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Scholarship By Legal Writing Professors: New Voices In the Legal Academy

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SCHOLARSHIP BY LEGAL WRITING PROFESSORS: NEW VOICES IN THE LEGAL ACADEMY

Terrill Pollman
Linda H. Edwards

I have only one thing to fear in this enterprise; that isn’t to say too much or to say untruths; it’s rather not to say everything, and to silence truths.¹

—Jean-Jacques Rousseau

TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 4
II. METHODOLOGY ........................................................................................................ 6
III. WHAT THE BIBLIOGRAPHY SHOWS .................................................................... 8
IV. THE JUSTIFICATIONS FOR SCHOLARSHIP ..................................................... 14
V. WHAT IS A “LEGAL WRITING TOPIC”? .............................................................. 18

A. Category One: The Substance or Doctrine of Legal Writing .................................... 20
B. Category Two: The Theoretical Foundations of Legal Writing ................................. 25
C. Category Three: The Theory and Practice Appropriate to the Teaching of Legal Writing .......................................................... 27

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I. INTRODUCTION

In this Article, we explore the questions of whether legal writing topics are subjects fit for scholarship and whether scholarship on these topics could support promotion and tenure. We examine the scholarship of today’s legal writing professors—what they are writing and where it is being published—and we define the term “legal writing topic,” identifying major categories of legal writing scholarship and suggesting criteria for evaluation in this emerging academic area.

The data we use derives in significant part from the bibliography presented at the end of this Article, which lists publications written by members of the academy who consider legal writing and rhetoric a primary area of their expertise. The bibliography contains entries for more than 300 authors. It includes entries for more than 350 books, book chapters, and supplements, as well as more than 650 articles published in traditional, student-edited law reviews.

The bibliography serves several purposes. First, it provides a database for those asking important questions about legal writing scholarship: What do legal writing professors write? Where are those articles being published? What is included in the category of legal writing scholarship? What can constitute the body of work of a legal writing scholar? What kinds of early writing can lead to the development of mature scholarly work? The bibliography also functions as a resource to assist legal writing professors in their

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2 The list is not limited to publications about legal writing topics. Rather, it includes publications by legal writing professors, no matter what the topic.
own scholarship. It provides a vehicle for finding and using scholarship created by legal writing colleagues, and it serves to stimulate ideas for new scholarship in this emerging field.

Finally, the bibliography disproves the assumption, sometimes recited in the legal academy, that legal writing professors do not need support for scholarship because they do no scholarship. Despite its circularity, the argument persists. The impressive length of this bibliography demonstrates that even with reduced support, legal writing professors write. One can imagine the productivity that would result if all legal writing professors received the institutional support their non-legal writing colleagues deem so critical for the production of good scholarly work. And if writing is important for the development of faculty members who teach subjects other than writing, it is doubly important for the development of those whose primary teaching area is the writing process itself.

In the following discussion, we first set out the methodology used to compile the bibliography and comment generally on what the bibliography shows (Sections II and III). We note particularly one important issue the bibliography raises—the surprisingly

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3 The argument fails on grounds other than its circularity as well. For instance, cost is the reason customarily offered for denying scholarship support. If, in fact, legal writing professors do not write, administrators need not deny eligibility for scholarship support. If legal writing professors would not write, they would not use the support, so eligibility for research stipends would cost the institution nothing.

4 Historically, law schools did not provide scholarship support to teachers of legal writing. Many law schools today provide their legal writing professors with the same scholarship support provided for other professors, but some schools still do not. According to the results of the 2005 Survey by the Association of Legal Writing Directors and the Legal Writing Institute, 16 of the 178 responding schools reported either that their school does not provide research grants at all or that the responders did not know their school's policy. Of the remaining 162 schools confirming the availability of research grants, only 77 reported making that support available to their legal writing faculty members, and at least 11 of those 77 reported awarding lesser amounts to legal writing faculty members. (Seventeen of the responders did not know how the legal writing faculty's scholarship grants compared to those of other faculty members.) ALWD & Legal Writing Institute 2005 Survey Results, questions 76 & 78, http://www.lwionline.org/survey/surveyresult.asp (accessed Sept. 6, 2005) [hereinafter LWI-ALWD 2005 Survey]. Since salaries for legal writing professors not on a tenure track are, on average, significantly lower than the salaries of their non-legal writing colleagues, Jan M. Levine & Kathryn M. Stanchi, Women, Writing & Wages: Breaking the Last Taboo, 7 Wm. & Mary J. Women & L. 551, 557, 582 (2001), the lack of summer research stipends is especially problematic for legal writing faculty members.

large percentage of non-legal writing topics among publications by legal writing professors. We identify a number of legitimate factors possibly contributing to this imbalance, but we also identify a particularly troubling factor—formal policies and informal attitudes that discount scholarship about legal writing topics as a whole.

Since these policies and attitudes threaten the future of an entire field of academic study, we devote the remainder of the Article to testing their supporting premises. We first review the customary justifications for legal scholarship generally (Section IV), and we clarify the definition of the term "legal writing topic" in Section V. We then test two rationales used to discount legal writing topics, the assumption that legal writing topics do not qualify as scholarship, and the fear that non-legal writing faculty members do not know how to evaluate legal writing articles (Section VI). We conclude that neither rationale withstands reasoned analysis. Both rationales rely on misconceptions about the substance and breadth of the field and also may be tainted with a human resistance to ideas that challenge one's own. Because the second rationale also signals some legitimate uncertainty about how to evaluate publications in fields unfamiliar to one's own, we offer methodologies faculties can use to evaluate scholarship in legal writing or in any other field with which they are unfamiliar.

Finally, we conclude that, if legal academics are true to our roles as lawyers, teachers, and scholars and if we are serious about the justifications we routinely offer for legal scholarship, we should not exclude legal writing topics from the legal canon. Rather, we should allow, even encourage, legal writing faculty members to write in their own field, unearthing and exploring the foundations of their discipline. If we do, we may be surprised at what we will learn.

II. METHODOLOGY

We began this project in 2000, when we contacted legal writing directors or deans' offices at each accredited law school and obtained the names of each school's legal writing professors. We ran electronic searches for publications by each legal writing professor, and we contacted each professor individually to double-

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6 See infra n. 204 and accompanying text.
7 See infra nn. 188–235 and accompanying text.
check our results. We returned to the project in 2001, updating the list by using the membership directories of two well-recognized professional organizations, the Legal Writing Institute (LWI)\(^8\) and the Association of Legal Writing Directors (ALWD).\(^9\)

After compiling a preliminary list, we created a website for the bibliography at http://www.legalwritingscholarship.org/. A notice on the two prominent legal writing listservs\(^10\) announced the list and asked legal writing professors to contact the authors or to visit the list online to correct or supplement the list. Additionally, conference attendees at the 2002 Biennial Conference of the Legal Writing Institute in Knoxville, Tennessee received an announcement in their registration materials asking them to visit the website and edit their entries. Finally, we distributed a draft of the list at the 2004 Biennial Conference at the University of Seattle.\(^11\) At a plenary session describing the list, we requested updates and corrections. Since 2004, publication updates have been solicited as part of the annual ALWD-LWI survey of legal writing programs.\(^12\)

The list includes publications of many sorts. Because part of the list's purpose is to discover what legal writing professors are

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\(^8\) The Legal Writing Institute (LWI) was founded in 1984 at the University of Puget Sound School of Law (now Seattle University School of Law), and now makes its home at Mercer University School of Law. "The Institute is a non-profit organization dedicated to improving legal writing by providing a forum for discussion and scholarship about legal writing, analysis, and research." LWI, Legal Writing Institute, http://www.lwionline.org/ (accessed Sept. 4, 2005). LWI currently has over 1,800 members.

LWI membership is open to anyone interested in the improvement of legal writing and is not limited to those who teach legal writing in American law schools. Therefore, to avoid including those LWI members whose primary focus lies in other areas, LWI members listed in the 2002 LWI membership list were contacted personally by either telephone or email. They were asked whether they considered "the teaching of Legal Writing and Rhetoric to be an area of primary interest and expertise." The bibliography includes entries for only those who answered affirmatively.

\(^9\) The Association of Legal Writing Directors "is a non-profit professional association of directors and former directors of legal research, writing, analysis, and advocacy programs from law schools throughout the United States, Canada and Australia." ALWD, Association of Legal Writing Directors, http://www.alwd.org (accessed Sept. 4, 2005).

\(^10\) Two listservs serve the legal writing community. DIRCON, the listserv of the Association of Legal Writing Directors (ALWD), is a closed listserv for ALWD members. LRWPROF (formerly LWIONLINE) is a closed listserv for LWI members who teach legal writing. Legal Writing Institute, http://www.lwionline.org/resources/listserv.asp (accessed Oct. 24, 2005).

\(^11\) Nearly 400 people attended the 2002 Conference, and almost 500 people attended the 2004 Conference. Almost all of the conference attendees teach legal writing.

\(^12\) Each year ALWD and LWI survey legal writing professors about curricular issues and employment conditions in the legal writing programs in which they teach. The survey is extraordinarily successful with a high response rate. For instance, the 2005 survey had a response rate of 93%. LWI-ALWD 2005 Survey, supra n. 4.
writing, we did not limit the list to any particular kind of publication. The instructions asked participants to include books; book chapters; articles in journals designed primarily for an academic readership; articles in journals designed primarily for practitioners; and articles in newsletters, bar magazines, continuing legal education publications, or law school development publications. The instructions also invited miscellaneous entries under the classification of "other."

The bibliography includes publications on any topic, but the publication must have been written since beginning law school. The publication must either have appeared in print or be the subject of a commitment from a publisher; the bibliography does not include self-published materials.

III. WHAT THE BIBLIOGRAPHY SHOWS

The most important observations pertain to the number, scope, and variety of publications by legal writing professionals. The list contains entries for nearly 300 authors. It includes more than 350 books, book chapters, supplements, and editorships, and over 650 law review articles. It includes at least that many articles in peer-reviewed academic journals, specialty journals designed primarily for practitioners, and other kinds of publications. By any criteria, the content of the list is impressive.

Law review placements span the spectrum of the academy and include journals at such schools as Harvard, Yale, Columbia, N.Y.U., Cornell, Georgetown, Minnesota, Virginia, California, Michigan, Duke, Wisconsin, Notre Dame, Stanford, and Chicago. The subject areas represented are as broad as the legal academy itself. Topics range from a variety of legal writing topics to topics

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13 We used the beginning of law school as the starting point so that the database could support a broad review of the writing histories of legal writing professors. Also, early sample data bases indicated that we would encounter questions about whether to include publications begun during law school but published later. We wanted a bright-line test that would avoid those subjectivities.

14 The bibliography demonstrates that, in addition to more traditional scholarship (books, student-edited law review articles, and articles in peer-reviewed academic journals), legal writing professors are writing a vast array of smaller pieces, such as short essays and substantive newsletter articles. These smaller pieces have created a rich and vibrant discourse on teaching, which is, after all, the other primary responsibility of the professoriate. This discourse on teaching probably is unequaled elsewhere in the legal academy. See Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (without Grading Papers), 10 Leg. Writing 23, 30 (2004).
in other areas such as constitutional law, contracts, property, criminal law, environmental law, employment discrimination, professional responsibility, legal history, civil procedure, family law, consumer law, bankruptcy, disability law, education law, media law, and antitrust law.

The list demonstrates that newsletter articles, book reviews, and other kinds of early writing are serving as an entry point for legal writing professors, just as they often do for professors in other areas. Peer-reviewed journals such as the *Legal Writing: The Journal of the Legal Writing Institute*, the *Journal of the Association of Legal Writing Directors*, *The Scribes Journal of Legal Writing*, the *Journal of Appellate Practice and Process*, and the *Journal of Legal Education* are publishing articles on legal writing topics, but many student-edited law reviews are publishing legal writing articles as well.

Uses of the bibliography are limited in some respects. First, it is almost certainly incomplete. Despite its length, the nature and scope of the undertaking virtually ensure that the bibliography does not include all legal writing professors in the country. Further, the list provides only a snapshot view of the publications of current or recent legal writing professionals. It does not include the scholarship of individuals who, for various reasons, had left the field before entries were solicited. Also, entries have not been updated for any who left the field during the project. Finally, since scholarly work is ongoing, the entries for some authors will have become incomplete by the time this Article appears in print. Entries for legal writing professors who are not members of LWI or ALWD are almost certainly incomplete since requests for updates have been made only through the listservs of those two organizations.

Also, the bibliography will not help answer some kinds of questions. One cannot readily discern trends in scholarship by legal writing professors since there is no earlier database to support a comparison. One cannot draw useful inferences about average productivity levels because the bibliography does not distinguish between professors new to the field and professors who have been teaching legal writing for twenty or more years.¹⁵ Nor can one draw useful inferences about the number of mature scholars be-

¹⁵The bibliography also does not reflect the greater-than-normal teaching loads of most legal writing professors, so meaningful comparisons to productivity levels for casebook faculty members are impossible.
cause the field is nascent and because, historically, institutional policies have artificially increased the turnover in the field.\textsuperscript{16} And since the list does not attempt to track law school graduation dates, one cannot accurately subtract publications written before law school graduation. Despite these limitations, the bibliography does provide important information about scholarship by legal writing professors and the scholarship about legal writing topics.

Among this important information is the comparison between the number of law review articles about legal writing topics and the number about non-legal writing topics. The bibliography reveals that approximately 75\% of the law review articles legal writing professors have published are about topics in areas other than legal writing, while only approximately 25\% are about legal writing topics. Even using the broad definition of legal writing scholarship described below,\textsuperscript{17} most of what legal writing professors have published in the traditional venues for legal scholarship is outside the field.

