

# PROCEEDINGS

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DEFINING “LEGAL WRITING SCHOLARSHIP”?

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# PROCEEDINGS

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VOLUME 2

ISSUE 1

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## DEFINING “LEGAL WRITING SCHOLARSHIP”?

*This issue explores the possibility of defining “legal writing scholarship” and examines what might be gained or lost in such a definition. The essays memorialize and expand on a discussion group at the 2021 conference of the Southeastern Association of Law Schools (SEALS), “Discipline Building: Scholarship and Status in the Legal Academy.”<sup>1</sup>*

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<sup>1</sup> The 2021 SEALS conference program is available on the Proceedings [website](#). This discussion group was part of the “Writing Connections” programming at SEALS, coordinated in 2021 by Elizabeth Berenguer, Suzanna Geiser, and Danielle Tully.

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VOLUME 2

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## SCHOLARSHIP: THE RESPONSIBILITY OF THE ACADEMY

KAREN J. SNEDDON<sup>1</sup>

Scholarship is often asserted to be “the coin of the realm.” This assertion focuses on how scholarship may result in the professional advancement of individuals and members of the academy as they seek promotion and tenure. But scholarship is more than that.

Scholarship is part of an academic's responsibility as a teacher, scholar, and leader. Academics have a responsibility to research, write, and speak on various subjects on which they have or are gaining expertise. And academics have a responsibility to read scholarship written by others.

In August 2021, members of the legal writing community gathered at the 2021 Southeastern Association of Law Schools (SEALS) Annual Conference to explore scholarship's role in discipline building. Part of the Writing Connections programming, the discussion group had the title “Discipline Building: Scholarship and Status in the Legal Academy.” The program description highlighted the goal of the discussion: “to encourage conversations about developing a scholarly agenda, adopting processes for serious scholarly inquiry, and promoting scholarly achievements within the legal writing community.”

As moderator of this discussion group, I posed the following six questions:<sup>2</sup>

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<sup>1</sup> Karen J. Sneddon is Interim Dean and Professor of Law at Mercer University School of Law.

<sup>2</sup> The questions were inspired by those posed in the program's description of the discussion group.

1. What is “legal writing scholarship”?
2. Does the discipline need to have (or agree on) a definition of legal writing scholarship?
3. How might a definition of legal writing scholarship advance the discipline? Might a definition of legal writing scholarship limit growth of the discipline or exclude the work of some?
4. Should the definition of legal writing scholarship include an interdisciplinary component?
5. To what extent should legal writing scholarship connect to the bench and bar?
6. Should the definition of legal writing scholarship include the characteristics of “serious scholarship” and, if so, what does “serious scholarship” refer to? How does a definition of scholarship move beyond issues of placement, length, and number of footnotes?

The questions prompted evaluation, assessment, and reflection of our responsibility as teachers, scholars, and leaders. As part of that responsibility, we seek opportunities to educate others, forge connections, and enrich existing conversations. Our responsibility as academics is to frame, contribute to, and advance exploration of relevant subjects in which we have or are gaining expertise.

The SEALS discussion and this issue of Proceedings continue this exploration of legal writing scholarship. Specifically, the essays and article published here consider the need, value, and perils of formulating a shared definition of legal writing scholarship to advance the discipline of legal writing.

Each of the contributing authors shares thoughtful responses to the posed questions. To begin, Professor Kirsten Davis’s essay, “A Provisional Definition of ‘Legal Writing Scholarship,’” explains the importance of a definition and offers a working definition to spark conversation. Professor Michelle L. Richards in her essay “Defining ‘Scholarship’: Why Writing about Writing Should Count” presents

another potential definition drawn from promotion and tenure standards. That definition is an “informed, reflective, deeply analytical, and, in some substantial part, a personal statement.” Professor Elizabeth E. Berenguer's essay, “Claiming Our Place at the Table of Legal Academia: Examining Types and Topics of Legal Writing Scholarship,” explores how a shared definition may both advance the discipline and limit the growth of the discipline. Professor Elizabeth Sherowski, in her essay “Measuring Impact: A Supportive and Inclusive Definition of Legal Writing Scholarship,” posits that a restrictive definition may undermine some important work that has been done and continues to be done in the discipline. Finally, Professor Melisa H. Weresh reviews how traditional legal scholarship has been tied to status and security. In her essay titled “Legal Writing Scholarship: Moving Not Toward a *Definition*, But Toward a *Cohesive Understanding*,” she explores what a common understanding may bring and how sharing a common understanding could build the legal writing discipline.

I thank the discussion group participants and the contributing authors for sharing their experiences, perspectives, and comments. As you read their work, consider how you would answer these six questions. Consider what would be gained and what would be lost with a shared definition. How would a shared definition enhance or limit the discipline? Finally, consider whether a definition is even needed. Discussions about the value of scholarship and the relevance of scholarship are also part of an academic's responsibility. I look forward to continuing the conversations.

## A PROVISIONAL DEFINITION OF “LEGAL WRITING SCHOLARSHIP”

KIRSTEN K. DAVIS<sup>1</sup>

Definition is always a tricky task.<sup>2</sup> Nowhere is this more true than with the phrase “legal writing scholarship.” The phrase, which is meant to describe a particular variety of academic research products, has been a point of contention among those who write this kind of scholarship (and among those who reject its legitimacy within the legal academy).

This essay, drawn from my comments at and participation in the 2021 SEALS discussion group on legal writing scholarship, explores how the phrase “legal writing scholarship” might be defined for the purpose of (1) identifying a body of literature that meets the definition and (2) identifying a community of scholars who write in the field. Although I do not intend to settle on a definition here, at the end of the essay, I propose a provisional, working definition for your consideration. That definition is meant as a starting point for future stakeholder conversations about what legal writing scholarship is and can be.

### **Why Defining Legal Writing Scholarship Is Important**

Preliminarily, I offer two thoughts on why it might be important to define the phrase. First, defining legal writing

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<sup>1</sup> Kirsten K. Davis is a Professor of Law and the Director of the Institute for the Advancement of Legal Communication at Stetson University College of Law.

<sup>2</sup> One rhetorical move of definition is that of “framing”—a definition makes selected aspects of the defined thing visible within a frame and, at the same time, places other characteristics outside the frame, rendering them invisible. Definitions, then, have the power of inclusion and exclusion. We should be mindful of the exclusionary consequences of definitional moves.

scholarship will help identify what academic literature and research should influence the teaching of legal writing courses, both in law schools and, as is occurring more frequently, in undergraduate schools. In other words, identifying what constitutes “legal writing scholarship” has the potential to improve the quality of instruction in legal writing courses and the professional advancement of faculty who teach those courses.

When faculty teaching legal writing are reading legal writing scholarship, the knowledge and understanding that result from high-quality research can influence improvements in legal writing curricula. In other words, a “canon” of “legal writing” that is continuously developing and is influenced by the ongoing conversation between researchers in the field can improve teaching. And improving legal writing teaching means improving legal writing in the legal profession itself, a goal worthy of our efforts and expected of our discipline.

Second, creating definitional boundaries for legal writing scholarship will help scholars find each other and engage in a scholarly conversation about legal writing. Entering a conversation about a topic requires familiarity with what has been written about the topic. Without boundaries on the topic, it can be difficult for legal writing scholars to identify the conversations they are entering. Just as with any area of research, boundaries for legal writing scholarship will be fluid and, as the discipline matures, evolves, and develops over time, sub-categories will continue to emerge. But, having a clearer starting point for what constitutes the literature in the field will help legal writing scholars to find and talk to each other via their scholarship, building upon and integrating each other’s ideas.

