

## *Legal Scholars' Ethical Responsibilities Concerning Neutrality and Objectivity, Candor and Exhaustiveness*

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# LEGAL SCHOLARS' ETHICAL RESPONSIBILITIES CONCERNING NEUTRALITY AND OBJECTIVITY, CANDOR AND EXHAUSTIVENESS

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## I. INTRODUCTION

The topic of this Symposium, The Ethics of Legal Scholarship, is always important to remind the law professorate of its duties. The specific topic of this Essay is legal scholars' ethical responsibilities concerning neutrality and objectivity, candor and exhaustiveness. These specific responsibilities are best understood in the context of ethical standards regarding scholarship for university faculty in general and then specifically for law faculty.

Part II below explores the responsibilities of neutrality and objectivity, candor and exhaustiveness in the context of the ethical standards for scholarship for university faculty in general. Part III analyzes these same responsibilities in the context of the American Association of Law Professors Statement of Good Practices. Part IV looks at the data relevant to the probable incidence of questionable conduct regarding these responsibilities. Part V briefly discusses how most effectively to educate law professors about these responsibilities.

## II. THE ETHICAL STANDARDS FOR SCHOLARSHIP FOR UNIVERSITY FACULTY IN GENERAL

A substantial proportion of legal scholars are members of a university faculty; so we can start with the generally-accepted ethical duties of a professor with respect to scholarship. While not the only source for the principles of professional conduct, the major statements of the American Association of University Professors (AAUP) have played a substantial role in defining academic tradition in the United States.<sup>1</sup> The foundational AAUP statements are the 1915 Declaration of Principles on Academic Freedom and Academic Tenure and the 1940 Statement of Principles on Academic Freedom and Tenure plus the 1966 Statement on Professional Ethics.<sup>2</sup>

### A. *Excerpt from Academic Ethics: Problems and Materials on Professional Conduct and Shared Governance by Neil Hamilton*<sup>3</sup>

The following summary uses **bold faced** to identify the framework of principles in the 1940 AAUP *Statement of Principles on Academic Freedom and Tenure*, and *italics* to identify the clarification added by the 1966 AAUP *Statement on Professional Ethics*. Sources for other principles are indicated in [footnotes].<sup>4</sup>

....

... **Correlative “Duties” of the Individual Faculty Member. The 1940 Statement does not exhaustively define the open-ended term “duties.” It lists several specific duties and mentions two general duties.**

#### **A. Duties Relating to Research, Teaching, and Intramural Utterance**

##### **1. Specific Duties**

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1. *See generally* AAUP, 1915 DECLARATION OF PRINCIPLES ON ACADEMIC FREEDOM AND ACADEMIC TENURE (1915), <https://aaup.org.uiowa.edu/aaup-principles> [<https://perma.cc/Q4UE-9W9B>] [hereinafter AAUP 1915]; AAUP, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE WITH 1970 INTERPRETIVE COMMENTS (1940), <https://www.aaup.org/file/1940%20Statement.pdf> [<https://perma.cc/5XAL-TX43>] [hereinafter AAUP 1940]; AAUP, STATEMENT ON PROFESSIONAL ETHICS (rev. 2009) (1966), <https://www.aaup.org/report/statement-professional-ethics> [<https://perma.cc/LT5A-TNU5>] [hereinafter AAUP 1966].

2. AAUP 1915, *supra* note 1; AAUP 1940, *supra* note 1; AAUP 1966, *supra* note 1.

3. NEIL W. HAMILTON, ACADEMIC ETHICS: PROBLEMS AND MATERIALS ON PROFESSIONAL CONDUCT AND SHARED GOVERNANCE 167–74 (2002) (citing AAUP 1915, *supra* note 1; AAUP 1940, *supra* note 1; AAUP 1966, *supra* note 1).

4. *Id.* at 167 (citing AAUP 1940, *supra* note 1; AAUP 1966, *supra* note 1).