While the bibliography does not provide evidence of the reasons for this perhaps surprising result, a number of factors may contribute. Some entries include publications written before the author began to teach legal writing. Some entries may have been written soon after the transition out of practice and may deal with a topic area in which the author had developed an expertise while in practice. Also, a number of legal writing professors maintain more than one area of expertise, just as do other law professors. Naturally, law professors with several areas of expertise can be

\textsuperscript{16} Although law schools recognized the need for legal writing courses as early as the 1950s, it is only over the last fifteen years that the "graduate student or young associate" model has been replaced by the "full time professional" model. Maureen J. Arrigo, \textit{Hierarchy Maintained: Status and Gender Issues in Legal Writing Programs}, 70 Temp. L. Rev. 117, 134, 144–45 (1997) (citing Allen Boyer, \textit{Legal Writing Programs Reviewed: Merits, Flaws, Costs, and Essentials}, 62 Chi.-Kent L. Rev. 23 (1985)). One old staffing model involved full-time teachers but imposed a limit of one to three years on the number of years a teacher was permitted to teach the course. That staffing model has now been discarded in most law schools. Terrill Pollman, \textit{Building a Tower of Babel or Building a Discipline? Talking about Legal Writing}, 85 Marq. L. Rev. 887, 912–13 (2002). Despite the marked trend toward more professional programs, turnover may have remained a problem for some time. One survey reported that in forty-five out of eighty-five schools, legal writing professionals stayed three years or less. J. Christopher Rideout & Jill J. Ramsfield, \textit{Legal Writing: A Revised View}, 69 Wash. L. Rev. 35, 38 n. 8 (1994). Today, staffing models that force legal writing faculty members to leave the position after a set number of years have all but died out. The results of the \textit{LWI-ALWD 2005 Survey} indicate that, of 119 schools responding, 105 (88\%) impose no cap on the number of years a legal writing teacher can remain in the position. \textit{Supra} n. 4, at question 66.

\textsuperscript{17} \textit{Infra} nn. 53–61 and accompanying text.
expected to write in those other areas as well. Undoubtedly, the nascency of the field is a significant factor too. Only in recent years has legal writing begun to develop as an academic field. Today, most law schools have discarded outmoded staffing models in favor of full-time professors with no arbitrary limits on the number of years those professors are permitted to teach the course.\textsuperscript{18} Therefore, for the first time in the history of legal education, the field of legal writing can begin to develop a critical mass of experienced scholars engaged in the serious and important work of developing a vision of legal writing scholarship.\textsuperscript{19}

These factors alone, however, cannot account for the number of non-legal writing topics included in the bibliography. Another more problematic factor—antipathy toward topics relating to legal writing—most likely is at play. Some law faculties tell their legal writing professors that legal writing articles will not be considered for promotion and tenure. Even if a law school does not have a formal policy, faculty mentors may discourage their legal writing colleagues from writing in the author’s own area, predicting that legal writing topics will be discounted. For instance, testimony before the American Bar Association’s Section of Legal Education and Admissions to the Bar Standards Review Committee demonstrated that some legal writing professors have been advised not to write on legal writing topics.\textsuperscript{20} Even without individualized advice,

\textsuperscript{18} \textit{Infra} nn. 53–61 and accompanying text.

\textsuperscript{19} Michael R. Smith, \textit{The Next Frontier: Exploring the Substance of Legal Writing}, 2 J. ALWD 1, 26 (2004).

\textsuperscript{20} ALWD & Leg. Writing Inst., \textit{Quality Legal Writing Instruction and ABA Accreditation Standard 405: Report and Recommendations to the ABA Standards Review Committee of the ABA Section of Legal Education and Admissions to the Bar} (Aug. 23, 2004) (on file with the Authors); see also Harold S. Lewis, Jr., \textit{Integrity in Research}, 42 J. Leg. Educ. 607, 609 (1992) (“Concerns about academic freedom are probably more pertinent to untenured faculty. Schools are uneven in assuring junior members that they will not be penalized for tackling controversial issues, espousing unpopular positions, or pursuing topics considered marginal when the more established faculty began their careers. Studies in clinical education or legal writing, for instance, may pose real risks for untenured faculty. Given the organized bar’s intense interest in these areas, it is at least somewhat troubling that they are still in bad intellectual odor at many of our schools. Do we communicate to junior faculty a sense that our institutions welcome these pursuits and deem them fair grist for the writings that lead to promotion and tenure? If we do, do we do so honestly? How many of us, for example, could confidently advise a junior colleague that his toils in the vineyard of clinical education will not be dismissed as falling within a disfavored category?” (emphasis in original)).

But not all law schools take this view:
Some schools recognize that prescribing acceptable publication outlets... forces candidates into what one school refers to as an “unfortunate byproduct” of tenure guidelines—“a tendency to force all of the work of young faculty into
legal writing professors almost certainly will choose topics with an “internal scholarly jury” in mind.21 Legal writing professors may choose to avoid risk by refraining from writing in their own discipline.22

One must ask whether a policy precluding or discouraging legal writing articles makes sense. Would a law school promulgate a policy that refuses to count torts articles written by a torts professor? Would a law school require the torts professor to write instead in someone else’s field? Contracts, perhaps? And would the law school then evaluate the torts professor’s contracts article against the articles written by professors who actually teach contracts? Such a counterintuitive policy should require a compelling justification.

We speculate that three primary reasons account for the resistance to legal writing topics. First and foremost, other faculty members may misunderstand the content of a modern legal writing course, not realizing its breadth and depth, and especially not realizing the intellectual content that underlies the course coverage. When faculties think of legal writing, they may think of classes on the passive voice and citation form. In fact, technical matters make up a relatively small percentage of most legal writing courses today.23 Rather, as we discuss in later Sections, legal

...
writing courses cover the role and function of the judicial system, common law analysis, statutory interpretation, forms of legal reasoning, case synthesis, structural paradigms, and other rich and complex subjects.\textsuperscript{24}

Further, most schools offer advanced legal writing electives that expand and deepen the coverage of the required courses.\textsuperscript{25} A recent advanced legal writing text, Advanced Legal Writing: Theories and Strategies in Persuasive Writing,\textsuperscript{26} can serve as an example of coverage in an advanced course. Professor Smith's entire text is devoted to such subjects as the cognitive dimensions of illustrative narratives; a multidisciplinary study of the functions of literary references; principles of classical rhetoric; the functions of metaphor and simile; and the ethics and morality of advocacy.\textsuperscript{27} Many casebook faculty members would be surprised to learn that a legal writing course syllabus can look like this table of contents.\textsuperscript{28}

Second, some legal writing topics rely on sources from such disciplines as rhetoric, literary criticism, composition theory, cognitive psychology, and philosophy. Thus, these topics fall within a somewhat controversial category of scholarship—interdisciplinary scholarship. Law faculty members are divided about the value of interdisciplinary scholarship. Some consider it an exciting and promising scholarly development;\textsuperscript{29} while others are less inclined to welcome its reliance on sources outside the law or its emphasis on theory.\textsuperscript{30} An interdisciplinary legal writing topic, like any other

\begin{itemize}
\item \textsuperscript{24} Ralph L. Brill et al., Sourcebook on Legal Writing Programs 5 (ABA 1997).
\item \textsuperscript{25} Of the 178 schools responding to the LWI/ALWD 2005 survey, only 18 reported not offering advanced legal writing electives. LWI-ALWD 2005 Survey, supra n. 4, question 32; see also Michael R. Smith, Alternative Substantive Approaches to Advanced Legal Writing Courses, 54 J. Leg. Educ. 119, 119 (2004).
\item \textsuperscript{26} Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing (Aspen L. & Bus. 2002).
\item \textsuperscript{27} \textit{Id.} at xi–xx.
\item \textsuperscript{28} Old understandings of the content of the field largely account for the academy's historic undervaluation of legal writing as a part of the teaching curriculum as well. Some faculty members today still operate out of these older attitudes, and so may allow a habitual response to the field to distort their judgment. A more accurate understanding of the content of a legal writing course is critical not only to questions of scholarship but also to questions of curriculum and institutional status of legal writing faculty members.
\item \textsuperscript{29} See e.g. J.M. Balkin, Interdisciplinarity as Colonization, 53 Wash. & Lee L. Rev. 949, 970 (1996).
\end{itemize}
interdisciplinary topic, may be subject to this larger scholarly debate.

Third, many law schools have not yet settled the question of whether legitimate legal scholarship can include sophisticated and rigorous analyses of pedagogy or penetrating critiques of institutional practices.\textsuperscript{31} Since some legal writing topics fall within these controversial categories, those topics may be considered risky as well.

In his carefully balanced article, Dean Edward Rubin, at Vanderbilt University School of Law, observes that peer evaluation of scholarship functions as a gatekeeper, setting the boundaries of a discipline.\textsuperscript{32} He reminds us that the evaluation of scholarship is an exercise of power that "determines which . . . groups are excluded or included, marginalized or empowered."\textsuperscript{33} These decisions will, over time, limit the intellectual reach of the entire discipline to only what we can now envision.\textsuperscript{34} So the stakes of our decisions are high. We should not lightly exclude from our definition of permissible scholarship an emerging field of study, for to do so is to reject out-of-hand all potential insights long before we can predict their nature or significance.

In the remainder of this Article, we analyze the propositions usually offered to justify institutional resistance to scholarship on legal writing topics. Two preliminary steps will facilitate the discussion, however. First, we should remind ourselves of the academy's normative understandings of the values and functions of scholarship. Second, we must clarify the meaning of the term "legal writing topic."

\section*{IV. THE JUSTIFICATIONS FOR SCHOLARSHIP}

Law schools devote substantial resources to the production of legal scholarship. As Banks McDowell has observed,

\begin{quote}
There are large economic costs—support for the ever-growing host of law reviews, research grants, research collections of law libraries, and compensation for student research assistants. There are time and opportunity costs—the hours that faculty
\end{quote}

\textsuperscript{31} See infra nn. 161–184 and accompanying text.
\textsuperscript{33} Id.
\textsuperscript{34} See id. at 894.
spend on scholarly research and writing leave less time available for teaching, counseling students, and engaging in university and community service. Finally there are substantial psychic costs to professors who worry about the quality and quantity of their writing.\textsuperscript{35}

The lost time and energy for teaching and counseling students have even caused some to question the value of the entire enterprise.\textsuperscript{36}

We do not agree that institutional and personal resources devoted to scholarship should be invested elsewhere. But because scholarship costs are indeed sobering, law faculties must consider seriously the values served and the purposes achieved by that investment. If law schools invest so much in scholarship, we have an obligation to the profession and to our students\textsuperscript{37} to secure the most value possible for that investment and to ensure that we are serving multiple interests and audiences.\textsuperscript{38}

One of the most important of these interests is the advancement of knowledge for its own sake. Universities have a unique obligation to advance human knowledge. We owe that obligation not only to individual legal constituencies like judges and lawyers, but also, and we hope not to fall victim to grandiosity here, to humanity itself. We refer to the fundamental scholarly urge to understand—to find undiscovered information, to identify unrealized effects, to uncover deep structures, to make new connections or draw new parallels—in short, "to understand as fully and as fundamentally as possible."\textsuperscript{39}

Another commonly recited value of scholarship is the enhancement of teaching.\textsuperscript{40} Scholarship may enhance teaching if it

\textsuperscript{35} McDowell, supra n. 30, at 265.

\textsuperscript{36} See e.g. John Elson, \textit{The Case against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?} 39 J. Leg. Educ. 343 (1989).

\textsuperscript{37} Students bear a significant portion of the expense and burden of institutional focus on scholarly production. See McDowell, supra n. 30, at 265; see generally Elson, supra n. 36.

\textsuperscript{38} McDowell identifies at least nine possible audiences for legal scholarship: "(1) legal academics, (2) other academics, (3) judges, (4) legal specialists, (5) general practitioners \ldots, (6) law students, (7) students from the rest of the university interested in law as it relates to [other disciplines], (8) legislators, and (9) the general public." McDowell, supra n. 30, at 261.

\textsuperscript{39} Id. at 270; see also Stephen Carter, \textit{Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law}, 100 Yale L.J. 2065, 2080 (1991) ("The purpose of scholarship is to increase human knowledge. The corollary is that the greater the degree of the contribution to human knowledge, the greater the value of a particular scholarly work. Any test for scholarly quality, then, should rest on answering the question: Does this scholarship increase human knowledge, and if so, by how much?").

\textsuperscript{40} See Ronald Benton Brown, \textit{A Cure for Scholarship Schizophrenia: A Manifesto for
expands the knowledge we can share with our students; if it becomes part of the text of a course;\textsuperscript{41} if it contributes to the moral education of our students;\textsuperscript{42} if it provides examples of excellence;\textsuperscript{43} or if it enhances our own analytical abilities.\textsuperscript{44}

Scholarship also provides a vehicle for improving the performance of legal decision makers.\textsuperscript{45} Part of the justification for law schools' relatively low teaching loads is the obligation to assist judges and lawyers. Because law faculty members have the luxuries of time, an objective role, and significant institutional support, we can assist lawyers to analyze thorny problems or think more clearly and deeply about their own lawyering responsibilities. Legal scholarship should anticipate social change and recommend resolutions for emerging issues.\textsuperscript{46} Indeed, Dean Rubin maintains that this prescriptive role is the primary purpose of scholarship.\textsuperscript{47} As Dean Rubin explains,

[T]he scholar may not literally be addressing the decisionmaker, nor need a decisionmaker ever see the work in question . . . . The notion of a prescription addressed to a particular

\begin{quote}


\textsuperscript{42} Anthony T. Kronman, Foreword: Legal Scholarship and Moral Education, 90 Yale L.J. 955, 968 (1981) (A scholar's pursuit of the truth can "preserve in his students an attitude of friendship, or goodwill, towards those who seek the truth and indeed toward the truth itself.").

