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LEGAL [WRITING] SCHOLARSHIP: WHY IT COUNTS

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In this essay, we continue a longstanding yet ongoing conversation within our community about legal writing scholarship: what it is, what it perhaps should be, and whether it *counts* toward promotion and tenure.[1] This bundle of questions remains vitally important not only for individual scholars' advancement at their respective law schools, but also for the continued development of the legal writing discipline as a whole. In our experience, the resistance to legal writing scholarship at many law schools, particularly those that are highly ranked,[2] remains a real and significant barrier to equity in the legal academy.[3] To circumvent this barrier, some legal writing faculty must publish in a second area of interest, imposing on them a double burden they might not otherwise assume and depriving them of the opportunity to be students and scholars of the subject they teach. In turn, it stunts the development of the legal writing discipline.

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[1] *See, e.g.*, Elizabeth E. Berenguer, *Claiming Our Place at the Table of Legal Academia: Examining Types and Topics of Legal Writing Scholarship*, 2 PROCEEDINGS 16 (2021); Linda L. Berger, Linda H. Edwards & Terrill Pollman, *The Past, Presence, and Future of Legal Writing Scholarship: Rhetoric, Voice, and Community,* 16 LEG. WRITING: J. LEG. WRITING INST. 521 (2010); Kirsten K. Davis, *A Provisional Definition of "Legal Writing Scholarship"*, 2 PROCEEDINGS 6 (2021); Linda H. Edwards & Terrill Pollman, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy*, 11 LEG. WRITING: J. LEG. WRITING INST. 3 (2005); Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS'N LEG. WRITING DIRS. 1 (2004); Kristen K. Tiscione, *The Next Great Challenge: Making Legal Writing Scholarship Count as Legal Scholarship*, 22 LEG. WRITING: J. LEG. WRITING INST. 50 (2018); Melissa H. Weresh, *Legal Writing Scholarship: Moving Not Toward a Definition, but Toward a Cohesive Understanding*, 2 PROCEEDINGS 26 (2021).

[2] Here we mean highly ranked law schools in U.S. NEWS & WORLD REPORT rather than highly ranked legal writing programs in the specialty rankings.

[3] The resistance extends to student-run law journals as well, reflecting the bias of the institutions that publish them. *See, e.g.*, Jessica Lynn Wherry, *Dear Student Editors, We Need Your Help*, 24 AM. U. J. GENDER SOC. POL'Y & L. 433 (2016) (explaining, anecdotally, that some "student editors seem to disfavor practical scholarship, scholarship about legal writing, and other scholarship that is viewed as "less than"). The difficulty publishing legal writing scholarship in major law journals contributes to the continued sidelining of legal writing scholarship.

We argue that legal writing scholarship is a relatively new form of scholarship that meets well established criteria for legal scholarship and should count towards promotion and all kinds of tenure. Other new forms of legal scholarship have met with resistance in the past, and legal writing scholarship is no exception. Despite this resistance, legal scholarship has expanded considerably since the late nineteenth century, not because the essential criteria for legal scholarship have changed, but largely because legal scholars' understanding of the law and the role of scholarship has changed. In the 1960s and 1970s, legal scholars began to question the nature of law and its operation, and they expanded the scope of legal scholarship to include not only what law is but also what law could or should be to achieve just results. With this expansion also came the recognition that law is not a self-contained system and that a host of related disciplines could be used to inform and improve it.

By the 1970s and 1980s, legal scholars and educators began to question whether law schools were adequately preparing students to practice law based on the limited focus of their curricula. As legal education expanded to include legal writing instruction, legal writing scholars began to explore not only what the law is or should be but also the role of the legal writer in shaping the law and affecting legal outcomes. They recognized that legal scholars should study the *creation* as well as the interpretation of legal texts—the act of writing as well as reading.[4] Like other legal scholars before them, legal writing scholars necessarily explored and relied on a host of new disciplines—classical and contemporary rhetoric, narrative theory, and cognitive science, to name a few—to explore and improve the nature of legal communication.

As we hope to demonstrate, continued efforts to reject legal writing scholarship reveal a troubling yet familiar resistance to new forms of knowledge and an implicit, if not explicit, desire to preserve the hierarchical status quo by those in control of the legal academy.[5] We begin with a brief summary of the evolution of legal scholarship over the last 150 years or so, expanding from descriptive to normative and interdisciplinary forms. In so doing, we explain the criteria that have emerged for it to count as legal scholarship: it must be (1) law-based, (2) written by members of the academy deemed qualified to write it, and (3) useful to members of the legal profession. Turning next to the emergence of legal writing scholarship, we

[4] *See* Berger et al., s*upra* note 1, at 523–25 (explaining the origin and persistence of legal scholars' preference for studying the interpretation as opposed to the creation of legal texts).

[5] *See* Kathryn M. Stanchi, *Who Next, the Janitors? A Socio-Feminist Critique of the Status Hierarchy of Law Professors*, 73 UMKC L. REV. 467, 485 (2004). Explaining the mechanisms employed by the academy to maintain status hierarchies, Stanchi observes that, while scholarship is the "coin of the realm," legal writing faculty face disincentives from producing it, and when they "publish *about* legal writing or pedagogy, their area of expertise, the scholarship does not 'count' at all or as much as traditional doctrinal scholarship, and it likely will not be eligible for the same rewards as other scholarship." *Id.* at 482, 485.

demonstrate how it meets these criteria.[6] As the ultimate acceptance of normative and other law-based interdisciplinary scholarship suggests, legal scholarship has the capacity to incorporate new forms, including legal writing scholarship. The result is a richer, more varied body of work with different but equally valuable objectives and knowledge.