- a. Teachers are entitled to full freedom in research . . . , subject to the adequate performance of their other academic duties.
- b. Research for pecuniary gain should be based upon an understanding with the authorities of the institution.
- c. Teachers should be careful not to introduce into their teaching controversial material that has no relation to their subject. [Also in 1970 AAUP Statement on Freedom and Responsibility where the modifier “persistently” is added.]<sup>5</sup>

## 2. General Duty of Professional Competence<sup>6</sup>

....

### c. *In Scholarship*

- i. Professors' “primary responsibility to their subject is to seek and to state the truth . . . .”
- ii. “As members of an academic institution, professors seek above all to be effective teachers and scholars.”
- iii. Professors should “devote their energies to developing and improving their scholarly competence.”
- iv. A faculty member should:
  - “hold before [students] the best scholarly and ethical standards”;
  - “practice intellectual honesty”; [and] “exercise critical self-discipline and judgment in using, extending, and transmitting knowledge”;
  - “acknowledge significant academic or scholarly assistance from [students]”; . . .
  - “acknowledge academic debt”<sup>7</sup> [A 1990 AAUP Statement on Plagiarism urges that professors must be rigorously honest in acknowledging academic debt, and a 1990 AAUP committee B statement urges that scholars involved in collaborative work explain forthrightly the respective contributions of each.]<sup>8</sup>; and

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5. *Id.* at 167–68 (citing AAUP, A STATEMENT OF THE ASSOCIATION'S COUNCIL: FREEDOM AND RESPONSIBILITY (1970), <http://www.aaup.org/report/freedom-and-responsibility> [<https://perma.cc/C5DT-UDEQ>] [hereinafter AAUP 1970]).

6. *Id.* at 168 (citing AAUP 1940, *supra* note 1).

7. *Id.* at 168–69 (quoting AAUP 1966, *supra* note 1).

8. *Id.* at 169 (citing AAUP, STATEMENT ON PLAGIARISM (1990), <http://ethics.iit.edu/ecodes/node/3173> [<https://perma.cc/6JJS-BD75>]).

- *[never permit subsidiary interests to seriously hamper or compromise their freedom of inquiry.]*<sup>9</sup>
- v. In research, a faculty member must develop and improve his or her scholarly competence. Academic tradition is that the faculty member is to use this competence to develop and improve the account of some area of knowledge. In *Scholarship Reconsidered: Priorities of the Professoriate* (1990), Ernest Boyer argues for a broader, more capacious understanding of scholarship.<sup>10</sup> The work of the professorate has four separate, yet overlapping functions: the scholarship of discovery, the scholarship of integration, the scholarship of application, and the scholarship of teaching.<sup>11</sup> In *Scholarship Assessed: Evaluation of the Professoriate* (1997),<sup>12</sup> the Carnegie Foundation returns to the topic, proposing the following standards for scholarship:
- “Does the scholar identify important questions in the field?”
  - Does the scholar adequately consider existing scholarship in the field?
  - Does the scholar use appropriate methodology recognized in the field? This includes the rules of evidence and the principles of logical reasoning.
  - Does the scholarship add consequentially to the field?
  - Does the scholar make an effective presentation of the work?<sup>13</sup>
- vi. The 1966 Statement urges: (1) *devotion of energy to “developing and improving [their] scholarly competence,”* (2) *“critical self-discipline and judgment in using, extending, and transmitting knowledge,”* (3) *“intellectual honesty,”* (4) *“the best scholarly and ethical standards,”* and (5) *contribution as an “effective*

9. See AAUP 1966, *supra* note 1.

10. HAMILTON, *supra* note 3, at 169 (citing ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORiate* 15–16, 25 (1990)).

11. *Id.* (citing BOYER, *supra* note 10, at 25).

12. *Id.* (citing CHARLES E. GLASSICK ET AL., *SCHOLARSHIP ASSESSED: EVALUATION OF THE PROFESSORiate* 25, 27–29 (1997)).

13. *Id.* (citing GLASSICK ET AL., *supra* note 12, at 25, 27–29, 31).