\textsuperscript{43} David L. Gregory, The Assault on Scholarship, 32 Wm. & Mary L. Rev. 993, 1003 (1991) ("So why write? Fundamentally, the answer is a matter of vocation and ethics. The aspiration to excellence breeds excellence in students and in legal audiences.").

\textsuperscript{44} Id. at 999 ("Although scholarship as an intellectual pursuit is commendable for its own worth, that is not its raison d'etre in the professional law school. If professors do not engage in scholarship, they cannot foster critical analytical skills in their students, because their own skills will atrophy.").


\textsuperscript{46} See e.g. Dennis Archer, The Importance of Law Reviews to the Judiciary and the Bar, 1991 Det. C. L. Rev. 229, 236–237; Brown, supra n. 40, at 46; Michael J. Graetz & Charles H. Whitebread II, Monrad Paulsen and the Idea of a University Law School, 67 Va. L. Rev. 445, 454 (1981) ("A university law school is among the few institutions for anticipating future social needs and for relating the role of law to furthering those needs. It must produce lawyers for tomorrow.") (cited in Donald J. Polden, Scholarship in Legal Education, 24 Mem. St. U. L. Rev. 1, 2 n. 8 (1993)).

\textsuperscript{47} Rubin, supra n. 32, at 903–904 ("The purpose of legal scholarship is most accurately described as prescription, or recommendation. . . . The entire field crackles with normativity . . . .").
decisionmaker describes the conceptual structure of the work, the way in which its arguments are formulated.\textsuperscript{48}

The academy also has an obligation to speak truth to power.\textsuperscript{49} That obligation can require confronting government in the persons of judges, legislators, and governmental administrators. It can require confronting the profession in the persons of lawyers, judges, and institutional structures such as bar associations and law firms. And it can require confronting the structures and institutions of legal education as well, for who is more able to critique and improve the vital enterprise of legal education than those who know it best?

Finally, scholarship is a powerful vehicle for personal and professional transformation\textsuperscript{50} and for the sheer pleasure of doing a difficult task well.\textsuperscript{51} While an author's personal and professional

\begin{footnotes}
\footnote{48 Id. at 904.}
\footnote{49 David R. Barnhizer, Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America, 50 U. Pitt. L. Rev. 127, 172 (1988) ("Hans Morgenthau . . . claimed the intellectual was responsible for speaking 'truth to power.'"). Barnhizer finds Arthur Schlesinger "most powerful" when commenting on Morgenthau: The contemporary intellectual, in [Morgenthau's] view, lived in a world that was distinct from, though potentially involved with, that of the politician. The intellectual . . . seeks truth; the politician, power. And the intellectual . . . can deal with power in four ways: by retreat into the ivory tower, which makes him irrelevant; by offering expert advice, which makes him a servant; by absorption into the machinery, which makes him an agent and apologist; or by "prophetic confrontation." Of the four modes of response, the last seemed to him most faithful to the intellectual's obligation. The "genuine intellectual," Hans Morgenthau wrote, " . . . must be 'the enemy of the people' who tells the world things it either does not want to hear or cannot understand." The intellectual's duty is to look "at the political sphere from without, judging it by, and admonishing it in the name of, the standards of truth accessible to him. He speaks, in the biblical phrase, truth to power."}
\footnote{50 As one scholar said, The task the course set me, then, was the direct analogue of Thoreau's task: to write my way out of Concord, out of false and inauthentic forms of speech and thought, to a kind of Walden, to a voice and language of my own. Writing to me thus became a way of creating a voice with which to speak and be, with which to represent and transform my own experience. White, supra n. 41, at 1030.}
\footnote{51 Another scholar said, And of course, for all that, legal scholarship is also something that produces pleasure. I do not want to end this symposium on a note of pure Yellow-Book aestheticism, but I defy any of the symposiasts (and at least many of the readers) to deny that they're also in the game . . . for those occasional moments}
\end{footnotes}
transformation and pleasure do not, alone, justify the resource expenditure for scholarship, this transformation and pleasure have their value for students, the profession, and the institutions we serve. The best faculties are composed of curious people, people who are constantly learning and adapting, people who are intellectually engaged with law, its study, and its practice. Scholarship is one of the best ways—perhaps the best way—to develop and maintain that kind of a faculty.

We join those who believe that these values justify the significant institutional and personal costs of scholarly production. But to claim these justifications, law faculties must take these underlying values seriously when defining acceptable scholarly topics and when evaluating individual scholarly efforts. Taken as a whole, the spectrum of scholarship we produce should serve these articulated values. If it does not, we cannot claim that legal scholarship justifies the enormous investment it requires.

V. WHAT IS A "LEGAL WRITING TOPIC"?⁵²

Most law professors would agree that the content of a particular field includes at least the topics covered by the texts commonly adopted for those courses.⁵³ For instance, if a property professor is looking for a property topic on which to write, she may look first at the table of contents of a property text. If she finds the category "estates and future interests," she can be fairly certain that a future interests topic is a property topic. She may write an article exploring a trend in future interests case law.⁵⁴ She may write a

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when they say, in some concise and illuminating way, something that appears to be true. . . .

[T]o have crafted, on occasion, something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it's the joy of that too.


⁵² Some have rightly questioned the use of categories to label kinds of scholarship. See e.g. Leslie Espinosa, Labeling Scholarship: Recognition or Barrier to Legitimacy, 10 St. Louis U. Pub. L. Rev. 197, 206 (1991). We use the label "legal writing topic" for the purposes of the discussion in this article, but we use it reluctantly and provisionally. See also infra § VII.

⁵³ The content of a legal field usually is broader and deeper than its course texts. Curricular constraints limit the breadth of coverage, and the course context limits depth. Much relevant material is more advanced or more theoretical than is appropriate for coverage in a law school course, though it is important for the development of scholars and teachers in the area.

⁵⁴ See e.g. C. Dent Bostick, Loosening the Grip of the Dead Hand: Shall We Abolish Legal Future Interests in Land? 32 Vand. L. Rev. 1061 (1979); Jesse Dukeminier, Perpetui...
more theoretical article analyzing the economic underpinnings of future interests.\textsuperscript{55} She may write about a technique for teaching future interests,\textsuperscript{56} or she may analyze the curricular resources law schools devote to teaching various property topics, including future interests.\textsuperscript{57} Our property professor has identified at least four categories of property topics: (1) the substance or doctrines of property; (2) the theories underlying property; (3) the pedagogy of the property class; and (4) the institutional choices affecting the teaching of property. Those four categories may be valued differently by her faculty colleagues, but they are all property topics.\textsuperscript{58} And they all serve, in one way or another, the purposes of scholarship, that is, they advance our understanding of the legal world in important ways. They develop new and important ideas and bring them to the people who need them—the legal academy, lawyers, and judges.

Applying this same methodology to the field of legal writing yields the same four categories. Just as in our property example, legal writing topics include those related to (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.\textsuperscript{59} A brief ex-


\textsuperscript{58} Topics may be relevant to more than one law school course. For instance, a future interests topic may be relevant to courses in property, wills, trusts and estates, taxation, and estate planning. A zoning topic may be relevant to courses in property, local government law, constitutional law, and environmental law. A law and economics topic may be relevant to a variety of courses. Faculty members in several subject areas may consider these shared topics part of their own areas. This sort of scholarly cross-fertilization is desirable since it significantly broadens our view of each topic. Christopher D. Stone, \textit{From a Language Perspective}, 90 Yale L.J. 1149, 1155–1156 (1981) ("To define and approach the same sorts of problems in different ways is a source of vitality.").

\textsuperscript{59} For other purposes, legal writing scholarship can be categorized in other ways as well. See Smith, \textit{supra} n. 19, at 5–21.
ploration of each of these categories will clarify the scope of legal writing scholarship.\(^{60}\)

\section*{A. Category One: The Substance or Doctrine of Legal Writing}

The first category—the substance or doctrine of legal writing—includes course content fundamental to a legal writing course. Just as in our property example, course textbooks provide the best starting point for identifying this content. A review of legal writing textbooks demonstrates that this course content includes such basic legal topics as the roles and functioning of the judicial and legislative systems; the doctrine of stare decisis; precedential values and appropriate uses of legal authority; the major forms of legal reasoning; the principles of statutory construction; the ethical duties of legal writers; the standards of appellate review; and other doctrines relating to appellate procedure.\(^{61}\)

Nor are legal writing textbooks alone in identifying this course content as basic to a legal writing course. The ABA’s Communication Skills Committee’s first articulated goal for a legal writing program is to “introduc[e] students to the fundamentals of the legal system: the structure of law-making bodies; the sources of law . . . ; the rules governing conflicts between those sources; and

\(^{60}\)For an initial understanding of legal writing scholarship, it is useful to think in terms of categories; but such artificial constructs do not reflect accurately the breadth of many of the articles we shall discuss. On closer inspection, one would find that many legal writing articles contain aspects of several or even all of the identified categories. For instance, no bright line divides category-one articles (articles on the substance of legal writing) and category-two (theoretical) articles. Many category-one articles do address theory, and most theoretical articles take a substantive point as their starting point. Many articles about substance and theory also discuss the pedagogical implications of the article’s thesis, and many primarily pedagogical articles include a significant substantive or theoretical component. Finally, many articles about institutional choices (category-four articles) deal with a substantive or theoretical misunderstanding that causes a misguided institutional choice.

interpretive canons for judging the meaning and weight of those sources.”

Some of this legal writing course content can also arise in non-legal writing courses. For instance, in a property course, the case for the day may invite a discussion of some aspect of the judicial system. Another case the next week may invite a discussion of the concept of dicta. Periodically, the professor may invite consideration of some aspect of policy-based reasoning. But the property professor is unlikely to do more than offer a brief explanation of such concepts. Rarely does a property professor assign any reading material on the judicial system, dicta, or forms of legal reasoning such as statutory construction. It is even more unlikely that a property professor will hold students accountable for the material by, for instance, including it on the course examination. Further, a review of traditional case books demonstrates that these topics are not part of the identified course coverage and certainly are not treated in any intentional and comprehensive way.

Indeed, the construction of most casebooks, at best, treats the precedential values of particular authorities as irrelevant. For example, consider the excellent text we each use for our property courses, Jesse Dukeminier and Jim Krier’s Property. Acquisition by capture is taught primarily by assigning Pierson v. Post (an 1805 case from the New York Supreme Court of Judicature, an early New York court that had both trial and appellate functions); Ghen v. Rich (an 1881 case from the federal trial court in Massa-

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62 Brill et al., supra n. 24, at 5; see also id. at 15–19.
63 Non-legal writing professors sometimes write about legal methods topics such as these, and just as in the case of our property example, supra n. 56, such scholarly cross-fertilization is desirable.
64 Professor Brill has observed, Only some of these reasoning skills can be taught in doctrinal courses, and those that can be taught in doctrinal courses cannot be taught completely there. For example, although two or three consecutive cases in a casebook can be synthesized into a consistent doctrine on a particular issue, the synthesizing that lawyers typically do is more complicated. A typical problem in the practice of law might involve harmonizing half a dozen cases, all within the same jurisdiction, none of which expressly states the rule for which it stands, and several of which appear to come to inconsistent results.
65 At worst, typical case book construction inadvertently suggests that all authorities are Equal.
67 3 Cai. R. 175, 2 Am. Dec. 264 (1805) (cited in Dukeminier & Krier, supra n. 66, at 19).
68 8 F. 159 (D. Mass 1881) (cited in Dukeminier & Krier, supra n. 66, at 26).
chusetts); and *Keeble v. Hickeringill*\(^{69}\) (a 1707 case from an English court of an unidentified level and not precisely on point). Note materials include a 1963 Mississippi case,\(^{70}\) a 1954 law review article,\(^{71}\) a 1950 case from the Seventh Circuit on which certiorari was denied by the United States Supreme Court,\(^{72}\) and a 1975 treatise.\(^{73}\) Nowhere does this excellent text explain the vastly differing precedential values of each of these authorities. Nor need the property text cover this important subject, for the property student is also taking a legal writing class, and she is learning the principles of precedential values there.

Legal writing course content also includes analytical processes students are expected to use in all of their classes, but for which they receive serious and sustained instruction usually only in their legal writing class. Examples of these analytical processes include common-law rule formulation; the construction of analogies; the synthesis of related authorities; the use of rule-based or policy-based reasoning; and the principles of statutory interpretation.

Finally, legal writing substantive content includes topics usually missing from other courses—topics such as the major structural paradigms of legal analysis; rhetorical principles of persuasion; the characteristics of legal readers; the stages of the legal writing process; strategies for dealing with adverse facts; the impact and use of narrative principles; and the standards of appellate review.\(^{74}\)

Just as in the property example above, articles about legal writing substance or doctrine (category one articles) analyze the

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\(^{70}\) *Carruth v. Easterling*, 150 So. 2d 852 (1963) (cited in Dukemin & Krier, supra n. 66, at 36 n. 16).


\(^{72}\) *Sickman v. U.S.*, 184 F. 2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951) (cited in Dukemin & Krier, supra n. 66, at 37).


