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LEGAL [PEDAGOGY] SCHOLARSHIP: WHY IT COUNTS

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Responding to *Legal [Writing] Scholarship: Why It Counts*

I. INTRODUCTION

This Article both responds to and furthers Melissa H. Weresh and Kristen K. Tiscione's (hereinafter "Authors") *Legal [Writing] Scholarship: Why It Counts*.[1] In their essay, the Authors discuss legal writing scholarship—what it is, what it perhaps should be, and whether it counts toward promotion and tenure.[2] Their examination is critically important to all of us in the legal academy because, as Deborah Rhode explained, "[a]ssumptions about what is and is not valuable in legal scholarship significantly affect how academics shape their careers, how law schools choose and reward their faculties, and how those faculties influence, or fail to influence, legal institutions."[3]

At the outset, the Authors describe how legal scholarship has evolved significantly since the inception of Christopher Langdell's reforms to legal education

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[1] Melissa H. Weresh & Kristen K. Tiscione, *Legal [Writing] Scholarship: Why It Counts*, 6 STETSON L. REV. F.: UNENDING CONVERSATION 1, 1 (Spring 2023), https://www2.stetson.edu/law-review/article/legal-writing-scholarship-why-it-counts/.

[2] *Id.*

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

in the 1870s.[4] Initially, legal scholarship was focused on legal doctrine, and scholars often wrote publications, such as treatises, that described or explained the law or the legal system.[5] It then transformed into something more normative, with scholars addressing questions about "what the law should be" (or should not be in some cases),[6] and using other disciplines to aid in their scholarly pursuits.[7]

Notably, critics complained that this normative scholarship was not sufficiently about the law, these "scholars were not qualified to write about disciplines outside the law, and normative arguments did not benefit [the right legal] audience, the bench and bar."[8] In response to these criticisms, legal scholars started reconsidering what it meant to be "about the law," who was considered qualified to write about it, and who the appropriate audience was for this legal scholarship.[9] What resulted was essentially a broadening of the interpretation of the concept of legal scholarship.

The Authors use this historical transformation to synthesize what has emerged as the three criteria of "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.[10] The Authors then demonstrate why legal writing scholarship is always about the law, how these scholars have the expertise to write in this area, and how, under a more appropriate definition of audience, this scholarly work is inherently valuable to the legal profession.[11] In their conclusion, the Authors argue that there is certainly room for all forms, so the concept of legal scholarship should be broad enough to encompass more than the traditional forms for promotion and tenure.[12]

Despite its own scholarship history, the Authors do not explicitly advocate for pedagogically based scholarship. They acknowledge that legal writing scholarship began as more pedagogically focused works.[13] For example, pedagogy works could be

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[4] Weresh & Tiscione, *supra* note 1, at 3 (citing 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)).
[5] *See* Rhode, *supra* note 3, at 1329.
[6] Robin West & Danielle K. Citron, *On Legal Scholarship,* CURRENT ISSUES IN LEGAL EDUC. (2014), https://scholarship.law.bu.edu/shorter_works/75/.
[7] *See* Weresh & Tiscione, *supra* note 1, at 5 (quoting Richard A. Posner, *Legal Scholarship Today*, 115 HARV. L. REV. 1314, 1316 (2002)).
[8] *Id.*
[9] *Id.*
[10] *Id.* at 2.
[11] *See id.* at 6–9.
[12] *Id.* at 3, 16 (discussing room in the legal scholarship field for all kinds of scholarship and that we should do what we can to "carve out space[s]" so we can have "a richer, more varied body of work with different but equally valuable objectives and knowledge").
[13] *Id.* at 3.

on the "theoretical nature of legal writing," but more commonly it involved written works about "how certain identified skills should be taught (i.e., the best teaching methodologies)."[14] However, as they explain, over time, many legal writing scholars have shifted their focus towards "exploring the substance of legal writing," and studying legal writing in the context of other disciplines such as composition and rhetoric.[15] This transition was likely the consequence of the legal academy's reluctance to recognize pedagogy as a true form of legal scholarship.[16] The Authors' arguments seem to take advantage of this shift because they predominantly showcase how the more normative form of legal writing scholarship meets the definition of legal scholarship. Unfortunately, as explained below, the Authors' broadened interpretation is still too restrictive and does not adequately capture the scholarship of teaching and learning ("SoTL").

Therefore, this Article continues with the Authors' mission to advocate for the inclusion of all scholarly work, specifically SoTL. This Article highlights the importance of SoTL to the legal academy and demonstrates how SoTL is legal scholarship and should be recognized as such by the legal academy. In doing so, I will first highlight the evolution of SoTL. I will then analyze SoTL in the context of the three criteria of legal scholarship as synthesized and used by the Authors. I will show how just in one small but very significant way, the Authors' interpretation of legal scholarship is still too narrow because it excludes pedagogically focused scholarship from the legal academy. However, I will illustrate how SoTL qualifies under all three criteria as legal scholarship by simply taking a slightly different definition for the first criterion.

II. THE EMERGENCE OF THE SoTL

As an initial matter, it is helpful to understand the origins of the field of SoTL. It is also important to know what defines something as SoTL to fully understand how this form of scholarship would (or would not) meet the criteria of legal scholarship.

Like the scholarship of legal writing, the field of SoTL is relatively new. The concept was first introduced in 1990 when Ernest Boyer, then President of the Carnegie Foundation for the Advancement of Teaching, published a piece called

[14] *See* Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ASS'N LEGAL WRITING DIRS. 1, 6 (2004) (discussing the types of scholarship of legal writing pedagogy and providing a list of references as examples).

[15] Weresh & Tiscione, *supra* note 1, at 10.

[16] *See* Melissa H. Weresh, *Sharing the Baton: Intergenerational Advances in the Legal Writing Community*, 25 J. LEGAL WRITING INST. 91, 105–07 (2021) (highlighting the evolution of legal writing scholarship and the disagreement amongst legal writing scholars about whether pedagogy is enough to count as "scholarship").