### **Developing a Definition**

My starting point for thinking about the definition of “legal writing scholarship” is law and rhetoric scholar James Boyd White’s



definition of “law.” He writes that law is a species of “art by which culture and community are established, maintained, and transformed [and] has justice as its ultimate subject.”<sup>3</sup> What I particularly like about this definition is the way it suggests both agency and purpose; law is not a *thing* at which one points but instead is an action, an art, that one *does*. Law represents transactions, relationships, and communications between and among people.

Professor White’s definition of law gives us some things to think about regarding a definition of legal writing scholarship. First, White’s definition of law suggests that legal writing scholarship, like law, is *communication-centered*. The phrase “legal writing” itself centers communication as the object of study in legal writing scholarship. Writing is a communicative art. Through the deployment of language, writers use inventive strategies to communicate ideas about the law through various media. As a form of communication, legal writing involves all parts of the communication model: authors and readers (senders and receivers), messages, communication channels, and environments or contexts.

But legal writing is not just communication scholarship; it is scholarship that looks at writing in and about a particular domain: the law. This means that legal writing scholarship is always and inextricably *law-connected*. That is, to fall within the definition, the scholarship must have some connection to the production, reception, circulation, or environments of legal texts.

Because legal writing scholarship involves both communication and law, it is *interdisciplinary*<sup>4</sup>—one must integrate knowledge of both the discipline of writing and the discipline of law

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<sup>3</sup> James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of the Law* 28 (1985).

<sup>4</sup> “Interdisciplinary” can be defined as “integrating knowledge and methods from different disciplines, using a real synthesis of approaches.” Alexander Refsum Jensenius, *Disciplinarity: intra, cross, multi, inter, trans*, (Mar. 12, 2012), <https://www.arj.no/2012/03/12/disciplinarity-2/>.

to produce legal writing scholarship. Legal writing scholarship, perhaps, does not occupy a single disciplinary “space” in the academy but instead sits at a disciplinary “intersection,” demanding that its writers be well-read and have expertise in multiple disciplines.

Extending this thinking a bit further, legal writing scholarship might also have the characteristics of *cross-disciplinary* scholarship; that is, legal writing scholarship views the discipline of “law” from the perspective of the discipline of “writing,” which itself is informed by research in other disciplines like rhetoric, composition, communication, and cognitive psychology.<sup>5</sup> For example, when legal writing scholarship examines metaphor use in judicial opinions, the scholarship is cross-disciplinary because it is looking at judicial opinions through the lens of literary or rhetorical theory. As an initial impression, I think that the cross-disciplinarity of legal writing scholarship is that it looks at the law *from the perspective of* writing, not the other way around. But I remain open to argument on that point.

The inter- and cross-disciplinary nature of legal writing scholarship means, of course, that not only law school academics produce legal writing scholarship. Other researchers in fields like philosophy, linguistics, rhetoric, composition, and cognitive psychology can also engage in this work. Because legal writing scholarship may draw from different disciplines, those who claim to write this scholarship have the added pressure of staying abreast of developments in disciplines other than their own to ensure that a true interdisciplinary conversation is being had amongst scholars. This means, for example, that scholars working in law schools cannot assume that only law scholars write about legal writing or possess that expertise; insularity is not an option in an

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<sup>5</sup> “Cross-disciplinary” can be defined as “viewing one discipline from the perspective of another.” *Id.*

interdisciplinary discipline. Thus, those interested in legal writing as a focus of research have the added obligation of identifying the community of scholars who write in the field, wherever they may be, and reading what they write.

### **Examining a Working Definition**

So where does that get us? So far, this is our working definition:

*“Legal writing scholarship” is inter- and cross-disciplinary scholarship that is communication-centered and law-connected.*

By definition then, legal writing scholarship is not confined to one theoretical perspective or research method. Theories from communication, rhetoric, composition, psychology, linguistics, and philosophy are obvious candidates to apply to improve our understanding of how legal writing works. Moreover, the research methods that can yield knowledge about legal writing are many—qualitative, quantitative, rhetorical, even historical methods might improve our understanding of legal writing. As scholars in an interdisciplinary space, legal writing scholars can use them all.

Thinking a bit more concretely, we might ask what topics fit within this definition. I think the range is fairly wide. A nonexclusive list of topics might include scholarship about

- how legal and other readers consume legal texts.
- how judges, lawyers, and nonlawyers write about the law.
- how legal texts persuade, influence, or accomplish other types of tasks.
- how different media (e.g., digital media) impact written messages about the law.
- how cultural, community, and environmental factors impact the production and reception of legal texts.

A final but critical component is required for a definition of legal writing scholarship: to be scholarship, legal writing scholarship must *create knowledge*. In other words, writing about legal writing, to be *scholarship*, must provide readers with insights or information that is new. These insights or information will most likely be about the production of, reception of, and communication environments for texts that communicate about the law.

### **A Provisional Definition for Your Consideration**

In sum, I offer a provisional, working definition of legal writing scholarship for further discussion:

*“Legal writing scholarship” is inter- and cross-disciplinary scholarship that is communication-centered and law-connected. It creates knowledge by offering new information or insights about the production of, reception of, and communication environments for texts that communicate about the law.<sup>6</sup>*

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<sup>6</sup> There are many more open questions about the meaning of legal writing scholarship:

- Is “legal writing” really a subfield of the broader field of “legal communication”? If so, should we be working to define “legal communication scholarship”?
- How does scholarship on legal research fit into this definition of legal writing scholarship?
- How does pedagogical scholarship on the teaching of legal writing fit this definition?
- What standards should be used to evaluate the quality of legal writing scholarship? (Relatedly, is this essay legal writing scholarship? How about this roughly 1,100-word blog post I wrote: Kirsten K. Davis, *Lists as Visual Rhetorical Strategy for Brief Writing: Set-Off and Stack-Up*, App. Advoc. Blog (July 11, 2019) [https://lawprofessors.typepad.com/appellate\\_advocacy/2019/07/lists-as-visual-rhetorical-strategy-for-brief-writing.html](https://lawprofessors.typepad.com/appellate_advocacy/2019/07/lists-as-visual-rhetorical-strategy-for-brief-writing.html))
- Are there doctrinal areas in the law that are part of legal writing as a scholarly field? For example, could a First Amendment article be classified as legal writing scholarship? What characteristics would the article have to have to fall within the category?
- Is it possible that legal writing scholarship could be transdisciplinary? “Transdisciplinary” scholarship “create[s] a unity of intellectual frameworks beyond the disciplinary perspectives.” Jensenius, *supra* note 4. In other words, could legal writing scholarship go beyond integrating the work of different disciplines or applying the perspectives of one discipline to another and achieve something else altogether? Could it occupy a new academic space and not sit at an intersection?

# PROCEEDINGS

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## DEFINING “SCHOLARSHIP”: WHY WRITING ABOUT WRITING SHOULD COUNT

MICHELLE L. RICHARDS<sup>1</sup>

In thinking about how to define “scholarship” in the context of legal writing, I admit that I cheated. I turned to the policy under which my scholarship was recently evaluated for tenure at my institution, Detroit Mercy Law, to evaluate whether it contained a good definition. Under this policy, “scholarship” is generally defined as an “informed, reflective, deeply analytical, and, in some substantial part, a personal statement.” In providing a description of “quality of scholarship,” the policy states,

Scholarship should reflect the author's attempt to impose his/her own views or sense of order on the existing material and to explain and justify those personal positions. The scholarly piece should include a carefully conceived doctrinal or theoretical construction that is offered as a perspective on the existing material. Whether it be a new way of perceiving established dogma or a proposal for new directions, the scope of scholarly work should be sufficiently ambitious to justify the substantial commitment of time that the applicant should have invested in the work.