I. THE EVOLUTION AND EXPANSION OF LEGAL SCHOLARSHIP

Much of the historical debate around legal scholarship—and there is plenty[7]—has focused on what legal scholars ought to be saying about the law, who is considered qualified to write about it, and who the appropriate audience is for such scholarship. As illustrated below, conventional understandings about the criteria for legal scholarship have evolved and expanded over time, resulting in new and valuable forms of scholarship in the legal academy.

Legal scholarship initially focused on legal doctrine. This narrow focus can be traced in part to the influence of Christopher Langdell and Charles Eliot at Harvard Law School, who revolutionized legal education in the 1870s. With support from Eliot, then president of the University, Langdell proposed to teach law as a science and envisioned legal education as the discovery of the true principles of law.[8] Langdell was affected by two main influences in the nineteenth century. The first was the impact of the study of and fascination with the natural sciences. In light of the prestige and credibility of the natural sciences in universities, Langdell strove to emulate the natural sciences model in law school.[9] The second was the influence of legal formalism, the notion that "the common law consisted of a systematic, eternal array of broad principles and specific doctrines, all interconnected and logically consistent."[10] Langdell believed that the "common law was 'self-contained' in the sense that it contained the answers for all legal questions, answers which could be uncovered through careful study,"[11] such that legal education and legal educators

[6] We do not address here the qualities that make good scholarship good. Our references to legal scholarship, including legal writing scholarship, assume that it is well researched, well written, and makes a significant contribution to the field as judged by those to whom it is written. If it meets these standards, it creates valuable knowledge, the *sine qua non* of all good scholarship.

[7] *See, e.g.*, Symposium, *Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1278 (2002); Symposium, *The Future of Legal Scholarship*, 66 J. LEG. EDUC. 1 (2016).

[8] Steven B. Dow, *There's Madness in the Method: A Commentary on Law, Statistics, and the Nature of Legal Education*, 57 OKLA. L. REV. 579, 580–81 (2004).

[9] *Id.* at 580–81.

[10] *Id.* at 581.

[11] *Id.* at 585.

focused on doctrinal law in the classroom[12] and in their scholarship.[13] Treatises were thus held in high regard[14] and valued for their contributions to the bench and bar.[15]

However, as legal philosophies began to shift from formalism[16] to realism and modern instrumentalism,[17] legal scholarship became ever more normative, seeking "to make the law better, rather than to explain or describe subtle or nonobvious features of law or the legal system."[18] By the 1960s and 1970s, law faculties were

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[12] *Id.* ("[I]n searching for the law there was no need to study anything outside of the cases, let alone outside of the law.").

[13] Richard A, Posner, *The Present Situation in Legal Scholarship*, 90 Yale L.J. 1113, 1116 (1981) [hereinafter Posner, *The Present Situation*] (explaining that "[b]ecause doctrinal analysis is, with the qualifications noted above, an autonomous sphere of legal scholarship, its pursuit within the existing framework of legal education—a framework unchanged in essentials since the turn of the century—does not raise any serious question").

[14] Brian Z. Tamanaha, LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW 151 (2006) (observing that "[t]reatise writers and their texts, such as Wigmore on evidence, Williston and Corbin on contracts, and Prosser on torts, became legendary sources of law within the legal academy and among lawyers. Writing a treatise was the peak achievement of a legal academic"); *see also* Charles W. Collier, *Interdisciplinary Legal Scholarship in Search of a Paradigm*, 42 Duke L. J. 840, 842–43 (1993) (noting that traditional legal scholarship was "largely descriptive, respectful of previous authority, and faithful to existing law; it recommended only modest improvements in the law").

[15] *See, e.g.*, Richard A. Danner, *Oh, the Treatise!,* 111 MICH. L. REV. 821, 834 (2013) (considering the historical and contemporary importance of the treatise and concluding that "[i]n the twenty-first century, American lawyers could benefit most from authoritative works on specialized subjects by knowledgeable scholars who are not only able to provide interpretive frameworks for tackling new questions but also conversant with the technologies that lawyers employ for seeking and working with legal information").

[16] Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 362 (2008) (noting that "[u]nder traditional formalism, law was seen as the painstaking articulation of first principles, a journey of constant elaboration and refinement on the way to an ideal set of doctrines—a true reflection of the natural law"); *see also* Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195, 199 (2009). As Schlag explains:

> At the end of the nineteenth century, legal thought in American law schools was dominated by a theoretically unarticulated, though institutionally settled, view of law. According to this view—one tacitly instantiated in treatises and law-review articles—law was a coherent, gapless, autonomous, and comprehensive system of conceptual propositions.

Schlag, *supra*, at 199.

[17] *See* Scordato, *supra* note 16, at 362–63.

> To the legal realists, law was a tool that society employed at a given time to solve perceived problems or to achieve desired goals. A change in law was typically necessitated not by a desire to move it closer to some abstract ideal, but to better respond to new social challenges or to changes in the regulated environment.

Id. at 362. This philosophical shift was "very much like the kind of profound paradigm in the natural and social sciences . . . ." *Id.* at 363.