Scholarship Reconsidered: Priorities of the Professoriate.[17] In this piece, Boyer discussed the concept of "the scholarship of teaching."[18] Boyer argued that we should reconsider the criteria of professorships and broaden the priorities to include all of the activities professors engage in, including the integration of research and teaching.[19] In his article, Boyer mentioned two different terms: *scholarly teaching* and SoTL.[20] Boyer, however, did not explicitly distinguish between the two concepts.[21] Later, Lee S. Shulman, another President of the Carnegie Foundation for the Advancement of Teaching, clarified the differences between the two terms.[22] Shulman explained that "[s]cholarly teaching is *teaching* that is well grounded in the sources and resources appropriate to the field. It reflects a thoughtful selection and integration of ideas and examples, and well-designed strategies of course design, development, transmission, interaction and assessment."[23] Scholarly teaching is something that is closely associated with "reflective practice."[24] Thus, scholarly teachers often "reflect on their [own] teaching, use classroom assessment techniques, discuss teaching issues with colleagues, try new things, and read and apply the literature on teaching and learning in their discipline."[25] To illustrate, Shulman explained that one can think of scholarly teaching as akin to the clinical work done by faculty in medical schools.[26]

On the other hand, the SoTL is only when "our work as teachers becomes public, peer-reviewed and critiqued, and exchanged with other members of our professional communities so they, in turn, can build on our work."[27] In other words, it has the "qualities of scholarship."[28] To illustrate this difference, Shulman explained that the clinical work done by faculty in medical schools (i.e., scholarly teaching) only

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[17] ERNEST L. BOYER, SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE (The Carnegie Foundation for the Advancement of Teaching 1990).
[18] *Id.* at 23.
[19] *Id.* at 24.
[20] *Id. at 23.*
[21] *See id.* at 24. It is also worth mentioning that as a result of this work, Boyer is attributed with essentially creating the concept that there should be four separate and distinct domains of scholarship: Discovery, Application, Integration, and Teaching (also known as "the Boyer Model"). *See Boyer Model*, CTR. FOR INNOVATION IN RSCH. ON TEACHING, https://cirt.gcu.edu/sotl/boyer (last visited June 19, 2024).
[22] Lee S. Shulman, *From Minsk To Pinsk: Why A Scholarship Of Teaching And Learning?*, 1 J. SCHOLARSHIP & TEACHING 1, 2–3 (2001).
[23] *Id.* at 2. (emphasis added).
[24] Kathleen McKinny, *What is the Scholarship of Teaching and Learning (SoTL) in Higher Education?*, ILL. STATE UNIV. CROSSED ENDOWED CHAIR IN THE SCHOLARSHIP OF TEACHING & LEARNING (June 17, 2024), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://sotl.illinoisstate.edu/downloads/definesotl.pdf.
[25] *Id.*
[26] Shulman, *supra* note 22, at 3.
[27] *Id.* at 2–3.
[28] *Id.* at 3.

becomes the scholarship of teaching when the faculty member's work is eventually communicated in a way that is "public, reviewed and exchanged."[29]

For this Article, I will use the more traditional definition of SoTL in which "our work as teachers becomes public, peer-reviewed and critiqued, and exchanged with other members of our professional communities so they, in turn, can build on our work."[30] This is because it most closely aligns to the concept discussed by the Authors in their essay, and it is also the concept that is predominantly accepted within the legal academy.[31]

So, what are some of the theories teaching and learning scholars research and write about? Just like legal writing and normative legal scholars, much of the work of SoTL is interdisciplinary. SoTL scholars look at theories and techniques based on literature from other disciplines like biology, psychology, and education.[32] To name a few, they look at topics such as learning styles, knowledge transfer, scaffolding, effective practice and feedback, assessments, competency-based metrics, metacognition, self-regulated learning (self-assessment), growth mindset, and self-awareness (reflection).[33] They also may look at the literature on the impact on student learning in different teaching modalities, such as formative and summative assessments in an in-person versus online learning environment.[34]

Although SoTL is relatively new, some scholarly outlets that specifically focus on SoTL already exist. Several non-legal outlets regularly publish general SoTL

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[29] *Id.*

[30] *See id.* at 2–3.

[31] To illustrate, a few legal SoTL scholars have defined SoTL as something that "uses discovery, reflection, and evidence-based methods to research effective teaching and student learning. These findings are peer-reviewed and publicly disseminated in an ongoing cycle of systematic inquiry into classroom practices." Gerald F. Hess et al., *Fifty Ways to Promote Teaching and Learning*, 67 J. LEGAL EDUC. 696, 705 (2018) (quoting University of Central Florida, *SoTL and DBER: Overview*, FACULTY CTR., http://www.fctl.ucf.edu/ResearchAndScholarship/SoTL/ (last visited July 21, 2024)). Additionally, although, as highlighted by the Authors in prior scholarly works, there are similar ongoing debates within the legal writing discipline about whether more reflective scholarship should count the same way as the more traditional analytical scholarship does. *See* Weresh, *supra* note 16, at 105–07 (highlighting the evolution of legal writing scholarship and the disagreement amongst legal writing scholars about whether pedagogy is enough to count as "scholarship"); *see also* Kristen K. Tiscione, *The Next Great Challenge: Making Legal Writing Scholarship Count As Legal Scholarship*, 22 J. LEGAL WRITING INST. 50, 53 (2018) (discussing how the type of legal scholarship may cause more burdens to new legal writing faculty). In many of these discussions, legal writing scholars highlight just how important this question is to their careers. While the specific debates in the legal writing community are not the focus of this Article, at a minimum, these debates certainly illustrate that the question about what constitutes legal scholarship is ripe for more discussions.

[32] Deborah L. Borman & Catherine Haras, *Something Borrowed: Interdisciplinary Strategies for Legal Education*, 68 J. LEGAL EDUC. 357, 358 (2019).

[33] *See generally id.* (discussing the depth of various learning techniques from other disciplines).

