

1-2020

## Correcting the Record: Post-Publication Corrections and the Integrity of Legal Scholarship

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### Recommended Citation

112 Law Libr. J. 365 (2020)

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# CORRECTING THE RECORD: POST-PUBLICATION CORRECTIONS AND THE INTEGRITY OF LEGAL SCHOLARSHIP\*

Janet Sinder\*\*

*In the age of electronic publication, post-publication correction of errors in law journal articles may seem like a simple, technical matter. But the lack of standardized policies and practices related to errors discovered after publication has allowed multiple versions of articles to co-exist and retracted or plagiarizing articles to remain unnoted. An examination of a sampling of articles with publication errors highlights the need for a uniform system to allow readers to know which version of an article is the most current and correct, what changes have been made to corrected articles, and whether other, even more serious, problems were discovered. After reviewing the scope of the problem, the article suggests policies and practices law journals should adopt to preserve the integrity of the scholarship they publish and ways that law journals could work together to provide a uniform solution.*

I. INTRODUCTION—DEFINING THE PROBLEM .....	2
II. CHARACTERISTICS OF SCHOLARLY INTEGRITY .....	5
III. CURRENT STATUS OF POST-PUBLICATION CORRECTIONS IN LEGAL SCHOLARSHIP: CASE STUDIES.....	7
A. Example 1: Minor Text Changes .....	9
B. Example 2: Major Text Changes.....	11
C. Example 3: Data Errors .....	12
D. Examples 4 and 5: Plagiarism.....	14
E. Example 6: Retraction and Withdrawal .....	16
F. Case Study Results .....	17
IV. A TYPOLOGY OF ERRORS.....	20
A. Typographical Errors .....	20
B. Errors of Fact.....	21
C. Expedient Corrections .....	22
D. Errors Requiring Retraction .....	22
V. CORRECTING BETTER.....	23
A. Instructive Analogies .....	23

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\* © Janet Sinder, 2020. My thanks to the Brooklyn Law School Dean’s Summer Research Stipend Program for supporting my work on this article, as well as to the attendees at the BLS Summer Faculty Workshop for their helpful comments at a time when the article was barely more than an outline. I also received incredibly useful suggestions from Dana Brakman Reiser, Bennett Capers, Ted Janger, Ben Keele, Brian Lee, Theresa Newman, and Eric Yap. The article is a revised version of the winning entry in the Open Division of the 2020 AALL/LexisNexis Call for Papers.

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B. Systems for Tracking Changes to Journal Articles .....	27
C. Use of These Solutions by Law Reviews .....	30
VI. RECOMMENDED POLICIES AND PRACTICES .....	31
A. Commitment to Transparency and Consistency .....	31
B. Phase I: Improvements to Individual Journal Practices .....	31
C. Phase II: Coordinated Action .....	33
VII. CONCLUSION .....	35

## I. INTRODUCTION—DEFINING THE PROBLEM

Imagine you have just published an article in a law journal. Reading it over, you discover errors in the published version. Maybe they are your errors or maybe they were accidentally introduced by the journal.<sup>1</sup> What would you ask the journal to do? Alternatively, imagine you are a law journal editor, most likely a third-year law student, and an author tells you there is a problem with an article she published in your journal, and she wants it fixed. What do you do? What if a published article contains data errors or plagiarizing material? What should be done then?

In the age of electronic publication, post-publication correction of errors in law journal articles may seem to be a simple, technical problem, to which the solution is to issue a corrected electronic version of the article and move on. Unfortunately, the ease of posting a new version online has allowed multiple versions of articles to co-exist, and the lack of standards for retractions means that erroneous or plagiarizing articles remain unnoted. Law journals appear to lack policies about how to handle post-publication corrections, and authors and editors probably never consider the consequences of issuing a revised version or a retraction.<sup>2</sup>

As this article will show, current practices for correcting errors discovered after publication appear to be ad hoc, and not very effective. They lack both consistency in individual cases (i.e., corrections are not made to all versions of an article) and consistency between cases (corrections are handled differently each time), and they are often accompanied by a lack of transparency as to what the error was and how it has been corrected. The absence of standardized practices has a significant impact on the integrity of legal scholarship.

Law students are taught to rigorously check primary sources, making sure that, among other things, all court opinions cited are still valid. Yet, for law

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<sup>1</sup> Justifiably or not, law professors are famously skeptical of the editorial quality of student-edited law reviews. *See, e.g.*, Barry Friedman, *Fixing Law Reviews*, 67 DUKE L.J. 1297, 1318–19 (2018).

<sup>2</sup> This article considers the issue only as it relates to law journals. As is discussed in part V, *infra*, disciplines other than law have developed robust systems for post-publication correction.

journal articles, there is often nothing to tell readers that an article they are relying on has been revised or retracted. Even if there is a notification of some sort (perhaps an errata notice or a footnote in the article), there is no way for readers to verify which is the latest, most “correct” version of the article, or if the article has been retracted. Finally, there is often no indication of what specific changes were made to an article, leaving even innocent authors open to charges of concealing errors or impolitic statements.

Without clear and specific notifications of revisions and retractions, readers can unknowingly rely on erroneous materials and are likely to pass those errors along in their own writing, opening themselves up to criticism as well as affecting the validity of their conclusions and causing similar problems for the next round of readers. The lack of a system for tracking post-publication corrections leads to the same problems that Richard Lazarus describes in his article about the revision of U.S. Supreme Court opinions after they are issued,<sup>3</sup> or that are encountered when dealing with the depublication of state court opinions.<sup>4</sup>

In the pre-digital age, when journals were available only in print, there were several possible solutions when errors were discovered after publication. If the error was minor or limited to a very small portion of the article, the journal could publish an erratum in a later issue, indicating the errors and corrections.<sup>5</sup> Alternatively, the journal could mail corrected pages to subscribers to be “tipped in” to the issue<sup>6</sup> or even send subscribers stickers to be pasted over the text or in the margins of the volume.<sup>7</sup> For situations involving very serious errors, a journal could republish the issue in its entirety, either with a revised version of the article, or without the article at all. It would then mail the issue to subscribers with instructions on how to replace the older version.

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<sup>3</sup> Richard J. Lazarus, *The (Non)Finality of Supreme Court Opinions*, 128 HARV. L. REV. 540 (2014). The article, which focuses on changes made to Supreme Court opinions after initial publication, is discussed in more detail *infra* part V.

<sup>4</sup> For example, “[t]he [California] Supreme Court may order that an opinion certified for publication is not to be published or that an opinion not certified is to be published. The Supreme Court may also order depublication of part of an opinion at any time after granting review.” Cal. R. Ct. 8.1105(e)(2) (2019). While the opinions are removed from the official state court reports, they still remain in West’s California Reporter, and on Lexis and Westlaw. *Depublication of California Cases*, UNIV. OF S.F. SCH. OF LAW, <https://legalresearch.usfca.edu/depublishation> [<https://perma.cc/JEZ6-C6KB>].

<sup>5</sup> Admittedly, many readers did not see the errata notices, but the difficulty of making effective changes made it less likely that authors would request changes and journals would agree to make them.

<sup>6</sup> See *Tipped-In Page*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Tipped-in\\_page](https://en.wikipedia.org/wiki/Tipped-in_page) (last updated Aug. 17, 2020).

<sup>7</sup> On the early use of what are called “cancel slips,” see Sarah Werner, *Correcting with Cancel Slips*, THE COLLATION (Apr. 14, 2015), <https://collation.folger.edu/2015/04/correcting-with-cancel-slips/> [<https://perma.cc/BR5M-2YRR>].

Digital publication has made this problem not, as some might think, easier to solve, but rather more complicated, and, to judge by the examples examined in part III, much worse. Correcting the electronic version of an article for typographical or factual errors seems simple: revise the document, and replace the previous version with the revised one. Despite its apparent simplicity, this seemingly obvious solution raises a multitude of questions, the most overarching of which are: How should editors determine if they will issue a revised version of an article, and what process should be followed if a retraction is required because of plagiarism or erroneous or falsified data?

If the editors decide to revise an article after publication, they must also consider the following: (1) how to ensure that all electronic versions are updated and that readers of the uncorrected print version will know it has been superseded by the corrected electronic version; (2) how readers of the revised electronic version will know it has been revised from the original version and what revisions were made; and (3) how readers will know which version is the “version of record,” i.e., the most up-to-date, correct version. All of this boils down to one important concern: When technology allows for the easy revision of articles after publication, how will law journals ensure that readers do not rely on the “wrong” version?

Unfortunately, as will be demonstrated in the case studies below, the lack of a set of best practices when correcting publication errors means that those relying on law journal articles to support their own work do not currently have a way to determine whether the version of an article they are reading is the current one, when and what changes were made when an article was revised, or whether the article is known to contain serious errors and should be retracted.

Fields other than law have instituted systems that address many of these problems.<sup>8</sup> Law has been slow to follow, perhaps because of the much-debated, but relatively unchanged system of student-edited law journals.<sup>9</sup> This article will not enter into that debate, but it will consider the scope of the problem related to post-publication corrections in law journals, and suggest some possible solutions that are designed to work with the publication system currently in place for law journals.

Part II of the article discusses the characteristics and values of scholarly integrity and considers whether these values are threatened by the current state of post-publication corrections, while part III contains case studies of how errors in

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<sup>8</sup> Some sections of this article distinguish between corrections and retractions, but generally a reference to post-publications corrections can be assumed to include retraction of articles as well.

<sup>9</sup> For a recent article in that persistent debate that includes both criticism of and recommendations to improve current law review practices, see Friedman, *supra* note 1.

law journals have been handled when they were discovered after publication. Part IV briefly outlines a typology of the errors being corrected, and part V discusses post-publication correction systems used by other disciplines and whether these would make sense for law journals. Finally, part VI recommends ways law journals could begin to work, both individually and in a coordinated way, to create a system that improves the integrity of legal scholarship.

## II. CHARACTERISTICS OF SCHOLARLY INTEGRITY

Scholarly integrity is often referred to but rarely clearly defined, and it can mean different things in different contexts.<sup>10</sup> For example, in 2008 the Council of Graduate Schools issued a report for the Project for Scholarly Integrity in Graduate Education.<sup>11</sup> The report's introduction said this about academic integrity, which includes scholarly integrity:

In the broader academic context, integrity is a concept rich with connotations that encompass understanding the minimal standards of compliance in research, the personal ethical decision-making processes of individuals, and ultimately the ways in which our institutions reflect the highest aspirations and broadest commitment on the part of the academic profession to the principles of truth, scholarship, and the responsible education of future scholars.<sup>12</sup>

The National Academy of Sciences followed with these guidelines on scientific research:

Some mistakes in the scientific record are quickly corrected by subsequent work. But mistakes that mislead subsequent researchers can waste large amounts of time and resources. When such a mistake appears in a journal article or book, it should be corrected in a note, erratum (for a production error), or corrigendum (for an author's error). Mistakes in other documents that are part of the

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<sup>10</sup> See, e.g., Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 238–43 (2012) (analyzing norms of scholarly integrity and noting differences from norms governing lawyers representing clients).

<sup>11</sup> COUNCIL OF GRADUATE SCHOOLS, THE PROJECT FOR SCHOLARLY INTEGRITY IN GRADUATE EDUCATION: A FRAMEWORK FOR COLLABORATIVE ACTION (Apr. 28, 2008), [https://www.cgsnet.org/ckfinder/userfiles/files/PSI\\_framework\\_document.pdf](https://www.cgsnet.org/ckfinder/userfiles/files/PSI_framework_document.pdf) [<https://perma.cc/829C-RP28>].