\(^{74}\) Some, though certainly not all, of these topic areas relate directly to lawyering skills rather than to the more theoretical exploration of law and legal reasoning. The marginal relationship of theoretical scholarship to the practice of law has been roundly criticized, with perhaps the best known recent example being that of Judge Harry Edwards. Edwards, supra n. 30; see Robert W. Gordon, *Lawyers, Scholars and the Middle Ground*, 91 Mich. L. Rev. 2017, 2096 (1993); Judith S. Kaye, *One Judge’s View of Academic Law Review Writing*, 39 J. Legal Educ. 313, 320 (1989). To the extent that law faculties take that criticism to heart, these more skills-oriented topic areas can build useful bridges between the academy and law practice. Faculties less interested in serving the practice, however, should recognize many theoretical topics among those taught most often in legal writing classes.
application of a doctrine or other topic, exposing questions and proposing answers. For instance,

1. A legal writing article might explore the effect of raising and deciding appellate cases sua sponte, without first allowing the parties to brief the dispository issue.\textsuperscript{75}

2. Another article might analyze the practice of manufacturing a final judgment in order to obtain appellate review\textsuperscript{76} or might propose a method for reducing intercircuit conflicts.\textsuperscript{77}

3. An article might explore fiction-writing strategies lawyers can use to construct a persuasive fact statement.\textsuperscript{78}

4. Another article might demonstrate the inadequacy of researching only legal sources when both the legal academy and law practice have long since rejected a formalistic understanding of the law in favor of a broad legal realism.\textsuperscript{79}

5. Yet another article might explore how bias typically appears in legal language and how it can infect legal analysis and argument.\textsuperscript{80}

6. Another might propose the use of object-oriented analysis and design to improve legislative drafting\textsuperscript{81} or draw on

\textsuperscript{75} Adam Milani & Michael Smith, Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts, 69 Tenn. L. Rev. 245 (2002). Professor Smith teaches legal writing at Mercer University School of Law, and the late Professor Milani taught legal writing at Mercer University School of Law.

\textsuperscript{76} Rebecca Cochran, Gaining Appellate Review by Manufacturing a Final Judgment, 48 Mercer L. Rev. 979 (1997). Professor Cochran teaches legal writing at University of Dayton School of Law.

\textsuperscript{77} Mary Garvey Algero, A Step in the Right Direction: Reducing Intercircuit Conflicts by Strengthening the Value of Federal Appellate Court Decisions, 70 Tenn. L. Rev. 605 (2003). Professor Algero teaches legal writing at Loyola University New Orleans School of Law.

\textsuperscript{78} Brian Foley & Ruth Anne Robbins, Fiction 101: A Primer for Lawyers on How to Use Fiction Writing Techniques to Write Persuasive Facts Sections, 32 Rutgers L.J. 459 (2001). Professor Robbins teaches and Professor Foley formerly taught legal writing at Rutgers School of Law–Camden.


\textsuperscript{80} Anne Enquist & Lorraine Bannai, (Un)Examined Assumptions and (Un)Intended Messages: Teaching Students to Recognize Bias in Legal Analysis and Language, 27 Seattle U. L. Rev. 1 (2003). Professors Enquist and Bannai teach legal writing at Seattle University School of Law.

methods of statutory interpretation, literary criticism, and musicology to propose a resolution to methodological disputes over statutory interpretation.\textsuperscript{82}

7. Another article might identify the myths and realities surrounding the "plain English" movement,\textsuperscript{83} or chronicle the growing acceptance of electronic communication within the American court system and use current research in rhetoric, cognition, and computer usability to suggest guidelines for using electronic communication with courts.\textsuperscript{84}

8. Still another article might explore the extent to which a lawyer or a court legitimately can rely on non-legal materials in support of policy rationales.\textsuperscript{85}

All of these articles are legal writing articles because they deal with the \textit{substantive content} of the typical legal writing course, and all of these articles serve the purposes of legal scholarship. They advance knowledge generally; they enhance teaching, often demonstrating a close relationship between the scholarly topic and actual course content; and they improve the performance of legal decision-makers. These legal writing topics directly improve the performance of judges and lawyers by improving their ability to reason effectively, research thoroughly, and communicate clearly.

Some of these topics fulfill the purposes of scholarship in the most traditional of ways. Many are examples of traditional analyses of clearly legal issues, such as topics of appellate procedure, uses of precedent, statutory construction, or professional responsibility. Other category one topics explore new territory, using insights from other disciplines to deepen our understanding of important issues of legal analysis. These examples of grounded interdisciplinary scholarship are directly useful to legal decision-makers, offering new insights to improve the performance of lawyers and judges. They offer the advantages of breaking new ground and expanding the scope of our thinking about law and the

\begin{thebibliography}{9}
\bibitem{Crist} Maria Perez Crist, \textit{The E-Brief: Legal Writing for an Online World}, 33 N.M. L. Rev. 49 (2003). Professor Crist teaches legal writing at the University of Dayton School of Law.
\end{thebibliography}
profession, while avoiding the concern of being too theoretical to be relevant to most legal audiences.

B. Category Two: The Theoretical Foundations of Legal Writing

All 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. Legal writing topics, too, have theoretical foundations. Those foundations include constitutional theory, legal methods concepts, jurisprudence, composition theory, philosophy, ethics, logic, political theory, rhetoric, literary theory, linguistics, cognitive psychology, narrative theory, comparative law, and legal history. For instance,

1. A legal writing article might challenge the use of unpublished and depublished opinions as a serious breach of traditional understandings of the common law system, resulting in a legal system much closer to a civil law system.

2. Another article might explore the relationship of narrative to rule articulation, analogy, and policy-based reasoning.

3. An article might use post-modern philosophy to critique common approaches to the teaching of legal writing, or

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86 One strand in the conversation about legal scholarship laments the difficulty of saying anything both important and new. See e.g. Christopher D. Stone, supra n. 58, at 1151. Speaking of treatise-writing, Professor Stone observes that “much of the most challenging, creative, and rewarding work...—the supplying of insight and system—has largely been done in the major common-law fields.” Id.; see also Geoffrey R. Stone, Controversial Scholarship and Faculty Appointments: A Dean’s View, 77 Iowa L. Rev. 73, 74 (1991) (“Quite frankly, it is difficult to make a useful contribution at the cutting edge of legal scholarship. Sometimes it seems that everything worth saying has been said.”). For a largely unmined field like legal writing, however, the most important and most exciting work—the work of unearthing patterns, making broad connections, unmasking misconceptions—remains to be done.

87 See e.g. Edwards, supra n. 30 (discussing criticisms of overly theoretical scholarship).


discuss the relationship of emotions to the more rational aspects of legal decision-making, showing that they work together to construct legal meaning.\textsuperscript{91}

4. Another article might compare the American common-law system to other common-law systems, explaining how the American system became uniquely writing-centered and why the American reliance on writing results in a more effective and trustworthy system.\textsuperscript{92}

5. An article might analyze the rhetorical forces at play in Justice Scalia's dissents\textsuperscript{93} or in the employment discrimination cases of the Supreme Court.\textsuperscript{94}

6. Yet another article might analyze the legal writing process in light of principles of composition theory.\textsuperscript{95}

7. Another article might critique rhetorical strategies of legal writers based on particular ethical principles.\textsuperscript{96}

8. The theoretical possibilities of legal writing topics are virtually limitless.

All of these articles serve the purposes of legal scholarship. They advance knowledge about the law and the profession. Many of them expressly discuss the application of theory to the profession or to teaching, and thus they serve the purposes of improving teaching and improving the profession. Other examples are highly theoretical, but as Professor Rubin reminds us, the scholar's work teaches legal writing at The John Marshall Law School.

\textsuperscript{91} Peter Brandon Bayer, \textit{Not Interaction but Melding—The “Russian Dressing” Theory of Emotions: An Explanation of the Phenomenology of Emotions and Rationality with Suggested Related Maxims for Judges and Other Legal Decision Makers}, 52 Mercer L. Rev. 1033 (2001). Professor Bayer teaches legal writing at the William S. Boyd School of Law at University of Nevada, Las Vegas.


can serve legal decision-makers even if it is not addressed to that audience, indeed, even if it is never seen by that audience. Some of today's best-known legal scholarship, though theoretical in nature, serves legal decision-makers in just this way.

C. Category Three: The Theory and Practice Appropriate to the Teaching of Legal Writing

Like other teaching areas, legal writing has been enriched by articles about pedagogy. In fact, the pedagogical conversation among legal writing professors may be more vibrant than that in any other area of the legal academy. Since much of the content of a legal writing course is focused on the teaching of a process, it is natural that legal writing professors would focus scholarly attention on pedagogical issues. Further, many articles about pedagogy take as their starting point a substantive (category one) or theoretical (category two) point. Examples of possible pedagogical topics are ample:

1. An article might analyze aspects of the legal environment of law teaching, such as the application of the ADA to learning disabled law students, or the tension between liability for peer-on-peer harassment under Title IX and students' rights of free expression under the First Amendment.

2. Another article might explore the effects on women and minorities of particular institutional environments and common classroom practices.

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97 Rubin, supra n. 32, at 904.
98 See e.g. infra nn. 148–158 and accompanying text (explaining that theoretical topics related to legal writing have long been acceptable for legal scholarship).
100 Susan Hanely Kosse, Student Designed Home Web Pages: Does Title IX or the First Amendment Apply? 43 Ariz. L. Rev. 905 (2001). Professor Kosse teaches legal writing at the Louis D. Brandeis School of Law at the University of Louisville.
3. Other articles might present a study of the effectiveness of various academic support techniques or critique present practices of teaching legal research.

4. Another article might analyze how the academic discipline of legal writing has developed its doctrine by developing a common professional language.

5. Still other articles might explore the application of various principles of learning theory to the law school classroom.

6. An article might draw on emerging contextualist work in cognitive research to critique existing clinical experiential theory.

7. Or an article might apply writing process principles to the setting of the law school seminar paper.

regaining pedagogies of legal writing and describing the linguistic model used to gauge how teaching law as language marginalizes outsider voices). Professor Baker teaches legal writing at Northeastern University School of Law. Professor Fischer teaches legal writing at the Louis D. Brandeis School of Law at the University of Louisville. Professor Stanchi teaches legal writing at Temple University James E. Beasley School of Law.

102 Laurel Currie Oates, Beating the Odds: Reading Strategies of Law Students Admitted through Special Admissions Programs, 83 Iowa L. Rev. 139 (1997) (presenting a study exploring perceived differences in the ways academically challenged students read judicial opinions). Professor Oates teaches legal writing at Seattle University School of Law.

103 McDonnell, supra n. 79; Terry Jean Seligmann, Beyond "Bingo!": Educating Legal Researchers as Problem Solvers, 26 Wm. Mitchell. L. Rev. 179 (2000); Marilyn Walter, Retaking Control over Teaching Research, 43 J. Leg. Educ. 569 (1993). Professor McDonnell teaches legal writing at Pace University School of Law. Professor Seligmann teaches legal writing at the University of Arkansas School of Law, Fayetteville. Professor Walter teaches legal writing at Brooklyn Law School.

104 Terrill Pollman & Judith Stinson, IRLAFARC! Surveying the Language of Legal Writing, 56 Me. L. Rev. 239 (2004) (presenting a study using correlation analyses and two-sample t-test analyses to analyze the degree to which legal writing professors employ or understand a common set of terms). Professor Pollman teaches legal writing at the William S. Boyd School of Law at University of Nevada, Law Vegas. Professor Stinson teaches legal writing at the Arizona State University College of Law.


8. An article might analyze the use of the Socratic method in law schools in general and in writing courses in particular.\textsuperscript{108}

9. An article might review composition theory’s analysis of the relationship between speech and writing and suggest ways in which that analysis informs the teaching of writing in law school.\textsuperscript{109}

10. Another article might argue that certain principles of rhetoric and literary criticism might serve as the foundations for a coherent philosophy of law study;\textsuperscript{110} or use principles of rhetorical criticism to argue that legal writing and first-year casebook courses should be viewed as one ongoing rhetorical activity;\textsuperscript{111} or examine possible definitions of legal writing and their impact on the effectiveness of teaching and learning in the academy;\textsuperscript{112} or identify the rhetorical roots of legal reasoning and advocate that law schools use classical rhetorical concepts and vocabulary to teach deductive and analogical reasoning.\textsuperscript{113}

11. Another article might compare the historical development and the pedagogical and jurisprudential foundations of le-


\textsuperscript{108} Mary Beth Beazley & Mary Kate Kearney, \textit{Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process}, 64 Temple L. Rev. 885 (1991). Professor Beazley teaches legal writing at Moritz College of Law at The Ohio State University. Professor Kearney taught legal writing at Vermont Law School until the two-year cap on her position expired. She now teaches at Widener University School of Law, Harrisburg.


\textsuperscript{110} Cornwell, \textit{Languages, supra} n. 90. Professor Cornwell teaches legal writing at The John Marshall Law School in Chicago.