[34] *See generally id.*

works.[35] With respect to the *legal academy*, one of the most well-known journals for law scholarship teaching and learning is the Association of American Law Schools' ("AALS") *Journal of Legal Education*, which was first created in 1948.[36] The Institute for Law Teaching and Learning ("ILTL"), which is an organization predominantly focused on promoting the quality of teaching and learning in legal education, also offers an online forum for law professors to post pedagogically-focused pieces.[37] Additionally, ILTL just recently launched its inaugural peer-reviewed journal.[38] Moreover, the *Clinical Law Review* is a semi-annual peer-edited journal devoted to issues of lawyering theory and clinical legal education.[39]

III. ANALYSIS OF THE CRITERIA AND CRITICISMS AS IT RELATES TO SOTL

Now to the issue of SoTL as legal scholarship. This Article evaluates SoTL using the same three criteria the Authors analyzed in their essay, which is that legal scholarship: "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."[40] When we apply these criteria to SoTL, we discover that generally the second and third criteria apply equally and do not require any revision. Yet, we also discover that the first criterion is still too narrow. Despite this issue, we can still be consistent with the principles underlying the Authors' arguments simply by adopting a slightly broader definition for the first criterion. With this minor revision, SoTL, without question, counts as legal scholarship.

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[35] *Journal of the Scholarship of Teaching and Learning*, IUSCHOLARWORKS J., https://scholarworks.iu.edu/journals/index.php/josotl (last visited June 17, 2024); *Teaching and Learning Inquiry*, INT'L SOC'Y FOR THE SCHOLARSHIP OF TEACHING & LEARNING, https://issotl.com/teaching-learning-inquiry/ (last visited June 19, 2024); INT'L J. SCHOLARSHIP OF TEACHING AND LEARNING, https://digitalcommons.georgiasouthern.edu/ij-sotl/ (last visited June 19, 2024); *Carnegie Academy for the Scholarship of Teaching and Learning (CASTL) Higher Education*, ARCHIVE: CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, http://archive.carnegiefoundation.org/scholarship_teaching_learning/CASTL_highed.html (last visited June 19, 2024).

[36] *Journal of Legal Education*, ASS'N OF AM. L. SCHS., https://jle.aals.org/home/about.html (last visited June 19, 2024).

[37] *About*, INST. FOR L. TEACHING AND LEARNING, https://lawteaching.org/about/ (last visited June 19, 2024).

[38] *Id.*; Jeff Baker, *Launching the Journal of Law Teaching and Learning*, CLINICAL L. PROF BLOG (June 6, 2022), https://lawprofessors.typepad.com/legal_skills/2024/08/new-law-teaching-journal-the-journal-of-law-teaching-and-learning--1.html.

[39] *A Journal of Lawyering Pedagogy and Social Justice*, NYU L.: CLINICAL L. REV., https://www.law.nyu.edu/journals/clinicallawreview (last visited July 23, 2024).

[40] Weresh & Tiscione, *supra* note 1, at 2.

A. Broadening the Subject Matter of Legal Scholarship to More Accurately Represent the Variations Within the Legal Academy

In defining the scholarship of a discipline, the first question is whether the subject matter is sufficiently tied to that discipline.[41] Originally, the subject matter of legal scholarship was only that which interpreted the law of a given subject (such as Contracts or Torts).[42] With the acceptance of normative and interdisciplinary approaches, the subject matter of legal scholarship expanded to also include works that "identify[] 'the underlying social purposes and the practical social consequences of legal doctrine.'"[43] A common criticism of a new form of legal scholarship is that it is not sufficiently legal or about the law.[44] Given this criticism, the Authors advocate for "broadening the subject matter of legal scholarship" to include the creation and interpretation of legal texts.[45] Because the Authors focus on normative legal writing scholarship, their broadened interpretation makes sense. As the Authors explained, "legal writing scholarship is always about the law—how legal practitioners use language to assess, articulate, and create meaning in legal settings."[46]

Unfortunately, even the Authors' slightly more expansive interpretation does not reach SoTL. This is because on its face SoTL is "not sufficiently legal or law-based."[47] It does not directly focus on a legal subject matter, it does not describe the law, nor does it explicitly interpret the law or argue what the law should be.[48] Nevertheless, while SoTL may not explicitly be "about the law," SoTL is necessary to properly educate future lawyers "about the law." So, we should broaden the subject matter of legal scholarship and use a term that more accurately reflects the vast changes occurring in the legal academy. There are two possible ways that this objective can be accomplished. First, we can use a slightly different "law" defined subject matter terminology. Second, we can look beyond the "law-based" defined subject matter altogether and embrace the already diverse nature of legal scholarship combined with the recent changes occurring within the legal academy.

The first option would be to revise the term "law-based" to "law-connected," which would capture a broader range of disciplines. Notably, Professor Kirsten Davis, a legal communication scholar, was the first to advocate for the law-connected term.

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[41] *Id.* at 5.
[42] *Id.* at 6.
[43] *Id.* (quoting Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 364 (2008)).
[44] *Id.* at 5.
[45] *Id.* at 6.
[46] *Id.* at 11.
[47] *See id.*
[48] *See id.*

In her piece, Davis proposes a provisional working definition for the academy to consider in defining what "legal writing scholarship is and can be."[49] Davis ultimately proposes that legal writing scholarship is something that is communication-centered and law-connected.[50] Accordingly, when applied in this context, instead of legal scholarship being tied to something that is "law-based," one could build off of Davis' provisional definition and argue that legal scholarship is something that should be law-connected. Similar to legal writing scholarship that is communication-centered, SoTL is pedagogically centered, focusing on theories of student learning and engagement. Additionally, to the extent that it uses the law as a framework or setting for this scholarship, while not "about the law," SoTL would be law-connected as Davis proposes for legal writing scholarship.