<sup>12</sup> *Id.* at 3.

scientific record—including research proposals, laboratory records, progress reports, abstracts, theses, and internal reports—should be corrected in a way that maintains the integrity of the original record and at the same time keeps other researchers from building on the erroneous results reported in the original.<sup>13</sup>

When relating scholarly integrity to the correction of errors after publication, integrity can be thought of as encompassing two separate issues: consistency of corrections and transparency about corrections. The emphasis on consistency fits with one of the dictionary definitions of *integrity*: “the state of being whole and undivided,” which is further defined as “the condition of being unified or sound in construction” and “internal consistency or lack of corruption in electronic data.”<sup>14</sup> Transparency fits under the other definition of integrity: “the quality of being honest and having strong moral principles.”<sup>15</sup> Consistency is easier to see, discuss, and agree on, because it is uncontroversial. It is difficult to imagine scholars disagreeing with the idea that if corrections are made, the corrected version should be available to readers of all formats of the article, and included in all databases containing the article. This does not mean that the original version should not also be available (a somewhat controversial position involving transparency, discussed below), but all readers looking at the article in any database or website should find the same corrected version.

Transparency is more problematic—not everyone appears to agree that every corrected article should indicate exactly what has been corrected, or that retracted articles should continue to be available,<sup>16</sup> or that all retractions should be

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<sup>13</sup> NAT’L ACAD. OF SCIENCES ET AL., ON BEING A SCIENTIST: A GUIDE TO RESPONSIBLE CONDUCT IN RESEARCH (3d ed. 2009). *See also* Joseph S. Francisco et al., *Scholarly Integrity*, 56 ANGEWANTE CHEMIE (INT’L ED.) 4070, 4070 (2017) (defining scholarly integrity).

<sup>14</sup> *Integrity*, OXFORD DICTIONARY OF ENGLISH (3d online ed., 2015), [http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m\\_en\\_gb0415130](http://www.oxfordreference.com/view/10.1093/acref/9780199571123.001.0001/m_en_gb0415130).

<sup>15</sup> *Id.* *Black’s Legal Dictionary* has a similar take on the word, defining *integrity* as: “1. Freedom from corruption or impurity; soundness; purity. 2. Moral soundness; the quality, state, or condition of being honest and upright.” *Integrity*, BLACK’S LEGAL DICTIONARY (10th ed. 2014).

<sup>16</sup> *See, e.g.*, Jeffrey Brainard & Jia You, *What a Massive Database of Retracted Papers Reveals About Science Publishing’s ‘Death Penalty,’* SCIENCEMAG.ORG (Oct. 25, 2018, 2:00PM), <https://www.sciencemag.org/news/2018/10/what-massive-database-retracted-papers-reveals-about-science-publishing-s-death-penalty> [<https://perma.cc/G5D5-JKRJ>].

There are numerous examples of retracted articles that continue to be cited for various reasons, including as authority. *See, e.g.*, Judit Bar-Ilan & Gali Halevi, *Post Retraction Citations in Context: A Case Study*, 113 SCIENTOMETRICS 547 (2017), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5629243/> [<https://perma.cc/F4R8-VUXS>] (examining the context of citations to retracted articles and focusing on articles cited ten or

publicly noted. We can see that apparent disagreement in the ways that some corrections are hidden by, for example, simply withdrawing an article from a database, making it unfindable; by stating that an article has been corrected but not showing the corrections; or by failing to note instances of plagiarism.<sup>17</sup>

This article argues that to preserve scholarly integrity, transparency is required to implement consistency. Readers can only know that a version has been corrected or retracted if it is marked as such, and if readers can see what changes have been made when they look at the revised version. Transparency should also be required to support one of the other, more substantive norms of scholarly integrity, *individual responsibility*.<sup>18</sup> Given that scholars are responsible for the content of their articles, any mistakes or more serious failings for which they are responsible should be corrected if possible or, if necessary, the article should be retracted and responsibility ascribed to the author. Conversely, if the mistakes were introduced by the journal's editors, that should be made clear in order to protect the author's reputation.

### **III. CURRENT STATUS OF POST-PUBLICATION CORRECTIONS IN LEGAL SCHOLARSHIP: CASE STUDIES**

In considering whether law journal publication practices harm the integrity of legal scholarship, it was important to first determine whether law journals already had processes in place to alert readers to post-publication corrections in ways that sufficiently protected the integrity of scholarly research in law. That is, were all the questions posed in the introduction already being answered satisfactorily?

I began by examining what readers would see when looking at corrected or retracted law journal articles in both print and online formats. Would the print journal contain a correction notice in a later issue? Would the online versions be corrected? If so, would this be indicated somewhere? Were readers told what corrections had been made? Did all the electronic versions reflect the corrections? Are there any consistent processes being followed in the ad hoc world of student-edited law journals?<sup>19</sup> For each journal article examined, I looked at the article in

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more times after retraction). This problem could be ameliorated by deleting retracted article from databases.

<sup>17</sup> See *infra* sections III.D–F for examples.

<sup>18</sup> Fallon, *supra* note 10, at 238–40 (positing that authors must be responsible for their research and for the contents of sources they rely on).

<sup>19</sup> I deem the student-edited law journal world ad hoc primarily because student editors are in their positions for only one year, and receive only rudimentary training, most of which is based on information handed down, formally or informally, from the outgoing editors. Oftentimes the request to make corrections after publication will be sent to a group of editors who did not



a number of different formats/databases which varied based on the type of correction that was made and what I found in the initial versions I examined.<sup>20</sup>

I also queried representatives from the three major legal databases that contain law journal articles: HeinOnline, LexisNexis, and Westlaw. Their responses indicated that online legal database providers respond to requests for corrections to the version in their databases by replacing one version with another.<sup>21</sup>

For the case study I examined print and electronic versions of six articles that I was able to determine had been corrected, retracted, or disavowed in some other way. A few were selected from the results of searches run in HeinOnline for: **errata or erratum**. Others were found by searching news stories or based on suggestions from colleagues. The case studies in this section describe what readers currently see when looking at these articles.<sup>22</sup> The corrections ranged from a change to one sentence, to corrections involving multiple sections of the article, to data errors and plagiarism, and finally to withdrawal of an article for unspecified reasons. In all six cases, the description of what happened and the resulting revisions to the article, if any, are from documents that are available either in print or online. The dates of the articles studied range from 1998 to 2018. One might expect processes to have improved as electronic publication of and access to law journal articles became more pervasive, but that does not appear to be the case. I have tried to avoid speculation as to the cause of the original error or why the revisions were handled the way they were. All six examples demonstrate a lack of consistency in how electronic versions are changed after errors are discovered and most demonstrate a lack of transparency about the post-publication correction process. I did not find any cases where revisions were

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publish the original article and have no knowledge of the article's publication process or what might have caused the error.

<sup>20</sup> For each article, I checked, at a minimum, LexisNexis, Westlaw, HeinOnline, and the journal's website or the institutional repository run by the journal's law school. If it seemed relevant, I looked at other online or print sources, and my findings for those are included.

<sup>21</sup> The Integration Specialist at HeinOnline noted that this is done "regularly" and that HeinOnline simply replaces the article with a revised version. E-Mail from Brandon Wiseman, HeinOnline Integration, to author (May 16, 2018) (on file with author). This is the same process that is followed by LexisNexis, E-Mail from Catherine Cabang, Content Specialist, LexisNexis, to author (June 26, 2018) (on file with author), and Westlaw, E-Mail from Laura C. Nutzmann-Hoyt, Thomson Reuters, to author (Aug. 28, 2018) (on file with author). The only revision information made available is what is provided by the journal within the article itself. According to Brandon Wiseman of HeinOnline, "Sometimes the Journal will include an extra Errata on the article which we would include in the online product, but we would not create one ourselves." E-mail from Brandon Wiseman, HeinOnline Integration, to author (May 22, 2018) (on file with author).

<sup>22</sup> Like authors, journals may also have an interest in repairing their reputations *ex post facto*. To that end I have used Perma.cc to preserve documents as I saw them during my research, and where that was not possible, have retained printed or downloaded copies of PDF files.

made consistently and transparently, although I presume (and hope) there do exist some articles where this is the case.<sup>23</sup>

### ***A. Example 1: Minor Text Changes***

I began my research with a simple correction to a 2017 article in the *California Law Review: Technoheritage* by Sonia Katyal.<sup>24</sup> The article defines *technoheritage* as “the marriage of technology and cultural heritage”<sup>25</sup> and considers what types of intellectual property issues might arise from using technology to digitally reproduce items of cultural heritage. In the original article, one sentence on page 1130 read: “In 2009, the Smithsonian decided to scan and digitize its collection of over 137 million objects in 3-D, including an ancient Cosmic Buddha sculpture, a rare orchid, and a series of modern art installations.”<sup>26</sup>

Two issues later in the same volume of the journal, following the final article in that issue, the journal published a “Notice of Errata”:

At the request of the author, the text on page 1130 of *Technoheritage* by Sonia Katyal, appearing in Volume 105, Number 4 of the *California Law Review*, is revised to read:

In 2009, the Smithsonian decided to scan and digitize *parts of* its collection of over 137 million objects, *including some* objects in 3-D.

The *California Law Review* apologizes to the author and to readers for any inconvenience or confusion its error may have caused.<sup>27</sup>

While there is a huge factual difference between the Smithsonian having 137 million objects, all of which are 3-D, and all of which are being digitized, and the

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<sup>23</sup> While it may seem that my selection is skewed to support the idea that the process is broken, the examples I discuss here were the first and only examples I examined. I began work on this article planning to consider only whether correcting articles online would cause problems because of a discrepancy between the print version and the online versions. Perhaps naively, I did not initially think that I would discover inconsistencies between online versions, much less that I would fail to find an example where corrections to online versions were made consistently and transparently.

<sup>24</sup> Sonia K. Katyal, *Technoheritage*, 105 CALIF. L. REV. 1111 (2017). I found the article by searching the Most Cited Law Journals database on HeinOnline for **errata or erratum**.

<sup>25</sup> *Id.* at 1114.

<sup>26</sup> *Id.* at 1130.

<sup>27</sup> *Notice of Errata*, 105 CALIF. L. REV. at [unnumbered page following page 1910] (emphasis added indicating what was changed from original article text).

Smithsonian digitizing some of its 137 million objects, only some of which are 3-D, the statement was simply an example and not crucial to the author's thesis.

I examined the following versions of the article: the print journal, HeinOnline, the *California Law Review* in the Berkeley Law Scholarship Repository,<sup>28</sup> SSRN, LexisNexis, Westlaw, and a PDF version of the article found through a Google search. Only Westlaw contained the corrected version of the sentence noted above, and it did not contain any language indicating that the article had been updated or corrected. HeinOnline contained the original version and also contained the *Notice of Errata* following the last article in volume 105, no. 6.<sup>29</sup> The Berkeley Law Scholarship Repository links to the uncorrected version of the article<sup>30</sup> and did not have the *Notice of Errata* on its website for volume 105, no. 6. A PDF copy of the article on the *California Law Review* website<sup>31</sup> contained the uncorrected sentence.<sup>32</sup> The version on SSRN dated September 1, 2017, is also the uncorrected version.<sup>33</sup>

In this case study, a seemingly simple correction process resulted in both versions of the article being available with no indication about the correction anywhere other than the *Notice of Errata* published in the print version and in HeinOnline. Even the scholarship repository at Berkeley Law, which, with its mission of preserving scholarship,<sup>34</sup> one might hope would be the “version of

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<sup>28</sup> BERKELEYLAW SCHOLARSHIP REPOSITORY, <https://www.law.berkeley.edu/library/ir/> (last visited Sept. 18, 2020).