*scholar.*"<sup>14</sup> The 1915 Declaration emphasizes both the importance of painstaking and thorough inquiry and the prohibition against misrepresentation or distortion of others' work.<sup>15</sup> The meanings of these phrases rest on common understandings of professional competence. Accuracy in the recording and use of evidence and non-falsification are simply so fundamental as to be assumed in the common understanding of "*intellectual honesty*" and "*best scholarly [and ethical] standards.*"<sup>16</sup> The major canon of academic work has been honest and accurate investigation, and the cardinal sin has been stating or presenting a falsehood. This includes omission of a fact so that what is stated or presented as a whole states or presents a falsehood. It also includes misrepresentation of the strength of one's findings or credentials, plagiarism, and improper attribution of authorship. With respect to extramural utterance, where this duty was not so fundamental and clear, the 1940 Statement states that teachers speaking as citizens shall "at all times be accurate."<sup>17</sup>

vii. In all academic work, a faculty member must meet general duties of both practicing "*intellectual honesty*" and exercising "*critical self-discipline and judgment in using, extending, and transmitting knowledge.*"<sup>18</sup> In teaching in particular, a professor is to "*hold before [students] the best scholarly and ethical standards of [the] discipline.*"<sup>19</sup> The traditions of the profession further define intellectual honesty, critical self-discipline and judgment, and best scholarly standards to include the following duties of inquiry and argument:

- to gather the evidence relevant to the issue at hand through thorough and painstaking inquiry [1915 Declaration]<sup>20</sup> and to preserve the evidence so that it is available to others;

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14. *Id.* (quoting AAUP 1966, *supra* note 1).

15. *Id.* at 169–70 (citing AAUP 1915, *supra* note 1).

16. *Id.* at 170 (quoting AAUP 1966, *supra* note 1).

17. *Id.* (quoting AAUP 1940, *supra* note 1).

18. *Id.* (quoting AAUP 1966, *supra* note 1).

19. *Id.* (quoting AAUP 1966, *supra* note 1).

20. *Id.* (citing AAUP 1915, *supra* note 1).

- to record the evidence accurately;
- to show the evidence and methodology so that other investigators can replicate the research;
- to set forth without misrepresentation or distortion the divergent evidence and propositions of other investigators [1915 Declaration]<sup>21</sup>;
- to give careful and impartial consideration to the weight of the evidence;
- to reason analytically from the evidence to the proposition;
- to seek internal consistency;
- to acknowledge when the evidence contradicts what the scholar and teacher had hoped to achieve;
- to present evidence and analysis clearly and persuasively;
- to be rigorously honest in acknowledging academic debt; and
- to correct in a timely manner or withdraw work that is erroneous.<sup>22</sup>

d. *In Teaching, Internal Governance, or Academic Citizenship and Scholarship*

“... [P]rofessors observe the stated regulations of the institution, provided the regulations do not contravene academic freedom . . . .”<sup>23</sup>

...  
 . . . **Correlative Duties of the Faculty as a Collegial Body.**

**“Termination for cause of a continuous appointment . . . should, if possible, be considered by both a faculty committee and the governing board of the institution.”<sup>24</sup>**

The faculty has the following duties:

1. to determine in the first instance when individual professors inadequately meet their responsibilities of professional competence and ethical conduct [1940 statement, 1970 Interpretive

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21. *Id.* (citing AAUP 1915, *supra* note 1).

22. *Id.* at 170–71.

23. *Id.* at 171 (quoting AAUP 1966, *supra* note 1).

24. *Id.* at 173 (quoting AAUP 1940, *supra* note 1).