[18] Robin West, *The Contested Value of Normative Scholarship*, 66 J. LEG. EDUC. 6, 7 (2016). We acknowledge that not all interdisciplinary scholars address what the law should be; some engage in

increasing educated at elite institutions and considered themselves academics rather than practitioners: "Many identified themselves as scholars, as social and legal theorists, as philosophers, as sociologists or anthropologists, as legal economists, as critical theorists, as people who produce knowledge *about* law, as anything but lawyers by proclivity, interest, and occupation. Law was their object of study."[19] As these legal scholars questioned not what the law is, but what it should or in some cases should not be, they often turned to other disciplines for answers, including "economics, political theory, moral philosophy, literary theory, Marxism, feminist theory, cultural studies, cultural anthropology, structuralism, and poststructuralism."[20]

More traditional scholars objected to these emerging forms of scholarship based on the criteria identified above: the subject matter was not sufficiently law-based because legal scholarship should describe the law; legal scholars were not qualified to write about disciplines outside the law; and normative arguments did not benefit legal scholarship's rightful audience, the bench and bar. The resistance to normative legal scholarship also raised fundamental questions about the purpose of legal scholarship. As Deborah Rhode summarized, everyone seemed to agree that legal scholarship should discover or promote new knowledge, but beyond that, its purpose was no longer clear:

> Any adequate assessment of the state of legal scholarship needs some working definition of its mission. Obvious as this might seem, most recent critiques are strikingly unhelpful about the objectives of the enterprise. Rarely does anyone get much beyond "the discovery of truth and the promotion of knowledge." As an abstract proposition, that goal is difficult to dispute, but it leaves all the most important questions unanswered: Knowledge for what? For whom? To what end?[21]

As scholars began to envision different forms of legal knowledge and different purposes for legal scholarship, they began to rethink what it means for scholarship to be *about the law*, who is qualified to write about it, and who the relevant audience for legal scholarship might be. Below, we trace how the academy began to view the answers to these questions more broadly, thereby expanding the notion of what counts as legal scholarship.

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empirical work, seeking to understand how law operates in fact. *See id.* at 13. The point is that these new forms of scholarship served a very different purpose from traditional legal scholarship.

[19] Tamanaha, *supra* note 14, at 151.

[20] Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002) [hereinafter Posner, *Legal Scholarship Today*].

[21] Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327, 1330 (2002).

A. Broadening the Subject Matter of Legal Scholarship

Objections to normative, often interdisciplinary scholarship as not sufficiently *legal* reflected the traditional belief that true legal scholarship describes and interprets the law—and only the law—of a given subject, such as property or contracts. To argue what the law should be took scholarship outside the realm of legal scholarship and into the realm of politics.[22] And the introduction of non-legal disciplines converted it into something else altogether. Ultimately, these objections gave way because twentieth century scholars began to view law as an institution for change rather than an immutable monolith.[23] As realists, normative scholars understood that law is not always logically consistent, is rarely neutral, and can yield unjust results. They also understood that the law does not operate in a vacuum, making the use of non-legal disciplines essential to their mission. Thus, the focus of legal scholarship and, in turn, legal education has expanded from describing and interpreting legal doctrine to include identifying "the underlying social purposes and the practical social consequences of legal doctrine."[24]

B. Envisioning Legal Scholars as Qualified to Speak About the Law and Subjects Related to Law

Traditional legal scholars also questioned whether legal scholars had the requisite qualifications to engage in interdisciplinary inquiry. Critics both in and outside the academy claimed that legal scholars lacked adequate training in social science research and were ill equipped to evaluate its quality.[25] In due course, these

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[22] West, *supra* note 18, at 7.

[23] David E. Van Zandt, *The Only American Jurisprudence*, 28 HOUS. L. REV. 965, 968–69 (1991) (reviewing James E. Herget, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY (1990), explaining that, because "American legal scholars, for one reason or another, began to view law as a social institution to be studied and revised instead of a moral or natural entity to be appreciated and obeyed," new forms of scholarship emerged and "populate the academic playground today"); *see also* Sanford Levinson & J. M. Balkin, *Law, Music, and Other Performing Arts*, 139 U. PA. L. REV. 1597 (1991). As Levinson and Balkin explain:

> With the rise of legal realism, new forms of legal scholarship emerge [sic]. Previously, the goal of much legal scholarship had been to explicate or interpret existing law, to offer the best interpretation of legal materials through traditional forms of doctrinal argument. The rise of realism brings with it an additional goal—to suggest policy based reasons for development of legal doctrine in one direction rather than another, even if these policy based reasons are not suggested or implicated by the language of existing legal materials. The realist approach begins to separate the goals of scholarship from those of the bar, although eventually the practicing bar would assimilate the approach of "going beyond the cases," at least in part.

Levinson & Balkin, *supra*, at 1651.

[24] Scordato*, supra* note 16, at 364.

[25] Posner, *The Present Situation*, *supra* note 13, at 1122 ("The difficulty that doctrinal analysts face in evaluating the work of social scientists comes not only from a lack of understanding of the theories and empirical tools of the social scientist but also from a difference in outlook or culture.").

objections gave way to the realization that law does not operate independently in society. As Richard Posner put it in *The Decline of Law as an Autonomous Discipline,* these realizations paved the way for new forms of scholarship that were informed by a variety of outside disciplines.[26] Further, the proliferation of administrative law broadened the reach of law and the focus of legal scholarship, requiring both practicing lawyers and legal scholars "to become familiar with disciplines previously remote from law and to integrate them with law."[27] The concern that legal scholars have insufficient training in the social sciences has been mitigated to some extent by the increasing number of law faculty holding J.D.s as well as Ph.Ds. in their non-legal discipline of interest.[28] And, given the tendency for interdisciplinary legal scholarship to be written for other scholars who have similar interdisciplinary expertise, concerns about the audience's ability to evaluate interdisciplinary scholarship seem to have been largely overcome.[29]