\textsuperscript{112} Rideout & Ramsfield, \textit{supra} n. 16. Professor Rideout teaches legal writing at Seattle University. Professor Ramsfield taught legal writing at Georgetown University Law Center for many years, and now teaches legal writing at University of Hawaii at Mānoa, William S. Richardson School of Law.

gal writing courses and casebook courses, demonstrating how each kind of course complements the other.\textsuperscript{114}

12. An article might use research in cognitive science, psychology, psychotherapy, composition theory, and critical discourse analysis to explore both the role of student conferences and the institutional and individual constraints that may impede learning.\textsuperscript{115}

The value of scholarship about pedagogy is the subject of debate within the legal academy,\textsuperscript{116} but a compelling case can be made for including pedagogical analysis as part of legal scholarship. Judge Harry Edwards begins his well-known critique of modern legal scholarship\textsuperscript{117} with an epigram from Felix Frankfurter: "In the last analysis, the law is what the lawyers are. And the law and the lawyers are what the law schools make them."\textsuperscript{118} He returns to Frankfurter again in the article's conclusion and argues for "practical scholarship and pedagogy."\textsuperscript{119} He writes "I earnestly believe that much of the growing disarray that we now see in the profession is directly related to the growing incoherence in law teaching and scholarship."\textsuperscript{120}

Judge Edwards is writing primarily to criticize highly theoretical scholarship not readily usable by the profession, but his criticism also says something important about taking seriously our role in "making lawyers." Tellingly, in this same article, Judge Edwards decires inadequate law school attention to legal writing and asserts that "far too few law professors recognize the gravity of the problem."\textsuperscript{121} He notes problems with matters of style and presentation in the practitioner writing he sees, but observes that


\textsuperscript{116} See e.g. Larry Catá Backer, Defining, Measuring, and Judging Scholarly Productivity: Working toward a Rigorous and Flexible Approach, 52 J. Leg. Ed. 317 (2002); Jonathan L. Entin, Scholarship about Teaching, 73 Chi.-Kent L. Rev. 847 (1998); Joy, supra n. 22.

\textsuperscript{117} Edwards, supra n. 30.


\textsuperscript{119} Edwards, supra n. 30, at 77.

\textsuperscript{120} Id. at 75.

\textsuperscript{121} Id. at 63–65.
"[t]he more serious problem is . . . lack of depth and precision in legal analysis."

If Felix Frankfurter and Judge Edwards are right that the lawyers we "make" define the future of the law, then surely pedagogy should not be excluded from our close, critical scholarly examination. Careful analysis of legal pedagogy serves all the identified values of scholarship. It identifies and proposes solutions for a serious legal problem; the problem of bad legal writing with its attendant effects on clients and on the legal system. It improves the performance of tomorrow's legal decision-makers far more directly than can a doctrinal article about a particular, often esoteric legal issue or a highly theoretical article addressed largely to other highly theoretical scholars writing in the same specialized field. It advances knowledge about one of our own professions, the profession of teaching. And given the marginalized status of legal writing programs and faculty members at many schools, scholarship about legal writing pedagogy often must speak truth to power.

When we talk about scholarship, we should say what we mean, and we should keep our stories straight. The claim that scholarship enhances teaching is one of the primary justifications for devoting so many institutional and personal resources to the scholarship project. It is difficult to square that claim with institutional policies declaring pedagogy categorically off limits as an area of scholarly inquiry. If serious scholarly treatment of law

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122 Id. at 64–65.
123 We do not claim that all publications about pedagogy should be considered scholarship. Rather, we claim that articles about pedagogy, like other kinds of articles, should be taken seriously enough to be evaluated according to their merit.
124 Scholarship about better teaching to a broad group of students is especially important now that law schools no longer dismiss large percentages of their entering classes for academic reasons. See Beasley, supra n. 14, at 30 nn. 5–7.
125 "The life of a law teacher . . . is dominated by two activities . . . : teaching and scholarship. . . . [T]eaching and scholarship are the principal activities of the academic lawyer, the activities that reflect his primary professional interest and capabilities, and the institution in which he lives his professional life is deliberately organized to promote these activities. Teaching and scholarship are the raisons d'être of the university." Kronman, supra n. 42, at 957.
126 Supra nn. 41–45 and accompany text; see also Mary Kay Kane, Some Thoughts on Scholarship for Beginning Teachers, 37 J. Leg. Educ. 14, 14 (1987); Polden, supra n. 46, at 1–5.
127 Of course, one might argue that rigorous inquiry about pedagogy is valuable but different from "scholarship." The argument would go, "Professors should write 'real' scholarship, and if they write about pedagogy in their spare time, that's good." The problem with this argument should be obvious. In the press of other obligations, most professors struggle to find time to write at all. Writing requires stealing time—a lot of time—away from student advising, from sponsoring co-curricular activities, from alumni events, from speaking en-
teaching is outside the boundary of acceptable scholarship, we cannot claim truthfully that we write to improve our teaching.

D. Category Four: The Institutional Choices Affecting the Teaching of Legal Writing

The final category of scholarship we have identified includes articles critiquing the institutional choices affecting the teaching of legal writing. It would be a mistake, however, to assume that category four articles do not deal with the substance or theory of legal writing. Many of these articles take as their starting point a substantive or theoretical misunderstanding that causes a misguided institutional choice. Certainly, misguided institutional choices can severely impede pedagogy. For instance,

1. An article might explore Rousseau's speech/writing hierarchy as it is manifested within the structures of the legal academy and use a deconstructionist critique to show the artificiality of separating speech and writing.\(^\text{128}\)

2. Another article, after comparing the pedagogical and jurisprudential foundations of legal writing and casebook courses, might identify and challenge some of the reasons for the anti-intellectual bias against writing courses.\(^\text{129}\)

3. An article might apply principles of rationality, academic ethics, and the cardinal legal standards of the Equal Protection Clause to the disparate treatment and adverse employment conditions sometimes imposed on writing professors.\(^\text{130}\)


\(^{129}\) Romantz, *supra* n. 114.

\(^{130}\) Peter Brandon Bayer, *A Plea for Rationality and Decency: The Disparate Treatment*
4. Other articles might present empirical studies to show the disparate impact on women caused by institutional policies affecting legal writing faculty members, or present and analyze survey results about staffing models, teaching loads, curriculum and course content, institutional status, and other aspects of legal writing programs.

5. An article might argue for institutional support for scholarship by legal writing professors or for teaching loads that include more than one area.

6. Another article might explore the trend toward tenure-track legal writing positions and the tenure criteria relevant to them.

7. Or after examining the uniquely writing-centered American common law system, an article might advocate for an enhanced role for writing programs in legal education.

Articles about institutional choices serve all of the identified values of legal scholarship as well. They advance individual and institutional knowledge; they directly enhance teaching; and they often powerfully transform both people and law school programs. And

of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics, 39 Duquesne L. Rev. 329, 331 (2001). Professor Bayer teaches legal writing at the William S. Boyd School of Law at University of Nevada, Las Vegas.


133 Liemer, supra n. 5. Professor Liemer teaches legal writing at Southern Illinois University School of Law.


136 Ehrenberg, supra n. 92, at 1195–1199.
more than any other kind of scholarship, articles about institution's choices serve the crucial function of speaking truth to power. In the final analysis, that function will have more cumulative impact on legal education, and therefore, on the future of the legal profession, than almost any other kind of scholarship.

Further, we in the academy claim that critiques of other institutions—courts, legislatures, agencies—fulfill a fundamentally important duty of the professoriate.\textsuperscript{137} If we value our role as critics of others, we can hardly reject our role as critics of ourselves. As Professor Rubin has observed, the very act of evaluating another's work is fundamentally self-critical. The evaluative process places the criteria, and therefore, the norms of the discipline itself, at issue.\textsuperscript{138} This self-testing is even more important and even more effective when the subject of the evaluation is itself an institutional critique.\textsuperscript{139} We should hesitate to banish prophetic voices within our own ranks. Whether the voices are "assimilated" or "rebellious,"\textsuperscript{140} we need to hear what they have to say.

VI. RATIONALES USED TO DISCOUNT LEGAL WRITING TOPICS

Even a casual look at the bibliography shows that legal writing professors are writing substantive, theoretical, and pedagogical articles, as well as political articles critiquing institutional choices. In this Section, we examine and respond to claims used to discount topics in all of these areas.\textsuperscript{141}

\textsuperscript{137} See e.g. David A. Westbrook, \textit{Pierre Schlag and the Temple of Boredom}, 57 U. Miami L. Rev. 649, 652 (2003). Westbrook notes, "In this way, law professors fulfill a very traditional notion of their duties as public intellectuals—the task of the professor is to improve the polity through criticism." \textit{Id.} at 652–653. He goes on to say that Pierre Schlag has turned this criticism back onto the legal academy with great success. \textit{Id.}

\textsuperscript{138} Rubin, \textit{supra} n. 32, at 889.

\textsuperscript{139} "The evaluation of another's work involves a confrontation with it that provides one of the best opportunities to develop an awareness of one's own work and the beliefs that underlie it." \textit{Id.} at 889.


\textsuperscript{141} We focus here on claims about the topics themselves, not claims about the quality of a particular article. To withstand logical challenge, claims discounting a particular topic must presume an article in which the author has achieved all the topic would permit. Otherwise, the claim is not addressed logically to the topic but rather to the sufficiency of a particular effort.
A. Myth #1: Legal Writing Topics Do Not Qualify as Scholarship

One rationale sometimes offered to support a policy discounting legal writing topics is the sweeping generalization that writing on legal writing topics does not constitute scholarship. Even assuming the possibility of a static and universal definition of "legal scholarship," this assertion cannot sustain reasoned analysis.

First and at the very least, the assertion is overbroad. Recall the topics in categories one and two described above, such as the roles and functioning of the judicial and legislative systems; the doctrine of stare decisis; precedential values and appropriate uses of legal authority; the forms of legal reasoning; the principles of statutory construction; relevant ethical duties of lawyers; the standards of appellate review; and other doctrines relating to appellate practice. One can hardly deny that these topics qualify as subjects of legal scholarship. Some of them have been well established as subjects of legal scholarship for many years. Consider, for example, such classics as Judge Benjamin Cardozo's *The Nature of the Judicial Process*; Karl Llewellyn's *Bramble Bush* or his famous "thrust and parry" article; Edward Levi's classic book on legal reasoning; David Mellinkoff's *The Language of the Law*; or Robert Cover's famous Forward to the Supreme Court 1982 Term, *Nomos and Narrative*.

Other kinds of legal writing topics are more recent threads of the legal conversation, but many have been received by the academy with fanfare. Consider, for instance, Steven Winter's book on the role of metaphor in law; Tony Amsterdam and Jerome

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150 Steven L. Winter, *A Clearing in the Forest: Law, Life and Mind* (U. Chi. Press 2001). Professor Winter's book was the subject of the symposium "Cognitive Legal Studies:
Bruner’s book, *Minding the Law;*\textsuperscript{151} James Boyd White’s book on law as translation;\textsuperscript{152} Susan Bandes’s anthology on the role of emotion in law;\textsuperscript{153} Lash LaRue’s book on the Constitution as narrative;\textsuperscript{154} Fred Schauer’s book on rule-based reasoning;\textsuperscript{155} Peter Brooks and Paul Gewirtz’s anthology on narrative and rhetoric in the law;\textsuperscript{156} or Lawrence Solan’s book applying generative linguistic theory to the issues of statutory construction.\textsuperscript{157}

To exclude all legal writing topics from the category “legal scholarship” would require excluding the work of such renowned scholars as these and many more. Yet, unless the work of these well-known legal scholars is excluded from the category of legal scholarship, no reasoned justification can be advanced to discount all legal writing topics. The only other possible explanation would be that topics count as legal scholarship when Professors Cover, LaRue, Bandes, Schauer, Solan, White, and Winter write about them, but not when legal writing professors write about them.\textsuperscript{158}


\textsuperscript{158} We cannot help but notice that virtually all of the well accepted, even nationally acclaimed publications about legal writing topics—that is, those whose place as part of legal scholarship is unquestioned even though they address topics covered primarily in the legal writing classroom—have been written by men. We also notice that the vast majority of the people who actually teach legal writing are women. Stanchi, supra n. 131, at 467 ("[An] institutionalized and illegitimate status hierarchy operat[es] in American law schools. Like any status hierarchy, its boundaries are well defined and well enforced. . . . [T]his hierarchy is gendered, with the lowest rank overwhelmingly composed of women and the highest rank overwhelmingly composed of men. The players in this status hierarchy are the faculties and
Certainly no one in the academy would advocate that we decide what is legal scholarship based on the identity of the author.\textsuperscript{159} Clearly, substantive or theoretical legal writing topics (articles in categories one and two) are and long have been well within the scope of acceptable, even admirable, legal scholarship.

Second, the question of whether an article about pedagogy or institutional practice (categories three and four) constitutes "real" scholarship is unrelated to whether the topic pertains to legal writing. The value of articles on pedagogy is the subject of an ongoing debate in the academy.\textsuperscript{160} Nothing in that debate, however, distinguishes whether the article addresses teaching methods for a casebook course,\textsuperscript{161} a seminar,\textsuperscript{162} or a legal writing course.\textsuperscript{163} Law schools will have to decide how to value such articles as Todd Rakoff's \textit{The Harvard First-Year Experiment};\textsuperscript{164} Philip Kissam's \textit{Seminar Papers};\textsuperscript{165} Scott Burnham's \textit{Teaching Legal Ethics in Contracts};\textsuperscript{166} Cass Sunstein's \textit{Risk Assessment and Resource Allocation by Law Students};\textsuperscript{167} and Leonard Riskin's \textit{Mindfulness: Foundations of American Law Schools. At the top are the tenured 'doctrinal' professors, roughly 70 percent of whom are male; at the bottom are legal writing professors, roughly 70 percent of whom are female."}.