<sup>29</sup> HeinOnline did not list this in the table of contents, but included it at the end of the PDF of the preceding article, Emma Mclean-Riggs, Note, *Locked Together/in This Small Hated Space: Recognizing and Addressing Intimate Partner Violence Between Incarcerated Women*, 105 CALIF. L. REV. 1879 (2017). There is no listing in the PDF of the journal's table of contents for the *Notice of Errata*. The errata notice was returned in a full-text search in the Law Journals library of HeinOnline for: **errata or erratum**.

<sup>30</sup> CALIFORNIA LAW REVIEW, <https://www.law.berkeley.edu/library/ir/clr/> (last visited Sept. 18, 2020) (the link to the article [<https://lawcat.berkeley.edu/record/1127986>] can be found by browsing the contents of volume 105).

<sup>31</sup> Sonia K. Katyal, *Technoheritage*, <http://www.californialawreview.org/wp-content/uploads/2017/08/3Replacement-Katyal-36.pdf> (last visited Sept. 18, 2020).

<sup>32</sup> Sonia Katyal, *Technoheritage*, [www.californialawreview.org/wp-content/uploads/2017/08/3Replacement-Katyal-36.pdf](http://www.californialawreview.org/wp-content/uploads/2017/08/3Replacement-Katyal-36.pdf) [<https://perma.cc/KPX3-5PE6>].

<sup>33</sup> Sonia Katyal, *Technoheritage*, (UC Berkeley Public Law Research Paper, Sept. 1, 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3030437](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030437).

<sup>34</sup> Many law schools have open-access repositories designed to be permanent archives and containing scholarship written by their faculty members as well as articles published in their journals. Berkeley Law says of its repository: “The Berkeley Law Scholarship Repository provides free and permanent online access to published articles, works-in-progress, conference papers, lectures, reports, and workshop presentations produced by Berkeley Law School faculty, centers, programs, and journals.” *About the Berkeley Law Scholarship Repository*, BERKELEY LAW, <https://scholarship.law.berkeley.edu/about.html> [<https://perma.cc/D42Q-AP98>].

record,”<sup>35</sup> provided the uncorrected copy. Readers of any of the online versions—other, perhaps, than HeinOnline, which contains the errata notice in a later issue—would not know that a correction had been made, what that correction was, or whether they were looking at the corrected or uncorrected version.

### ***B. Example 2: Major Text Changes***

A recent example of an article that was significantly revised after publication is *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, which is about sentencing under the Military Justice Act of 2016, and was published in the *Notre Dame Law Review* in 2017.<sup>36</sup> The journal published an errata notice in issue 3 of the next volume, which said:

Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, 92 NOTRE DAME L. REV. 2179 (2017), appeared in Volume 92, Issue 5 of the *Notre Dame Law Review*. A revised version of this Note, with corrections, is available at [www.ndlawreview.org](http://www.ndlawreview.org).<sup>37</sup>

The *Notre Dame Law Review*'s website contained a PDF file of Flynn's Note with an asterisked footnote on the first page that reads: "This is an updated version of the Note that appears in the print edition of this volume of the *Notre Dame Law Review*."<sup>38</sup> This same updated version was available on HeinOnline and Westlaw. LexisNexis, though, contained the original version, as did the law school's digital repository, *NDLScholarship*.<sup>39</sup>

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<sup>35</sup> Unlike some other disciplines, law journals have no accepted or implicit idea of a version of record. See *infra* notes 119–122 and accompanying text for definitions recommended for use by the National Information Standards Organization. At a workshop where I presented an early draft of this article, several faculty members stated that they considered LexisNexis or Westlaw to be the version of record, an opinion that left the librarians in attendance somewhat aghast. In fact, three of the examples I looked at had different versions in LexisNexis and Westlaw. See Katyal, *supra* note 24; Flynn, *infra* note 36; Sohoni, *infra* note 77.

<sup>36</sup> Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, 92 NOTRE DAME L. REV. 2179 (2017).

<sup>37</sup> *Errata*, 93 NOTRE DAME L. REV. at [unnumbered page following 1414]. As with Katyal, *supra* note 24, the errata is not listed in the table of contents of the print journal or on HeinOnline. Based on these two examples, it appears that HeinOnline uses the journal's table of contents to create the one on its site.

<sup>38</sup> See Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*, <http://ndlawreview.org/wp-content/uploads/2018/03/Updated-Flynn.pdf> [<https://perma.cc/Y76U-2H8E>].

<sup>39</sup> See Sean Patrick Flynn, Note, *The More? Uniform Code of Military Justice (and a Practical Way to Make It Better)*,

The revised version does not indicate what changes were made to the original article. I reviewed the two PDF versions (the version on the *Law Review*'s website and the version in the law school's digital repository) side by side. The two versions have the same number of pages, but the revised version has ten fewer footnotes, and there are two places in the article where multiple paragraphs have been deleted and replaced with alternative text.<sup>40</sup>

### C. Example 3: Data Errors

In 2008, the *Tulane Law Review* published *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*.<sup>41</sup> In the article, the authors claimed that:

[t]his empirical and statistical study of the Louisiana Supreme Court over a fourteen-year period demonstrates that some of the justices have been significantly influenced—wittingly or unwittingly—by the campaign contributions they have received from litigants and lawyers appearing before these justices. Statistically speaking, campaign donors enjoy a favored status among litigants appearing before the justices.<sup>42</sup>

Unsurprisingly, the article received substantial publicity.<sup>43</sup> Several articles soon appeared questioning the study,<sup>44</sup> and the chief justice of the Louisiana

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<https://scholarship.law.nd.edu/cgi/viewcontent.cgi?article=4745&context=ndlr>  
[<https://perma.cc/E3P4-MBAM>] (private Perma link).

<sup>40</sup> Compare Flynn, *supra* note 38, at 2179–80, 2195–97 with Flynn, *supra* note 39, at 2179–80, 2195–97. I did not compare the articles word for word, but did also notice other places where minor changes were made, including changes to section headings. Compare Flynn, *supra* note 38, at 2182 (sec. I.B. “Complaints with the *Current System*”) with Flynn, *supra* note 39, at 2183 (sec. I.B. “Complaints with the *Military System*) (emphasis added).

<sup>41</sup> Vernon Valentine Palmer & John Levendis, *The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 82 TUL. L. REV. 1291, 1292 (2008).

<sup>42</sup> *Id.*

<sup>43</sup> See, e.g., Debra Cassens Weiss, *Study Says La. Supreme Court Justices Apparently Swayed by Campaign Cash*, ABAJOURNAL (Jan. 29, 2008, 5:02 PM CST), [http://www.abajournal.com/news/article/study\\_says\\_la\\_supreme\\_court\\_justices\\_swayed\\_by\\_campaign\\_cash/](http://www.abajournal.com/news/article/study_says_la_supreme_court_justices_swayed_by_campaign_cash/) [<https://perma.cc/5EVC-AM56>]; Adam Liptak, *Looking Anew at Campaign Cash and Elected Judges*, N.Y. TIMES (Jan. 29, 2008), <https://www.nytimes.com/2008/01/29/us/29bar.html> [<https://perma.cc/5JKP-6VWW>].

<sup>44</sup> See Robert Newman et al., Terrell, A Critique of “The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function,” [http://www.lasc.org/press\\_room/press\\_releases/2008/Critique\\_of\\_Tulane\\_Law\\_Review.pdf](http://www.lasc.org/press_room/press_releases/2008/Critique_of_Tulane_Law_Review.pdf) [<https://perma.cc/3G5X-FNMG>]; Kevin Tully & E. Phelps Gay, Rebuttal of “The Louisiana

Supreme Court issued a statement responding to the article's claims and criticizing the authors' data analysis.<sup>45</sup> In September 2008, the dean of Tulane Law School wrote a letter of apology to the justices, stating in part that "[b]ecause of the miscalculation in the underlying data, the reliability of some or all of the authors' conclusions in the study as published has been called into question."<sup>46</sup> The dean also wrote that "notice about the errors will be posted on the law review's Web site, and the same notice will go out with hard copies of the law review's next edition, and if possible, hyperlinked to electronically archived versions of the article."<sup>47</sup> According to an article in the *Times-Picayune*, many of the errors were discovered by one of the authors, who claimed that even with the data errors corrected "the study's conclusions, broadly speaking, are the same."<sup>48</sup>

At the end of its November 2008 print issue, the *Tulane Law Review* included this errata notice:

The Louisiana Supreme Court in Question: An Empirical Statistical Study of the Effects of Campaign Money on the Judicial Function, published in Volume 82 of the Tulane Law Review at 1291 (2008), was based on empirical data coded by the authors, but the data contained numerous coding errors. Tulane Law Review learned of the coding errors after the publication. Necessarily, these errors call into question some or all of

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Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function,"  
[http://www.lasc.org/press\\_room/press\\_releases/2008/Rebuttal\\_revised.pdf](http://www.lasc.org/press_room/press_releases/2008/Rebuttal_revised.pdf)  
[<https://perma.cc/7TFF-W7BQ>], revised version published as Kevin R. Tully & E. Phelps Gay, *The Louisiana Supreme Court Defended: A Rebuttal of The Louisiana Supreme Court in Question: An Empirical and Statistical Study of the Effects of Campaign Money on the Judicial Function*, 69 LA. L. REV. 281 (2009).

<sup>45</sup> Press Release, Statement of Chief Justice Pascal F. Calogero, Jr., Louisiana Supreme Court (June 12, 2008),  
[https://www.lasc.org/press\\_room/press\\_releases/2008/Statement\\_of\\_Chief\\_Justice\\_Calogero\\_June\\_12\\_2008.pdf](https://www.lasc.org/press_room/press_releases/2008/Statement_of_Chief_Justice_Calogero_June_12_2008.pdf) [<https://perma.cc/TZX6-9V83>].

<sup>46</sup> Dan Slater, *Dean Apologizes to Louisiana Supremes for Errors in Law Review Article*, WALL ST. JOURNAL LAW BLOG (Sept. 18, 2008), <https://blogs.wsj.com/law/2008/09/18/dean-apologizes-to-louisiana-supremes-for-errors-in-law-review-article/> [<https://perma.cc/K86A-HX4T>] [private Perma link] (quoting Susan Finch, *Tulane Law School Issues Apology to Louisiana Supreme Court*, NOLA.COM (updated Nov. 23, 2009), [https://www.nola.com/news/index.ssf/2008/09/law\\_school\\_issues\\_apology\\_to\\_h.html](https://www.nola.com/news/index.ssf/2008/09/law_school_issues_apology_to_h.html) [<https://perma.cc/6CLR-2J7F>]).

<sup>47</sup> Letter from Lawrence Ponoroff, Dean, Tulane Law Sch., to Hon. Pascal F. Calogero, Jr. et al., Justices of the La. Supreme Court (Sept. 10, 2008),  
[https://www.lasc.org/press\\_room/press\\_releases/2008/AR-TU\\_APOLOGY\\_LETTER.pdf](https://www.lasc.org/press_room/press_releases/2008/AR-TU_APOLOGY_LETTER.pdf)  
[<https://perma.cc/9TRA-K285>].