Because of the breadth and inclusivity of this definition, I was not concerned about whether my legal writing articles and essays

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<sup>1</sup> Michelle L. Richards is an Associate Professor of Law at University of Detroit Mercy School of Law.

would be properly considered “scholarship” as part of my tenure review. In fact, encouraging and including legal writing scholarship in the promotion/tenure track review process were among the principal goals when our faculty developed this definition. Moreover, this definition was extremely important in making the transition to a unitary tenure track for legal writing faculty and clinicians an equitable one. Upon further reflection, I believe this comprehensive definition works effectively in several ways to fully promote legal writing scholarship, regardless of whether it is used to transform a promotion/tenure system, by effectively placing it on a level playing field with all legal scholarship.

### **Defining Scholarship Broadly**

First, a broad definition of scholarship provides assurance that much exploration and advocacy is still possible in the national conversation about legal writing. The concept of writing about writing can be intimidating, both to outsiders to the legal writing community as well as newcomers to the field. To some, the effort required to come up with a new and different writing theory seems overly or unnecessarily challenging or even unattainable. Newer legal writing scholars may feel that developing a research or scholarly agenda around legal writing is incredibly intimidating because they have nothing to add to the conversation or at least nothing of any substance that could amount to a full piece of scholarship.

Having a broad definition like the one above provides some assurance that one can think deeply about what has already been said and either advocate for change or contribute one's own thoughts to the conversation. As a result, the rest of us in the discipline gain the opportunity to evaluate the way we teach our courses, incorporate the “fresh take” on an old idea, and ultimately better equip our students to enter this profession. This approach creates an expectation that legal writing norms will be routinely

evaluated because institutions and the larger community value the contributions of those scholars willing to do this work.

### **Encouraging Interdisciplinary Content**

Further, this broad and inclusive definition encourages interdisciplinary content from both the legal academy as well as law non-legal disciplines, without requiring it. For those who teach both legal writing and legal doctrinal courses, the definition allows for the opportunity to explore and investigate how to use these doctrinal courses as a basis for teaching legal writing. It also allows for curricular design and development by encouraging intersectional courses, like teaching transactional drafting in a Sales course. For example, I created a course called Pre-Trial Litigation Skills, which took students from case intake to pre-trial conference/settlement and required students to draft the documents that accompanied each stage of the process. They learned the difference between drafting an effective pleading and a persuasive motion, and they had to make decisions in terms of pre-trial strategy by incorporating the rules of procedure along the way.

For others, encouraging an “interdisciplinary” approach opens the door a little wider and allows for incorporating important writing considerations outside of legal education like educational pedagogy, learning theory, logic, assessment design, or even psychology. Still, for those among us who are very successful at staying within the lines of legal writing to create discreet, useful, and innovative legal writing scholarship, the use of a definition that allows interdisciplinary content-but doesn't mandate it-errs on the side of inclusiveness and will only further the legal writing academy. In other words, the definition inherently and equally values a scholarly conversation about legal writing, regardless of whether it is a doctrinal theory of a particular area of law, legal writing and the integration of a non-legal discipline, or is squarely within the legal writing arena.

### **Blurring Traditional Lines**

Finally, the definition of legal writing scholarship should, at a minimum, work to blur the lines between doctrinal and legal writing faculty. Scholarship, regardless of its topic, should be defined by its overall contribution to the larger conversation about how to create better lawyers who will work to advance our system of law, not whether the scholarship is about the law itself. Legal writing is a fundamental skill that all law students must possess to enter the practice of law, regardless of whether their career path is to become an attorney, judge, legislator, or academic/legal scholar. Effective legal writing, in whatever form—including a bar exam essay, simple memo, Supreme Court brief, administrative regulation, judicial opinion, or journal article—is a product of critical thought and analysis. To that end, any scholarship, whether practical or theoretical, that works to enhance the ability of others to instruct and/or produce writing that effectively communicates that critical thought and analysis should be as valued as any other scholarship. My school's definition includes valuable scholarship on legal writing and acknowledges the importance of this scholarship to larger conversations about the law.

In short, the broad and inclusive definition of scholarship under which I earned tenure does not distinguish between legal writing scholarship and any other kind of scholarship. Rather, it values the effort made to offer a perspective on existing doctrinal or theoretical material regardless of topic. Its implicit inclusion of legal writing scholarship that reflects that value inherently rejects the fiction that legal writing scholars are somehow not as important or valuable to the academy. I would encourage national organizations like the Legal Writing Institute, as well as individual schools, to adopt a definition of legal writing scholarship that is similarly broad and inclusive.



## CLAIMING OUR PLACE AT THE TABLE OF LEGAL ACADEMIA: EXAMINING TYPES AND TOPICS OF LEGAL WRITING SCHOLARSHIP

ELIZABETH E. BERENGUER<sup>1</sup>

The legal writing community is on a discipline-building mission, and one effort in discipline building occurred this summer through discussion groups at the SEALS Conference. During one of the discussion groups, the following questions (among others) were posed: (1) How might a definition of legal writing scholarship advance the discipline? (2) Might a definition limit growth of the discipline or exclude the work of some? This essay adds to that conversation.

Full disclosure: I am generally opposed to creating labels and categorizing things and people because labels limit potential and create opportunities for exclusion rather than community building. That said, I can appreciate the desire for definitions that can help people identify where they belong and what they should be doing. But the idea that we need to define legal writing scholarship seems a bit like an adolescent obsession with defining what is “in” and what is “out.” To me, it seems the question we should be asking is, “What are the contours of our discipline?”

In its inaugural issue, the *Savannah Law Review* published an entire symposium about the discipline of legal writing.<sup>2</sup> Authors Ken

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<sup>1</sup> Elizabeth E. Berenguer is an Associate Professor of Law at Stetson University College of Law.

<sup>2</sup> Elizabeth B. Megale, *A Place at the Table*, 1 *Savannah L. Rev.* vii (2014).

Chestek,<sup>3</sup> Linda Edwards,<sup>4</sup> Lucy Jewel,<sup>5</sup> Teri McMurtry-Chubb,<sup>6</sup> and Chris Rideout<sup>7</sup> offered thoughtful insights about legal writing as a discipline and how those who write about it belong at the academic table. That issue would be a good place for us to look when thinking about what it is that makes legal writing a legitimate discipline within the legal academy. But, since the question of what constitutes legal writing scholarship, specifically, is on the table, let's dig in.

Defining legal writing scholarship raises two issues that are related but significantly different. One involves the type of documents that constitute “legal writing scholarship.” The other involves the topics that might constitute “legal writing scholarship.” I will address both of these in turn.

### **Types of Legal Writing Scholarship**

Generally, carving out a special definition for legal writing scholarship in terms of the type of document produced seems unnecessary and risky. The term “scholarship” is already commonly understood in legal academia as it relates to the type of document produced. Tenure standards at most institutions specifically identify acceptable document formats that conform with defined scholarship guidelines. Generally, scholarship guidelines demand that the writer engage in a rigorous process of research and writing that results in a work product, typically an article or essay, that is footnoted with citations to other sources and that contributes meaningfully to the “conversation.” An article is lengthier and more heavily footnoted

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<sup>3</sup> Kenneth D. Chestek, *The Life of the Law Has Not Been Logic: It Has Been Story*, 1 Savannah L. Rev. 21 (2014).