We hope that the concept of "traditional" scholarship is not gender-related, but it may be. Professor Karin Mika observed a similar phenomenon in "traditional" constitutional scholarship. Karin Mika, \textit{Self-Reflection within the Academy: The Absence of Women in Constitutional Jurisprudence}, 9 Hastings Women's L.J. 273, 305–306 (1998) ("However, the bulk of writings by female authors tend to appear in the context of a gender-related discussion. The majority of venerated constitutional law 'scholars' are overwhelmingly male. Although there were many prolific female authors in the Nineteenth century who wrote eloquently about contemporary issues, their work usually does not appear in our legal texts. This is, no doubt, because their work was not, and is still not, considered traditional legal scholarship that could be used in conjunction with the case method of study.").

\textsuperscript{159} For an interesting related point, see Carter, \textit{supra} n. 39, at 2066 ("[O]ne claim that seemed absolutely inadmissible is that either article might stand on its own. Evidently, there is no "on its own" any longer. Not only must one know the context, one must know the author. The more one knows about the author, the less work one has to do to evaluate the argument.").
\textsuperscript{160} See \textit{supra} sec. 5(C).
\textsuperscript{162} See e.g. Fajans & Falk, \textit{supra} n. 107.
\textsuperscript{163} See e.g. Linda L. Berger, \textit{A Reflective Rhetorical Model: The Teacher as Reader and Writer}, 6 Leg. Writing 57 (2000).
tional Training for Dispute Resolution.\textsuperscript{168} Whatever a law school decides about the value of pedagogical articles, clear-sighted and fair-minded assessment requires that articles on torts pedagogy, civil procedure pedagogy, seminar pedagogy, or legal writing pedagogy be treated the same way.\textsuperscript{169}

Similarly, debate over the value of articles critiquing the institutional practices of legal education is ongoing,\textsuperscript{170} but nothing in that debate distinguishes among topics challenging institutional practices based on race, gender, jurisprudential school, skills courses in general, or legal writing courses in particular. Whatever a law school decides about the value of articles on institutional practices, all rigorous articles critiquing institutional practices should be treated alike.

At some law schools, pedagogical or political articles may be counted as legal scholarship, and the relevant question is the quality of a particular article. Other law schools may take the opposite view, refusing to consider any pedagogical or political article, no matter what its intellectual rigor. But there is no basis for counting a pedagogical or political article about another subject area and not counting a similar article about legal writing.

In fact, most law schools that discount pedagogical or political topics probably apply that policy across the board, to all subject areas. Consider two recent articles, \textit{Teaching Civil Procedure through Its Top Ten Cases, Plus or Minus Two}\textsuperscript{171} and \textit{Making Contracts Relevant: Thirteen Lessons for the First-Year Contracts Course}.\textsuperscript{172} Each article has something important to say. The civil


\textsuperscript{169} Christopher D. Stone, \textit{supra} n. 58, at 1165 ("[The law] involves continual explanation and justification. Justice requires that like cases be treated alike; analogies have to be sorted into those that fit and those that do not. Metaphors have to be kept within the bounds of judicial constraint.").


\textsuperscript{171} Kevin M. Clermont, \textit{Teaching Civil Procedure through Its Top Ten Cases, Plus or Minus Two}, 47 St. Louis U. L.J. 111 (2003).

\textsuperscript{172} Robert M. Lloyd, \textit{Making Contracts Relevant: Thirteen Lessons for the First-Year
procedure article applies schema theory to argue that civil procedure professors should give more attention to the subject's landmark cases. The contracts article recommends a preventive law focus in the first-year contracts course.

Most law schools that would discount an article about legal writing pedagogy probably would discount these articles as well, at least for tenure and promotion purposes. At many schools, however, the articulation of those two decisions would differ. For the article about civil procedure pedagogy, faculty members would say that articles about pedagogy do not count as legal scholarship. They would not say that civil procedure articles do not count. For the article about legal writing pedagogy, however, faculty members are not likely to say that articles about pedagogy do not count. Instead, they are likely to say that legal writing articles do not count.

Similarly, consider an article on valuing diversity in hiring for doctrinal positions, such as Derrick Bell’s *Diversity and Academic Freedom*. If a law school has adopted a policy that discounts articles critiquing institutional practices, faculty members are likely to explain the problem with this racial critique of law school hiring and tenuring processes by saying that articles about law school politics do not count. They are not likely to say that articles about race do not count. If the article is about hiring practices affecting legal writing professors, however, those same faculties may justify discounting the article by explaining that it is about legal writing.

These differences in description constitute errors in categorization, perhaps prompted by a classic induction error—the erro-

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*Contracts Course, 36 Ariz. St. L.J. 257 (2004).*


174 See *e.g.* Levine & Stanchi, *supra* n. 4; Neumann, *supra* n. 131. Professors Levine and Stanchi teach legal writing at Temple University. Professor Neumann taught legal writing at Hofstra University.

175 "A category is a set of things . . . treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other." Amsterdam & Bruner, *supra* n. 151, at 20. Professors Amsterdam and Bruner point out,

Acquiring and negotiating our categories is part of . . . learning . . . a profession . . . Whether the categories deal with nearly universal human experience . . . or are found only in . . . legal digest headings[,] . . . we need to get them
neous assumption that legal writing articles are pedagogical or political. And since induction and classification are steps in the construction of analogies,\textsuperscript{176} these errors lead directly into errors of analogical reasoning. The article on civil procedure pedagogy is analogized to other articles on pedagogy, while the article on legal writing pedagogy is analogized to other (unknown but imagined) articles on legal writing topics. Essentially, the speaker is articulating the conclusion of an unspoken syllogism.\textsuperscript{177} The induction error occurs in the minor premise, but since the premises are unarticulated, the error is "smuggled"\textsuperscript{178} into the reasoning process. An examination of the actual categories of legal writing topics would expose the analogical error.

We in the academy have a special responsibility to take seriously our reasoning processes and to take care with our language. As Professor Cover explained, language is power.\textsuperscript{179} Our language creates and constrains the intellectual world we inhabit,\textsuperscript{180} and the world of legal scholarship is no different. The categorization error and the conclusion of the faulty syllogism produce a serious consequence—they exclude an entire subject area from academic exploration without offering a justification for the exclusion.

\textit{right} both to make sense of the world and to communicate with one another about it.

That means we are always at risk that our categories may lead us astray. Indispensable instruments, they are also inevitable beguilers. To interrogate their uses and their dangers is a necessary part of legal studies, as it is of any preparation for considered thought and action.

\textit{Id.} at 19.


\textsuperscript{177} Major premise: Articles about pedagogy or politics do not count. Minor premise: Legal writing articles are about pedagogy or politics. Conclusion: Legal writing articles do not count.

\textsuperscript{178} Professor Rubin uses the term "smuggling" in discussing the evaluative criterion that legal scholarship should state its normative premises. He writes,

The imagery of smuggling is quite precise here. One can smuggle contraband, such as narcotics, but one can also smuggle perfectly legitimate items, such as wristwatches. The defining characteristic of smuggling is that the material is brought in clandestinely, and not subject to established rules of inspection. Thus, there is no way to determine whether it is contraband or not, no way to gauge its quality, and no way to control its effect upon the market.

Rubin, supra n. 32, at 916 p. 88.


\textsuperscript{180} "[L]anguage is no mere instrument which we can control at will; it controls us." Frederick Pollock & Frederic William Maitland, \textit{The History of English Law} vol. 1, 87 (2d ed., Cambridge U. Press 1898).
When faculty members talk about legal scholarship, we should speak clearly, precisely, and candidly. We can say that legal writing topics will not count for promotion and tenure only if we intend also to exclude the work of many of today’s best-known legal scholars. We can exclude legal writing topics as a category only if we intend also to exclude topics like appellate procedure, forms of legal reasoning, the functioning of the common law system, ethical duties pertaining to advocacy, and the philosophy of language. But if we do not mean to exclude the books and articles addressing those topics, we should not say that “legal writing articles” will not support promotion and tenure.

We can say that articles about pedagogy or politics will not count. But if we take that position, we should not articulate differently our reasons for discounting an article on legal writing pedagogy and an article on civil procedure pedagogy. We should not say that our decision in one case was based on the article’s relationship to a particular course, such as legal writing, while our decision in the other case was based on the article’s pedagogical or political nature.

Or we can say that pedagogical and political articles can serve important scholarly values by directly improving our ability to make good lawyers, thereby improving the law and the legal process. We can say that these articles will be evaluated like any other kind of article—that is, by looking at the intellectual rigor the article required, the comprehensiveness of the research on which it is based, its contribution to the scholarly conversation on its topic, and its potential to advance the study and practice of law. Some pedagogical articles clearly meet these standards; some may not. Some authors may intend their pedagogical pieces as service to the academy and would not claim that they represent scholarship. But the evaluation process should be based on criteria related to the function of legal scholarship rather than on factual and logical errors.

And if we say that articles about pedagogy do not count, we should not say that one of the primary reasons for spending mas-

181 See supra nn. 117–126 and accompanying text.
182 “[A law school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship. When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work.” AALS Tenure Report, supra n. 20, at 505.
183 See infra nn. 192–235 and accompanying text.
sive institutional and personal resources on scholarship is to enhance our teaching.

B. Myth #2: Non-Legal Writing Faculty Members Do Not Know How to Evaluate Legal Writing Articles

The other rationale sometimes offered for discounting legal writing topics is the concern that non-legal writing faculty members do not know how to evaluate legal writing topics. This rationale essentially says, "Your scholarship does not count for promotion and tenure because I do not know enough about your field." Or perhaps, as Judge Richard Posner put it, "what I do not know is not knowledge."184

One must question a rationale that, by its very definition, limits scholarly inquiry to existing fields. Such a rationale flies in the face of a fundamental purpose of scholarship in the academy: to generate and disseminate new knowledge.185 If an evaluator feels inadequate to evaluate a publication, perhaps a more appropriate response is a combination of becoming more competent and seeking review by others already competent in the field. Indeed, law faculties have long evaluated legal scholarship outside their individual areas of expertise in just this fashion.186

We do not mean to make light of the difficulty of evaluating an article in an unfamiliar area. Evaluating works outside one's own area always requires some assessment of the place of that work in

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184 Richard A. Posner, The Present Situation in Legal Scholarship, 90 Yale L.J. 1113, 1129 (1981) ("The difficulty) of fitting interdisciplinary research into the law-school mold . . . is compounded by the well-known hostility of scholars to types of scholarship different from their own, a hostility captured in the adage, 'what I do not know is not knowledge.").

185 Am. Assn. U. Profs., General Report of the Committee on Academic Freedom and Academic Tenure, 1 Am. Assn. U. Profs. Bull. 17 (1915) (reprinted in L. & Contemp. Probs. 393, 397 (Summer 1990)); see also Geoffrey R. Stone, supra n. 86, at 76 ("[L]aw schools should always be open to new ideas. Scholarship should never be dismissed as unworthy merely because it is unorthodox, controversial, or even deeply unsettling.").

186 The American Association of Law Schools reported that

Nearly two-thirds [of law schools] indicated that the school assigns responsibility for scholarship assessment within the law school to more than one category (e.g., faculty colleague with special knowledge, tenure committee, all tenured faculty). . . . Nearly 70 percent use outside evaluations on a regular basis and another 10 percent in "exceptional cases," but not regularly. This compares with 40 percent in 1979 using outside evaluations regularly, and another 20 percent using them in exceptional cases, meaning that in 1979 just under 60 percent used outside evaluation at all compared to 80 percent in 1989.

AALS Tenure Report, supra n. 20, at 485.
the existing literature, a literature with which the evaluator is unfamiliar. An evaluator whose own area is civil procedure, for instance, faces this difficulty whether the subject of evaluation is in the area of legal writing, sales, criminal law, or international law. Since this sort of difficulty has never stopped faculties from evaluating other scholarship, however, the concern must mean something else.

And in fact it does. Faculty members concerned about their ability to evaluate legal writing scholarship are seeing in some articles a methodological difference with their own work. In other articles, they sense an ideological difference. In still other articles, they find both methodological and ideological differences. 187 To evaluate such articles is “to cross the conceptual divide that separates one’s own views from the views of the author.” 188 The journey across that divide has enormous value, for to cross it is to see the world in new ways. As lawyers, teachers, and scholars, this is precisely the kind of journey we have a duty to make, for all three roles ask us to be ready to look at the world differently. 189 And in the case of tenure decisions, we have another kind of duty to make that journey. As Professor Rubin chides, “[I]t is surely irresponsible to reject the work categorically and deny the person tenure. In that situation, at least, legal academics are obligated to evaluate the works of those in different subdisciplines as fairly and conscientiously as possible.” 190

So how does a non-legal writing faculty member evaluate a legal writing article? Again, we find that stereotypical generalizations about legal writing topics simply do not work. The field includes topics of precisely the kind law faculties have been evaluating for years. It also includes less traditional scholarship such as interdisciplinary topics, skills topics, and highly theoretical topics. These different kinds of articles present an evaluator with significantly different situations.

For topics within the fold of traditional scholarship, evaluation should proceed as it would for any other traditional article. No

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187 Rubin, supra n. 32, at 940–941.
188 Id. at 941.
189 “Of course, importing foreign methods into the traditional categories of legal analysis and synthesis can be dismissed as mere ‘academic stuff,’ but this dismissal is inconsistent with our professional traditions of flexibility, and comprehensiveness, and our willingness to learn anything that will be necessary or helpful.” Phillip C. Kissam, The Evaluation of Legal Scholarship, 63 Wash. L. Rev. 221, 241 (1988).
190 Rubin, supra n. 32, at 941.
law faculty should have trouble evaluating a classic analytical article on some topic about precedent, procedure, or statutory construction. Most faculties agree on at least some norms, such as the intellectual rigor the article required, the comprehensiveness of the research on which it is based, its contribution to the scholarly conversation on its topic, and its value to the advancement of the study of law. These norms apply easily to this variety of legal writing scholarship.