<sup>48</sup> Finch, *supra* note 46.

the conclusions in the study as published. The Law Review deeply regrets the errors.<sup>49</sup>

Examining the various electronic versions of this article was particularly troubling, because the data errors discovered after publication were serious enough that the article's conclusions were called into question. On HeinOnline, the original article was included in volume 82, but there was no errata notice included with the online version of the November 2008 issue, either separately in the table of contents, or as the last page of the preceding article, as there was for the Katyal and Flynn errata notices.<sup>50</sup> Neither of the other electronic versions (Westlaw and LexisNexis) contained a notice about the errors as conditionally promised by the dean.<sup>51</sup> The *Tulane Law Review*'s website contained only volumes 84 (2009–2010) through 92 (2018), so the article was not available on that site.<sup>52</sup> There is no scholarly repository at Tulane Law School or Tulane University containing *Tulane Law Review* articles. Without searching news articles or reading the erratum notice in the printed copy of the *Tulane Law Review*, readers will have no notice of the serious problems with the article.

#### ***D. Examples 4 and 5: Plagiarism***

Two of the articles examined were ones in which plagiarism was discovered after publication. While it is likely that many instances of plagiarism are discovered before publication,<sup>53</sup> discovery also often comes after publication, sometimes many years later.<sup>54</sup>

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<sup>49</sup> *Erratum*, 83 TULANE L. REV. at [unnumbered page following 284] (2008).

<sup>50</sup> See *Notice of Errata*, *supra* note 27; *Errata*, *supra* note 37. As with these two examples, no listing for the errata notice is in the print table of contents for the issue.

<sup>51</sup> See Letter from Laurence Ponoroff, Dean, Tulane Law Sch., *supra* note 47.

<sup>52</sup> *Issues: All Volumes*, TULANE LAW REVIEW, <http://www.tulanelawreview.org/category/volumes/> [<https://perma.cc/DA9D-QG48>].

<sup>53</sup> Of necessity, this statement is based on anecdotal evidence—journals do not publicize information they discover about plagiarism before an article is published.

<sup>54</sup> See, e.g., Jonathan Martin, *Plagiarism Costs Degree for Senator*, N.Y. TIMES, Oct. 11, 2014, at A14 (“The Army War College rescinded the master’s degree of Senator John E. Walsh on Friday [Oct. 10, 2014], determining that Mr. Walsh, a Montana Democrat, plagiarized his final paper there in 2007.”); Jonathan Bailey, *Should There Be a Statute of Limitations on Plagiarism Claims?*, PLAGIARISM TODAY (Mar. 19, 2013), <https://www.plagiarismtoday.com/2013/03/19/should-there-be-a-statute-of-limitations-on-plagiarism-claims/> [<https://perma.cc/G3UR-T3SN>].

i. *Retraction*

In 2004, the *Supreme Court Economic Review* published an article by Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*.<sup>55</sup> The article discussed the effectiveness of deterrence via criminal sanctions, given most people’s inherent irrational thinking. Three years after publication the article was retracted with a statement reading: “Substantial portions of *Irrationality and the Criminal Sanction*, 12 SCER 139 (2004), by Michael E. O’Neill, were appropriated without attribution from Anne C. Dailey’s book review, *Striving for Rationality*, 86 *Virginia Law Review* 349 (2000). Professor O’Neill’s article is therefore withdrawn.”<sup>56</sup>

The retraction appeared as a separate item in the table of contents for volume 15, so regular readers of the print version of the journal were given notice, but other readers will not see any evidence that the article was retracted. On Westlaw and LexisNexis the article is simply not there (although if you begin typing the article author and title into the search bar on Westlaw it will suggest a link to the retraction notice). The article remains on HeinOnline, as does the retraction, but there is no link between the two.<sup>57</sup> The same is true for the University of Chicago Press journals site<sup>58</sup> and the JSTOR database,<sup>59</sup> both of which contain the article and the later retraction in different issues. In 2008, a year after the article was retracted, the retraction received publicity when O’Neill was nominated by President George W. Bush for a federal district court judgeship.<sup>60</sup> Users of Westlaw and LexisNexis will not come across or cite the O’Neill article, but that is not the case for those using other databases or doing a Google search.<sup>61</sup>

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<sup>55</sup> Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*, 12 SUP. CT. ECON. REV. 139 (2004).

<sup>56</sup> *Retraction of Irrationality and the Criminal Sanction 12 SCER 139 (2004) by Michael E. O’Neill*, 15 SUP. CT. ECON. REV. 1 (2007);

<sup>57</sup> Listing the retraction notice in the print journal’s table of contents also meant that HeinOnline included it in the issue’s online table of contents. *See Retraction of Irrationality and the Criminal Sanction 12 SCER 139 (2004) by Michael E. O’Neill*, 15 SUP. CT. ECON. REV. 1 (2007), <https://heinonline.org/HOL/P?h=hein.journals/supeco15&i=11>. HeinOnline does not have a way to connect the errata notice with the original article, although one might expect HeinOnline’s ScholarCheck function to list the retraction, as it lists all articles that cite the original article. This, however, was not the case. The retraction does appear when searching for the title of the article in EBSCO’s Legal Source database.

<sup>58</sup> Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*, UNIV. OF CHICAGO PRESS JOURNALS, <https://www.journals.uchicago.edu/doi/abs/10.1086/scer.12.3655320>.

<sup>59</sup> Michael Edmund O’Neill, *Irrationality and the Criminal Sanction*, JSTOR, <https://www.jstor.org/stable/3655320> [<https://perma.cc/9QAG-RDHD>].

<sup>60</sup> Adam Liptak, *Copying Issue Raises Hurdle for Bush Pick*, N.Y. TIMES, July 4, 2008, at A1.

<sup>61</sup> A Google search for: **O’Neill Irrationality and the Criminal Sanction** retrieves the retraction as well as the article, but some users may not see the retraction link and will just follow the direct link to the article.



ii. *Censure Without Retraction*

Another plagiarism case resulted in a public censure by the Michigan Supreme Court,<sup>62</sup> but not a retraction of the article. In 1989, Michigan district court judge Thomas E. Brennan, Jr. was censured by the Michigan Supreme Court for plagiarizing material from two different articles in his 1987 article, *Dismissal and Prearrest Delay: Time Is of the Essence*, published in the *Cooley Law Review*.<sup>63</sup> The article can be found on Westlaw and HeinOnline, and there is nothing noted there about plagiarism.<sup>64</sup> LexisNexis's coverage of the *Cooley Law Review* begins with 1994, so the 1987 article is not in the database. Cooley Law School's law review archives only go back to 2013.<sup>65</sup>

***E. Example 6: Retraction and Withdrawal***

The final example is an article that was retracted and withdrawn from the *Denver Journal of International Law & Policy*. The article, which was critical of the actions of Boise Cascade Corporation, was published in 1998.<sup>66</sup> In 2000, the authors were informed that months earlier the university had ordered the article retracted, and pulled it from both Westlaw and LexisNexis.<sup>67</sup> The errata notice stated:

After further review of this article, the editorial staff has determined that the article was not consistent with the editorial standards of the *Journal* or of the University of Denver, and the portions of the article relating to Boise Cascade were clearly inappropriate and require elimination, revision or correction. Although the editors are committed to publishing articles on controversial issues of public importance, we are retracting portions of

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<sup>62</sup> Matter of Brennan, 447 N.W.2d 712 (Mich. 1989).

<sup>63</sup> *Id.* at 713–14. The article in question is Thomas E. Brennan, Jr., *Dismissal and Prearrest Delay: Time Is of the Essence*, 4 COOLEY L. REV. 493 (1987).

<sup>64</sup> I searched the *Cooley Law Review* on HeinOnline for: **errata or erratum or retraction** and for: **“Brennan, Jr.”**

<sup>65</sup> WMU-Cooley Law Review Archives, WESTERN MICH. U. COOLEY LAW SCH., <https://www.cooley.edu/lawreview/archives> [https://perma.cc/M8YR-TZXT].

<sup>66</sup> William A. Wines et al., *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*, 26 DENV. J. INT'L L. & POL'Y 453 (1998).

<sup>67</sup> Peter Monaghan, *A Journal Article Is Expunged and Its Authors Cry Foul*, CHRON. HIGHER EDUC. (Dec. 8, 2000), <https://www.chronicle.com/article/A-Journal-Article-Is-Expunged/15905>.

the article and have requested that the article be removed from on-line sources pending its re-editing.<sup>68</sup>

The authors sued in federal district court for defamation, breach of contract, and breach of the covenant of good faith and fair dealing.<sup>69</sup> The case was settled before trial.<sup>70</sup> As of this writing, the article remains available on HeinOnline.<sup>71</sup> A 2005 article co-authored by William Wines, a co-author of the *Denver Journal of International Law and Policy* article, discusses the situation in more detail.<sup>72</sup> It says that the original article is inaccessible on LexisNexis and Westlaw but that a draft is available on the journal's website.<sup>73</sup> At the time of this writing the link to that draft no longer worked.<sup>74</sup> Other than the news and law review articles discussing the incident, there is no notice in online versions of the journal that the article was retracted.<sup>75</sup> Instead of making the retraction public, the journal seems to have done its best to make both the article and the retraction notice disappear.

#### ***F. Case Study Results***

Overall, the examples I examined demonstrate a wide range of issues related to post-publication corrections. In no instance was the correction

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<sup>68</sup> *Errata*, 27 DENV. J. INT'L L. & POL'Y [unnumbered page following 544] (1999). Unlike other errata notices in the *Denver Journal of International Law and Policy*, this one was not listed in the table of contents for the issue. See, e.g., *Errata*, 27 DENV. J. INT'L L. & POL'Y 723 (1999). Instead, it appears as though it were a continuation of *Errata: Vijayashri Sripati, Human Rights in India—Fifty Years After Independence (1947–97)*, 27 DENV. J. INT'L L. & POL'Y 541 (1999). One might conclude the page was designed to be hidden, since the Sripati errata ends on page 544 and the following issue of the journal begins on page 545. See Thomas E. Carbonneau, *Introduction*, 27 DENV. J. INT'L L. & POL'Y 545 (1999) (article following errata notice).

<sup>69</sup> Complaint, *Wines et al. v. Univ. of Denver*, No. 1:00-cv-00488-EJL (D. Idaho, Aug. 31, 2000).

<sup>70</sup> See William A. Wines & Terrance J. Lau, *Can You Hear Me Now? Corporate Censorship and Its Troubling Implications for the First Amendment*, 55 DEPAUL L. REV. 119, 137 & n.124 (2005).

<sup>71</sup> William A. Wines et al., *The Critical Need for Law Reform to Regulate the Abusive Practices of Transnational Corporations: The Illustrative Case of Boise Cascade Corporation in Mexico's Costa Grande and Elsewhere*, 26 DENV. J. INT'L L. & POL'Y 453 (1998), <https://heinonline.org/HOL/P?h=hein.journals/denilp26&i=465>.

<sup>72</sup> Wines & Lau, *supra* note 70, at 139–41.

<sup>73</sup> *Id.* at 141.

<sup>74</sup> See *id.* at 141, n.167; *Page Not Found*, UNIV. OF DENVER STURM COLL. OF LAW, [http://www.law.du.edu/ilj/online\\_issues\\_folder/wines.pdf](http://www.law.du.edu/ilj/online_issues_folder/wines.pdf) (last visited Sept. 18, 2020).