- Comments, and 1958 AAUP/AAC Statement on Procedural Standards in Faculty Dismissal Proceedings]<sup>25</sup>;
2. to be the source for the definition and clarification of standards of professional conduct and to take the lead in ensuring that these standards are enforced [1973 AAUP/ACC Commission on Tenure]<sup>26</sup>;
  3. to distinguish “honest error” that peers consider within the range of competent and ethical inquiry<sup>27</sup>;
  4. *to respect and defend the free inquiry of colleagues*<sup>28</sup>;
  5. to assume a more positive role as guardian of academic values against unjustified assaults on academic freedom from within the faculty itself [1970 AAUP Statement on Freedom and Responsibility]<sup>29</sup>;
  6. to be honest and courageous in their duty to detect and eliminate the incompetent during the period of probation [AAUP Committee A]<sup>30</sup>;
  7. *to “strive to be objective in their professional judgment of colleagues”*<sup>31</sup>;
  8. if faculty members have reason to believe a colleague has violated standards of professional conduct, to take some initiative to inquire about and to protest against apparently unethical conduct [1998 AAUP Committee B]<sup>32</sup>;
  9. to draw up conflict of interest guidelines, with due regard for the proper disclosure of a faculty member’s involvement in off-campus enterprises, including the use of university personnel, property, and the disposition of potential profits [1990 AAUP Committee B]<sup>33</sup>;
  10. *recognizing the particular obligation of professors as citizens engaged in a profession that depends upon freedom for its health*

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25. *Id.* (citing AAUP 1940, *supra* note 1; AAUP, STATEMENT ON PROCEDURAL STANDARDS IN FACULTY DISMISSAL PROCEEDINGS (1958), <https://www.aaup.org/report/statement-procedural-standards-faculty-dismissal-proceedings> [<https://perma.cc/LP2P-BN89>]).

26. *Id.* (citing AAUP & AAC, FACULTY TENURE (1973) [hereinafter AAUP 1973]).

27. *Id.* at 173.

28. *Id.* (citing AAUP 1966, *supra* note 1).

29. *Id.* (citing AAUP 1970, *supra* note 5).

30. *Id.*

31. *Id.* (quoting AAUP 1966, *supra* note 1).

32. *Id.* (citing AAUP, *On the Duty of Faculty Members to Speak Out on Misconduct*, 84 ACADEME 58, 58 (1998)).

33. *Id.* (citing AAUP, *Statement on Conflicts of Interest*, 76 ACADEME 40, 40 (1990)).



*and integrity, “to promote conditions of free inquiry and to further public understanding of academic freedom.”*<sup>34</sup>

11. to create a peer culture of high aspiration with respect to the ideals of the profession.<sup>35</sup>

*B. Analysis of Ethical Duties with Respect to Neutrality and Objectivity, Candor and Exhaustiveness*

To what degree does the AAUP tradition on the ethical duties of university faculty regarding scholarship speak to the ethical duties of a legal scholar with respect to neutrality and objectivity, candor and exhaustiveness? The tradition is clear that professors' primary duty is to seek and state the truth, so candor would be assumed. The tradition clearly asks a scholar to adequately consider existing scholarship in the field, to do so with painstaking and thorough inquiry, and to give careful and impartial consideration to the weight of the evidence.<sup>36</sup> The scholar is to set forth without misrepresentation or distortion the divergent evidence and propositions of other investigators.<sup>37</sup> The scholar should not misrepresent the strength of the scholar's findings.<sup>38</sup> The scholar is also to avoid conflicts that seriously hamper or interfere with freedom of inquiry.<sup>39</sup>

The faculty of the professor's employing university has the duty to be the source for the definition and clarification of standards of professional conduct and to take the lead in ensuring that these standards are enforced.<sup>40</sup> The meaning of the concepts above rests principally on common understandings of professional competence within the faculty.

With respect specifically to duties of neutrality and objectivity, candor and exhaustiveness, the AAUP tradition provides very general principles, but the federal government's efforts over recent decades to define the responsible conduct of research for those receiving federal research grants gives further, more specific insight.<sup>41</sup> The government, in awarding research grants, has sought to promote the responsible conduct of research defined as “conducting research in ways that fulfill the professional responsibilities of

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34. *Id.* at 174 (quoting AAUP 1966, *supra* note 1).

35. *Id.*

36. *Id.* at 170.

37. *Id.*

38. *Id.*

39. *Id.* at 172.

40. *Id.* at 173 (citing AAUP 1973, *supra* note 26).