<sup>4</sup> Linda H. Edwards, *Legal Writing: A Doctrinal Course*, 1 Savannah L. Rev. 1 (2014).

<sup>5</sup> Lucille A. Jewel, *The Doctrine of Legal Writing - Book Review of Linda H. Edward's Readings in Persuasion: Briefs That Changed the World*, 1 Savannah L. Rev. 45 (2014).

<sup>6</sup> Teri A. McMurtry-Chubb, *Toward a Disciplinary Pedagogy for Legal Education*, 1 Savannah L. Rev. 69 (2014).

<sup>7</sup> J. Christopher Rideout, *Knowing What We Already Know: On the Doctrine of Legal Writing*, 1 Savannah L. Rev. 103 (2014).

than an essay, but both should clearly identify a thesis and defend that thesis. The final written product should demonstrate that the writer is well-informed on the topic, has read the works of other scholars in the field, and has critically considered the nuances of how the thesis intersects with the existing body of scholarship.

The discussion at SEALS suggested an interest in expanding the definition of scholarship to include shorter and more practical pieces that are written based on our experiences in the classroom or in practice. These shorter practical pieces are valuable to legal writing professors and practitioners who read them and apply what they learn to their everyday work. Additionally, there are a variety of publication outlets, like blogs, bar publications, and practice journals, so publication is typically easier and less stressful than publishing in a traditional law review or journal.

That some desire to characterize these pieces as scholarship is understandable. They are not terribly difficult or time-consuming to write; they are a quick and easy publication to add to a resume; they are helpful to professors and practitioners; and they might even be cited. Significantly, these pieces may be the only type of writing that some legal writing professors can accomplish considering status issues, lack of support for scholarship, and the overwhelming teaching loads at many institutions. Characterizing these shorter, practical pieces as scholarship would allow those who are not writing traditional articles and essays to be recognized as scholars.

Undoubtedly, these shorter practical pieces add value to our discipline. Take this essay, for example; I certainly would not have written it if I did not hope to contribute meaningfully to building the discipline. It even has a few footnotes! But it is not scholarship because it is not rigorously and thoroughly researched, and it is far too short. It is simply a discipline-building essay that offers my perspective on the questions posed, based on more than a decade of experience teaching legal writing, researching, and producing

scholarship. Although this piece occupies a valuable place in our discipline, it does not belong in the category of legal scholarship.

We gain nothing for our profession by labeling these shorter, practical pieces as scholarship. In fact, we harm our discipline when we create artificial barriers highlighting the differences between legal writing and the rest of legal academia. Legal scholarship is itself a genre of writing. It must conform to certain expectations, including rigor, length, and citations. We do not have the power to change the norms of legal scholarship by fiat, nor should we try to claim such power. Doing so only marginalizes us and justifies the negative stereotypes that legal writing professors are not “real” law professors. If we seek legitimacy and acceptance in academia, then creating a definition of scholarship only marginalizes us more if that definition includes writings that do not match the definition of scholarship in the broader academic community.

Respecting the norms of scholarship is no different than teaching our students about the different genres of legal writing in practice: a contract is not a brief, an opinion letter is not legislation, and a motion is not an order. As legal writing professors, we know that not all documents are created equally, and we should not try to force legal academia to accept short, less rigorous practical pieces as legal scholarship.

Acknowledging what scholarship is does not arbitrarily or artificially marginalize those who are not writing scholarship; the fact that they are not writing scholarship simply means that their writing falls into some other category. Scholarship is just one of many valuable genres of academic writing that an academic may choose to pursue. For these reasons, I would urge us as a discipline to refrain from attempting to change the definition of “legal scholarship” to capture documents that do not conform to the longstanding norms of scholarship.

### **Topics for Legal Writing Scholarship**

Turning to the second question, should we label which topics count as legal writing scholarship? Here again, we run the risk of unnecessarily alienating ourselves and highlighting ways in which we should not belong in legal academia; further, we risk harming our own community by excluding the valuable contributions of scholars within our discipline. No other discipline within legal academia defines or delineates the subject matter of “legal scholarship.” There is no “torts scholarship” or “contracts scholarship.” There is no arbiter of what belongs in any artificial category of scholarship because doctrinal categories do not exist.

The categories that do exist are ones like normative legal scholarship or reformist legal scholarship, to name just two. Critical theories also exist, like critical race theory or critical feminist theory. But none of these categories are specific to any particular doctrine, nor should they be. The categories speak to the various theoretical frameworks that might guide a particular analysis in a piece of scholarly writing. They might help an author find a voice, a point of view, or a lens through which to examine an issue. These categories are not specific to any doctrine, though. In fact, a variety of topics might be relevant to the legal writing discipline: pedagogy, learning theory, cognitive psychology, rhetoric, literature, and so on, just like a variety of topics might be relevant to the disciplines of torts, contracts, or criminal law.

### **Building a Discipline through Scholarship**

As far as building our discipline, engaging more legal writing professors in the process of scholarly writing is essential. To thrive as a discipline, we must build a community of thinkers who regularly engage in the rigorous process of scholarly writing. The topic of any given article is almost beside the point. That is not to say that scholarship on topics central to our discipline are not important; they absolutely are. But scholarly writing on any topic is valuable to

building the discipline because, when we produce scholarship, we embrace our responsibilities as members of the academic community to engage deeply with and contribute meaningfully to an existing body of scholarship.

Writing scholarship is transformative. The process changes how we think about the world around us, so it will necessarily change how we engage with each other on all topics, not just those we are studying through our scholarship. Our conversations with each other will be more nuanced and meaningful because our brains will have opened in ways that simply are not possible absent the scholarly writing process. Writing scholarship also makes us better professors because it enriches the way we think about teaching, develops our empathy for students who struggle with legal writing, and challenges our ways of thinking about the world. When we write scholarship, we walk our talk and demonstrate for our students that we ask hard things of ourselves, not just of them.

In answer to the scholarship questions posed above, I would revise them to ask, “How do we build our discipline by developing an active and diverse scholarly community?” I would caution us not to draw hard lines that create barriers to entry, while we also preserve longstanding norms defining “legal scholarship.” This calls for mentoring nascent scholars, supporting experienced scholars by reading and citing their work, and advocating for better status and pay at institutions where the workload is too heavy to support writers who are pursuing a scholarly agenda.

The rigorous scholarship written by those within our community demonstrates that we are scholars, and we belong in academia. And all of our scholarship belongs to our community.

MEASURING IMPACT:  
A SUPPORTIVE AND INCLUSIVE DEFINITION OF  
LEGAL WRITING SCHOLARSHIP

ELIZABETH SHEROWSKI<sup>1</sup>

As we seek to define legal writing scholarship, I argue that all scholarship is better measured by impact than by length. The impact of what we write may extend beyond the legal academy to reach the bench and bar, academia in general, and the public. Our definition should recognize, and even embrace, that a scholar might produce a wide variety of works for a wide variety of audiences, rather than restricting every scholar to the traditional law review article aimed at other academics.