<sup>75</sup> The errata notice appears in the print version of the journal. *Errata*, *supra* note 68. However, that page (which is unnumbered) has been omitted from the HeinOnline version of the issue. The Wines and Lau article cites to an article in the *Chronicle of Higher Education* when quoting the errata notice. Wines & Lau, *supra* note 70, at 140, nn.157–160 (citing Monaghan, *supra* note 67).

consistently made to all copies of the article. Rather, in every case, some of the available copies were uncorrected or available without being marked as revised or retracted. The examples varied in their transparency—some indicated an attempt at transparency but were inconsistent about it, and others showed no attempt at all or even an effort to keep the problem hidden. A few of the journals appear to be following a procedure for publishing corrected electronic copies, but without sufficient attention to consistency and transparency.

Even this small set of examples shows that the possible problems and variations with post-publication corrections are almost infinite.<sup>76</sup> While some law journals appear to be considering these issues (e.g., the corrected version of Flynn's Note with its initial footnote directing readers to the version on the journal's website<sup>77</sup>), the lack of a standard set of practices, makes it difficult for journals to provide the type of consistency and transparency researchers require and scholarly integrity demands. Eliminating print versions of law journals and publishing only electronic versions would not solve the problem: inconsistencies between electronic versions are likely to remain, along with the issue of revised versions failing to indicate what has been changed. Finally, the *Tulane Law Review* and *Denver Journal of International Law & Policy* examples highlight that even when the errors are considered to be substantial and the article worthy of retraction, legal scholarship has no standardized practice for retraction similar to that which exists in other fields.<sup>78</sup>

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<sup>76</sup> Far from basing my selection on outliers that were corrected in a problematic fashion, I chose a number of examples where I would have expected the corrections to have been undertaken carefully since many of them had extensive publicity.

<sup>77</sup> Flynn, *supra* note 38. Unfortunately, the *Notre Dame Law Review* has taken a step backward. For example, after publication, Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419 (2018), was revised and an errata notice published. *Errata*, 94 NOTRE DAME L. REV. at [unnumbered page following p. 472] (2019). Unlike Flynn, the revised version is not marked as such. See Mila Sohoni, *King's Domain*, 93 NOTRE DAME L. REV. 1419 (2018), <http://ndlawreview.org/wp-content/uploads/2018/10/2-Sohoni.pdf> [<https://perma.cc/SQJ7-E2DG>]. Only by comparing the print version with versions found online was I able to determine that HeinOnline, Westlaw, SSRN, the law review's website, and the Notre Dame Law School digital repository contain the revised version, while LexisNexis and several Gale databases contain the original version. The errata notice listed another article that had been revised from volume 93 of the *Notre Dame Law Review*. *Errata, supra*. Rather than moving toward making its revisions more transparent, the journal is making them harder to detect while seemingly changing an increasing number of articles after publication.

<sup>78</sup> It is also possible to speculate about political explanations for both situations. Perhaps the dean at Tulane apologized to respond to the complaints of the Louisiana Supreme Court justices, but allowed the article to remain in circulation because he believed the authors when they said their conclusions remained the same even after the data errors were taken into account. See Finch, *supra* note 46. With respect to the Boise Cascade article, the University of Denver may have tried to withdraw the article as quietly as possible to avoid threatened litigation, and do as little damage to its own reputation as possible.

Most examples of plagiarizing law review articles are not publicized—perhaps because they often involve student authors, and law schools do not have an interest in publicizing that type of information about their students. Unless the student later seeks political office or appointment, there is a good chance the plagiarism will not be made public, although it likely will be in the student’s academic record and reported to the state bar character and fitness committee.<sup>79</sup>

Neither of the plagiarism situations discussed here resulted in complete notice to readers, but the *Supreme Court Economic Review*, which is a faculty-edited journal,<sup>80</sup> does appear to have made more of an effort to notify readers of the problem. The lack of experience and deep knowledge of scholarly standards and expectations likely leaves student editors without sufficient expertise on how to deal with these situations<sup>81</sup>—and the lack of standard procedures common to law journals only exacerbates the situation. Part VI contains suggestions for how law journals might begin to develop a set of common standards.

In the print-only era, if a journal published an errata notice, it could expect at least some portion of its readership to see the notice when paging through the journal. At that time, errata were sometimes published to correct even the smallest of typographical errors.<sup>82</sup> Today, when articles can be found in multiple locations, and authors may have limited control over where their articles are archived, it is almost impossible for researchers to know that an article has been corrected or withdrawn if that information is not somehow connected to the article itself. If anecdotal evidence can be trusted, the number of post-publication corrections being made without notice to readers is quite large.<sup>83</sup>

My study looked at only a small number of examples, but it demonstrated that none of the questions posed in the introduction are currently being answered satisfactorily. With the current lack of standardized policies or best practices, readers lack the tools necessary to verify the continuing validity of a scholarly law journal article. Lawyers expect to do this verification for primary sources of law,

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<sup>79</sup> See Roger Billings, *Plagiarism in Academia and Beyond: What Is the Role of the Courts?*, 38 U.S.F. L. REV. 391, 399 (2004) ([L]aw schools tend to allow a student who has plagiarized to graduate, knowing that their respective state’s board of bar examiners . . . will receive a record of the plagiarism incident.”).

<sup>80</sup> *About*, SUPREME COURT ECONOMIC REVIEW, <https://www.journals.uchicago.edu/journals/scer/about> [<https://perma.cc/9CND-Q2KK>] [private Perma link].

<sup>81</sup> Most student-edited law journals have faculty advisors, but we cannot know how often they are queried or whether an advisor would suggest a standardized procedure to follow if they were asked.

<sup>82</sup> See *Errata*, 46 COLUM. L. REV., at ii (1946) (e.g., “Page 32, line 32 : for ‘fradulent’ read ‘fraudulent.’”). Some readers might consider this type of errata to be excessive and unnecessary.

<sup>83</sup> Several people I spoke to in the course of writing this article had corrected published articles of own, and admitted that there was no public notice of the correction.

and citators exist specifically for this purpose. It does not seem reasonable, though, to expect researchers to try to determine whether the journal article they are relying on has since been revised or retracted without tools for doing so. Law reviews must therefore adopt standards and best practices for notifying readers when articles have been revised or retracted.

#### **IV. A TYPOLOGY OF ERRORS**

Before considering possible correction procedures for law journals, it is worth thinking about the different reasons why corrections are issued, and whether this should make a difference in how (or if) an article is corrected. When creating the policies and practices proposed in part VI, journals may want to have different policies for different types of errors. Also important are the role of the person requesting the correction (author, editor, other), the type and magnitude of the error and the correction required, the reason for making the correction, and the identity of the responsible party, i.e., whether the errors are attributable to the author or the journal editors.<sup>84</sup>

The journal should also consider the seriousness of the error and whether a correction is worth all the possible attendant problems that have been detailed here. The journal might decide not to correct minor typographical errors unless these could have serious consequences for the author—for example, if the misspelled word were part of the article title or author's name, that would affect later attribution and citation. Finally, journals must consider the motivation for the correction. Journals may not want to allow authors to correct their own errors of reasoning, understanding, or even poor word choice simply to avoid criticism.

Perhaps if journals consider the type of error, its magnitude, and the reason for possibly correcting it, they will find it easier to implement a policy that provides transparency and consistency. The first two subsections below focus on specific types of errors; the following subsections are concerned more with the reasons for requesting corrections.

##### ***A. Typographical Errors***

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<sup>84</sup> A distinction is sometimes made between the two types of errors: errors introduced by the publisher are labeled *errata*, while author's corrections are labeled *corrigenda*. See, e.g., *Policy and Best Practice: Errata & Corrigenda*, ELSEVIER (Aug. 2016), <https://www.elsevier.com/editors/perk/policy-and-best-practice-errata-And-corrigena> [<https://perma.cc/U2GP-SXXX>].

Most of the time, journal articles are corrected for a simple reason—to fix typographical errors.<sup>85</sup> Articles go through various rounds of editing, and it is not unusual for errors to slip in or for an error that was thought to have been corrected to show up in the final version because of a mix-up. Minor errors might be corrected after publication because of the journal’s or author’s perfectionism, or, if more substantial, to protect the reputation of the author or the journal. Errors might be noticed by the author, or by readers, and then brought to the author or journal’s attention. In instances of typographical errors, journals must decide whether the error is substantial enough to warrant correction, either by a simple errata notice or by publishing a corrected electronic version.

The cost of correcting minor typographical errors that do not interfere with comprehension may be greater than the benefit of having a “perfect” article. No matter how diligent the journal is in publicizing its corrections, there will still be two versions of the article in existence, raising the possibility of confusion. In the past, journals often published errata to correct simple misspellings,<sup>86</sup> but should that same correction be considered appropriate today if it means that two different versions of an article will now be circulating online?

### ***B. Errors of Fact***

Corrections may also be warranted if the author or journal made an error of fact. Factual errors can be the fault of the author, or errors can creep in during the editing process.<sup>87</sup> Factual errors may be caught by the author or by a reader who realized the original statement was mistaken. Again, journals must decide whether a correction is warranted, but here they may be subjected to more pressure from either the author or the person who discovered the error.<sup>88</sup>

Errors of fact can range from very minor, such as that in the Katyal article,<sup>89</sup> to errors with significant impact on the entire article. For example, if the author made an error of “fact” in assuming a case was decided one way, when the opposite was actually true, and then based an argument on that fact, the correction might invalidate the author’s argument. In this latter sense, errors of fact are also errors of interpretation and reasoning, since the author has perhaps misunderstood

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<sup>85</sup> See, e.g., E-Mail from Laura C. Nutzmänn-Hoyt, *supra* note 21 (“The changes are usually very minor (a misspelled or missing word, incorrect citation, etc.)”).

<sup>86</sup> See *Errata*, *supra* note 82.

<sup>87</sup> In the Katyal article, the journal editors apologized to the author and to readers for the error. *Notice of Errata*, *supra* note 27.

<sup>88</sup> For example, the subject of the erroneous statement might want it corrected. One could imagine a request by the Library of Congress for a correction of the statement about its collection in Katyal, *supra* note 24, at 1130.

<sup>89</sup> See *Notice of Errata*, *supra* note 27, and accompanying text.

the import of a court decision or statute, which then affects the article's thesis and conclusions.

### ***C. Expedient Corrections***

The unregulated system of corrections that now exists for law journals can create issues even more serious than the possibility of researchers using an uncorrected version of an article. The lack of transparency in what has been corrected, the date of corrections, or who requested them leaves scholarship open to manipulation by authors who might want to “correct” past statements, perhaps for political reasons (e.g., an author who is applying for a new job or running for political office). Without a tracking or versioning system in place, authors and journals are free to change the record to their benefit. The current system allows changes to be made with no notification even that an article had been changed—only someone who thought to compare the print (if it exists and is available) with the online version word by word would ever know. And fixing what are said to be small errors could in reality be making significant changes.<sup>90</sup>

### ***D. Errors Requiring Retraction***

Plagiarism and other serious errors often require retraction rather than correction. The lack of a standard process for retractions in law journals not only allows researchers to unknowingly use articles that may have been discredited for a variety of reasons, it also protects the authors from investigations of malfeasance, since the article can be made to disappear from the online universe without a trace.<sup>91</sup> Journals that allow “silent” retractions (deleting an article from an online database and amending the table of contents), without providing notice to readers, do a disservice to the integrity of their publications.