In fact, one of the benefits to using a law-connected focus would be that it would more appropriately reflect the dual nature of those of us in higher education. While we all have differing areas of expertise in the law, clearly those of us who *teach* in law schools have at least two professional roles: (1) our discipline, which is our professional field (e.g., law), and (2) our profession as an educator.[51] These two roles hold true regardless of what courses we teach at our law schools—almost all of us serve a role in the legal profession *and* serve the role as an educator at the same time.[52] Thus, similar to someone who writes a piece about the law and literature, someone who writes a piece about law teaching and learning is simply integrating—or as Davis suggests "connecting"—their two disciplines. They are using their professional role in the legal field to discuss a theory on teaching and learning in their role as an educator. In other words, they are using the law as a vehicle to discuss how to use pedagogical theories for teaching or learning to advance a legal topic or lawyering skill. Importantly, using a law-connected terminology acknowledges that legal scholarship is tied to law. But using this terminology would also open the category to include other types of scholarship, such as SoTL. It would also allow us to include clinical, externship, and academic success scholarly works that similarly use the law field to discuss their particular disciplinary fields. Therefore, a law-connected terminology would undoubtedly address the first criterion criticism and adhere to the same principles advanced by the Authors in their essay.

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[49] Kirsten K. Davis, *A Provisional Definition of "Legal Writing Scholarship*," 2 ONLINE J. LEGAL WRITING CONF. PRESENTATIONS 6, 6 (2021).

[50] *Id.* at 11.

[51] *See* Shulman, *supra* note 22, at 2.

[52] In fact, this "dualist" model has paved the way for the long-held assumption (one that is also employed throughout all higher education) that "the production of legal scholarship and law school classroom teaching are mutually supportive activities." Marin Roger Scordato, *The Dualist Model of Legal Teaching and Scholarship*, 40 AM. U. L. REV. 367, 368 (1990). As the Author has found, this proposition is not necessarily true.

Notwithstanding the above, critics will still likely object that SoTL is not legal scholarship because it is not explicitly about a subject matter in the law. However, these criticisms ignore two existing realities. The first reality is that there is an expansive array of topics already accepted as legal scholarship. This variety exists partly because the concept of legal scholarship lacks uniformity. In fact, there is no consensus on what constitutes legal scholarship.[53] Other critics have acknowledged that there is no shared vision on the accepted forms of legal scholarship within the legal academy. [54] Some of these problems may be the result of the legal academy's history of broadening its interpretation of legal scholarship. As the Authors demonstrated, this is exactly how the now commonly produced "normative" legal scholarship came to be accepted in the legal academy.[55] Some of the problem could be the fact that much of the doctrinal scholarly work in core areas of the law has already been written, which leaves the rest of legal scholars to develop creative and novel ways to produce scholarship.[56] Regardless of the reason, the ever-shifting landscape to legal scholarship means the "law has done better than most fields in transcending rigid disciplinary boundaries and integrating theory and practice."[57] As it currently stands, there are many forms of legal scholarship: Normative, Doctrinal, Reformist, Rhetoric & Communication, and Clinical and Experiential.[58] Therefore, expanding the subject matter of legal scholarship to include SoTL would continue to capture the imprecise nature of legal scholarship and formally acknowledge the variations within the academy.

The second reality critics ignore is that a broadened interpretation, such as law-connected, more accurately represents the legal academy's recent movements towards a more practice-based curriculum. While some things in law schools have not changed much since Langdell, the legal academy's notion of "what is the law" has

[53] Those in other higher education disciplines have often criticized legal scholarship for its lack of discipline, peer-review, and purpose. West & Citron, *supra* note 6, at 1.
[54] *See* Rhode, *supra* note 3, at 1328.
[55] Weresh & Tiscione, *supra* note 1, at 6. "[T]he 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.'" *Id.* at 6 (quoting Marin Roger Scordato, *Reflections on the Nature of Legal Scholarship in the Post-Realist Era*, 48 SANTA CLARA L. REV. 353, 364 (2008)).
[56] Scordato, *supra* note 52, at 376 (citing John Nowak, *Woe Unto You, Law Reviews!*, 27 ARIZ. L. REV. 317, 320 (1985)) (finding that legal scholarship has focused on either "(1) very recent, and relatively narrow, developments in statutory law or in court decisions; (2) relatively specialized areas of legal doctrine; (3) very theoretical and highly abstract approaches to legal doctrine; or (4) inter-disciplinary approaches to legal materials").
[57] Rhode, *supra* note 3, at 1329.
[58] *See generally* West & Citron, *supra* note 6, at 2. In this Article, the Authors even recognize works focusing on how we convey legal doctrine to our students (i.e., "pedagogy") as a form of legal scholarship. *Id.* at 15.

transformed significantly over the past several decades.[59] Instructively, the law school curriculum also changed in the 1970s and 1980s with the expansion of clinical education and the requirement that law schools offer rigorous writing experiences for law students.[60] More recent changes have further added to the law school curriculum.[61] For example, the American Bar Association ("ABA") Section on Legal Education and Admission to the Bar added experiential learning requirements to law school accreditation standards that expanded law school curriculum to include types of non-doctrinal topics that are important to the practice of law.[62] Moreover, as of 2022, law schools have to provide "substantial opportunities" for students to develop a professional identity (along with having substantial opportunities for students to participate in externships and clinics).[63] Therefore, adopting a more inclusive definition of legal scholarship, such as law-connected, exemplifies the current shifts towards including more practice-based subject matters in the curriculum.

To summarize, using law-connected terminology will allow for more legal scholarly works, reflect our dual professional roles, and adhere to the same principles advanced by the Authors in their essay. Moreover, this slight revision also embraces the already diverse nature of legal scholarship and aligns with the recent changes occurring within the legal academy.

B. Envisioning Scholars as Anyone Deemed Qualified to Write in their Area of Expertise

The second criterion of legal scholarship is that it must be written by members of the academy deemed qualified to write it.[64] The Authors argue that legal writing scholars have the necessary expertise in their field since they have relevant legal

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[59] *See* JOAN W. HAWORTH, SHAPING THE BAR: THE FUTURE OF ATTORNEY LICENSING 128 (Stan. Univ. Press ed., 2023) (citations omitted) (noting that the bar examiners have focused on the same goal for new lawyers for 150 years despite that the "amount and types of law blew up around us," and the fact that "lawyers shifted from representing local people with predictable problems to working for people or entities enmeshed in the complex and unwieldy edifice of court decisions, statutes, regulations, that gush steadily from towns, counties, states, and federal systems").