**Traditional Scholarship**

The legal academy has traditionally used “scholarship” to mean long-form, heavily footnoted articles published in law journals. Legal scholars sought to publish these articles in highly ranked journals, believing that a prestigious placement indicated that an article was high quality. This definition emerged over fifty years ago and has changed little despite significant developments in how information is disseminated today.<sup>2</sup> As legal writing has sought to gain credibility as a discipline, it has adopted the legal academy's perception of scholarship. And, at this point, the perception is too entrenched to not be included in the definition of legal writing scholarship.

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<sup>1</sup> Elizabeth Sherowski is an Assistant Professor at University of Detroit Mercy School of Law.

<sup>2</sup> See Bernard J. Hibbitts, *Last Writes? Reassessing the Law Review In the Age of Cyberspace*, 71 N.Y.U. L. Rev. 615, 640–41 (1996).

There will always be a place for traditional law journal articles in the definition of legal writing scholarship. And there's no question that legal writing scholars have used the traditional law journal article format to advance important ideas about legal research, analysis, and communication. Anne Ralph's *Narrative-Erasing Procedure*<sup>3</sup> impacted the way that lawyers approach drafting civil complaints, as well as the way that we in the academy teach pleading. Alexa Chew's *Stylish Citation*<sup>4</sup> gave practitioners and academics a new way to think about the persuasive use of legal citations.

But we need to make room in the definition for other types of scholarship: shorter articles, pedagogical pieces, teaching materials, and practitioner resources. For some writers with little institutional support, these may be all that they have the time or the means to produce. Other writers, even those with institutional support, sometimes prefer writing these types of pieces over traditional articles. And there's no question that these types of pieces can also advance ideas that are important to improving the academy and the profession.

### **The Impact of Non-traditional Scholarship**

Scholarship doesn't have to be lengthy to be impactful. Shorter pieces might still require research to support their theses. Shorter pieces still require evidence, either empirical or anecdotal, to support their findings. In fact, the brevity of shorter pieces and presentations can increase their impact because they are more accessible to the bench and bar and provide academics with a wider audience to whom they can showcase their expertise.

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<sup>3</sup> Anne Ralph, *Narrative-Erasing Procedure*, 18 Nev. L.J. 573 (2018).

<sup>4</sup> Alexa Chew, *Stylish Citation*, 71 Ark. L. REV. 823 (2019).



I have been on both sides of the longer vs. shorter scholarship divide. As a lecturer and visitor, my scholarship was neither encouraged nor supported, financially or otherwise. One of the pieces that I was able to produce during that time was a conference presentation, followed by an 800-word blog post, called “Change Your Syllabus, Change Your Life.” It doesn't show up on my SSRN or Google Scholar pages, but it's the number-one thing that I am known for in the legal writing field and in academia in general. My presentation and blog post required research on rhetoric and Generation Z learning theory to determine the most effective way to introduce a course to today's students. The presentation relied on both empirical and anecdotal evidence to support its recommendations for constructing a welcoming and motivating syllabus. And it reached a much wider audience than just the legal writing community-academics across the country, in disciplines from agricultural sciences to veterinary medicine, contacted me after the blog post's publication to consult on techniques for revising their syllabi.

Since that blog post came out, I have been fortunate to land at a school with a unitary tenure track and its accompanying traditional scholarship requirements. Although my school has adopted a fairly expansive definition of scholarship for tenure review, I will still have to produce at least two traditional-length law review articles on topics in my areas of expertise (legal writing, legal pedagogy, and disability law) to be promoted. Given the time and financial backing to produce these longer works, I have happily been able to do so. But as of yet, nothing has made the scholarly impact that the 800-word blog post did. So, when someone asks me, “What is your scholarship about?” what should I answer? The law review article that has been cited eleven times? Or the blog post that has changed how hundreds of educators, in law and other disciplines, think about their syllabus?

**Inclusion through Impact**

Scholarship is better measured by impact, rather than by length. And we should consider its impact not just within the legal academy, but within the bench and bar, academia in general, and with a wider public audience. A well-rounded, supported scholar should be able to produce a wide variety of works for a wide variety of audiences.

However, there are many legal writing faculty who receive no support for scholarship, or who receive less support than their doctrinal colleagues. We must not forget our colleagues who are not as well-supported, and are able to produce only shorter pieces, conference presentations, or posters. Their contributions to the development of the field are no less important than traditional articles placed in top-ten journals. A broader definition of scholarship would be more inclusive and build the discipline by encouraging more under-resourced scholars to share their valuable ideas.

If we want the definition of legal writing scholarship to move beyond placement, length, and other traditional measures of “seriousness,” we need to be the ones to move it by creating a more supportive and inclusive definition.

# PROCEEDINGS

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VOLUME 2

ISSUE 1

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## LEGAL WRITING SCHOLARSHIP: MOVING NOT TOWARD A *DEFINITION*, BUT TOWARD A *COHESIVE UNDERSTANDING*

MELISSA H. WERESH<sup>1</sup>

In August 2021, a Writing Connections discussion group met at the Southeastern Association of Law Schools (SEALS) Conference to consider scholarship and status in the legal academy. Professors considered how we might define legal writing scholarship and how such a definition might advance or limit the growth of the discipline and/or exclude the work of some of our members. It was a lively discussion that prompted additional, subsequent reflection.

For my remarks at SEALS, and for the content in this short essay, I want to emphasize that I am addressing the type of scholarship that is typically recognized for purposes of promotion and tenure. After all, our discussion group, titled *Discipline Building: Scholarship and Status in the Legal Academy*, was framed as a conversation about serious scholarly writing and promoting scholarly achievements in the legal writing community. In these remarks, I strive to be precise about the topic of status and scholarship, and what “counts” in the academy for that purpose. Because I am only considering that precise question, I do not endeavor to articulate all forms or topics of expression that are valuable in or from our community of scholars. Clearly what “counts” toward promotion and tenure is not the only valuable form

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<sup>1</sup> Melissa H. Weresh is the Dwight D. Opperman Distinguish Professor of Law, Drake University Law School. The author would like to thank Karen Sneddon for her leadership at our SEALS discussion group and her thoughtful comments on this essay. She would also like to thank the predictably helpful comments of her colleagues Danielle Shelton and Karen Wallace.

of legal expression. Blog posts, essays, tweets, and other forms of legal expression are increasingly valuable forms of expression. Indeed, members of the academy have debated whether those forms of expression constitute scholarship<sup>2</sup> and/or whether they should be recognized in some other manner for purposes of promotion and tenure of faculty members in general.<sup>3</sup>

In my view, legal writing professors should have a firm and cohesive understanding of the scholarship traditionally recognized for purposes of promotion and tenure. In doing so, we are better able to recognize and articulate some of the unique contributions of our discipline, and how those forms of legal expression constitute legal scholarship in the academy. I hesitate to advocate for a *definition* of what constitutes the appropriate topics or methodologies of tenure-level scholarship—that has been a lingering debate in the academy.<sup>4</sup>

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<sup>2</sup> See Paul L. Caron, *Are Scholars Better Bloggers? Bloggership: How Blogs Are Transforming Legal Scholarship*, 84 Wash. U. L. Rev. 1025, 1033 (2006) (considering the views of various symposium panelists’ on the impact blogs have on legal scholarship); see also Erwin Chemerinsky, *Why Write?*, 107 Mich. L. Rev. 881, 890–93 (2009) (indicating that blogs, bar journal articles and op-ed pieces do not generally count toward promotion and tenure scholarship requirements because “the very short nature” of these types of formats do not lend themselves “to in-depth analysis that is characteristic of excellent scholarship”).