A related criticism was that some interdisciplinary frameworks do not transfer well to legal scholarship. For example, even Richard Posner, famous for his role in the Law and Economics and Law and Literature movements, has argued that

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[26] Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 769–78 (1987) (arguing that "the overall progress of disciplines other than law in illuminating law" challenged the notion that law was an autonomous discipline and suggesting that "it seems unlikely that we shall soon (if ever) return to a serene belief in the law's autonomy"); *see also* Thomas S. Ulen, *The Lessons of Law and Economics*, 2 J. LEGAL ECON. 103 (1992). Ulen observes that changes to legal scholarship since the 1960s can be attributed to the "withering away of the vestiges of legal formalism" explaining:

> The change since the 1960s can be characterized as an abandonment of the view of the law as self-contained. The various changes in legal scholarship that have arisen in the last three decades—the law and society movement, feminism in the law, law and literature, critical legal studies, law and biology, and law and economics—have had as a common feature the use of analytical tools and categories from other fields to examine legal rules and institutions.

Ulen*, supra*, at 104.

[27] Posner, *Legal Scholarship Today*, *supra* note 20, at 1319.

[28] *See* Thomas S. Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Scholarship*, 79 CHI.-KENT L. REV. 403, 414–15 (2004) (observing that "[a]nother indication of the changing nature of legal scholarship is the fact that joint degree holders—those with a J.D. and another degree, usually a Ph.D. in a cognate subject—are among the most highly sought entrants into the legal academy"); *see also* Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 885 (2009) (observing that, "[i]n the past two decades, elite law schools have emphasized theoretical, interdisciplinary scholarship. This is reflected in their entry-level hiring. A significant percentage of those now hired to teach at elite institutions have their PhD in other disciplines").

[29] *But see* Levinson & Balkin, *supra* note 23, at 1652 (arguing that the "fragmentation of legal scholarship into new genres such as feminist scholarship, critical legal scholarship, or law and economics" makes it "increasingly difficult for lawyers and legal academics to agree on what good legal scholarship is and how to evaluate it"); Posner, *Legal Scholarship Today*, *supra* note 20, at 1322–26 (raising concerns about the ability of the academy to regulate the quality of interdisciplinary scholarship).

methods for interpreting literature are not useful in interpreting statutes and constitutional provisions.[30] Posner asserts that "there are too many differences between works of literature and enactments of legislatures to permit much fruitful analogizing of legislative to literary interpretation."[31] In response, Sanford Levinson and Jack Balkin have argued that the measure of any discipline's usefulness to legal scholarship is the extent to which it promotes understanding of the legal subject at hand:

> [I]n regard to the interplay of law and literature, music, or any other field is the practical aid given the analyst, the felt sense of illumination provided by thinking about [other disciplinary fields] . . . while wrestling with the possible meanings of a statute, regulation, or the Constitution of the United States.[32]

In spite of Posner's skepticism about the application of literature to the interpretation of statutes and constitutional provisions, he has written extensively on literature and its usefulness in studying judicial decisions.[33] He has also acknowledged that other disciplines, including economics, cognitive psychology, and feminist theory, have "led to significant changes in legal doctrines and institutions, in the way law is practiced in certain fields, and in the teaching of those fields in law school."[34] The increasing interdisciplinarity of legal inquiry of all sorts suggests that objections to interdisciplinary scholarship based on the nature of the discipline, without more, can no longer be supported.

C. Expanding the Audience for Legal Scholarship to Include Scholars of Law and Other Subjects

Finally, traditional legal scholars criticized normative and interdisciplinary scholars for writing primarily to each other, without providing knowledge useful to the bench or bar. In short, they were not legal scholars because they were writing to the wrong audience. In the early 1990s, Harry Edwards, the former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, famously complained that:

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[30] *See* RICHARD POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).
[31] *Id*. at 218; *see also* RICHARD POSNER, LAW AND LITERATURE 3d ed. 550 (Harvard University Press 2009) (maintaining that legal scholars should "abandon efforts, so far fruitless and likely to remain so, to apply principles of literary interpretation to statutes and to provisions of the Constitution").
[32] Levinson & Balkin, *supra* note 23, at 1604.
[33] *See generally id.*; *see also* Richard Posner*, Law and Literature: A Relation Reargued*, *in* LAW AND LITERATURE: TEXT AND THEORY 61, 61 (Lenora Ledwon ed., 1996). In this later view, Posner noted that "the study of literature has little to contribute to the interpretation of statutes and constitutions but that it has something, *perhaps a great deal*, to contribute to the understanding and improvement of judicial opinions." *Id*. (emphasis added).
[34] Posner, *Legal Scholarship Today*, *supra* note 20, at 1326.

> [M]any 'elite' law faculties in the United States now have significant contingents of 'impractical' scholars, who are 'disdainful of the practice of law.' The 'impractical' scholar—that is the term I will use—produces abstract scholarship that has little relevance to concrete issues, or addresses concrete issues in a wholly theoretical manner. As a consequence, it is my impression that judges, administrators, legislators, and practitioners have little use for much of the scholarship that is now produced by members of the academy.[35]

This indictment sparked a huge debate.[36] In response, Erwin Chemerinsky challenged Edwards' assumption that the primary audience for legal scholarship is the bench,[37] arguing that students, the public, government decision makers, law and other disciplinary professors, and judges all benefit from legal scholarship, including theoretical, interdisciplinary scholarship.[38] With regard to the scholarly audience, Chemerinsky asserted, "[t]here is potentially great value in writings that advance legal understanding and knowledge, even if the immediate audience is only professors of law or other disciplines," and "it is often difficult to know what works of seemingly abstract theory or interdisciplinary empiricism might in some way have practical usefulness."[39] He also addressed the kinds of scholarship that should count towards promotion and tenure in light of the Edwards audience debate, concluding, "[i]f a writing makes a significant, original contribution to knowledge about the law, then it should be regarded as scholarship regardless of the audience for whom it is written and regardless of whether it is doctrinal or theoretical writing."[40]

II. THE EMERGENCE OF AND RESISTANCE TO LEGAL WRITING SCHOLARSHIP

Legal writing scholarship arose in the 1970s and 1980s coincident with the broad-scale introduction of legal writing programs in first-year legal education.[41] Early legal writing scholarship focused primarily on creating a community of scholars

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[35] Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992) (arguing that "too much of the law review literature is 'theory wholly divorced from cases'").