[60] L. Danielle Tully, *What Law Schools Should Leave Behind*, 2022 UTAH L. REV. 837, 837 (2022).

[61] Stephen Daniels et al., *Analyzing Carnegie's Reach: The Contingent Nature of Innovation*, 63 J. LEGAL EDUC. 585, 589 (2014) (finding recent activity in the area of curriculum, in particular in the areas of lawyering, professionalism, and integration).

[62] Anthony Niedwiecki, *Prepared for Practice? Developing a Comprehensive Assessment Plan for a Law School Professional Skills Program*, 50 U.S.F. L. REV. 245, 245–46 (2016) (discussing ABA's recent standards aimed at teaching students professional skills).

[63] Megan Bess, *Transitions Unexplored: A Proposal for Professional Identity Following the First Year*, 29 CLINICAL L. REV 1, 7–8 (2022) (discussing revised ABA Standard 303 on professional identity formation and proposing the use of externship pedagogy to support it).

[64] Weresh & Tiscione, *supra* note 1, at 12.

practice experience, possess the same academic credentials as traditional law faculty, and produce works that are interdisciplinary in nature.[65] Because of these attributes, the Authors conclude that the academy should "envision[] legal scholars as those qualified to speak about the practice of law from the practitioner's perspective."[66] This same rationale should extend to SoTL scholars. Accordingly, by accepting the Authors' position that a legal scholar more broadly includes anyone with the expertise to speak in their field, SoTL scholars also meet this second criterion.

To be clear, an expert in SoTL is not inherently anyone who teaches. Concerning the legal academy, when I talk about those who have expertise in teaching and learning, I am not suggesting that this is anyone who is instructing law students at a law school or a similar higher education law-related program. In fact, if we were to take what we know about law professors' teaching, training, and expertise at face value, this second criterion could appear problematic. This is because, generally speaking, as a legal academy we do not possess the adequate knowledge and training as educators before we enter legal education.[67] While this observation may seem harsh at first, it is supported by the following two pieces of evidence.

First, many law schools do not primarily focus on teaching qualities when hiring new law professors. When one reviews materials on how to become a law professor, it is clear that teaching skills or expertise are not the main focus of most law school hiring decisions. Instead, there is a general consensus that if one is interested in becoming a law professor, then they need to become a subject matter expert in an area of law.[68] This is particularly true for someone considering a tenure-track doctrinal law professor position. How does one typically become a subject matter expert before they teach? By publishing at least one (preferably three) scholarly work(s) within an area of the law.[69] As the Authors point out in their essay, more recently, at higher ranked law schools, there has also been a notable shift in hiring practices with schools searching for individuals possessing other advanced

[65] *Id.*
[66] *Id.*
[67] Borman & Haras, *supra* note 31, at 357; Scott Fruehwald, *Why Aren't Law Professors Taught to Teach?*, LEGAL SKILLS PROF BLOG (July 8, 2012), https://lawprofessors.typepad.com/legal_skills/2012/07/why-arent-law-professors-taught-to-teach.html.
[68] Lawrence J. Trautman, *The Value of Legal Writing, Law Review, and Publication*, 51 IND. L. REV. 693, 708–09 (2018) (first citing Tracey E. George & Albert H. Yoon, *The Labor Market for New Law Professors*, 11 J. EMPIRICAL LEGAL STUD. 1, 18 (2014); then citing Brian Leiter, *Information and Advice for Persons Interested in Teaching Law*, UNIV. CHI. THE L. SCH. (Dec. 2023), https://www.law.uchicago.edu/careerservices/pathstolawteaching).
[69] Minna J. Kotkin, *Clinical Legal Education and the Replication of Hierarchy*, 26 Clinical L. Rev. 287, 294–95 (2019) (discussing the importance of having a fellowship and/or a Ph.D. as the "coin of the realm" for hiring in academia).

degrees, such as PhDs, along with also having graduated from top-ranking institutions.[70] Significantly, these sought-out advanced degrees typically do not focus on education or areas on teaching and learning.[71]

Second, the well-known historical law teaching methods and assessment practices are not the best practices for promoting positive student learning. The way law professors teach their classes is generally the same as back in the 1890s when Langdell introduced the casebook and corresponding Socratic dialogue method to legal education.[72] Additionally, legal education has historically relied on single end-of-semester examinations, or summative assessments.[73] Even with the rise of clinical programs and the recent push to include more lawyering skills in the curriculum, casebook instruction with Socratic dialogue and summative assessments remain the primary pedagogical tools in legal education.[74] While some within the legal academy will argue otherwise, research shows that these are not the most effective pedagogical tools for improving student learning.[75] Specifically, research shows that there are negative impacts to using the casebook and Socratic dialogue,[76] such as contributing to law students' psychological distress and unintentionally impacting the success of