41. See generally Nicholas H. Steneck, *Fostering Integrity in Research: Definitions, Current Knowledge, and Future Directions*, 12 SCI. & ENG. ETHICS 53 (2006).

researchers, . . . professional organizations, the institutions for which [the researcher] work[s] and, when relevant, the government.”<sup>42</sup>

The analytical framework set forth in Diagram 1 below on the responsible conduct of research is useful in thinking about legal scholars' duties with respect to neutrality and objectivity, candor and exhaustiveness.

DIAGRAM 1:<sup>43</sup>

**FRAMEWORK FROM RESEARCH ON THE RESPONSIBLE CONDUCT OF RESEARCH THAT IS USEFUL TO DEFINE ETHICAL BEHAVIORS IN LEGAL SCHOLARSHIP**

<b>Clearly Defined Prohibited Behaviors</b>	<b>Questionable Research Practices (QRP)</b>	<b>Responsible Research Behaviors</b>
These behaviors include deliberate misconduct that is significantly detrimental to the research process and the welfare of the public like fabrication, falsification, and plagiarism (FFP).	These behaviors violate the traditional ideals and core values of scholarship in the academic profession and, while they do not directly damage the integrity of research, they may be detrimental because of their impact on both responsible policy decisions and the trust of professional colleagues and the public. QRPs increase the likelihood of finding support for a false hypothesis.	In the sciences/engineering/health disciplines, this is defined as the research practices that steadfastly adhere to high ethical principles and standards articulated by professional organizations and the professor's employer, and when relevant, the government. The term of art is the Responsible Conduct of Research (RCR).

Diagram 1 provides a deeper analysis of the general duties of neutrality and objectivity, candor and exhaustiveness outlined in the AAUP tradition. Deliberate fabrication, falsification, or plagiarism would violate the AAUP

42. *Id.* at 55.

43. Diagram 1 is adapted from information on pages 53–55, 59, 62–64 and 68, *id.*

tradition concerning neutrality and objectivity, candor and exhaustiveness. The definitions of questionable research practices (QRP) help in understanding the AAUP principles. Scholarship on the responsible conduct of research defines QRP to include the following behavior:

1. Over-interpretation of “significant” findings in small trials;
2. Selective reporting of outcomes in the article’s abstract;
3. Negative or detrimental studies not mentioned;
4. Selective reporting of positive results or omission of adverse events data;
5. Post-hoc analysis not admitted;
6. Statement of incomplete information about analyses with non-significant results;
7. Failure to present data that contradicts the researcher’s previous research;
8. Withholding of details of methodology and results;
9. Misrepresentation of a researcher’s contribution to the research publication based on commonly-accepted authorship rules;
10. Pattern of inaccuracy that creates concern about intentionality; and
11. Bias in terms of conflicts of interest including changing the design, methodology, or results of research in response to pressure from funding sources.<sup>44</sup>

This scholarship on the responsible conduct of research and questionable research practices in particular speaks to the ethical duties of a legal scholar with respect to neutrality and objectivity, candor and exhaustiveness. The list of QRP above indicates that a scholar should not selectively report only those studies and data that support the scholar’s hypothesis.<sup>45</sup> If the research has a review of the literature, the scholar should acknowledge contributions of others in the field on the same topic even if in opposition to the scholar’s premise.<sup>46</sup>

To put this in the context of legal ethics in the advocacy role, while an advocate in the justice system operates in a role morality of half-truth by omission and has no duty to apprise opposing parties of material facts that are adverse to the advocate’s position (constrained by the duty not to say an affirmative lie), the legal scholar does have a duty of disclosure of studies and data that do not support the scholar’s position. The legal scholar also has some duty not to “over-interpret” findings.

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44. *Id.* at 59–60, 63–65.

45. *Id.* at 64.