[36] *See* Chemerinsky, *supra* note 28, at 883 ("The debate over Edwards's article produced the most analysis in recent years on the question of why law professors should write and what the focus of their legal scholarship should be.").

[37] *Id*. at 886 (noting that "Edwards was explicit in his assumption that the desirable audience for legal scholarship is judges who decide cases and can benefit from doctrinal analysis").

[38] *Id*. at 887–90.

[39] *Id*. at 889–90.

[40] *Id*. at 891. Chemerinsky acknowledged that scholarship acceptable for promotion and tenure must also withstand review based on depth and rigor—"quality," in his view. We too acknowledge that legal writing scholarship must demonstrate depth and rigor to qualify as legal scholarship.

[41] *See* Berger et al., *supra* note 1, at 526–27.

who were experienced legal writers and who could teach well.[42] Soon thereafter, legal writing scholars began to dig deeper, exploring the substance of legal writing; this led quickly to the study of related disciplines such as composition, rhetoric, and more.[43] Thus, its subject became the theory and practice of effective legal communication, at times about the efficacy of written legal texts such as judicial opinions,[44] but more often directly about symbols and modes of persuasion—oral and written—in the practice of law.

Legal writing scholarship is often multi-interdisciplinary in approach. As Kirsten Davis recently stated:

> "Legal writing scholarship" is inter- and cross-disciplinary[45] scholarship that is communication-centered and law-connected. It creates knowledge by offering new information or insights about the production of, reception of, and communication environments for texts that communicate about the law.[46]

Instead of focusing on what the law is or should be, it focuses largely on rhetorical skills in the context of law practice, including what an advocate does and should do to achieve the best possible results for their clients within reasonable, ethical constraints.[47] As a natural extension of this focus, it often addresses teaching and

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[42] *See id.* at 528–29; *see also, e.g.*, Anne Enquist, *Critiquing Law Students' Writing: What the Students Say Is Effective*, 2 LEG. WRITING: J. LEG. WRITING INST. 145, 146 (1996); James F. Stratman, *Teaching Lawyers to Revise for the Real World, A Role for Reader Protocols*, 1 LEG. WRITING: J. LEG. WRITING INST. 35, 37 (1991); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 LEG. WRITING: J. LEG. WRITING INST. 1, 9 (1991).

[43] *See* Berger et al., *supra* note 1, at 530; *see also, e.g.,* Terrill Pollman & Linda H. Edwards, *Scholarship by Legal Writing Professors: New Voices in the Legal Academy,* 11 LEG. WRITING: J. LEG. WRITING INST. 3, 15 (2005); Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS'N LEG. WRITING DIRS. 1, 3–4 (2004); Kristen K. Robbins-Tiscione, *Paradigm Lost: Recapturing Classical Rhetoric To Validate Legal Reasoning*, 27 VT. L. REV. 483, 484 (2003).

[44] *See, e.g.*, Linda L. Berger, *What Is the Sound of a Corporation Speaking? How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ASS'N LEG. WRITING DIRS. 169, 171 (2004) (examining the use of metaphor to describe corporate action in First Amendment cases); Linda H. Edwards, *Where Do the Prophets Stand? Hamdi, Myth, and the Master's Tools*, 13 CONN. PUB. INT. L. J. 43, 61 (2013) (exploring the use of narrative in Hamdi v. Rumsfeld, 296 F.3d 278 (4th Cir. 2002)).

[45] Davis defines cross-disciplinary scholarship as scholarship that views one discipline (law) from the perspective of another (writing), whereas inter-disciplinary scholarship is scholarship that integrates the knowledge of two or more disciplines, such as law and writing. Davis, *supra* note 1, at 8–9.

[46] *Id.* at 11.

[47] *See, e.g.*, Lisa Eichhorn, *Declaring, Exploring, Instructing, and (Wait for It) Joking: Tonal Variation in Majority Opinions*, 18 J. ASS'N LEG. WRITING DIRS. 1, 26 (2021); Brian N. Larson, *Precedent as Rational Persuasion*, 25 LEG. WRITING: J. LEG. WRITING INST. 135, 199 (2021); Teresa Phelps & Kevin Ashley, *"Alexa, Write a Memo": The Promise and Challenges of AI and Legal Writing*, 26(2) LEG. WRITING: J. LEG. WRITING INST. 329, 379 (2022); Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 J. ASS'N LEG. WRITING DIRS. 27, 57 (2021); Susan M. Chesler & Karen J. Sneddon, *From Clause A to Clause Z: Narrative Transportation and the Transactional Reader*, 71 S. C. L. REV. 247 (2019).

learning with respect to novice legal writers in legal education.[48] Its subject matter is thus far-reaching; it explores law from the perspective of writing, draws on a number of disciplines useful to the law, and is by nature both descriptive and normative.