[70] *Id.*; *see also* Erwin Chemerinsky, *Why Write?*, 107 MICH. L. REV. 881, 885 (2009) (noting the trend at elite law schools to hire people with PhDs in other disciplines and placing more emphasis on theoretical, interdisciplinary scholarship).
[71] Chemerinsky, *supra* note 70, at 886.
[72] Tully, *supra* note 59, at 837–40; *see also* Erwin Chemerinksy, *Rethinking Legal Education*, 43 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 595, 595 (2008).
[73] Chemerinsky, *supra* note 72; *see also* Robert Minarcin, *Ok Boomer –The Approaching DiZruption of Legal Education by Generation Z*, 39 QUINNIPIAC L. REV. 29, 30–31 (2020); Steven Friedman, *A Critical Inquiry into the Traditional Uses of Law School Evaluation*, 23 PACE L. REV. 147, 150–52 (2002) (discussing the current status of evaluation practices at law schools and advocating for rethinking the practices).
[74] Friedman, *supra* note 73, at 150–52.
[75] Debra Moss Curtis, *Beg, Borrow, or Steal: Ten Lessons Law Schools Can Learn from Other Educational Programs in Evaluating Their Curriculum*, 48 U.S.F. L. REV. 349, 357–58 (2014); Amanda L. Sholtis, *Say What?: A How-To Guide on Providing Formative Assessment To Law Students Through Live Critique*, 49 STETSON L. REV. 1, 4–6 (2019); *see also* Elizabeth B. Bloom, *A Law School Game Changer: (Trans)formative Feedback,* 41 OHIO N. UNIV. L. REV. 228, 232–36 (2015); Sandra L. Simpson, *Riding the Carousel: Making Assessment a Learning Loop Through the Continuous Use of Grading Rubrics*, 6 CAN. LEGAL EDUC. ANN. REV. 35, 35–41 (2011).
[76] WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 8 (2007)*;* Karen J. Sneddon, *Square Pegs and Round Holes: Differentiated Instruction and the Law Classroom*, 48 MITCHELL HAMLINE L. REV. 1095, 1115–33 (2022) (citing DEREK BOK, HIGHER EDUCATION IN AMERICA 77 (William G. Brown ed., revised ed. 2013)) (acknowledging the benefits of the Socratic method but also the negative impacts of this method on legal education); *see also* Anthony Niedwiecki, *Teaching for Lifelong Learning: Improving the Metacognitive Skills of Law Students Through More Effective Formative Assessment Techniques*, 40 CAP. U. L. REV. 149, 170–73 (2012); Niedwiecki, *supra* note 61, at 271–72 (discussing how summative assessments are too focused on the end product and not enough on the process of how students got to the final product).

nontraditional students.[77] In addition, because the Socratic method teaches metacognition implicitly, students do not explicitly see the process on how to get to the answer, which detrimentally impacts their ability to transfer their learning to new and novel situations.[78] Moreover, researchers have also shown that summative assessments are not the best practice for improving student learning.[79] Summative assessments are only designed to measure a student's mastery of a skill set and not provide the students with feedback on their skill set.[80] Yet the research shows that formative assessments are really the methods that positively "affect future learning and student achievement."[81] This is because formative assessments, typically not used for grading students in a course, are designed to "provide feedback to the students and faculty on course performance while the course is in session."[82] These realities are noteworthy because every law professor's frame of reference for law school teaching has been experiencing these entrenched, minimally beneficial teaching practices as students. As aptly described by one legal SoTL scholar, "[t]his focus results in a shared perspective among . . . lawyers that they were taught to think like a lawyer, but did not learn how to be a lawyer."[83] Ultimately, what this means is that we cannot, and should not, automatically assume that a SoTL scholar is anyone who graduated from, and now teaches students at, a law school.

Rather, SoTL scholars "pose, study, and begin to answer intriguing questions about their teaching."[84] SoTL is not just "simply for the faculty member's own improvement . . . [but rather it] contributes to the practice of others."[85] Some may discount SoTL, as they often do with legal writing scholarship because it does not rely on "the traditional and persistent view of law as a science."[86] Both SoTL and legal writing scholarship often rely on disciplines outside of the social sciences.[87] As noted above, scholars in teaching and learning often rely on literature from psychology, biology, sociology, and education. They may research literature on cognitive learning theories and write about how certain techniques can be incorporated into classroom

[77] Ruta K. Stropus, *Mend It, Bend It, And Extend It: The Fate of Traditional Law School Methodology in the 21st Century*, 27 LOY. CHI. L.J. 449, 450, 456–65 (1996).
[78] Niedwiecki, *supra* note 76, at 167–69.
[79] Simpson, *supra* note 75, at 39–40.
[80] *Id.*
[81] Bloom, *supra* note 75, at 232–33 (citations omitted).
[82] Yvonne M. Dutton & Margaret Ryznar, *Law School Pedagogy Post-Pandemic: Harnessing the Benefits of Online Teaching*, 70 J. LEGAL EDUC. 252, 257 (2021).
[83] Minarcin, *supra* note 73, at 30 (2020).
[84] *See* Barbara L. Cambridge, *The Scholarship of Teaching and Learning: A National Initiative,* 18 AM. ASS'N FOR HIGHER EDUC. 55, 56 (2000), https://quod.lib.umich.edu/t/tia/17063888.0018.
[85] *Id.* at 57.
[86] Weresh & Tiscione, *supra* note 1, at 13.
[87] Gerald F. Hess et al., *supra* note 31, at 698.

instruction that would foster the best learning opportunities for students.[88] And just as a particular legal theory can change over time and inspire new legal scholarship on normative ideas, so too can educational theories change and inspire new scholarship on innovative approaches on SoTL.[89] An SoTL scholar may discuss how law schools exemplify an elemental model of learning but that this model has not kept up in light of changes in cognitive science, learning theory, advancements in technology, and the characteristics of the new law student.[90] But, as the Authors demonstrate with legal writing scholars, SoTL legal scholars have just as much ability to use these other disciplines in their own work as other legal scholars.[91] As the Authors aptly point out, it is up to any legal scholar to "perform rigorous research and seek expert advice to ensure their scholarship is accurate and well-grounded in its non-legal disciplinary approach."[92] This is true of any legal scholar, including SoTL, no matter the non-legal discipline they are relying on.

As a final point, we as a legal profession should want to encourage some of our legal educators to be experts in teaching and learning so we can produce more competent attorneys. As highlighted above, there are a few existing law-related SoTL outlets where we can find invaluable resources and SoTL legal experts. However, compared to other educational fields, such as primary and secondary education, there is a significant gap in legal teaching and learning resources. Furthermore, the fact that legal education continues to rely on ineffective teaching methods illustrates that there are still insufficient SoTL legal scholars within the legal academy. Notwithstanding this reality, recent developments at the ABA strongly suggest that the tides could change regarding SoTL in legal education. The Council of the ABA Section of Legal Education and Admissions to the Bar just released a proposed change to Standard 403 that would add a mandate to law schools to "require its full-time faculty to participate annually in educational activities that promote effective teaching, including but not limited to, workshops on pedagogy, learning, course design, classroom management, and assessment."[93] Perhaps this shift means that the acceptance of SoTL as legal scholarship could be soon on the horizon.