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<sup>90</sup> See Lazarus, *supra* note 3, at 611 (noting that substantive legal changes have resulted from corrections of “formal error” in U.S. Supreme Court opinions).

<sup>91</sup> The “withdrawal” of Wines, Buchanan & Smith, *supra* note 66, from LexisNexis and Westlaw was an imperfect version of this. One can find references to the article (it was cited several times), but those citations in LexisNexis and Westlaw are not linked to the article, because the article is no longer available in the databases. And if a researcher searches for the article in those databases it will not be found. However, as noted above, the article can still be found in HeinOnline. Because an errata notice was placed in the print version, *Errata*, *supra* note 68, the removal of the article does not seem to have been intended to be surreptitious. For a discussion of “stealth retractions” in science journals, see Jaime A. Teixeira da Silva, *Silent or Stealth Retractions, the Dangerous Voices of the Unknown, Deleted Literature*, 32 PUB. RES. Q. 44 (2016).

## V. CORRECTING BETTER

### A. Instructive Analogies

Publications in all subject areas face problems of noting and publishing corrections. Three disciplines that offer instructive analogies are briefly discussed below, followed by some possible solutions for linking different article versions and informing readers about revisions to and withdrawal of articles.

#### 1. Primary Sources of Law

Legal researchers are taught from the beginning how important it is to make sure that the primary materials they are working with are current and still valid. Many tools have been developed to help lawyers update and validate primary materials, including citators, pocket parts, and in the digital age, frequent database updates accompanied by detailed information about when each source was last updated. So researchers may be surprised to learn that problems caused by post-publication corrections affect even primary legal sources. As Richard Lazarus described in a lengthy piece in the *Harvard Law Review*, the same problems that I found in law journal publishing plague corrections to U.S. Supreme Court opinions (although the Court does warn researchers about this possibility).<sup>92</sup> Supreme Court opinions are published first as slip opinions, then as preliminary prints, and finally in the *U.S. Reports*. As part of that process, the Court reserves the right to correct its opinions before final publication in the *U.S. Reports* and also to issue corrections later if warranted.<sup>93</sup>

Lazarus's article describes the history of opinion revision by the Court, providing examples of opinions that were changed after initial publication, and suggesting ways for the Court to improve the transparency of its practices: "Although the Court has long revised its opinions and disclosed the fact that it does so, the Court has done little to make clear what changes have been made in individual cases. Instead, the Court deliberately makes discovery difficult notwithstanding the public nature of the revisions."<sup>94</sup> Most of Lazarus's examples concern changes made between the issuance of the initial slip opinion and publication in the bound *United States Reports*, a period that has now grown to

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<sup>92</sup> Lazarus, *supra* note 3, at 540 (2014).

<sup>93</sup> *See id.* at 543, 555.

<sup>94</sup> *Id.* at 546.



almost five years; however, he gives some examples of language that has been changed decades, and even close to a century, later.<sup>95</sup>

Lazarus then discusses the ways that corrections are made to federal statutes and regulations, resulting in much greater transparency.<sup>96</sup> Differing versions of Supreme Court opinions certainly have a greater impact on the law and legal researchers than multiple versions of law review articles,<sup>97</sup> but one of Lazarus's suggestions for improvement could be adopted by law journals: providing "public notice of any revisions made, just as Congress does in revising its legislation and federal agencies do in correcting errors in regulations."<sup>98</sup>

## 2. *Commercially Published Scholarly Journals*

One reason for a lack of standardized practice for post-publication corrections in law journals is the way that most academic law journals in the United States are published, with student editors who are replaced every year and very flexible publishing, copyright, and distribution policies. At the other end of the spectrum, commercially published scholarly journals, particularly in the sciences and medicine, have standardized policies and practices for making corrections and guidelines that encourage or require them to conform to these practices.

Errors in scientific studies, whether deliberate or unintended, are frequent,<sup>99</sup> and the results of relying on flawed studies can be serious. In response, medical and scientific journals have developed ways to alert researchers to

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<sup>95</sup> See *id.* at 574 (noting an errata sheet from 2010 correcting a 1933 opinion and one from 1980 correcting an 1888 opinion). The Court does "warn" researchers that the opinion is not final until it is published in the *U.S. Reports*, but, particularly if opinions are online, how will researchers know what version they are using? "Change sheets" are sent to Westlaw and LexisNexis, but are they sent to other legal database vendors (e.g., Bloomberg BNA, Wolters Kluwer, FastCase, Casemaker)? To Google Scholar? (The question of where Google Scholar gets its court opinions is an interesting one, since the answer does not appear to be publicly available. One attorney speculates on Quora that they are supplied by Thomson Reuters. Dana H. Schultz, *Answer to "Where Does Google Scholar Get Its Case Law (Full-Text Court Opinions) From?"*, QUORA, (Sept. 24, 2015), <https://www.quora.com/Where-does-Google-Scholar-get-its-case-law-full-text-court-opinions-from> [<https://perma.cc/C6NW-EMT2>].)

<sup>96</sup> Lazarus, *supra* note 3, at 612–17.

<sup>97</sup> The discussion of lower court opinions decided in reliance on later-corrected language in U.S. Supreme Court opinions is particularly troubling. See, e.g., *id.* at 602–03.

<sup>98</sup> *Id.* at 620.

<sup>99</sup> See, e.g., Allison McCook, *Errors Trigger Retraction of Study on Mediterranean Diet's Heart Benefits*, NPR (June 13, 2018, 5:03PM), <https://www.npr.org/sections/health-shots/2018/06/13/619619302/errors-trigger-retraction-of-study-on-mediterranean-diets-heart-benefits> [<https://perma.cc/7HWV-SY5S>] (private Perma record); Michael Roston, *Retracted Scientific Studies: A Growing List*, N.Y. TIMES (May 29, 2015), <https://www.nytimes.com/interactive/2015/05/28/science/retractions-scientific-studies.html> [<https://perma.cc/ZDT8-WR5G>] (private Perma record);

problems. Examining publication practices for journal articles in these fields provides a glimpse into a world where retractions and corrections are common, and there is an accepted method for publishing and publicizing them.

The policies and practices of the National Library of Medicine (NLM) are an example. NLM, through its databases PubMed Central and MEDLINE, is the main aggregator of medical journals. NLM publishes a fact sheet titled *Errata, Retractions, and Other Linked Citations in PubMed*, defining different types of publication errors and how they are handled in the PubMed database.<sup>100</sup> For example:

Errata may be published to correct or add text or information that appears anywhere within an earlier published article. Errata must be labeled and published in citable form; that is, the erratum must appear on a numbered page in an issue of the journal that published the original article. For online journals or online-only content, the erratum must be readily discernable in the table of contents of a subsequent issue and must be associated with identifiable pagination or elocation. . . .

NLM links the citation for the erratum notice to the citation for the referent article, and the citation for the erratum notice is automatically indexed with the Publication Type Published Erratum [PT]. The citation for the erratum notice contains the phrase “Erratum for: [article title],” and the citation for the referent article contains the phrase “Erratum in: [article title].”<sup>101</sup>

NLM requires the journals it includes in its databases to follow the publishing practices outlined in two different documents, each of which contain sections on error correction and article retraction.<sup>102</sup> Publishers that do not comply with these practices face removal of their journals from the National Library of Medicine and its databases, which include PubMed Central and MEDLINE.<sup>103</sup> Practices from the ICMJE, the International Committee of Medical Journal

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<sup>100</sup> *Errata, Retractions, and Other Linked Citations in PubMed*, U.S. NAT’L LIBRARY OF MEDICINE, <https://www.nlm.nih.gov/bsd/policy/errata.html> [<https://perma.cc/7VH4-V8HK>].

<sup>101</sup> *Id.*

<sup>102</sup> The two documents are: ICMJE, *Recommendations for the Conduct, Reporting, Editing, and Publication of Scholarly Work in Medical Journals* (Dec. 2018), <http://www.icmje.org/icmje-recommendations.pdf> [<https://perma.cc/96QF-YHVE>], and *Principles of Transparency and Best Practice in Scholarly Publishing*, DOAJ: DIR. OF OPEN ACCESS JOURNALS (Jan. 2018), <https://doaj.org/bestpractice> [<https://perma.cc/6KJX-5SS9>]. See *Policies*, PUBMED CENTRAL, NCBI, <https://www.ncbi.nlm.nih.gov/pmc/about/guidelines/> [<https://perma.cc/LLV3-CVPG>].

<sup>103</sup> *Policies*, *supra* note 102.

Editors, contain sections covering corrections and retractions, which include “post[ing] a new article version with details of the changes from the original version and the date(s) on which the changes were made,” archiving all previous versions, and noting on older versions that newer versions exist.<sup>104</sup>

In addition to the requirements of the NLM, there is an independent watchdog website, *Retraction Watch*, that keeps track of retractions in scientific articles.<sup>105</sup> *Retraction Watch* is funded by the Center for Scientific Integrity, a non-profit with a mission “to promote transparency and integrity in science and scientific publishing, and to disseminate best practices and increase efficiency in science.”<sup>106</sup>

## 2. Journalism

Journalism has faced two challenges related to post-publication corrections—one continuing from the print era, and one that was created when most journalism became digital. Newspapers have always published Errata, or “Corrections.” For example, the *New York Times* publishes a list of corrections in its print edition every day, in the first section of the paper, indicating the page where the error was originally published. Corrections include the original erroneous information, along with the corrected information, for example: “ARTS—An article about Susan Sontag’s ‘Duet for Cannibals’ misspelled the given name of an actor. He is Gosta Ekman, not Gost Ekman.”<sup>107</sup> The *Times* also publishes these corrections on its web site.<sup>108</sup>

Newspapers also have strong online presences where articles are published quickly and change frequently. Rapid changes in online news stories have created another, more recent, concern—stories that change, or even disappear, replaced by a later version or a related story from another angle, as events develop.<sup>109</sup> A website that helped readers track changes to stories in the *New York Times* and several other major news sites was *NewsDiffs*.<sup>110</sup> The site listed articles that had changed, and showed the different versions with the changes marked. *NewsDiffs*

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<sup>104</sup> ICMJE, *supra* note 102, at 78.

<sup>105</sup> RETRACTION WATCH, <https://retractionwatch.com/> (last visited Sept. 21, 2020).

<sup>106</sup> *The Center for Scientific Integrity*, RETRACTIONWATCH, <https://retractionwatch.com/the-center-for-scientific-integrity/> [<https://perma.cc/7GSH-XHPD>].

<sup>107</sup> *Corrections*, N.Y. TIMES, Nov. 27, 2019, at A21.

<sup>108</sup> See Rogene Jacquette, *We Stand Corrected: How the Times Handles Errors*, N.Y. TIMES (June 7, 2018), <https://www.nytimes.com/2018/06/07/reader-center/corrections-how-the-times-handles-errors.html>; *Corrections*, N.Y. TIMES, <https://www.nytimes.com/section/corrections> (last visited Sept. 21, 2020).

<sup>109</sup> Arthur S. Brisbane, *On NYTimes.com, Now You See It, Now You Don't*, N.Y. TIMES, June 26, 2011, at SR10.