46. HAMILTON, *supra* note 3, at 172.

### III. THE AALS STATEMENT OF GOOD PRACTICES BY LAW PROFESSORS IN THE DISCHARGE OF THEIR ETHICAL AND PROFESSIONAL RESPONSIBILITIES<sup>47</sup>

The Association of American Law Schools (AALS) Statement of Good Practices by Law Professors has several provisions relating to the ethics of legal scholarship.

#### **Responsibilities as Scholars**

“Covered 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.”<sup>48</sup>

“The scholar’s commitment to truth requires intellectual honesty and open-mindedness.”<sup>49</sup>

“Although a law professor should feel free to criticize another’s work, distortion or misrepresentation is always unacceptable. Relevant evidence and arguments should be addressed.”<sup>50</sup>

“When another’s scholarship is used—whether that of another professor or that of a student—it should be fairly summarized and candidly acknowledged. Significant contributions require acknowledgement in every context in which ideas are exchanged.”<sup>51</sup>

“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.”<sup>52</sup>

“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

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47. 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].

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

would be likely to see that fact as having influenced the position taken by the professor.”<sup>53</sup>

To what degree does the AALS Statement on Good Practices speak to the ethical duties of a legal scholar with respect to neutrality and objectivity, candor and exhaustiveness? The AALS Statement is aspirational but it does outline general principles regarding neutrality and objectivity, candor and exhaustiveness very similar to the AAUP tradition discussed above.<sup>54</sup> The AALS Statement does emphasize that a legal scholar should disclose when the research was developed in the context of a client representation or consultation.<sup>55</sup>

#### IV. PROBABLE INCIDENCE OF SCHOLARLY MISCONDUCT

There are no data specifically on the probable incidence of scholarly misconduct in the legal professorate. There are some studies of the incidence of scholarly misconduct in the sciences, engineering and health disciplines.<sup>56</sup> It seems reasonable to assume that the incidence of scholarly misconduct in the legal professorate would be similar or perhaps greater since there are mandated efforts at formal training on the responsible conduct of research for researchers who get federal grants in the sciences, engineering and health disciplines, but very few law professors would receive such training.<sup>57</sup>

The available self-assessment empirical data evidence indicates that somewhere between 1%–2% of scientists admit they have fabricated, falsified, or modified data or results at least once, and up to 33.7% admit other questionable research practices.<sup>58</sup> In a 2012 survey of research psychologists, more than half admitted to having only reported the experiments that gave the results the researcher wanted.<sup>59</sup> The social desirability bias in self-assessment data suggests these results are understated. In surveys asking about the behavior of colleagues, colleagues have seen between 12%–14% of other scientists commit FFP, and approximately 28% commit questionable research practices.<sup>60</sup>

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53. *Id.*

54. *See generally id.*

55. *Id.*

56. *See generally* Daniele Fanelli, *How Many Scientists Fabricate and Falsify Research? A Systematic Review and Meta-Analysis of Survey Data*, 4 PLOS ONE 1 (2009).

57. *See* Leslie K. John et al., *Measuring the Prevalence of Questionable Research Practices with Incentives for Truth Telling*, 23 PSYCHOL. SCI. 524, 527 (2012).

58. Fanelli, *supra* note 56.

59. John, *supra* note 57, at 526–27.

60. Fanelli, *supra* note 56.

If these same proportions were also true in the legal professorate, how serious is the ethical challenge? By comparison, if were to assume that 1–2 percent of all licensed lawyers in Minnesota admit to committing serious violations of the professional rules, this would be between 250–500 lawyers out of approximately 25,000 licensed lawyers in the state. If other lawyers have seen approximately 12 percent of their colleagues commit serious violations, this would be approximately 3,000 licensed lawyers. Similarly, if somewhere around 30 percent of the licensed lawyers have committed questionable practices, this would total approximately 7,500 lawyers. The public and the profession in Minnesota would consider this a serious problem requiring reform.

