribute to the global knowledge base by archiving their own research literature, thereby reducing the south to north knowledge gap and professional isolation . . . [and employing] an increasingly available means to distribute local research in a way that is highly visible and without the difficulties that are sometimes met in publishing in journals (e.g. biased discrimination between submissions generated in the north and south) (Chan and Kirsop 2002,140-142; see also Arunachalam 2003,140-142; Lor and Britz 2005, 72).

Writing with Subbiah Arunachalam, Chan and Kirsop have also noted that research generated in developing and emerging countries is '"missing" to the international knowledge base because of financial restrictions affecting its publication and distribution'. Their 2005 paper argues that open archiving is the solution to this problem and urge awareness-raising and sharing of technical knowledge regarding creating and maintaining archives (Arunachalam, Chan and Kirsop 2005, 9). In 2011, they note 'growing … awareness about institutional repositories' in Africa due to the efforts of such organizations as Electronic Information for Libraries and the Electronic Publishing Trust for Development (with which they are affiliated) (Chan, Kirsop and Arunachalam 2011, 2).

Yet, despite the potential of open archiving and institutional repositories for 'facilitating the movement of knowledge—in all directions' (PLoS Editors 2011, 2), it is worth noting the cautions expressed by Nwagwu and Ahmed regarding what they term the 'crucial question': How do we build OA in Africa? After pointing out that open access initiatives 'are characterised by construction of websites containing resources which scientists are expected to use, they note that without 'deliberate and organised efforts by communities in Africa, it will yet be proved whether the strategy of "build it and they will use it" will suffice in making the movement vibrant'. For Nwagwu and Ahmed, 'There is a need for a global community of stakeholder groups—librarians, authors, etc. who will come together to champion the cause of OA', funding from 'non-profit foundations at global and national levels', and backing by international organizations (Nwagwu and Ahmed 2009, 91).

[21] In 2011, five international publishers temporarily withdrew free access to 2500 health and biomedical journals under the WHO HINARI program for Bangladeshi institutions (see 'Publishers Withdraw Free Access' 2011, 125; PLoS Medicine Editors 2011, 1).

Few writers on issues of access to scholarship in the developing world comment directly on legal scholarship or on specific issues of information flow for legal literature.22 Yet, as argued above, the responsibility to make their work widely accessible should be as applicable to legal scholars as it is to scholars and researchers in other fields. Following the need for collaborative activities stated by Nwagwu and Ahmed, how can law schools, law librarians, technologists working in legal institutions, open access advocates, and the editors of law journals collaborate to assist legal scholars in meeting this responsibility? In light of what we know about how legal scholarship is created, published and distributed throughout the world, it is essential to work together to determine which strategies will be most effective in improving access to legal commentary and ensuring the free flow of published scholarship between North and South.

Duke Law School's open access initiatives have been successful in improving access to scholarship published at Duke Law and to works of the Duke faculty, and making those works more visible to readers outside the U.S., to scholars in other disciplines, and to policy-makers in government and elsewhere. They have also afforded opportunities for faculty, students, law librarians, and information technologists to collaborate successfully with other law school and university administrators. Through their joint efforts, the school has assisted its faculty in making their works widely, openly, and freely available, and in meeting the responsibilities encompassed in the access principle.

The success of the Duke repository suggests that even small institutional repositories can benefit from implementing Willinsky's 'publishing systems that can be installed and controlled locally, but have a global presence'. They can make local scholarship not only more visible, but readily available to anyone who will benefit from access to it. In accomplishing those goals, they go far toward promoting what Colin Darch called 'the establishment of an equitable world information order, based on entrenched principles of full disclosure and free flow' (Darch 1998, 12).

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[22] For commentary on the sustainability of Free Access to Law Initiatives, with a focus on Africa, see Moncion & Badeva-Bright (2011). See also *Environmental Scan Report: Free Access to Law; Is It Here to Stay?* (2010).

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