<sup>110</sup> NEWSDIFFS, <http://newsdiffs.org/> (last visited Sept. 21, 2020).

was highlighted in an article by the Public Editor of the *Times*, who lamented that the paper was not doing this on its own and preserving the information in an archive.<sup>111</sup> The site now appears defunct, with no current content, and a Twitter feed last updated in August 2017.<sup>112</sup> *Diffengine* is a more recent program developed to provide the same type of tracking for news stories,<sup>113</sup> and is available through Github.<sup>114</sup> There are a number of Twitter sites that use *diffengine* to track changes in news sites.<sup>115</sup>

Journalists value transparency, so it is not surprising that news organizations have developed systems to document and preserve the changes made to their articles. As can be seen from the Public Editor's comments,<sup>116</sup> though, some failings in their tracking and preservation of information are being supplemented by outside organizations, and it may take time before news organizations routinize preservation of the correction and updating process in a digital environment.

## ***B. Systems for Tracking Changes to Journal Articles***

As noted above, most scientific journals are published by commercial publishers with much greater resources than the typical student-edited and law school-funded law journal. Thus, it might seem that the formalized systems are not necessary or practical for law journals. On the other hand, the non-system in place now is clearly not satisfactory, and it is worth considering other possible solutions before recommending best practices.

### *1. Journal Versioning*

One possible solution would be for law journals to adopt a journal versioning system.<sup>117</sup> Standards for version labeling exist in the scientific

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<sup>111</sup> Arthur S. Brisbane, *Insider's View of Changes, From Outside*, N.Y. TIMES, July 1, 2012, at SR9.

<sup>112</sup> *NewsDiffs*, TWITTER, <https://twitter.com/newsdiffs> (last visited Sept. 21, 2020).

<sup>113</sup> See Ed Summers, *Tracking Changes with diffengine*, INKDROID (Jan. 13, 2017), <https://inkdroid.org/2017/01/13/diffengine/> [<https://perma.cc/BZJ7-LM2G>].

<sup>114</sup> GitHub is a platform for hosting software code, both open source and proprietary. See GITHUB, <https://github.com/> (last visited Sept. 21, 2020).

<sup>115</sup> Summers, *supra* note 113. A list of Twitter accounts using *diffengine* (some of which have been deleted by Twitter, perhaps because of copyright concerns) are on the *diffengine* GitHub page, <https://github.com/DocNow/diffengine> [<https://perma.cc/E86H-HVHR>].

<sup>116</sup> Brisbane, *supra* note 109.

<sup>117</sup> This possibility was discussed briefly in a 2012 article in *Law Library Journal*, but the authors concluded that existing systems were too complicated for student-edited law journals and suggested instead that librarians consider versioning issues when working with faculty and student-edited journals. Benjamin J. Keele & Michelle Pearse, *How Librarians Can Help Improve Law Journal Publishing*, 104 LAW LIBR. J. 383, 387–91 (2012). The article focuses

literature. NISO, the National Information Standards Organization, issued a set of best practices on Journal Article Versioning (JAV) in 2008.<sup>118</sup> The Technical Working Group recommended seven terms and definitions for journal article versions which ranged from “author’s original”<sup>119</sup> to “version of record,”<sup>120</sup> “corrected version of record,”<sup>121</sup> and “enhanced version of record.”<sup>122</sup> The working group did not address the question of retractions in the standards.

If journals adopt a versioning system, they label each version so that users will know which type of version they have (e.g., “corrected” or “original”). However, by itself this would not provide much of a solution. A reader who finds an “original” version would not know whether or not a “corrected” or “enhanced” version also existed. Some sort of system to link these versions together is needed.

## 2. *Linked Versions (Crossmark and Digital Object Identifiers)*

Automated linking for corrections and retractions is available and is used by a number of commercial publishers. This is generally done using Crossmark, a linking system developed by Crossref. Started in 1999, Crossref is a nonprofit organization created by a group of scholarly and scientific publishers to link references in journals using Digital Object Identifiers or DOIs.<sup>123</sup> DOIs are numerical strings assigned by publishers to journal articles, and they ensure that if an article’s location on the web moves, the article can still be found by using the

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more on draft versioning than on post-publication corrections, although these were mentioned. *See id.* at 390.

<sup>118</sup> NISO/ALPSP JAV TECH. WORKING GROUP, JOURNAL ARTICLE VERSIONS (JAV) (Apr. 2008), <http://www.niso.org/publications/rp/RP-8-2008.pdf> [<https://perma.cc/CV7P-LT3Z>].

<sup>119</sup> The version “considered by the author to be of sufficient quality to be submitted for formal peer review by a second party. The author accepts full responsibility for the article.” *Id.* at 1.

<sup>120</sup> “A fixed version of a journal article that has been made available by any organization that acts as a publisher by formally and exclusively declaring the article ‘published.’” *Id.* at 3.

<sup>121</sup> “A version . . . in which errors in the VoR [version of record] have been corrected. The errors made be author errors, publisher errors, or other processing errors.” *Id.* at 4.

<sup>122</sup> “A version of the Version of Record . . . that has been updated or enhanced by the provision of supplementary material.” *Id.*

<sup>123</sup> *See Board and Governance*, CROSSREF, <https://www.crossref.org/board-and-governance/> [<https://perma.cc/2YXC-88ND>]; Press Release, Reference Linking Service to Aid Scientists Conducting Online Research, CROSSREF (Nov. 16, 1999), <https://www.crossref.org/news/1999-11-16-reference-linking-service-to-aid-scientists-conducting-online-research/> [<https://perma.cc/9WSL-P4UN>];

DOI.<sup>124</sup> DOIs are inexpensive, but not free. They are available from a number of different registration agencies,<sup>125</sup> one of which is Crossref.<sup>126</sup>

Crossref developed Crossmark to “give[] readers quick and easy access to the current status of an item of content. With one click, you can see if content has been updated, corrected or retracted and access valuable additional metadata provided by the publisher.”<sup>127</sup> Publishers agree to embed the Crossmark logo in their articles, and clicking on the logo informs the reader if this is the latest version of an article; it also links to any corrections, retractions, additional data, etc.<sup>128</sup> Crossref is used by many commercial publishers.<sup>129</sup> Its disadvantage is the cost. Membership in Crossref costs several hundred dollars per year, and the journal is also charged each time that Crossmark is embedded in an article.<sup>130</sup>

### 3. Citation Rules

*The Bluebook*, which is followed by almost all student-edited law journals for citation format, does not address the question of post-publication corrections.<sup>131</sup> The *Chicago Manual of Style* gives this instruction about publishing errata:

Journals periodically publish errata, which, in print issues, may appear in the front or the back matter. Electronic journals should provide two-way links from errata to the articles that contain the errors; in other words, the articles themselves should be updated to link to or otherwise indicate the relevant errata. The entries in the table of contents for the original articles should also contain links to the errata. Small errors in online articles that are corrected after the original publication date (e.g., broken images and typographical errors) are best accompanied by

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<sup>124</sup> See Benjamin J. Keele, *A Primer on Digital Object Identifiers for Law Librarians*, 20 TRENDS L. LIBR. MGMT. & TECH. 35, 36 (2010).

<sup>125</sup> See *DOI Registration Agencies*, DOI, [https://www.doi.org/registration\\_agencies.html](https://www.doi.org/registration_agencies.html) [<https://perma.cc/HMN7-6TJ9>].

<sup>126</sup> See *Content Registration Guide*, CROSSREF, <https://www.crossref.org/get-started/content-registration/> [<https://perma.cc/8TMJ-JY2M>].

<sup>127</sup> *Crossmark*, CROSSREF, <https://www.crossref.org/services/crossmark/> [<https://perma.cc/4WCJ-2292>].

<sup>128</sup> *Id.*

<sup>129</sup> At the time of writing, Crossref had over 17,000 members. *Become a Member*, CROSSREF, <https://www.crossref.org/membership/> (last visited Sept. 21, 2020).

<sup>130</sup> *Crossmark Fees*, CROSSREF, <https://www.crossref.org/fees/#crossmark-fees> [<https://perma.cc/UHB3-54D8>].

<sup>131</sup> THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (21st ed. 2020) [hereinafter THE BLUEBOOK].

a note indicating the nature of the changes and when they were made.<sup>132</sup>

The widely used APA style manual also has a format for citing corrected articles.<sup>133</sup>

While the *Bluebook* editors could make the problem more visible by suggesting ways to cite to revised or retracted articles, the main issue with post-publication corrections is not one of citation practices, but of publication practices. However, the *Bluebook* does require checking of the validity of cases cited,<sup>134</sup> and a citation to the exact version of a statute relied on,<sup>135</sup> as well as an indication if the statute has been invalidated, repealed, or amended.<sup>136</sup> The *Bluebook* also requires citations to the specific edition of a book,<sup>137</sup> and citations to web pages require specific date information.<sup>138</sup> A rule requiring that citations include the version of an article that being cited might be one way to encourage journals to include such versioning information. Perhaps this rule could be implemented in conjunction with idea of a Version of Record, discussed below in part VI.B.

### ***C. Use of These Solutions by Law Reviews***

Any of the suggested or existing solutions described in this section could be used by law reviews, but implementing them in the decentralized arena of student-edited law reviews would be a daunting task. Most would require monetary investment, something that schools are unlikely to do in a time of law school budget cutbacks, particularly for law journals whose publication is already subsidized by law schools.<sup>139</sup>

Despite this, law journals should not simply give up and continue to make ad hoc decisions about corrections. There are changes that law reviews can make

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<sup>132</sup> CHICAGO MANUAL OF STYLE ONLINE, Rule 1.90 [<https://perma.cc/TY45-XVNG>]. BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* (4th ed. 2018) does not mention errata or post-publication corrections; however, it is a manual for writers rather than for publishers.

<sup>133</sup> See Chelsea Lee, *How to Cite a Corrected Journal Article*, APA STYLE BLOG (Mar. 15, 2017), <https://blog.apastyle.org/apastyle/2017/03/how-to-cite-a-corrected-journal-article.html> [<https://perma.cc/H8QX-BJJX>].

<sup>134</sup> Rule 10.7 requires citations to include the subsequent history of cases, as well as explanatory parentheticals if anything affects the weight of a case's authority. *THE BLUEBOOK*, *supra* note 131, at 109–10.

<sup>135</sup> Rule 12.3.2 requires citation to the year of the print code, including a citation to the supplement if relevant. *Id.* at 125. Rule 12.5 requires citation to “the currency of the database provided by the database itself” if an electronic source is used for a statute citation. *Id.* at 127.

<sup>136</sup> *Id.* at 128–29 (Rule 12.7).

<sup>137</sup> *Id.* at 150 (Rule 15.4).

<sup>138</sup> *Id.* at 180 (Rule 18.2.2 (c)).

<sup>139</sup> See Friedman, *supra* note 1, at 1322.

individually, and even the possibility of low or no-cost systems that could be adopted generally and would improve the integrity of law journal publication practices.