Much of the legal academy has resisted, at least initially, the value of legal writing scholarship. Despite its similarity to traditional legal scholarship in focusing on a discrete aspect of law practice, traditional scholar-opponents tend to view it as outside the realm of legal scholarship. Although it encompasses legal analysis and argument, it is not limited to a particular legal doctrine. Other objections to legal writing scholarship include those raised against normative and interdisciplinary scholarship: again, the subject matter is not sufficiently legal, its authors lack adequate training to speak about law or disciplines related to law, and it is written to the wrong audience. These objections are motivated in part by a persistent disdain for the practice of law among normative legal scholars[49] and a lack of respect for the intellectual rigor associated with teaching legal skills.[50] We address these objections below.

A. Broadening the Subject Matter of Legal Scholarship to Include the Creation as Well as the Interpretation of Legal Texts

Critics have argued that legal writing scholarship is not sufficiently legal or law-based. The descriptive scholar's major complaint seems to be that it does not articulate legal doctrine or identify trends in the law. Yet legal writing scholarship is always about the law—how legal practitioners use language to assess, articulate, and create meaning in legal settings. In interrogating how language and the law operate together to create meaning, confusion, and conviction, legal writing scholarship helps us understand the theory as well as the practice of the legal profession from the practitioner's point of view. In contrast, the normative scholar's objection is that legal writing scholarship is *too* descriptive; it fails to take a normative position about the law. Although legal writing scholarship may not argue what a specific law or doctrine of law should be, it is most definitely normative: It argues, sometimes explicitly and sometimes implicitly, what legal writers should be doing in the application and practice of law. Its aim is to better under understand legal communication and help judges and advocates become better legal communicators; in short, to improve the

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[48] *See, e.g.,* John H. Larsen, *Using Visuals to Better Communicate Logic in Legal Reasoning*, 25 LEG. WRITING: J. LEG. WRITING INST. 285, 330 (2021); Nancy E. Millar, *The Science of Successful Teaching: Incorporating Mind, Brain, and Education Research into The Legal Writing Course*, 63 ST. LOUIS U. L.J. 373, 373 (2019); Maria Termini, *Finding the Right Angle: Lessons from Mathematics for the Legal Writing Classroom*, 26(1) LEG. WRITING: J. LEG. WRITING INST. 1, 4 (2022).

[49] *See, e.g.*, Edwards, *supra* note 1, at 46.

[50] Clinical law faculty have experienced similar objections to the value of their scholarship, in part because it is interdisciplinary and in part because it too may address pedagogy. *See, e.g.*, Clark D. Cunningham, *Hearing Voices: Why the Academy Needs Clinical Scholarship*, 76 Wash. Univ. L. Q. 85, 93 (1998).

practice of law and fulfill the law's promise of competent and zealous advocacy on behalf of clients.

To the extent critics complain further that legal writing scholars do not engage in enough debate, legal writing is a relatively new discipline. It owes its existence in large part to the relatively recent acceptance of interdisciplinary legal studies, and it is written primarily by a cohort of faculty with a disproportionately demanding course load and little institutional support for its development. Against these odds, the discipline has begun to mature. In due course, legal writing scholars have begun to enjoy the luxury of debating some of its core assumptions, engaging in an ongoing conversation about the efficacy of the various forms and methods of legal communication.[51]

B. Envisioning Legal Scholars as Those Qualified to Speak About the Practice of Law from the Practitioner's Perspective

Legal writing scholarship's continued struggle for acceptance reflects harsh realities. Among these, especially at top tier schools, is the assumption that legal writing faculty do not have the requisite expertise or inherent ability to engage in either traditional or normative legal scholarship. Although they are often experienced practitioners,[52] share the same academic credentials as traditional law faculty,[53] and teach the same students, legal writing faculty are the newer members of the legal academy. Like clinical legal faculty who joined the ranks of law professors after doctrinal faculty were firmly established,[54] legal writing scholars have been challenged to prove their worth. Historically, legal writing faculty have not been hired on the tenure track, not been expected or encouraged to engage in scholarship, and have been dismissed as teachers of skills as opposed to law. Despite these obstacles, legal writing faculty have engaged in scholarship with a passion for developing their

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[51] *See, e.g.*, Kirsten K. Davis, *"The Reports of My Death are Greatly Exaggerated": Reading and Writing Objective Legal Memoranda in a Mobile Computing Age*, 92 OR. L. REV. 471, 510 (2013) (arguing that predictive legal analysis is the same regardless of the nature of the document); Laura P. Graham, *Why-Rac? Revisiting the Traditional Paradigm for Writing About Legal Analysis*, 63 UNIV. KAN L. REV. 681, 681 (2015) (one of many articles exploring the deficiencies of IRAC as an organizational tool); Kristen K. Tiscione, *The Rhetoric of E-mail in Law Practice*, 92 OR. L. REV. 525, 526 (2013) (arguing that legal analysis differs based on the form in which it is written).

[52] Mitchell Nathanson, *Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor*, 11 LEG. WRITING: J. LEG. WRITING INST. 329, 337 (2005) (explaining that the mean numbers of years doctrinal professors practiced law prior to initial teaching position was 2.12 years, in contrast with 4.5 years for legal writing professors).

[53] Susan P. Liemer & Hollee S. Temple, *Did Your Legal Writing Professor Go to Harvard?: The Credentials of Legal Writing Faculty at Hiring Time*, 46 U. LOUISVILLE L. REV. 383, 425 (2008) (demonstrating that "many more legal writing professors have traditional tenure-line credentials than actually have tenure-line appointments" and that "there are plenty of doctrinal, tenure-line professors who lack some of the traditional tenure-line credentials").