Many articles meet those criteria by using a relatively standard schema. They (1) pose a question that matters; (2) present the current scholarly thought on that question; (3) identify an inadequacy in that analysis; (4) and propose and support a new or supplemental answer. Law faculties have been evaluating articles like these ever since scholarship has been evaluated in the academy. Non-legal writing professors can recognize good scholarship on these traditional legal writing topics, just as a contracts professor can recognize good scholarship in tax or intellectual property.

A more difficult question is whether less traditional legal writing scholarship can be evaluated fairly using such generally applicable criteria. But this same question arises in other nontraditional areas and is debated there as well. Some argue that nontraditional scholarship should be evaluated by a distinct set of criteria. Such an approach would seem to require a distinct set of criteria for each subdiscipline. Others argue that scholarship in newer subdisciplines should be evaluated by the same criteria that apply to all other legal scholarship. For instance, Stephen Carter has argued that scholarship about race should be evaluated

191 AALS Tenure Report, supra n. 20, at 489–491.
192 For a similar schema, see Rubin, supra n. 32, at 903–904.
193 Other non-traditional areas include interdisciplinary and empirical scholarship, clinical scholarship, and scholarship providing political, racial, feminist, or cultural critique.
195 We adopt Rubin’s definition of “subdiscipline” here. Rubin uses “subdiscipline” to refer to “works that do not display qualitative differences from one another in either ideology or methodology,” Rubin, supra n. 32, at 909.
using the same criteria as those more generally applicable. He wrote

[T]he quality of a piece of scholarly work . . . turns on a demonstrated mastery of the relevant material and the ability to contribute to a dialogue, or to spark a new one. It turns on saying something that not only is not in the prior literature, but is not obvious in light of the prior literature. It turns, further, on making a logical argument—not a correct one, necessarily, or even a non-controversial one, but certainly one that is coherent. And it turns on setting out fairly the possible objections and dealing with them, or even noting, when appropriate, the extent to which they successfully limit one’s own position.\textsuperscript{197}

The difficulties of applying these criteria to nontraditional work are normal and even necessary for scholarly development of a healthy discipline. Professor Kissam points out that our evaluation always lags behind new developments in scholarship.\textsuperscript{198} Indeed it must, for if mature work

is to be of high quality, significant originality, and substantial importance or influence, the scholar, in most cases, will need to break away from the more conventional approaches and methods exhibited by the earlier stages or perspectives of legal scholarship.\textsuperscript{199}

He writes that this break may “feature rich understandings of practical professional contexts”\textsuperscript{200} or “may include knowledge of more effective teaching and communication techniques, the tacit knowledge of outstanding practitioners, or simply the knowledge and methods of other academic disciplines.”\textsuperscript{201} Therefore, he writes, our “formalist paradigm” is insufficient for evaluating scholarship. It limits our vision of “the richer possibilities that might accrue from pursuit of more innovative patterns in contemporary scholarship.”\textsuperscript{202}

Professor Geoffrey Stone, then Dean of the University of Chicago Law School, warned against three potential problems in evaluating newer forms of scholarship:

\begin{itemize}
\item\textsuperscript{197} Stephen L. Carter, The Best Black, and Other Tales, 1 Reconstruction 6, 29 (Winter 1990).
\item\textsuperscript{198} Kissam, supra n. 189, at 223.
\item\textsuperscript{199} Id. at 246.
\item\textsuperscript{200} Id.
\item\textsuperscript{201} Id. at 247.
\item\textsuperscript{202} Id.
\end{itemize}
First, we may undervalue "good" work because we do not understand it. Aficionados of law and literature may not appreciate the subtle elegance of a novel application of the Coase Theorem. They may not understand why the work is original or useful. Moreover, because they do not grasp the work's substance, they may tend to dismiss its significance. Even law professors fall victim to human nature.

Second, we may undervalue "good" work because it suggests, implicitly or explicitly, that the work we do is not valuable. Practitioners of law and economics may feel that feminist theory rejects the basic premises of their work. An all-too-human response is to dismiss those ideas that do not "appropriately" value our own.

Third, we may undervalue "good" work because it promotes a view of the legal system or society or human relations that is fundamentally inconsistent with our own world view. Such work may challenge not only the value of our work, but also our broader sense of the appropriate order of things socially, economically, politically, and personally. Work that casts doubt upon everything we cling to is not likely to be embraced enthusiastically.\textsuperscript{203}

Perhaps the two most thorough and thoughtful treatments of evaluation of nontraditional scholarship are Professor Rubin's \textit{On beyond Truth: A Theory for Evaluating Legal Scholarship},\textsuperscript{204} and Professor Kissam's \textit{The Evaluation of Legal Scholarship}.\textsuperscript{205} Professors Rubin and Kissam agree on many points. Both remind us that we should evaluate scholarship in light of its purposes, and each grounds his suggested evaluative approach expressly in those purposes.\textsuperscript{206} Both support the value of nontraditional scholarship\textsuperscript{207}

\textsuperscript{203} Geoffrey R. Stone, supra n. 86, at 74. Appropriately, Dean Stone also cautions that scholarship is not necessarily good simply because it is new. \textit{Id.}

\textsuperscript{204} Rubin, supra n. 32.

\textsuperscript{205} Kissam, supra n. 189.

\textsuperscript{206} \textit{Id.} at 222, 230; Rubin, supra n. 32, at 902–903.

\textsuperscript{207} Kissam identifies six categories of legitimate legal scholarship. Kissam, supra n. 189, at 230–239. The first four categories he considers traditional: legal analysis, legal synthesis, the resolution of doctrinal issues, and teaching materials. Even these categories, he observes, "are developing a new complexity" of values, subcategories, and methods. \textit{Id.} at 239. The other two categories, scholarship of understanding and scholarship of critique, are based on a perspective outside legal doctrine itself. Publications in these categories use a broad array of methods and reflect diverse perspectives on law, the legal system, and legal education. In the scholarship of understanding, Kissam includes scholarship such as clinical or skills scholarship, that is, scholarship that "analyzes, reflects upon, and interprets legal practices as opposed to legal doctrine." \textit{Id.} at 237 (emphasis added). Many legal writing topics would fall within this category. Kissam observes that today's scholarly pluralism has
and deal with the difficulties of evaluating scholarship when the evaluator is outside the article's subdiscipline, and therefore, unfamiliar with its literature, its ideology, and its methodologies. Both conclude that fair, effective evaluation of nontraditional scholarship is both important and achievable. Finally, both conclude that the key to effective evaluation is the evaluator's duty to notice, admit, and lay aside her own inherent perspectives and biases.

Professor Kissam's approach is exhortatory. He urges faculties to remain open to valuing a variety of kinds of scholarship and to maintain a flexible approach to evaluation. An evaluator should apply relevant criteria in light of the specific intended audience for the piece, as well as its values, purposes, methods, and perspectives. Further, the evaluator should be watchful for and mindful of any social or political obstacles that might interfere with effective evaluation. Criteria for value should include whether the work forges connections to larger projects; informs or inspires the work of others; illuminates a difficult problem; provides practically useful knowledge; disseminates knowledge to new audiences; wades into the deep waters of theory; or even delights and inspires its readers.

Professor Kissam cautions that, despite the rhetoric we sometimes employ, we should not expect all scholarship to meet the highest absolute standard, and this refreshingly honest state-

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208 Kissam, supra n. 189, at 222; Rubin, supra n. 32, at 940–961.
209 Kissam, supra n. 189, at 252–255; Rubin, supra n. 32, at 897–902.
210 Kissam, supra n. 189, at 227.
211 Id. at 223.
212 Id. We would include here mindfulness of teaching loads and administrative duties that impair the author's ability to devote time to scholarship. We do not propose lowering qualitative standards. Rather, the institution should adjust the legal writing faculty member's load to be more equivalent to that of other faculty members or provide sufficient release time to even the field. A law school should not burden legal writing members with heavy teaching and administrative loads and then use the very loads they imposed to argue that legal writing faculty members do not have the time to write, and therefore, should not be included as tenure-track faculty.
213 Id. at 223–230.
214 Id. at 229. Professor Rubin agrees; he writes that when law schools require that
ment applies to traditional and nontraditional scholarship alike. According to Professor Kissam, we should (and most of us do) require only "good" scholarship, which he defines as scholarship that is original and competent, measured by whether it is factually accurate, well written, and based on appropriate methods. Whether a faculty agrees with Professors Kissam, Rubin, and Leff on this point, a faculty must take care to hold traditional and nontraditional scholarship to the same standard. If a faculty usually finds traditional scholarship sufficient when it is original, factually accurate, well written, and based on appropriate methods, the faculty should not apply a higher standard to nontraditional scholarship.

Professor Rubin reaches the same conclusions about evaluation but takes a route quite different from Professor Kissam's broader generalizations and exhortations. Professor Rubin uses the work of Jürgen Habermas, Hans-Georg Gadamer, Martin Heidegger, and Edmund Husserl to build a full theory of evaluation. As a foundational matter, Professor Rubin reminds us that all evaluation grows out of the phenomenological experience of the evaluator and that therefore, all scholarship is historically and subjectively contextualized. He proposes a theory of evaluation that does not claim an objectivity it cannot achieve. Rather, his theory assumes and accounts for the effect of differences in indi-

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215 Kissam, supra n. 189, at 227–228.

216 Kissam defines other standards, in ascending order, as "important" scholarship (which may have the potential to impact the lives and work of others or to resolve a particularly difficult intellectual question) and "influential" or "outstanding" scholarship (which "substantially affects the behavior of others or causes others to change fundamentally how they think about difficult issues"). Id. at 228–229.

217 Professor Rubin stated the following:

Underlying the critique of methodology is an epistemology grounded in the personal experience of individual human beings. That experience is seen as the starting point for all intellectual inquiry, the ultimate ground-plane or referent for thought. Any claims about the world must be built upon the foundation of individual experience—the 'lifeworld' that the individual inhabits—for nothing else is real to that individual.

Rubin, supra n. 32, at 907.

218 Id. at 908.
individual experience, particularly with regard to differences both of methodology and of ideology.\textsuperscript{219}

Professor Rubin proposes that all scholarship be evaluated by the same criteria but that certain "sensitivities" be applied to scholarship outside one's own subdiscipline. Specifically, all scholarship should be evaluated according to (1) the degree to which it identifies its foundational norms (its \textit{normative clarity}); (2) the degree to which it presents a logical rationale for its claims (its \textit{persuasiveness}); (3) its relationship to the historical development of its field (its \textit{significance}); and (4) the degree to which it contains "an identifiable insight that the evaluator can grasp through application."\textsuperscript{220} (its \textit{applicability}).\textsuperscript{221} To evaluate a work, Professor Rubin says, we must know "what scholars in the field are attempting to achieve."\textsuperscript{222}

Evaluating work in a subdiscipline different from one's own requires the evaluator to transcend her own subdiscipline,\textsuperscript{223} so Professor Rubin suggests employing the "sensitivities" of doubt and anxiety. Doubt is an act of will, an intellectual effort that allows us to bracket our own natural experience of the world and therefore recognize it as just that—our own phenomenological experience.\textsuperscript{224} Anxiety is more emotion-based, arising against our will. Anxiety is a "sensation of uncertainty" about one's own beliefs.\textsuperscript{225} Both doubt and anxiety "suggest an openness about one's own work, a willingness to stand apart from it and see it as merely one position among many."\textsuperscript{226} Professor Rubin writes,

If one finds oneself rehearsing one's prior arguments, or articulating refutations in one's mind, or searching assiduously for new ways to justify one's conclusions, then a work which generates such responses should be judged to be of value. Thus, the very process of formulating counter-arguments, which is a mechanism for outright rejection of the author's work when un-

\textsuperscript{219} By "methodology," Rubin means a set of procedures generating research and resolving questions. By "ideology," he means "an interlinked set of normative beliefs that generate a comprehensive vision of a given subject." \textit{Id.} at 899.

\textsuperscript{220} \textit{Id.} at 937.

\textsuperscript{221} \textit{Id.} at 912–940.

\textsuperscript{222} \textit{Id.} at 902.

\textsuperscript{223} \textit{Id.} at 943.

\textsuperscript{224} \textit{Id.} at 944–946.

\textsuperscript{225} \textit{Id.} at 946.

\textsuperscript{226} \textit{Id.}
critically performed, becomes a datum for assessing that work's quality in the context of a more disciplined evaluative theory.\textsuperscript{227}

Thus, if the evaluator is willing to be both honest and self-aware, the very distance between the evaluator and the article provides the opportunity to gauge the article's effectiveness.

According to Professor Rubin, the degree to which the work differs from one's own determines the degree of reliance on doubt and anxiety.\textsuperscript{228} For work that differs in both methodology and ideology, the sensitivities of self-doubt and anxiety should guide judgments of all criteria except the degree to which the work identifies and remains consistently within its foundational norms.\textsuperscript{229}

A word about the role of ideology is in order here. As we have seen, Professor Rubin defines an ideology as "an interlinked set of normative beliefs that generate a comprehensive vision of a given subject."\textsuperscript{230} He cautions that

those who subscribe to [an ideology] do not perceive it as an ideology at all, but simply as the proper way to view the world. When such an ideology is maintained by the majority of scholars in an academic field, it will define the boundaries of the field and regulate debate within it.\textsuperscript{231}

Because Professor Rubin is writing primarily about scholarly camps such as law and economics, critical legal studies, or feminist legal theory, his examples of ideological differences all pertain to different views of the legal system. But ideological differences certainly exist with regard to legal education as well. In fact, because they place at issue the allocation of our own and our institutions' finite resources, ideological differences over legal education can be even more painfully divisive than jurisprudential differences. We include both in the category of ideological differences, therefore, and caution evaluators consciously to transcend their own ideologies of legal education as well.