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[88] *See* Sneddon, *supra* note 76, at 1115–33 (discussing different interdisciplinary theories in application to law teaching and applying differentiated instruction in the classroom with examples).

[89] *See* Joshua Aaron Jones, *Building a Community of Inquiry Through Interactive Materials: The Interactive Syllabus*, 45 NOVA L. REV. 353, 362 (2021) (noting that there has been a recent shift into new pedagogies).

[90] Rebecca Flanagan, *Better by Design: Implementing Meaningful Change for the Next Generation of Law Students*, 71 ME. L. REV. 103, 111 (2018).

[91] *See* Weresh & Tiscione, *supra* note 1, at 14.

[92] *Id.*

[93] ABA Legal Educ. and Admission to the Bar Council, Memorandum (Mar. 1, 2024), https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_t

Until that day comes, though, we can still demonstrate that SoTL scholars meet the second criterion by accepting the Authors' position that a legal scholar more broadly includes anyone with the expertise to speak in their field. When combining the first and second criteria of legal scholarship, we see that SoTL legal scholars are simply using the discipline of law and applying it with their expertise in interdisciplinary teaching and learning theories. Again, these individuals are not just any law professor. Rather, SoTL scholars have performed rigorous research and can ensure their legal scholarship is accurate and well-grounded in the SoTL theories. Thus, any legal scholar who has expertise in the subject matter of teaching and learning, and who writes a law-connected scholarly work, meets the second criterion of legal scholarship.

C. Anyone Who Teaches Future Lawyers Should be Interested in SoTL, and Should Find SoTL Useful in Their Professional Role as an Educator

The third and last criterion of legal scholarship is that it be "useful to members of the legal profession."[94] Concerning this criterion, it should go without saying that anyone who has the privilege of calling themselves a legal educator should take at least some professional interest in SoTL. Especially since we serve dual professional roles as legal professionals and educators of future legal professionals. But even if a faculty member does not follow SoTL all of the time, SoTL has an audience similar to those who write in other forms of legal scholarship. More importantly, its potential audience is substantial, and its potential impact is far-reaching.

First, the potential audience for a SoTL is expansive. SoTL is not limited to a particular doctrinal and subject matter field, like law and economics. Rather, the target audience for any law SoTL piece would be the larger law school faculty membership. According to a 2019 ABA report, there were 9,494 full-time professors at ABA-accredited law schools.[95] Moreover, according to a May 2022 U.S. Bureau of Labor Statistics report, there are 14,570 individuals who identify as teaching postsecondary courses in law.[96] So, regardless of one's status and the types of courses

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he_bar/council_reports_and_resolutions/comments/2024/24-march-notice-comment-memo-outcomes-complaints.pdf.

[94] Weresh & Tiscione, *supra* note 1, at 2.

[95] Stephanie Francis Ward, *How many tenured law professors are Black? Public data does not say*, ABA J. (Oct. 28, 2020, 3:25 PM), https://www.abajournal.com/web/article/how-many-tenured-law-professors-are-black-public-data-does-not-say#:~:text=For%20the%202019%20reports%2C%20there,of%20whom%20identified%20as%20minorities.

[96] U.S. BUREAU OF LAB. STAT., 25-1112 LAW TEACHERS, POSTSECONDARY (2023), https://www.bls.gov/oes/current/oes251112.htm (last visited April 28, 2024).

one teaches, anyone who teaches at a law school could be an intended audience for SoTL. In fact, anyone within a general higher education institution, depending on the nature of a law SoTL piece, could be an intended audience. That is because although each discipline offers different ways to approach SoTL work, "these literatures are now becoming known more broadly, thanks to the growth of forums for cross-disciplinary conversations both on and off campuses."[97]

Moreover, the possible impact that SoTL can have is quite significant because it has the potential to benefit so many in the legal profession. Admittedly, there are three main benefits from someone focusing their scholarship on teaching and learning. First, SoTL certainly enriches the individual scholar's experience as a teacher.[98] Second, SoTL improves and enhances the contributions to the field of teaching which will serve to enrich the practices of other teachers (law and others) who read this scholarship.[99] Last, and most importantly, "SoTL improves student learning [because it necessarily] affects how faculty members think about teaching and learning opportunities for their students."[100] For those producing SoTL, it is the students on the receiving end of the implementation of the publicly disseminated SoTL pieces who are the true beneficiaries of SoTL. In 2022, there were approximately 116,723 students pursuing Juris Doctor degrees.[101] In general, there are currently over 1.3 million lawyers in the legal profession in the United States,[102] or in other words, there are about 1.3 million past law students who could have benefited from SoTL.

While not every law professor needs to write a SoTL work during their career, SoTL works should be of interest and useful to anyone teaching future lawyers at some point in their legal teaching careers.[103] And, at a minimum, we should not allow anyone in the legal academy to consider "being 'pedagogical' . . . a death-knell for legal scholarship" because to do so would completely ignore the educational role we all

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[97] Mary Taylor Huber & Sherwyn P. Morreale, *"Situating the Scholarship of Teaching and Learning: A Cross-Disciplinary Conversation," in Disciplinary Styles in the Scholarship of Teaching and Learning: Exploring Common Ground.*, ARCHIVE: CARNEGIE FOUND. FOR THE ADVANCEMENT OF TEACHING, http://archive.carnegiefoundation.org/publications/elibrary/situating-scholarship-teaching-and-learning-cross-disciplinary-conversation.html (last visited June 19, 2024).

[98] C. BISHOP-CLARK & B. DIETZ-UHLER, ENGAGING IN THE SCHOLARSHIP OF TEACHING AND LEARNING: A GUIDE TO THE PROCESS, AND HOW TO DEVELOP A PROJECT FROM START TO FINISH 4 (2012).