#### V. EFFECTIVE EDUCATION ON LEGAL SCHOLARS' ETHICAL RESPONSIBILITIES CONCERNING NEUTRALITY AND OBJECTIVITY, CANDOR AND EXHAUSTIVENESS

As stated in Part II, academic tradition is that the faculty of the professor's employing university has the duty to be the source for the definition and clarification of standards of professional conduct and to take the lead in ensuring that these standards are enforced. The meaning of the concepts above rests principally on common understandings of professional competence within the faculty. The data above on the incidence of some questionable research practices—for example, over fifty percent of research psychologists reporting that they only reported the experiments that gave the results the researcher wanted—suggests that some questionable practices may now constitute the research norm on some faculties.

How well do law faculties educate new and veteran professors on the ethical duties of legal scholarship? While legal scholars who are both professors and law graduates have received required education on the ethics of being a lawyer, few law professors (except those doing empirical work receiving federal grants who are required to take responsible conduct of research training and those who receive IRB training) have had required education on the ethics of legal scholarship or more generally, the ethics of being a professor.<sup>61</sup> Some universities may have mandatory education for all new professors on the ethics of scholarship, but I am not aware of any specific example currently. The general assumption is that a junior law professor will pick up the ethics of legal scholarship from earlier work in law school on the law review and by osmosis—like diffusion from senior scholars.

My hypothesis is that since there is virtually no formal education of legal scholars on the ethics of legal scholarship, the acculturation of new entrants to

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61. *See supra* Part IV.

the legal professorate occurs in the “hidden curriculum”<sup>62</sup> of the culture of each law faculty, and the topic is thus not seen to be of importance. In such circumstances of inattention, I would expect that self-interest would cause the norms to drift down over time.

There is a great deal that the professorate could learn about effective education regarding professional norms and the ideals and core values of the profession from both our sister professions of medicine and law and from ongoing research on effective education regarding the responsible conduct of research. Medical education is about 15 years ahead of legal education in its effort to foster each physician’s internalization of the responsibilities of the profession including its ideals and core values,<sup>63</sup> but there is a growing social movement within legal education to give more attention to ethical identity learning outcomes.<sup>64</sup> There is also a growing literature on what type of education is most effective regarding the responsible conduct of research.

One place to start is with what we know about educational engagements in that they are not effective. From moral psychology research, we know that several common approaches to this type of education show no assessable benefit on any of the Four Component Model capacities.<sup>65</sup>

-Ethics/philosophy/jurisprudence courses focused on doctrinal knowledge and critical analysis without reflective exploration of student’s own moral core<sup>66</sup>

-One-time short programs (need weekly meetings over three weeks or longer)<sup>67</sup>

-Fear-based programs<sup>68</sup>

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62. Neil Hamilton & Verna Monson, *Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)*, 9 U. ST. THOMAS L.J. 325, 369 (2011).

63. See Neil Hamilton & Sarah Schaefer, *What Legal Education Can Learn From Medical Education About Competency-Based Learning Outcomes Including Those Related to Professional Formation and Professionalism*, 29 GEO. J. LEGAL ETHICS 399, 402 (2016); Neil Hamilton, *Professional-Identity/Professional-Formation/Professionalism Learning Outcomes: What Can We Learn About Assessment From Medical Education?*, 14 UNIV. ST. THOMAS L.J. (forthcoming 2018) (ms. at 1).

64. See William M. Sullivan, *Professional Formation as Social Movement*, 23 PROF. LAW 26, 32 (2015); Neil Hamilton, *The Next Steps of a Formation-of-Student-Professional Identity Social Movement: Building Bridges Among the Three Key Stakeholders—Faculty and Staff, Students, and Legal Employers and Clients*, 14 UNIV. ST. THOMAS L.J. (forthcoming 2018) (ms. at 4).

65. Hamilton & Monson, *supra* note 62, at 346.

66. *Id.* at 375.

67. *Id.* at 373.

68. *Id.* at 373–74.

