

Draft Principles of Scholarly Ethics

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DRAFT PRINCIPLES OF SCHOLARLY ETHICS

DEFINING LEGAL SCHOLARSHIP¹

For purposes of this document, legal scholarship is defined as all published works that (a) are written by law faculty or other legal academics, (b) contain independent, critical, and careful analysis, (c) are the product of significant effort and professional expertise on the part of the author, and (d) provide information, insight, or other value to the reader. Legal scholarship includes works that employ traditional legal methods, as well as works that use methodologies from other disciplines. Legal scholarship is ordinarily published by academic presses, scholarly journals (such as law reviews), and their online counterparts.

Legal scholarship does not include work which is prepared during the course of litigation or in other situations in which the author represents a client. Therefore, it necessarily excludes briefs, opinion letters, and expert testimony at trial.

In defining scholarship for the purposes of this document, we do not seek to weigh in on whether various activities ought to “count” as scholarship for promotion and tenure decisions within law schools. Different schools have chosen to adopt more expansive definitions for those purposes, while others have adopted more restrictive definitions. Our definition of scholarship is not intended to endorse either a more expansive or a more restrictive view. Instead it is meant only to identify the forms of scholarship to which we believe that the articulated principles of scholarly ethics ought to apply.

1. We are hardly the first to attempt to define “legal scholarship.” Some have defined scholarship as “an activity *within* the academy, funded by the academy, and done for the general educational benefit of all.” Ronald K. L. Collins, *A Letter on Scholarly Ethics*, 45 J. LEGAL EDUC. 139, 140 (1995). Others have suggested that our scholarship activities include “any published work, oral or written presentation to conferences, drafting committees, legislatures, law reform bodies and the like, and any expert testimony submitted in legal proceedings.” AALS, STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES (amended 2017) (1989), <https://www.aals.org/members/other-member-services/aals-statements/ethics> [https://perma.cc/586T-96T8].

SPECIFIC NORMS

Exhaustiveness: An author should treat the identified topic of a work in an exhaustive manner, including through the acknowledgement of and engagement with pertinent past work bearing on that topic.

An author should competently and in good faith undertake sufficient research to identify pertinent past work addressing her topic, and should then acknowledge and engage with that work as appropriate. An author should scrupulously avoid inaccurate claims of originality.

An author should fully explore available legal resources and evidence, including that which is contrary to the author's normative positions or goals, whether in general or with respect to the specific topic under investigation. If non-legal sources are relevant to the project, then the author should also fully explore such sources. This norm is similar to what Richard Fallon called the obligation of "confrontation." "The confrontation norm requires scholars to be candid in acknowledging difficulties with their arguments by confronting the most significant possible non-obvious objections to their analyses."²

More generally, in addition to her ongoing general responsibility to engage in research and work to improve her scholarly competence, an author has a duty to acquire sufficient expertise to support the production of a work and the claims and analyses within it. She must, in addition, remain mindful of the limits of her expertise, and shape and present the claims and analysis made in a manner that does not exceed the bounds of that expertise.

Sincerity/Good Faith: An author should make all of her claims, arguments, and characterizations of past work in good faith, and should state them in such a way as not to mislead her readers.

This principle is similar to what Richard Fallon called the "norm of trustworthiness, which demands that [an author] sincerely believe all of her claims or arguments and that she state them in ways not intended to mislead her readers about their relations to other arguments or evidence." An author should, among other things, refrain from making false or unsubstantiated claims of novelty or originality.³

It further incorporates a norm of engagement. A scholar should not merely engage with the past work on a topic, but should do so in an appropriately charitable and respectful manner. In circumstances where it is possible to do

2. Richard H. Fallon, Jr., *Scholars' Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223, 242 (2012).

3. Ryan Scoville, *The Ethics of Baiting and Switching in Law Review Submissions*, 101 MARQ. L. REV. 1075 (2018).

so, an author should provide the authors of past work with which she engages in a substantial way the opportunity to review and respond to her characterization of that work.

Candor: An author should be explicit about her methodology and the substantive assumptions underlying a scholarly work, and should clearly articulate the scope and limits of her claims, analysis, and any normative recommendations.

Few works of scholarship directly address first principles, such that authors' analyses necessarily proceed from certain premises and assumptions. Those analyses are likewise a product of and are undertaken pursuant to methodological choices. Authors should clearly outline both.

As a corollary to this principle, authors should cite to sources supporting any factual claims they make. Claims about the state of the law or particular doctrines are factual claims that should be supported by a systemic review, and the methodology for that review should be disclosed.⁴

In the case of any data they produce or generate themselves, authors should make the data publicly available to the extent possible, and they should describe the processes used to generate the data.

Openmindedness: An author should approach the researching and production of a work with an open mind, rather than with a predetermined goal. Put differently, an author should cultivate a mindset pursuant to which she regards herself as striving in a work of scholarship honestly to answer a question rather than simply to justify a pre-identified conclusion or advance a particular interest.

Authors should strive to be mindful of their own biases and predilections and of the effects they may have on their analyses, should be open to the possibility that their initial hypotheses may be wrong, and should seek to adhere to their selected methodology and follow its analysis wherever it may lead.

The norm of openmindedness is not a condemnation of, or even inconsistent with, the production of normative scholarship. Nor does it require that authors disclaim a point of view. Such a stance is impossible to achieve, and the nature of law and legal analysis is such that normative considerations are necessary ingredients.

4. William Baude et al., *Making Doctrinal Work More Rigorous: Lessons from Systematic Reviews*, 84 U. CHI. L. REV. 37, 38 (2017).

Disclosure: An author should disclose all information not otherwise apparent from the work itself that is material to the evaluation of a work of scholarship. This disclosure should be included in the work itself.

The animating principle here is that a reader of legal scholarship should be able to identify and account for any information about the author or the circumstances under which a work was produced that might lead a reader to question the author's ability to comply with these principles. This obligation extends to any funding which might lead a reader to question whether the author has complied with the author's ethical obligations as a scholar.⁵ It further extends to any affiliations or activities, professional or otherwise, with the potential to influence the positions taken or arguments made, including not only partisan affiliations but also, for example, the fact that a person has filed an amicus brief on an issue under analysis.

An author should disclose the contributions of any co-authors, as well as of research assistants to the extent that they are responsible for any portions of the intellectual content or drafting of a work of scholarship.

Disclosure does not in any way diminish an author's obligation to comply with the author's other ethical obligations as a scholar. At times a conflict of interest will be so substantial that such compliance will not be possible and the work should not be produced. One example of such a conflict is if a research funder places restrictions on the conclusions that an author may reach. Another example is if an author's professional obligations as counsel for a party or

5. AALS Statement of Good Practices:

A law professor shall disclose the material facts relating to receipt of direct or indirect payment for, or any personal economic interest in, any covered activity that the professor undertakes in a professorial capacity. A professor is deemed to possess an economic interest if the professor or an immediate family member may receive a financial benefit from participation in the covered activity. . . . Disclosure of material facts should include: (1) the conditions imposed or expected by the funding source on views expressed in any future covered activity; and (2) the identity of any funding source, except where the professor has provided legal representation to a client in a matter external to legal scholarship under circumstances that require the identity to remain privileged under applicable law. . . .

A law professor shall also disclose the fact that views or analysis expressed in any covered activity were espoused or developed in the course of either paid or unpaid representation of or consultation with a client when a reasonable person would be likely to see that fact as having influenced the position taken by the professor.

AALS, *supra* note 1.

amicus in litigation limit the ability of the author to acknowledge and explore counterarguments.

Authors who have no disclosure obligations under this principle are encouraged to explicitly say so.

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