## **VI. RECOMMENDED POLICIES AND PRACTICES**

### ***A. Commitment to Transparency and Consistency***

Technical solutions might provide the means for legal scholarship to address questions of consistency in post-publication corrections. Unless corrected versions indicate what has been corrected, however, there is still no guarantee of transparency. It is unrealistic to expect readers to compare each version of an article in order to determine what changes have been made. Rather, to ensure transparency, corrections should either be described in detail, or clearly marked on the revised version. And in order to avoid accusations of whitewashing the record, corrected versions should be dated—readers should know what the corrections were made so that they can determine whether they were made in response to outside events such as a nomination to the bench, a campaign for political office, an application for a new academic position, or a tenure review.<sup>140</sup>

### ***B. Phase I: Improvements to Individual Journal Practices***

#### *1. Policies*

Creating a policy and procedures for making post-publication changes would be a relatively easy first step for law journals to take. Even if some decisions are discretionary, the policy should indicate who is the final decision maker. Journals might find it helpful to create a policy for each type of error listed in part IV, and outline a solution based on the type of error in conjunction with its magnitude and the reason for correction. For example a small typographical error, whether made by the author or the journal, might be corrected in all online versions, the revision noted in a starred footnote, and the correction marked by underlining or a different font. Journals could publish annual notes of revisions in the first issue of the next volume. Journals should also have a policy against making expedient corrections, and authors should be made aware of these policies when signing the publication agreement; it can then be brought to their attention later if necessary. For retractions, journals could publish a note about any

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<sup>140</sup> The requirements described in Rule 1.90 of the CHICAGO MANUAL OF STYLE, *supra* note 132, provide a useful starting point.



retractions in an annual update with a citation (hopefully allowing citators such as Shepard's or KeyCite to list it), as well as watermarking the original article online as "Retracted," at least on their own websites. Transparency concerns argue against pulling articles without public acknowledgement.

Journals should include some information about their correction and retraction policy in their publication agreements—for example they could include a paragraph stating how decisions about corrected versions are made, the process of notation for corrected copies, and what will happen if a retraction is necessary. Or, to simplify matters, they might simply state in the agreement that the author agrees to the policy, with a link to the policy on their website.

## 2. *Practices*

One way to solve the consistency problem of multiple versions of an article would be for law journals to adopt a version of record.<sup>141</sup> Each journal could choose a version (if available, perhaps the version in its institutional repository) and designate that as the version of record by noting this in the information about the journal on its website. That would be the version that researchers could check for the latest, presumably most correct, version of the article.

To make things even easier for researchers, journals could include text about the version of record in a preliminary footnote to each article. For example, it could contain language to the effect of: "Any revisions or changes to this article can be found in the Version of Record on the journal's website/institutional repository." While a journal could also send the updated version to various databases if it wanted to, all versions would refer back to the Version of Record for possible changes. The version of record would indicate when it was last updated if changes were made after publication. This does not, though, solve the problem of transparency, which would still depend on the journal clearly indicating what was changed.

Internally, journals should maintain a list of the databases that publish its articles in case it needs to send them corrected versions. Journals should also request that the author update any versions under the author's control, such as those on SSRN or in the digital repository of the author's law school.<sup>142</sup>

The journal should also have a checklist to be followed whenever it is confronted with a request for post-publication correction. The list should refer to

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<sup>141</sup> See NISO/ALPSP JAV TECH. WORKING GROUP, *supra* note 118, at 3, for an accepted definition of the term.

<sup>142</sup> Many law schools include faculty-authored articles published in law journals from other law schools in their institutional repositories.

the policy, but also could contain references to previous instances of post-publication correction and details of how these were handled. The more information that a journal has, the more likely it is to consider all the consequences of making post-publication corrections, and the more information about its policies and practices it can provide to the person requesting the corrections.

### ***C. Phase II: Coordinated Action***

#### *1. Could Legal Journal Databases Provide a Solution?*

The major online databases of legal journals (HeinOnline, LexisNexis, and Westlaw) currently have a policy of following instructions they receive from journal editors or law school administrators, but nothing more.<sup>143</sup> Perhaps the databases could be convinced to make changes, although they do not have the motivation or type of funding that a database like PubMed, which is part of the National Library of Medicine, has to ensure that it provides the current status of journal articles.

Another limitation to relying on these databases for a solution is that HeinOnline, LexisNexis, and Westlaw are not the only databases where one can find law journal articles. The “loose” nature of law journal publishing, with noncommercial publishers, open access repositories, and few restrictions on dissemination, means that online versions of articles can be found on other sites: law school institutional repositories, JSTOR, EBSCO databases, SSRN, LawArXiv, journal websites, etc. Not everyone has access to the major legal databases—many readers likely find articles on open access sites. Thus, even a system developed in conjunction with these databases would not solve the problem—it might even exacerbate it by lulling authors or journal editors into thinking that the issue had been taken care of.

#### *2. Coordinated Solutions Among Law Journals*

A solution like the one used by the NLM and PubMed requires coordination across a field of literature. The system used for most science and medical journals results from the fact that most of the journals in these fields are published by large, commercial publishers. Law reviews present a situation that is almost the polar opposite—journals published by hundreds of law schools, edited by students who are in the position for only one, or perhaps two, years. Even

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<sup>143</sup> See sources cited *supra* notes 20 & 21.

minor attempts at coordination are not always successful. For example, the National Conference of Law Reviews had annual conferences, but suffered the same problems as law reviews, which are captive to the quality of their annually changing staffs.<sup>144</sup> The National Conference of Law Reviews asked two law professors, Michael Closen and Robert Jarvis, to draft a model code of ethics in 1992.<sup>145</sup> The model code was approved by the Conference, but no updates have been made to it since, and it does not consider questions about article corrections after publication.<sup>146</sup> There is no information available on the Conference website about which law reviews have adopted the ethics code.

Nonetheless, there is some precedent for journals working together or voluntarily agreeing to make changes caused by technology. Consider, for example, the Harvard Library Innovation Lab's development of Perma.cc to fight the problem of link rot (web links that no longer function).<sup>147</sup> Perma allows authors or journals to preserve a web page or document as it was the day they looked at it, and provides web links to those preserved documents. The use of Perma links was slowly rolled out to law journals. The use of Perma or another reliable Internet archiving site is now recommended for use by the *Bluebook*,<sup>148</sup> and Perma citations are being used by the Law Library of Congress<sup>149</sup> as well as many law reviews.<sup>150</sup>

If the Harvard Innovation Lab or another law library or law school were to develop a method for linking journal articles and their revised versions together and indicating whether an article had been updated or retracted (similar to what Crossmark does), it could be adopted by law reviews at low or no cost.<sup>151</sup> And if

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<sup>144</sup> The website of the Conference, <http://www.ncrlaw.com/index.php> has disappeared and is up for sale by HugeDomains.com. No information later than 2017 is available about the organization, so it seems to be defunct. See, e.g., *National Conference of Law Reviews: Recap*, SCHOLASTICA (Apr. 10, 2017), <https://blog.scholasticahq.com/post/national-conference-of-law-reviews-2017-recap/> [<https://perma.cc/TY4B-EH7T>].

<sup>145</sup> See Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 510 (1992).

<sup>146</sup> *Id.*

<sup>147</sup> *Project: Perma.cc*, LIBRARY INNOVATION LAB, <https://lil.law.harvard.edu/projects/perma-cc/> [<https://perma.cc/47LW-C4ZR>].

<sup>148</sup> THE BLUEBOOK, *supra* note 131, at 177 (Rule 18.2.1)

<sup>149</sup> Charlotte Stichter, *Law Library of Congress Implements Solution for Link and Reference Rot*, DIGITALGOV (Apr. 13, 2016), <https://digital.gov/2016/04/13/law-library-of-congress-implements-solution-for-link-and-reference-rot/> [<https://perma.cc/VX97-6SZX>].

<sup>150</sup> See *About Perma.cc*, PERMA.CC, <https://perma.cc/about#perma-partners> (listing the law libraries and journals that are partners in the Perma project).

<sup>151</sup> A system similar to this was posited by Eugene Volokh, along with other suggestions for alerting readers to errors in law journal articles, whether they were contained in corrected versions or in responses and critiques by others. See Eugene Volokh, *Law Reviews, the Internet, and Preventing and Correcting Errors*, 116 YALE L.J. POCKET PART (2006), <https://www.yalelawjournal.org/forum/law-reviews-the-internet-and-preventing-and-correcting-errors>.

the *Bluebook* created a rule governing journal corrections it would encourage most law reviews to adopt whatever system is in place.

There are other agreements between journals that have been influential in the past. For example, in 1998 the Association of American Law Schools (AALS) drafted a model author/journal agreement that permitted authors to retain copyright and giving the journal only a license to publish.<sup>152</sup> Over the years more and more law journals adopted this type of agreement, until now it is the norm among law-school published journals.<sup>153</sup>

In the case of post-publication corrections, journals, their faculty advisors, and law school administrators should understand how the lack of consistency and transparency harms the integrity both of their individual journals and of legal scholarship as a whole. This could encourage them to work together, or to at least follow the lead of law schools that decide to be in the forefront of adopting policies and practices to address the problem.

## VII. CONCLUSION

In 2003, Emily Poworoznek published a study of how article corrections were identified and linked in online physical science journals.<sup>154</sup> Her study looked at whether online journals contained links both to and from corrections to the article in that journal. As in my brief case studies of law journal articles, Poworoznek found inconsistencies in whether links were present and how they were labeled.<sup>155</sup> She concluded: “The disparities among journals are confusing and suggest that a standard phrase and accepted location for these links would be helpful to both readers and those implementing full-text linking from bibliographic databases.”<sup>156</sup> With the National Library of Medicine and PubMed

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<sup>152</sup> AALS Special Committee, Model Author/Journal Agreement (1998), *archived at* <http://www.webcitation.org/67X0Z3Jsc>. The original document location, <http://www.aals.org/deansmemos/98-24.html> has returned a “page not found” error since 2014, according to the Internet Archive link at <https://web.archive.org/web/20141120231802/http://www.aals.org:80/deansmemos/98-24.html>.

<sup>153</sup> See Benjamin J. Keele, *Copyright Provisions in Law Journal Publication Agreements*, 102 LAW LIBR. J. 269, 274–275 (2010) (reporting the results of examining author agreements from seventy-eight law reviews). With the advent of institutional repositories at many law schools, the number is likely even higher now.

<sup>154</sup> Emily L. Poworoznek, *Linking of Errata: Current Practices in Online Physical Sciences Journals*, 54 J. AM. SOC’Y INFO. SCI. & TECH. 1153 (2003).

<sup>155</sup> For example, some journals linked to errata using terms such as “Forward references,” “Referred to by,” and “See also,” which do not clearly indicate that they refer to corrections rather than to related materials. *Id.* at 1158.

<sup>156</sup> *Id.*

systems in place today, as well as the NISO standard on journal versioning,<sup>157</sup> an update of Poworoznek's study would likely find different, and better, results today. This provides hope that by developing a system, and convincing law journals to use it, law journals might also be able to improve the transparency and consistency of post-publication corrections.

As publishers of legal scholarship, law journals must be committed to maintaining the integrity of that scholarship, and this includes using reliable methods to ensure that readers can rely on the articles they are reading. Student editors cannot be expected to think of all the possible repercussions involved each time they receive an author's request to make a minor change to an article after publication, or a university's demand that the article be pulled from the online databases. Even in the easiest of cases, they cannot be relied on to know which databases contain their articles so that they send the corrected version to all of them, and we cannot know in any case how reliable each online vendor is in making requested corrections.

The invisibility of post-publication corrections to law journal articles is a threat to the scholarly integrity of law journals, one that has been exacerbated by the advent of digital publishing. This article proposes some solutions, but it will be up to law journals to implement what works for them, probably through a process of trial and error. What is most important is that journals consider the issue rather than merely reacting to each situation as it arises, and adopt a policy that is made available to authors. While it may never be possible to have a perfect system, the implementation of policies at the individual journal level, and work toward more coordinated solutions can provide a way for journals to ensure they maintain their scholarly integrity.

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<sup>157</sup> NISO/ALPSP JAV TECH. WORKING GROUP, *supra* note 118.