<sup>3</sup> See, e.g., Ellen S. Podgor, *Blogs and the Promotion and Tenure Letter*, 84 Wash. U. L. Rev. 1109, 1110–11 (2006). Podgor explores, in particular, the value of blogs in the context of promotion and tenure, recognizing that where blogs may set forth “thoughtful material that is well written and important to the field,” such expression “should be considered in the mix of a candidate’s scholarship for promotion and tenure purposes,” particularly in institutions that place value on writing other than traditional law review articles. *Id.* at 1110. In other instances, blogs may be considered in the context of a tenure candidate’s service requirement. *Id.* at 1110–11.

<sup>4</sup> In 1988, Philip Kissam commented on the lack clarity of standards defining legal scholarship, noting that “[w]ithout defining terms or demonstrating how certain standards are met, works of scholarship are characterized as ‘original,’ ‘insightful,’ and ‘outstanding,’ or conversely as ‘unimaginative,’ ‘mechanical,’ and ‘routine.’” Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 Wash. L. Rev. 221, 222 (1988). Later, in 1992, Mary Coombs observed that, with legal scholarship’s long history, “one might expect [evaluative] criteria to be quite highly developed and clearly articulated. One would be disappointed. They are occasionally the subject of vague discussions in the faculty lounge.” Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. Colo. L. Rev. 683, 706 (1992). Deborah Rhode, in prepared remarks for a 2002 symposium, acknowledged the lack of consensus among legal academics about questions related to the topics and methodologies of legal scholarship. Deborah L. Rhode, *Symposium: Law, Knowledge, and the Academy: Legal*

And by their nature definitions necessarily exclude some forms of expression that may later emerge as acceptable for tenure and promotion in the academy.<sup>5</sup> I nonetheless think it is important that members of the legal writing community have a shared understanding of how the topics and types of writing and expression we produce contribute to the advancement of law among varied legal audiences, and how those works might be recognized in the context of promotion and tenure decisions. In developing such an understanding, we can situate our unique contributions to legal scholarship writ large, and further develop and support the scholarly contributions of our members.

### **What Counts? The “Substantial” Piece**

Law faculty on the tenure track typically have a communal understanding of what counts as serious scholarship for purposes of promotion and tenure: extensively footnoted, full-length articles

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*Scholarship*, 115 Harv. L. Rev. 1327, 1328 (2002). She recognized that the “legal profession has no shared vision of what kinds of scholarship are most valuable or even most valued by the academy. Leading scholars in virtually every field believe that their own type of research is insufficiently appreciated.” *Id.* The debate continues to this day, with Marnix Snel lamenting,

What standards do legal academics use for evaluating works of legal scholarship? Given the long history of legal scholarship, one might expect an answer to that question to be quite highly developed. One is likely to be disappointed, however. Unlike their colleagues operating in other academic disciplines, legal academics rarely engage, individually or collectively, in a more general and thorough analysis of their quality standards. Consequently, what counts as evidence of “outstanding” legal scholarship has remained largely inexplicit, mysterious, and ill-defined.

Marnix Snel, *Making the Implicit Quality Standards and Performance Expectations for Traditional Legal Scholarship Explicit*, 20 German L.J. 1, 1–2 (2019) (internal citations omitted).

<sup>5</sup> For example, as interdisciplinary scholarship emerged, so did questions about its rightful place in promotion and tenure decisions. Nonetheless, “in recent years, doctrinal and policy articles have taken a backseat to theoretical interdisciplinary scholarship in hiring, promotion, and tenure.” David S. Levine, *Wisdom, Not Noise: The Law Professor as Policy Influencer*, 7 Wake Forest L. Rev. Online 1, 6 (2017) (note my reliance on this useful legal scholarship, published in an online resource, once questioned for its value as “substantial” legal scholarship).

published in traditional law reviews.<sup>6</sup> Some discussants at SEALS questioned the value of bloated, excessively footnoted, traditional articles, and I agree with others that some articles are markedly longer than they need be.<sup>7</sup> Nonetheless, there is a reason that traditional law review pieces remain the standard metric for promotion and tenure purposes.

#### a. Quality Characteristics

Most tenure standards articulate some quality characteristics associated with the form, depth, and length of “substantial” pieces considered for tenure. At Drake University Law School, for example, the standards address the nature and preparation of a research product and set qualitative standards:

##### *NATURE OF THE RESEARCH PRODUCT*

The following attributes of a research product are intended to present ways of describing the nature of research work, rather than a fixed and inflexible guide to suitable research products. Ordinarily, a faculty member would not be awarded promotion or tenure on the basis of scholarship falling only within category 1. Most

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<sup>6</sup> Steven W. Bender, *The Value of Online Law Review Supplements for Junior and Senior Faculty*, 33 *Touro L. Rev.* 387, 393–95 (2017) (explaining that such traditional pieces are the “quintessential scholarly work for tenure-track law faculty” and that “[m]ost tenure-track faculty understand the meaning of the ‘tenure-piece(s)’ as lengthy and extensively footnoted articles published with traditional printed law reviews.”)

<sup>7</sup> Eric J. Segall, *The Law Review Follies*, 50 *Loy. U. Chi. L.J.* 385, 393 (2018). Professor Segall emphasizes that “[t]raditional forty-plus page law review articles with hundreds of footnotes are barely read, except by law school hiring and tenure committees and maybe a few other law professors writing on the same subject.” *Id.* at 385. Certainly length and number of footnotes are poor representations of quality. “A paper should be only as long as it needs to be to realize its own singular ambition and identity [and] forcing a short-form essay into a too-long article hampered by logorrhea, circumlocution and verbosity should not impress any reader.” Andrew Jensen Kerr, *Writing the Short Paper*, 66 *J. Legal Educ.* 111, 114 (2016). “Likewise, the excessive footnoting in a journal article is a poor proxy for quality.” Michael Conklin, *Online Law Journals as Legal Scholarship: A Survey of Faculty Perceptions*, 61 *Jurimetrics J.* 171, 177 (2021). In this vein, many traditional journals are now encouraging that submissions be fewer than 25,000 words.

credible scholarship will fall within categories 2-4, which are not distinguishable in terms of the significance or weight attached to them:

1. primarily descriptive work: an explication of what a case, statute, regulation or body of literature says.
2. analytic work: this category includes, in addition to some purely descriptive work, commentary by the author which adds his or her insights to a problem or issue, identifies inconsistencies and reconciles apparent inconsistencies in the descriptive work, or critically assesses positions, rules or developments described by a case, statute, regulation, or body of literature.
3. original synthesis: a work which brings together material under consideration in a new way by developing a new organizing principle or a new frame of reference.
4. a proposed solution: this category involves the presentation and defense of a solution to a problem through a proposed statute, rule, or legal theory.

#### *PREPARATION OF RESEARCH PRODUCT*

In determining how well a candidate accomplished his or her research task, the following factors should be considered:

1. clarity of the author's expression;
2. the thoroughness of research and analysis;
3. scope and depth of the subjects covered in the piece;
4. the difficulty or complexity of the subject matter;
5. the originality of the study; and
6. the probable impact or significance of the work.

*QUALITATIVE STANDARDS*

By the time that an untenured faculty member is considered for tenure she or he is expected to have produced scholarship which:

1. demonstrates a high quality of preparation;
2. is capable of advancing its audience’s understanding of the subject matter; and
3. represents a material contribution to the field of law.<sup>8</sup>

Thus, a topical analysis of quality is focused on original synthesis or analysis and/or normative proposals, while the qualitative evaluation is focused on the depth and rigor of the product and its impact on the field of law. Because the format of legal expression continues to evolve, and topic selection has moved beyond traditional doctrinal analysis, questions arise as to how to treat these new topics and forms of expression.