[99] *Id.*

[100] *Id.*

[101] *Law School Applications and Enrollment*, AM. BAR ASS'N, https://www.abalegalprofile.com/legaled.html (last visited June 19, 2024).

[102] *ABA survey finds 1.3M lawyers in the U.S.*, AM. BAR ASS'N (June 20, 2022), https://www.americanbar.org/news/abanews/aba-news-archives/2022/06/aba-lawyers-survey/; *see also ABA's Profile of the Legal Profession 2023*, AM. BAR ASS'N, https://www.abalegalprofile.com/demographics.html (last visited April 29, 2024).

[103] *See* Cambridge, *supra* note 84.

inherently serve in legal education.[104] Instructively, as highlighted by the Authors, Harry Edwards, the former Chief Judge of the United States Court of Appeals for the District of Columbia Circuit, raised similar complaints about how he felt legal scholarship had lost its way by becoming more "abstract" since it was no longer directed to the right audience (judges, administrators, legislators, and practitioners).[105] However, as Dean Chemerinsky noted in his push back against Judge Edwards' criticism, we should value all audiences and reject any attempt to narrow the categories to only one, such as practitioners or other elite scholars: "A narrow definition - either Edward's or those in elite schools who value only abstract writings for other scholars - should be rejected. There is much that legal scholarship can offer to many different types of readers."[106] In light of this position, given the fact that SoTL's potential audience and impact on the profession is substantial and far-reaching, SoTL meets the third criterion of legal scholarship.

IV. FINAL REFLECTIONS & CONCLUSION

In summary, in evaluating SoTL using the same three criteria the Authors analyzed in their essay (that legal scholarship "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"),[107] we discover that the second and third criteria apply equally and do not require any revision. We also discover that the first criterion is still too narrow. However, we can be consistent with the principles underlying the Authors' arguments simply by adopting a slightly broader definition for the first criterion. In other words, if we were to use a law-connected terminology in defining the first criterion, or just accept the realities of legal scholarship and the changing legal academy, then SoTL meets the three criteria of legal scholarship.

Admittedly, this Article does not directly answer the question of what *should* count as scholarship for promotion and tenure purposes. This question is not new to higher education. In fact, the main purpose behind Boyer's instrumental piece was to urge higher education institutions to reconsider the priorities of the professoriate.[108] Boyer's call to adopt a more inclusive interpretation of scholarship is still being

[104] Weresh & Tiscione, *supra* note 1, at 15.
[105] *Id.* at 8–9 (quoting Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 35 (1992)).
[106] Chemerinsky, *supra* note 70, at 890 (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").
[107] Weresh & Tiscione, *supra* note 1, at 2.
[108] Boyer, *supra* note 17, at xi.

vigorously debated in higher education.[109] Interestingly, as highlighted above, legal scholarship already represents a more broadly defined notion of scholarship, at least compared to other academic disciplines. It is just that the legal academy has not addressed the "structural sources of the problems," such as siloing of law school positions and status for promotion and tenure decisions, which necessarily impact the conversation around defining legal scholarship.[110] Nevertheless, what constitutes legal scholarship has serious consequences. To repeat Deborah Rhode's statement from the beginning of this Article, "[a]ssumptions about what is and is not valuable in legal scholarship significantly affect how academics shape their careers, how law schools choose and reward their faculties, and how those faculties influence, or fail to influence, legal institutions."[111] Again, while not the primary focus of this Article, we certainly cannot ignore the fact that any analysis of the three criteria raises this important issue. Hopefully, this Article demonstrated that, as it relates to SoTL, the issue with what is legal scholarship really does not require significant revisions or radical changes to the interpretation of the academy's criteria.

Overall, my aspiration for this brief Article is for it to further the Authors' mission while simultaneously showcasing the value of SoTL to the overall legal academy. Even though we do not live in an ideal world, we nonetheless should not be limiting or excluding our fellow scholarly colleagues in a narrow interpretation of legal scholarship. Rather, we should openly embrace the criticism about the lack of "cohesiveness" in legal scholarship.[112] We should celebrate "that the current diversity of approaches is a healthy development."[113] And we should take any opportunity to argue about and advocate for a more inclusive interpretation of legal scholarship. As the Authors state, "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. . . . [W]e must work together to 'carve out space[s]' for all kinds of legal scholarship."[114] Furthermore, as other legal scholars have noted, "[a] healthy law

[109] A few years after Boyer's "Scholarship Reconsidered" piece, Charles E. Glassick, Mary Taylor Huber, and Gene I. Maeroff wrote what is considered the sequel to Boyer's work, where they developed six standards for institutions to use to evaluate the range of scholarly work that faculty produce (whether it is research, applied work, or teaching). Pat Hutchings et al., *The Scholarship of Teaching and Learning in Higher Education: An Annotated Bibliography*, 35 PS: POL. SCI. & POL., 233, 233 (2002). "The six standards are: clear goals, adequate preparation, appropriate methods, significant results, effective presentation, and reflective critique." *Id.*

[110] Rhode, *supra*, note 3, at 1327.

[111] *Id.*

[112] *See* Melissa H. Weresh, *Legal Writing Scholarship: Moving Not Toward a Definition, but Toward a Cohesive Understanding*, 2 PROCEEDINGS 26, 27 (2021).

[113] Rhode, *supra* note 3, at 1329.

[114] Weresh & Tiscione, *supra* note 1, at 16 (quoting Robin West, *The Contested Value of Normative Scholarship*, 66 J. LEGAL EDUC. 6, 17 (2016)).

faculty has room for all of it; a healthy community of legal scholars values it all."[115] For all of these reasons and more, we should continue these kinds of conversations to push ourselves to reconsider what counts as legal scholarship. In doing so, hopefully we can reach a place where we can say the academy truly accepts the proposition that there is certainly room for all kinds.

[115] West & Citron, *supra* note 6, at 15.