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

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

MELISSA H. WERESH[1]

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

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"counts" toward promotion and tenure is not the only valuable form 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[2] and/or whether they should be recognized in some other manner for purposes of promotion and tenure of faculty members in general.[3]

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 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.[4]

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[2] *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").

[3] *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.

[4] 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

And by their nature definitions necessarily exclude some forms of expression that may later emerge as acceptable for tenure and promotion in the academy.[5] 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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of legal scholarship. Deborah L. Rhode, *Symposium: Law, Knowledge, and the Academy: Legal 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).

[5] 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.[6] 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.[7] 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

[6] 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.")

[7] 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.

creditable 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.[8]

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.[9] 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."[10] In spite of this assertion, he nonetheless

[8] Drake University Law School Faculty Handbook (copy on file with author).
[9] 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.").
[10] Segall, *supra* note 7, at 393.

concludes that few law schools consider such forms of expression for purposes of promotion and tenure.[11] 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.[12] 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 additional to doctrinal articles, interdisciplinary and theoretical articles are now routinely considered for tenure and promotion purposes,[13] to the dismay of some who assert that the latter two fail to make practical contributions to the law.[14] 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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[11] *Id.* (concluding that "[s]adly, few law schools agree with that proposal.").
[12] *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).
[13] Chemerinsky, *supra* note 2, at 885 (explaining that tenure candidates produce both doctrinal and theoretical, interdisciplinary work).
[14] 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.[15] 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.[16] 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."[17]

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

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[15] 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.").

[16] *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).

[17] 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).

[18] 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.[19]

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."[20]

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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[19] *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.").

[20] 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.[21] These articles are also scholarly in the traditional sense insofar as they may analyze legal issues or offer interdisciplinary insights into legal analysis.[22] Articles addressing the theories underlying the substance of legal writing are similar to other legal scholarship that rests upon theoretical foundations.[23] And, while highly theoretical scholarship may have its critics,[24] articles focused on the theoretical foundations of legal writing are no less potentially relevant to advancing knowledge than other theoretical articles.[25]

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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[21] *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.").
[22] *Id.* at 24–25.
[23] *Id.* at 25.
[24] 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/ [https://perma.cc/7UCP-2NH4].
[25] 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.[26] But, where an article carefully considers pedagogical issues, it most certainly advances one of the primary values of scholarship—that of enhancing teaching.[27] 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.[28]

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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[26] 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.

[27] 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).

[28] *Id.* at 32–34.

of the "substantial" piece of "Scholarship of Teaching and Learning" (SoTL),[29] 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.[30] 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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[29] 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).

[30] *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.