For example, given the emphasis on depth, originality, and material contribution to the field of law as proxies for quality, there has been considerable debate about whether forms of legal expression other than traditional law review articles should count toward promotion and tenure determinations.<sup>9</sup> One author asserts that nontraditional forms of expression like blogs, essays, and op-ed posts should count towards tenure in certain circumstances, arguing that a “series of blog posts on originalism, for example, over a period of months, adding up to 10,000 to 15,000 words, should count just as much for hiring and tenure as one 15,000-word essay, if they are of the same quality.”<sup>10</sup> In spite of this assertion, he nonetheless

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<sup>8</sup> Drake University Law School Faculty Handbook (copy on file with author).

<sup>9</sup> Nancy Levit, *Scholarship Advice for New Law Professors in the Electronic Age*, 16 *Widener L.J.* 947, 948 (2007) (“Professors just joining the legal academy may feel caught in a time of transition between promotion and tenure rules based on traditional methods of publication and contemporary electronic and interdisciplinary possibilities for publication.”).

<sup>10</sup> Segall, *supra* note 7, at 393.



concludes that few law schools consider such forms of expression for purposes of promotion and tenure.<sup>11</sup> That is likely due to the traditional emphasis on the depth of the product, because essays and blogs do not typically exhibit the thoroughness of research and analysis illustrated in full-length articles.<sup>12</sup> And it is likely that depth that demonstrates a candidate's capacity for the type of thoroughness and scope associated with serious legal scholarship.

### **b. Topic and Depth Considerations**

Topics acceptable for tenure scholarship have also evolved over the years. In addition to doctrinal articles, interdisciplinary and theoretical articles are now routinely considered for tenure and promotion purposes,<sup>13</sup> to the dismay of some who assert that the latter two fail to make practical contributions to the law.<sup>14</sup> Notwithstanding this criticism, a comprehensive understanding of serious legal scholarship clearly incorporates topics beyond doctrinal analyses.

If not necessarily the topic, format, or length, then what really matters in terms of substance is likely depth (in terms of thoroughness rather than bulk), rigor (in terms of analytical precision and attention to audience and purpose) and, to a certain

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<sup>11</sup> *Id.* (concluding that “[s]adly, few law schools agree with that proposal.”).

<sup>12</sup> See Chemerinsky, *supra* note 2, at 890–93; see also Bender, *supra* note 6, at 394. Professor Bender differentiates between the depth of articles in online law review supplements from blogs and from traditional law review articles. *Id.* He notes that online law review supplement articles “offer[] the potential for more in-depth discussion than the typical blog piece, yet [are] still shorter than the typical tenure-piece law review.” *Id.* In terms of depth, he concludes that online law review supplement articles “fall into an uncertain middle between the *trusty* full-length law review and the *skeptical* blog entry.” *Id.* (emphasis added).

<sup>13</sup> Chemerinsky, *supra* note 2, at 885 (explaining that tenure candidates produce both doctrinal and theoretical, interdisciplinary work).

<sup>14</sup> Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34, 36 (1992) (arguing that “[b]ecause too few law professors are producing articles or treatises that have direct utility for judges, administrators, legislators, and practitioners, too many important social issues are resolved without the needed input from academic lawyers.”).

but likely unquantifiable extent, impact. Impact, of course, is difficult to measure, and much criticism has been directed at measurements such as citation counts or downloads.<sup>15</sup> Some of that criticism is directed at the “gamesmanship” of citation, calling attention to dubious motivations for citing certain work, such as citing a friend’s research, or including all plausible citations regardless of significant relevance.<sup>16</sup> Additional criticism highlights the troubling reality that “this method of external validation . . . oftentimes . . . leads to the entrenchment of institutional hierarchies to the detriment of minority groups.”<sup>17</sup>

Erwin Chemerinsky has asserted that legal scholarship is writing that “makes a significant, original contribution to knowledge about the law.”<sup>18</sup> In terms of evaluating the quality of such scholarship, Dean Chemerinsky offers four criteria provided by Professor Edward Rubin:

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<sup>15</sup> Arthur Austin, *The Reliability of Citation Counts in Judgments on Promotion, Tenure, and Status*, 35 Ariz. L. Rev. 829, 838–39 (1993) (cautioning that, because “legal scholarship is in a constant state of flux, balkenized by different visions of what law is about,” tenure and promotion committees should “[e]valuate citation counts with caution and reservation. Do not take them seriously. The bottom line is still scholarship, not citations.”).

<sup>16</sup> *Id.* at 830. Austin explains,

Nevertheless, cite counts are not universally endorsed. Thorne calls them a “shell game.” “One of the most amazing pseudoscientific popularity contests has surfaced in the form of citation indices, which are supposed to yield estimates of the validity and enduring worth of scientific contributions.” Among the manipulative ploys, he identifies “hat-tipping citations” (citing prominent people “to gain respectability by association”), “[o]ver-detailed citations” (citing everything, no matter how trivial), and “[c]onspiratorial cross-referencing” (citing a friend’s research). There are even other more questionable motives: citing only recent works to “show how up-to-date they are . . .;” or citing the article “because it happened to be on the citer’s desk rather than because it was the ideal paper . . .” “How often,” Kaplan asks, “are the works of others cited without having been read carefully?” “How often are citations tacked on after the paper is completed as an afterthought and window dressing?” And, of course, there is always the last refuge for the uncited: cite yourself.

*Id.* (citations omitted).

<sup>17</sup> Lawprofblawg & Darren Bush, *Law Reviews, Citation Counts, and Twitter (Oh My!): Behind the Curtains of the Law Professor’s Search for Meaning*, 50 Loy. U. Chi. L.J. 327, 340 (2018).

<sup>18</sup> Chemerinsky, *supra* note 2, at 891.

(1) clarity, the extent to which the work identifies [and explains] its normative premises; (2) persuasiveness, the extent to which the evaluator believes the work should convince the public decisionmakers whom it addresses; (3) significance, the extent to which the work relates to the ongoing development[s] of the field; and (4) applicability, the extent to which the evaluator believes that the work contains an identifiable [thought] that [can] be used by other legal scholars.<sup>19</sup>

Bearing all this in mind, legal writing scholarship can be assessed against this framework.

### **Legal Writing Scholarship Is Substantial**

The topics and format of legal writing scholarship are substantial in terms of the criteria for promotion and tenure. As Terry Pollman and Linda Edwards have explained, the topics of *legal writing* scholarship (as opposed to the many traditional, doctrinal pieces authored by legal writing professionals) fall into four categories: “(1) the substance or doctrine legal writing professors teach; (2) the theories underlying that substance; (3) the pedagogy used to teach that substance; and (4) the institutional choices that affect that teaching.”<sup>20</sup>

The first two categories of scholarship—well-supported and deeply-considered articles focused on either the substance of legal writing or the theories underlying that substance—easily fall within the ambit of traditional scholarship. Articles about the substance or

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<sup>19</sup> *Id.* at 892–93 (the author notes that he “would quibble with aspects of these criteria—such as the requirement that scholarship be addressed to policy-makers as opposed to other audience,” and concludes that “the question is whether the work adds substantially to the body of literature that already exists. Has the author made an important, original contribution? If so, it is excellent scholarship, whatever its audience and whatever its form.”).