[54] *See* Peter A. Joy & Robert R. Kuehn, *The Evolution of ABA Standards for Clinical Faculty*, 75 TENN. L. REV. 183, 190 (2008) (tracing the development of clinical legal education and the challenges clinical law faculty face in terms of status and security of position).

discipline.[55] Although a significant number of law schools now hire legal writing faculty on a traditional tenure track, the overwhelming majority—seventy-three percent—do not.[56] Empowered by ABA Standard 405, which permits discrimination against clinical and legal writing faculty based on the subject they teach,[57] legal writing faculty's ineligibility for tenure is taken as proof of their inability to be legal scholars.[58]

Moreover, despite legal writing scholarship's interdisciplinary nature—a quality seemingly now in vogue—some interdisciplinary legal scholars are more successful than others. Because "the tools [legal writers] bring to [their] work from traditional legal education are inadequate,"[59] legal writing scholars have turned to the humanities as well as the social sciences. Relevant disciplines include composition theory, classical and contemporary rhetoric, and narrative theory. Despite their legitimacy and relevance to legal communication, they are not well understood or respected, reflecting the traditional and persistent view of law as a science unto itself.[60]

Balkin explains resistance to these new disciplines as a struggle for dominance. When the member of an established discipline seeks "to import lessons" from an outside discipline, [61] one of two things can happen. Either the lessons are incorporated into and become part of the existing discipline, or they are rejected. If rejected, those who sought to expand the established discipline are "marginalized and dismissed."[62] Although the benefit of these outside disciplines to the study of law and legal communication is manifest, their outright rejection forces legal writing scholars to defend not only their own scholarship, but also the legitimacy of their discipline. As Balkin further explains, law as an academic discipline "seems to accept and even to welcome invasion [from other disciplines] while secretly resisting and subverting it"; thus "no invasion of law can ever be fully successful." [63]

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[55] *See, e.g.*, Terrill Pollman, *Building a Tower of Babel or Building a Discipline? Talking About Legal Writing*, 85 MARQ. L. REV. 887, 887–88 (2002) (discussing the development of legal writing scholarship); Pollman & Edwards, *supra* note 43, at 59–212 (listing the scholarly works of nearly 300 legal writing professionals); Berger et al., *supra* note 1, at 521; Melissa H. Weresh, *Stars Upon Thars: Evaluating the Discriminatory Impact of ABA Standard 405(c) "Tenure-Like" Security of Position*, 34 L. & INEQ. 137, 151 (2016); Tiscione, *supra* note 1, at 50.

[56] *ALWD/LWI Legal Writing Survey, 2019-2020*, Q.8.2 (indicating that 123 out of 169 law schools do not hire legal writing faculty on the traditional tenure track).

[57] Am. Bar Ass'n, 2022-2023 Standards for Approval of Law School, Std. 405, https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/standards/2022-2023/22-23-standards-toc.pdf.

[58] *See generally*, Stanchi, *supra* note 5, at 486.

[59] Cunningham, *supra* note 50, at 88.

[60] *See, e.g.*, Kristen K. Robbins (Tiscione), *Philosophy v. Rhetoric in Legal Education: Understanding the Schism Between Doctrinal and Legal Writing Faculty,* 3 J. ASS'N LEG. WRITING DIRS. 108, 120 (2006).

[61] J. M. Balkin, *Interdisciplinarity as Colonization*, 53 WASH. & LEE L. REV. 949, 961 (1996).

[62] *Id.*

[63] *Id.* at 965.

Even where the disciplines relied on by legal scholars do garner respect, some critics resort to the argument that legal writing scholars have insufficient training in the non-legal disciplines they rely on. We have heard tenured legal faculty suggest that without an accompanying Ph.D. in the non-legal discipline, legal writing scholars lack the requisite expertise to be respectable interdisciplinarians. While a lack of training in social science research can pose a legitimate barrier to empirical legal scholarship, legal writing scholars have as much ability to import principles and methodologies from other disciplines as other legal scholars. To the extent that any legal scholar wades into areas clearly outside their expertise, it is incumbent upon them to perform rigorous research and seek expert advice to ensure their scholarship is accurate and well-grounded in its non-legal disciplinary approach.

Finally, related to these objections is the argument that legal writing scholars cannot demonstrate the impact of their scholarship on the profession. But the impact of legal writing scholarship—indeed, the impact of any type of legal scholarship[64]—is difficult to measure for a couple of reasons. First, scholarly impact has recently been measured using the scoring system created by Brian Leiter and refined by Gregory Sisk.[65] A faculty's Leiter score is based on the number of citations to their scholarship.[66] The problem is that Leiter scores track only tenured or tenure track faculty, excluding clinical and legal writing scholarship unless the authors are employed by a law school that makes them eligible for tenure.[67] In addition, traditional legal scholars' lack of familiarity with legal writing scholarship is due in part to the fact that elite law journals generally do not publish legal writing scholarship. Finally, as with all forms of legal scholarship, its real life impact is always inherently difficult to gauge.[68]

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[64] *See, e.g.*, Tamara R. Piety, *In Praise of Legal Scholarship*, 25 WM. & MARY BILL RTS. J. 801, 812 n.50 (2017) (asserting that, in the context of the Edwards debate about the value of emerging forms of scholarship, "the length of time it takes for [the] influence [of legal scholarship] to be felt, the (sometimes) need for deep familiarity with the field in order to be able to discern influence due to the inadequacy of citation counts as a proxy for influence, that, together, suggest the characterization of [legal] scholarship as mostly wasteful and a bad investment, overblown").