If an evaluator has a negative attitude toward a legal writing topic (without regard to the quality of the article's analysis of that topic), the evaluator should recognize that reaction as strong evidence of an ideological difference. According to both Professors

\textsuperscript{227} \textit{Id.}.
\textsuperscript{228} \textit{Id.} at 940–961.
\textsuperscript{229} \textit{Id.} at 947–953.
\textsuperscript{230} \textit{Id.} at 889 (emphasis added).
\textsuperscript{231} \textit{Id.} at 900.
Kissam and Rubin, an evaluator should take great care to remove from evaluation the effects of an ideological difference. Professor Kissam’s approach reminds us generally to value broad, open discourse. Professor Rubin’s postmodern and phenomenological approach proposes a decisional model specifically designed to foster a conscious skepticism about our own ideologies.

Under either approach, legal writing scholarship can be evaluated fairly and effectively by faculty members outside the field. As we have seen, some legal writing topics are examples of traditional scholarship, presenting no added evaluative challenge. Such articles can unearth assumptions, point out unnoticed or unexpected effects, or resolve troubling problems. Non-legal writing faculty members should have no trouble evaluating legal writing scholarship of this sort since, in Professor Rubin’s terms, it does not differ from traditional scholarship in either methodology or ideology.

Other legal writing articles—such as articles about interdisciplinary topics, topics using empirical methods, topics relating to legal skills, pedagogical topics or topics about institutional choices—may differ from traditional scholarship in methodology, ideology, or both. Evaluating articles in these categories may require more of the evaluator, but the burden is no greater because the topic area is legal writing as compared to feminist legal theory, clinical scholarship, critical race theory, law and literature, rhetoric, or law and philosophy. Professor Rubin’s theory of evaluation is particularly useful here, because it recognizes different evaluative stances depending on the combination of the particular evaluator and the nature of the article. The degree to which the article differs from one’s own work determines the degree of reliance on Professor Rubin’s proposed sensitivities.

While Professors Rubin’s and Kissam’s approaches are both theoretically sound, each has practical limitations. The usefulness of Professor Kissam’s approach may be limited by its generality and over-reliance on exhortation. Professor Rubin’s approach may be limited by its complexity and abstraction. We offer a supplemental model intended to be more concrete than exhortation and simpler, less abstract, and more broadly familiar to the legal academy than phenomenology and post-modern philosophy. We suggest that, when evaluating an article using nontraditional methodologies or written from a nontraditional ideological perspective, the evaluator adopt a role similar to that of an appellate court reviewing factual findings. The appellate court does not substitute its
own judgment for the findings of the trial court. An appellate judge, recognizing the distance between the trial court’s vantage point and the cold appellate record, does not ask whether she would have come to the same conclusions as did the trial court. Rather, she assumes the rhetorical stance of the trial court judge and evaluates the reasoning process the trial judge used. If there is sufficient evidence to support the trial court’s conclusions, the appellate judge affirms.\(^{232}\)

The distance between the cold appellate record and the trial court’s vantage point can mimic the distance between an evaluator and a work of scholarship significantly different from her own. The evaluator should begin by recognizing the distance between the subject text and her own work. She therefore approaches the text with the same kind of tolerance for other views as is inherent in the appellate review of facts. She is willing to admit the validity of multiple perspectives and the fallibility of her own. She is prepared to value conclusions with which she disagrees so long as those conclusions meet fundamental standards of rationality, consistency, and evidentiary sufficiency.

Professors Kissam and Rubin each make a compelling case justifying this need to transcend individual perspectives. We join them in urging faculty evaluators to focus on the quality of an article within its own field and according to its own methodological and ideological perspectives. Also, we join Professors Kissam, Rubin, and others who would apply standard criteria to evaluate legal writing topics, but with the caution that those criteria should be applied with the kind of openness, flexibility, curiosity, and self-awareness that Professors Kissam and Rubin both describe.

Professor and former Dean Geoffrey Stone of the University of Chicago offers some practical advice for achieving this kind of evaluative process. To evaluate scholarship, especially newer forms of scholarship, Dean Stone would first ask faculty members to talk with each other, defining exactly what they like or dislike about the article. Second, he would have them ask both what is wrong with the article and what they can learn from it. Third, he would ask those who understand and appreciate the article to translate its point and its value into terms more familiar to the doubters.\(^{233}\) Finally, Dean Stone reminds us of two ideals every law school should strive to meet: openness to new ideas and insis-


\(^{233}\) Stone, supra n. 86, at 75.
tence on excellence in scholarly research. With this kind of good faith process, balancing concern for quality with desire for new ideas, legal writing topics can be evaluated fairly and effectively by those outside the field.

VII. THE TROUBLE WITH CATEGORIES

For the purposes of this Article, we have referred to a number of categories of scholarship, but we cannot end this discussion without recognizing the problems inherent in any attempt to categorize scholarly inquiry. Even a casual look at the literature reveals a confusing variety of taxonomies. Some discussions of legal scholarship use categories based on jurisprudential schools such as legal realism, critical legal studies, feminist legal theory, or law and economics. Others distinguish categories based on differences in the kinds of sources considered authoritative, such as traditional scholarship based on legal sources, interdisciplinary scholarship drawing on other disciplines, and empirical scholarship, which gathers and analyzes particular data bases. Other commentators categorize scholarship based on its primary audience, identifying theoretical scholarship intended primarily for an academic audience, practical scholarship intended to be useful to the practitioners, and teaching scholarship, whose primary intended audience is students. Still other categories are based on the purpose of the individual piece, for example, legal analysis, legal synthesis, resolution of doctrinal issues, teaching materials, understanding, and critique. Clinicians use the category “clinical” scholarship. Judge Posner distinguishes doctrinal analysis (which “involves the careful reading and comparison of appellate opinion with a view to identifying ambiguities, exposing inconsistencies among cases and lines of cases, developing distinctions, reconciling holdings, and otherwise exercising the characteristic skills of legal analysis”) from positive analysis using social science methods and from normative analysis.

We have referred to a number of these categories and have ourselves used the terms “legal writing topics” and “legal writing scholarship.” But we do so provisionally, knowing that all classifi-

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234 Id. at 76–77.
235 Kissam, supra n. 189, at 230–239.
236 E.g. Joy, supra n. 22.
237 Posner, supra n. 184, at 1113.
cations limit and distort, if only subtly. These categories are useful primarily for their value in facilitating one kind of discussion or another, but when the issue under discussion changes, a classification may well lose its usefulness. The terms "legal writing scholarship" or "legal writing topic" have helped us discuss the value of scholarship on topics arising in legal writing courses. But this classification misleads because, as we have seen, "legal writing" topics overlap with other curricular subject areas, with classifications based on authoritative sources, with classifications based on intended audiences and uses, and with ideological and jurisprudential categories. The same danger exists for the subcategories within the larger category. We have discussed four subcategories of legal writing scholarship—substance or doctrine; theory; pedagogy; and institutional choices—but we have seen that many articles span more than one. Indeed, the best articles almost always do.

We hope that soon the question whether legal writing topics can qualify as scholarship will be resolved so the need for a separate category will disappear. When that day comes, we hope that the relevant discussion will focus on the purpose and quality of a particular scholarly effort, regardless of its underlying course connection.

We join Dean Donald Polden in recommending the categories set out in Ernest Boyer's 1990 Carnegie Foundation report on academic scholarship. Boyer recommends four scholarly categories: (1) scholarship of discovery (searching for knowledge, primarily for its own sake); (2) scholarship of integration (connecting ideas across areas of thought); (3) scholarship of application (testing and amending theories by applying them to a practice); (4) scholarship of teaching (gathering and communicating the subject's material or studying pedagogical methods). ²³⁸ Categories such as these are grounded firmly in the values to be served by scholarship, and they focus evaluation directly on how well the publication accomplished its particular purpose. These categories admit the legitimacy of varying ideologies, authoritative sources, particular subject areas, and intended audiences. They focus the debate on the merits of the particular scholarly work rather than on contention between ideological camps. They accordingly advance the funda-

mental purposes of scholarly inquiry and set the stage for a more accurate evaluation of individual scholarly efforts.

VIII. WHERE DOES THIS LEAVE US?

As the bibliography demonstrates, many legal writing professors are publishing. The nearly 300 authors listed here have published more than 150 books, over 200 book chapters and supplements, over 650 law review articles, and at least that many articles in peer-reviewed academic journals, specialty journals designed primarily for practitioners, and many other kinds of publications. Placements include the most prestigious journals, and topics include most legal subjects. Clearly, legal writing professors have written much, often without the traditional kinds of institutional support such as research stipends, research assistants, faculty development funds, formalized scholarship development programs, or informal mentoring by faculty colleagues. 239 And of course, the traditional institutional support, important as it is, does not address the primary impediment to writing: heavy teaching loads and high student/faculty ratios. When more legal writing professors are given the same institutional support other faculty members receive, undoubtedly they will write even more.

Since legal writing professors are writing and writing well, the academy cannot postpone the question of what to do with legal writing scholarship. First, law schools should use all the standard formal and informal incentives to encourage their legal writing faculty members to write. Unlike many doctrinal areas, which have been mined for writing topics for many years, the young field of legal writing is bursting with important unexplored ideas. 240 We know that writing is important to the substantive development of all law faculty members because there is no better way to deepen one's understanding of an area than to write about it. But writing is even more important to the development of professors who actually teach the writing process. Not only does the professor develop her understanding of the substance of her field, but she develops her understanding of the nature of the very process she teaches. A law school should no more discourage a legal writing professor

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239 Supra n. 4.
240 See supra n. 86 and accompanying text.
from writing than a tennis club should discourage its tennis coach from picking up a racket.

Second, there is no legitimate reason to discourage legal writing professors from writing in their own field. Many legal writing topics are solidly within the canon of legal scholarship, have been the subject of work by well-respected legal scholars for many years, and have been evaluated by law faculties with ease. Other legal writing topics are more interdisciplinary, empirical, or otherwise innovative. Those topics may be new to the imagination of the legal academy, but their relationship to law and to the advancement of legal knowledge is clear. Still other legal writing topics fall within the larger categories of pedagogical or political articles. The viability of those topics as legal scholarship depends not on their relationship to legal writing but on a particular faculty’s assessment of pedagogical or political scholarship in general. Whatever a faculty decides about pedagogy or politics, the decision should not be articulated with reference to any particular course.

As Judge Posner and others have observed, human nature may cause some faculty members to resist new ways of thinking and new approaches to the law or to legal scholarship. Professor Rubin refers to a particular kind of conceptual bias—ideological bias—as one of the problems with evaluation of scholarship. As Professor Rubin explains, “those who subscribe to [an ideology] do not perceive it as an ideology at all, but simply as the proper way to view the world.” Outdated attitudes toward legal writing courses and professors function the same way. Without updating their knowledge and reassessing their attitudes in light of that information, well-meaning faculty members simply may not be able to see the world in any way other than the way it looked when and where they studied law. We need to remind ourselves, in Aviam Soifer’s words, to “[r]isk [t]oleration,” so we can continue to learn, and to teach what we learn to tomorrow’s lawyers.

241 Posner, supra n. 184, at 1129.
242 E.g. Rubin, supra n. 32, at 895.
243 Professor Rubin defines an ideology as “an interlinked set of normative beliefs that generate a comprehensive vision of a given subject.” Id. at 899.
244 Id. at 900.
245 See supra nn. 185–191 and accompanying text.
246 Aviam Soifer, Musings, 37 J. Leg. Educ. 20, 24 (1987); id. at 23 (“Many of us seem so determined to impose our own particular values on an indeterminate world” that we never recognize “the abyss of uncertainty” right in front of us.).
Speaking about legal scholarship, Frederick Schauer has written,

[All disciplines . . . should find it useful to engage in serious self-reflection and self-criticism. Without it, the contingent methods and perspectives of the discipline begin to seem inevitable, making the exploration of alternatives less possible, and the understanding of the discipline itself less rich. When a discipline challenges its own understandings, it takes a step towards deeper appreciation of those understandings themselves. Without such self-reflection, there is a risk of forgetting that . . . normativity is contingent and not inevitable.\textsuperscript{247}

This Article calls for just such self-reflection.

Legal writing faculty members are beginning to find their own voices. Many have begun the long, exciting process in which, as Julius Getman writes,

[C]olleagues, cohorts in a movement, teachers, fellow law review editors, and judges are largely replaced by one's self. It occurs when the writer becomes more concerned with expressing his or her own vision of justice than with the reaction of others. Developing one's own voice is an important step toward scholarly distinction.\textsuperscript{248}

When legal writing faculty members have found their voices, every part of the academy will be enriched by their contributions. But if the academy does not allow these voices to develop—if, instead, we tell them what they may and may not say—we will lose a vital thread in the conversation about law, the legal profession, and legal education. We will never know what we would have learned had we been willing to listen.


\textsuperscript{248} Getman, \textit{supra} n. 21, at 340.
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