We also know that in practice, many “research institutions tend to participate in a ‘race to the bottom,’ seeking the least costly, rather than most useful, approach to meet federal requirements; despite NIH guidelines explicitly arguing against reliance solely on *online tutorials* for RCR education, a high percentage of institutions continue to choose this option,” even though there is no evidence that it decreases research misconduct and the impact of such training is modest.<sup>69</sup>

There are two principal themes in the RCR literature on effective education. One theme is that “the primary goal of RCR education is to foster a research culture in which conversations about responsible conduct of research are expected and acceptable”<sup>70</sup> rather than to focus just on the floor of the “rules” and possible discipline. Workplace norms are the most important.<sup>71</sup> The research culture would regularly discuss hypothetical or actual cases relating both to violation of professional standards and, even more important, to the ideals and core values of the profession and the particular faculty’s culture.<sup>72</sup> Diagram 2 below shows these two areas of discussion.

DIAGRAM 2:<sup>73</sup>

**THE ETHICS OF LEGAL SCHOLARSHIP**

<b>Scholarly conduct viewed from the perspective of clear professional standards</b>	<b>Scholarly conduct viewed from the perspective of the ideals and core values of the academic profession</b>
This focuses on scholars possessing and steadfastly adhering to clear professional standards as outlined by professional organizations and the professor’s employer, and when relevant, the government.	This focuses on the study and application of the ideals and core values guiding scholarly conduct, the ethical problems that arise in legal scholarship not clearly resolved by stated professional standards, and the resolution of

69. Michael Kalichman, *Rescuing Responsible Conduct of Research (RCR) Education*, 21 ACCOUNTABILITY RES. 68, 68–69 (2014) (emphasis added).

70. *Id.* at 69; Steneck, *supra* note 41, at 68.

71. JOHN M. BRAXTON & ALAN E. BAYER, FACULTY MISCONDUCT IN COLLEGIATE TEACHING 3 (1999); see Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 246 (2001).

72. Steneck, *supra* note 41, at 56.

73. The diagram is adapted from Steneck, *id.*



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these ethical problems in light of  
the ideals and core values.

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Nicholas Steneck emphasizes a second principal theme in the RCR literature on effective education.<sup>74</sup>

After working [on RCR] training for over 30 years now, I have come to believe that the main problem we face is institutional apathy rather than motivating and training researchers. Students and researchers don't put much energy into the training because they are not encouraged to do so by their institutions.<sup>75</sup>

This is the hidden curriculum problem discussed earlier.<sup>76</sup>

There is a growing literature on the principles that should guide effective education to foster the formation of a professional identity for medical and law students.<sup>77</sup> This growing literature has many "lessons learned" useful for educating new and veteran law professors about their ethical duties regarding scholarship.<sup>78</sup> This Essay is too short to summarize the 21 principles here.<sup>79</sup>

## VI. CONCLUSION

The Draft Principles of Scholarly Ethics—Individual Norms published in this Symposium issue is a significant step forward in reminding law faculty about their duties. The Draft Principles incorporate the key principles concerning neutrality and objectivity, and candor and exhaustiveness from the AAUP tradition discussed in Part I of this Essay.

The next major question is how to make the Draft Principles of Scholarly Ethics into a living document that law professors actually use to inform their scholarship? As Nicholas Steneck emphasizes in Part V above, "the main problem we face is institutional apathy rather than motivating and training researchers. Students and researchers don't put much energy into the training because they are not encouraged to do so by their institutions."<sup>80</sup> From the data available, it seems reasonable to assume that there is some significant incidence of scholarly misconduct in legal scholarship presently, which is a serious problem. The key question is whether law schools can overcome institutional

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74. *Id.*

75. E-mail from Nicholas Steneck, Professor Emeritus of History at Univ. of Mich., to author (Aug. 1, 2017) (on file with author) [hereinafter Steneck E-mail].

76. *See supra* note 62.

77. Hamilton & Schaefer, *supra* note 63, at 434.

78. *Id.* at 426.

79. *See* Hamilton, *supra* note 64 (manuscript at 13–15).

80. Steneck E-mail, *supra* note 75.

apathy and give some attention to scholarly ethics? The academic profession, including law schools and law faculty, can learn how to do this effectively from the experience of many professions, including law, the health professions, engineering and the sciences. Do we want to do better with respect to the ethics of our profession?