[65] *See, e.g.*, Gary M. Lucas, Jr., *Measuring Scholarly Impact: A Guide for Law School Administrators and Legal Scholars*, 165 U. PA. L. REV. ONLINE 165, 170 (2017).

[66] *Id.* The Leiter score is designed to compare law faculties based on their scholarly impact. "A faculty's Leiter score equals two times the faculty's average citations [in the Westlaw Journal and Law Review (JLR) database] plus the faculty's median citations, which places greater weight on the average than on the median faculty member." *Id.*

[67] *Id.* (explaining that the "Leiter score is calculated with respect to the tenured faculty only and excludes clinical and legal writing faculty unless the school in question has an integrated tenure track under which these faculty have a scholarship obligation similar to the doctrinal faculty").

[68] *See, e.g.*, Piety, *In Praise of Legal Scholarship*, *supra* note 63, at 808 (arguing that "it may take an exceptionally long time for impact to be felt or acknowledged" and that citations are "a crude and imperfect measure of influence").

C. Engaging in Scholarship of Interest and Use to a Wide Legal Audience

Critics of legal writing scholarship tend to object to its audience as both too limited and, paradoxically, too broad for inclusion in true legal scholarship. Its strongest critics, descriptive and normative scholars alike, assume that it is of no interest to anyone because it is of no interest to them. This is simply not true. Just as the primary audience for law and economics scholarship is other law and economics scholars, the primary audience for legal writing scholarship is legal writing scholars, a large cohort of law faculty nationwide. Moreover, it is of general use and interest to "lawyers, judges, students," and other scholars as well."[69] For example, *Legal Communication & Rhetoric*, the journal of the Association of Legal Writing Directors, is designed to advance the study of legal communication and to be of use to law professors and practitioners.

Although normative legal scholars were criticized for being too theoretical to be of use to the bench and bar, legal writing scholars are criticized for not being theoretical enough, despite legal writing scholars' reliance on outside disciplines and engagement with other scholars' work. This objection is often a veiled criticism of legal writing scholarship's focus on the creation of texts (i.e., skills) and its relation to pedagogy. For scholars who study the law but are several steps removed from its practice, being "pedagogical" is a death knell for legal scholarship. But the idea that legal educators—particularly skills-focused faculty—have no business engaging in the study of teaching and learning in higher education makes no sense. This is the attitude that forced normative scholars to defend themselves in the most recent attacks on legal education.[70] As Balkin has stated, within a discipline such as law, the ability of those in control to decide what forms of scholarship will be valued and count toward promotion and tenure is "a classic version of Foucauldian power/knowledge."[71] We believe that if it otherwise meets the requirements for good scholarship,[72] legal writing scholarship is a legitimate form of legal scholarship even if it addresses pedagogy.

III. CONCLUSION

As we hope to have demonstrated, legal writing scholarship meets the criteria for legal scholarship and should count towards promotion and tenure. It is undeniably law-based, written by experienced practitioner-scholars, and it is of interest and use to a wide legal audience, including other legal scholars, the bench, the bar, and often, students (even though it is not typically addressed to students). Its subject is the

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[69] Berger et al., *supra* note 1, at 530.

[70] *See, e.g.*, David Segal, *What They Don't Teach Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?pagewanted=all&_r=0 [http://perma.cc/5ALE-9M6Y]; West, *supra* note 18, at 16.

[71] Balkin, *supra* note 61, at 954.

[72] *See supra* notes 5 and 39 and accompanying text.

theory and practice of effective legal communication. Instead of focusing on what the law is or should be, it focuses primarily on what an advocate does and should do to achieve the best possible results for his or her clients. In short, it explores the creation as well as the interpretation of legal texts. In so doing, it often draws on a host of related disciplines, ranging from the humanities to the sciences, to inform, define, and develop its subject matter.

Historically, objections to new forms of legal scholarship have attempted to serve a gatekeeping function—to "preserve the [existing] discipline and reproduce it in others."[73] Despite these objections, the scope of legal scholarship has consistently expanded to incorporate new forms of interest. Just as normative and interdisciplinary scholars demonstrated the value of asking new questions about the nature of law and developing new methods for answering them, legal writing scholars have demonstrated the value of asking new questions about the legal writer's role in the legal process and developing new methods for answering those questions. Continued resistance to scholarship of demonstrable interest and use to a significant cohort of the legal profession is indefensible.

As a community of legal scholars, we must acknowledge that legal scholarship is not a zero-sum game. The acceptance of new, viable, and valid forms of legal scholarship does not diminish or dilute the value of other forms. Instead of jockeying for the most prestigious position, we must work together to "carve out space[s]"[74] for all kinds of legal scholarship. As Robin West argued in defense of normative scholarship, "[i]f we want to use law to further the ends of justice, we . . . need big, ambitious scholarship that is unabashedly normative."[75] At the same time, with respect to empirical interdisciplinary scholarship, she claimed that in order to "understand how our law serves the ends of injustice, we [also] need big, ambitious scholarship that is unabashedly non-normative and non-pragmatic, that doesn't aim for the legal fix, but aims instead for understanding."[76] And, if we want to better understand the legal advocate's role in achieving just legal outcomes, we need big, ambitious scholarship that is unabashedly descriptive, normative, and interdisciplinary; that restores legal communication to its rhetorical roots; and that aims both for more fair and effective legal solutions and a better understanding of how to achieve them.

[73] Balkin, *supra* note 61, at 954.
[74] West, *supra* note 18, at 17.
[75] *Id.*
[76] *Id.*