<sup>20</sup> Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 *Legal Writing: J. Legal Writing Inst.* 3, 19 (2005).

doctrine of legal writing constitute legal scholarship as they advance knowledge and can improve the performance of lawyers and judges.<sup>21</sup> These articles are also scholarly in the traditional sense insofar as they may analyze legal issues or offer interdisciplinary insights into legal analysis.<sup>22</sup> Articles addressing the theories underlying the substance of legal writing are similar to other legal scholarship that rests upon theoretical foundations.<sup>23</sup> And, while highly theoretical scholarship may have its critics,<sup>24</sup> articles focused on the theoretical foundations of legal writing are no less potentially relevant to advancing knowledge than other theoretical articles.<sup>25</sup>

The latter two categories—articles addressing the pedagogy of legal writing or the institutional choices that affect the teaching of legal writing—may at first glance be harder to situate as traditional legal scholarship. Nonetheless, when articles addressing these topics are amply researched and explored, there is no reason to exclude those categories from the understanding of legal scholarship that counts toward tenure. Legal writing professors are likely familiar with the criticism of the scholarly impact of articles examining legal writing pedagogy. One criticism of such articles is that they are

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<sup>21</sup> *Id.* at 24 (“These legal writing topics directly improve the performance of judges and lawyers by improving their ability to reason effectively, research thoroughly, and communicate clearly.”).

<sup>22</sup> *Id.* at 24–25.

<sup>23</sup> *Id.* at 25.

<sup>24</sup> Consider the remarks of Chief Justice John Roberts on the overly theoretical nature of legal scholarship:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I’m sure was of great interest to the academic that wrote it, but isn’t of much help to the bar.

Debra Cassens Weiss, *Law Prof Responds After Chief Justice Roberts Disses Legal Scholarship*, ABA J. (July 7, 2011, 10:29 AM CDT),

[http://www.abajournal.com/news/article/law\\_prof\\_responds\\_after\\_chief\\_justice\\_roberts\\_disses\\_legal\\_scholarship/](http://www.abajournal.com/news/article/law_prof_responds_after_chief_justice_roberts_disses_legal_scholarship/) [<https://perma.cc/TUCP-2NH4>].

<sup>25</sup> Pollman & Edwards, *supra* note 19, at 25 (explaining that “[a]ll legal fields rest upon theoretical foundations, and many can claim theoretical ties to other disciplines such as economics, history, political science, statistics, psychology, environmental science, and philosophy.”).

merely descriptive, lacking the rigor and intellectual depth of traditional normative, or prescriptive, scholarship.<sup>26</sup> But, where an article carefully considers pedagogical issues, it most certainly advances one of the primary values of scholarship—that of enhancing teaching.<sup>27</sup> Articles addressing institutional realities may similarly further purposes of legal scholarship, as they may advance both knowledge and teaching and they may speak truth to power.<sup>28</sup>

### **What Doesn't Count?**

If “substantial” pieces of significant length and scope are understood to count towards the type of scholarship necessary to earn promotion and tenure, what does that mean for shorter pieces and other forms of legal expression like blogs, tweets, and essays? It certainly does not make these forms of expression less valuable to their intended audiences. In fact, a short piece describing a pedagogical innovation published in *The Second Draft* or *Perspectives* might in some ways be more valuable to a busy legal writing professional than a heavily-footnoted article tracing the theoretical underpinnings of such a technique. But the latter, more reminiscent

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<sup>26</sup> The value or necessity of a normative perspective in legal scholarship is also a subject of debate. See, e.g., *Transcript – Conference on the Ethics of Legal Scholarship: Day One*, 101 Marq. L. Rev. 1084, 1092 (2018) (addressing a split of opinion in whether a normative perspective is essential for purposes of scholarship offered in support of tenure, or whether such pieces should be rejected as scholarship due to their advocacy focus); see also Edward L. Rubin, *Law and the Methodology of Law*, 1997 Wis. L. Rev. 521, 522–23 (1997) (describing “standard legal scholarship” as normative and contrasting it with “a substantial body of work that simply describes the law, without offering prescriptions or relying on a recognized academic methodology. This is distinctively legal, but it is generally not regarded as scholarship.”). It seems that the distinction is not endemic to the topic itself, but the approach taken. For example, an article about a substantive legal issue may simply be descriptive. But if the key is to present pertinent facts about the topic (whatever it may be) and then use that knowledge (perhaps combined uniquely with other data, whether empirical, lenses from other disciplines, etc.) to recommend what should be, then pedagogical articles can certainly do that just as easily as theoretical ones.

<sup>27</sup> Pollman & Edwards, *supra* note 19, at 27–32 (asserting that pedagogical scholarship serves other purposes of legal scholarship, including confronting legal issues, improving the performance of legal decision-makers, advancing knowledge in the field, and speaking truth to power).

<sup>28</sup> *Id.* at 32–34.

of the “substantial” piece of “Scholarship of Teaching and Learning” (SoTL),<sup>29</sup> demonstrates the type of professional depth and rigor understood to warrant recognition in the academy. In other words, we should not equate counting for purposes of tenure and promotion with the value associated with the content of the communication; these are two different metrics.

This leads to a necessary consideration and one which sparked much debate among the SEALS discussants: what is the consequence of a form of legal expression not counting as scholarship? Does the fact that a form of expression may not count toward the scholarship evaluation for purposes of tenure and promotion discourage the production of such pieces or lessen their impact? Not if those types of expression count as a supplement to the substantial pieces for purposes of scholarship or toward the service component of promotion decisions, as they often do.<sup>30</sup> And certainly not if the expression fulfills the author’s purpose vis-à-vis the intended audience, which is likely to initiate or contribute to a conversation about the law.

### **Why Does This Matter?**

This analysis brings us to a final question about the import of the discussion group—why does having a conversation about the definition of scholarship matter to the legal writing community? I believe it matters greatly that we understand not some static definition of the topics or methodology of scholarship that counts

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<sup>29</sup> Gerald F. Hess, Michael Hunter Schwartz & Nancy Levit, *Fifty Ways to Promote Teaching and Learning*, 67 J. Legal Educ. 696, 705 (2018). The authors note that SoTL “uses discovery, reflection, and evidence-based methods to research effective teaching and student learning [and that] [t]hese findings are peer reviewed and publicly disseminated in an ongoing cycle of systematic inquiry into classroom practices.” *Id.* (quoting Faculty Center, *SoTL and DBER*, Univ. Cent. Fla. (last visited Oct. 20, 2021), <https://fctl.ucf.edu/sotl-and-dber/>). As a result, they recommend that law schools promote teaching and learning by “inviting authors of high quality scholarship about teaching and learning to deliver scholarly workshops as part of the law school’s scholar invitations, and rewarding SoTL in connection with annual reviews, raises, promotion, and tenure.” *Id.* (emphasis added).

<sup>30</sup> See Podgor, *supra* note 3, at 1110–11.

towards promotion and tenure in the academy, but that we have a sense of principles and values associated with the standards associated with the product. Again, those standards likely relate less to topic or methodology and more to depth and rigor. By understanding the difference between the depth and rigor of, say, a full-length article, and the value associated with the less rigorous yet impactful essay, we situate ourselves as members of a discipline with common expectations about legal scholarship. This gives us the ability to be both conversant about what currently counts in the academy and provides a foundation to challenge existing assumptions so as to promote new, impactful scholarly contributions. In this way, a common understanding of traditional legal scholarship and its relationship to status and security of position contributes to the discipline-building function of our community.