



# Setting Markers on the Path to ETHICALLY SOUND LEGAL SCHOLARSHIP

When writing a piece of legal scholarship, do you start with a question and work in good faith toward an answer? Or do you start with an answer and select things that support your point?

In defining ethical scholarship, the answers must be “Yes” to the first question and “No” to the second, in the view of Professor Chad Oldfather, associate dean for academic affairs at Marquette University Law School. That is to leave aside, he noted, whether the second sort of writing is even scholarship at all.

Questions such as this motivated Oldfather and colleagues from across the nation to convene an unusual and provocative roundtable conference at Eckstein Hall last fall. In a day and a half of focused conversation and in nine papers submitted by participants, a range of issues involving the ethics of legal scholarship was probed and prodded.

Participants included law professors and academic figures in other fields. They shared an interest in exploring the ethical norms relating to legal scholarship and shared concerns about some things being done in the name of legal scholarship.

The outgrowth of conversations on the internet among several of the participants (some of whom had never met each other in person before convening in Milwaukee), the session had a goal of coming up with a concise and constructive set of principles for what constitutes ethical legal scholarship. The resulting draft statement accompanies this article.

The organizers—Marquette’s Oldfather, Professor Carissa Byrne Hessick of the University of North Carolina School of Law, and Professor Paul Horwitz of the University of Alabama School of Law—said that many conferences don’t end with a common resolution or consensus about an issue.

“In this case, the symposium planners had a different goal in mind: to actually arrive at some common, generally agreed upon answers and principles,” they wrote in the introduction to the summer 2018 issue of the *Marquette Law Review*. “With the wonderfully collegial collaboration—but not, to be sure, complete agreement on every issue—of the symposium participants, and the kind assistance of the editors of the *Marquette Law Review* and their willingness to do the unusual, we have done just that here.”

The organizers’ introduction continued:

It helps that the subject of this symposium—the ethics of legal scholarship—is one as to which there is widespread agreement that all is not well. Not all of this consensus necessarily reaches the “outside” world. The legal academy, like any other branch of the academy, can be defensive. When academics generally are, or are perceived to be, under assault from outside (and sometimes internal) forces, it is unsurprising that the pages of the *Chronicle of Higher Education* and of an equally endless number of books are filled with defenses of what we do, and serve as the launching point for a barrage of arrows pointed anywhere else but at ourselves. When law schools are surrounded (and inhabited) by critics, it is unsurprising that they too will have their ardent defenders. Similarly, although law professors have worried about the state of legal scholarship for as long as legal scholarship has



Chad Oldfather



Carissa Byrne Hessick



Paul Horwitz



**“The seeming privacy of other platforms, such as Facebook, may encourage other forms of writing, perhaps more naked in their motivations and expressions.”**

existed, when those criticisms come from the outside, our colleagues can be relied upon to rally 'round the flag.

The same is true for the *ethics* of legal scholarship. Even if—as we think—there is a fairly broad consensus among legal scholars themselves that we either behave imperfectly as ethical actors when engaging in legal scholarship or lack clear guidance for what it *means* to act ethically, or both, legal academics may be unwilling to say so outside faculty lounges, private chats in offices, and other safe spaces.

While some aspects of controversies over ethical scholarship are longstanding, other aspects are shaped by the enormous changes that have occurred in the communication of ideas, Oldfather, Hessick, and Horwitz wrote:

The long timeline and (somewhat) careful vetting of scholars' writing in some platforms encourages one type of writing. The seeming privacy of other platforms, such as Facebook, may encourage other forms of writing, perhaps more naked in their motivations and

expressions. The immediacy of platforms like Twitter, which both contain and incentivize hot takes, hot responses from readers, and hot replies from the author, may result in still another form of writing. Taken together, they raise important questions about the nature of legal scholarship and the duties and constraints of legal scholars writing as such.

The conference was organized into six sessions, but the proceedings were informal and conversational. The participants focused much of their discussion on the definitions, importance, and practical implications of basic aspects of ethical practice, such as thoroughness, good faith, acknowledgment of all sides of an issue, and candor about matters such as sources and an author's involvements with an issue.

Presented here, in addition to the proposed principles themselves, are snapshots of the roundtable discussion and an edited excerpt from a conference paper that brought a lot of reaction when it was circulated beyond the participants. It concerns whether and how standards of legal scholarship apply to Twitter posts by law professors.

# EXCERPTS FROM THE SYMPOSIUM

Here are edited excerpts from the discussion, followed by the text of the draft statement that emerged from the conference. We also offer an excerpted and edited version of one of the papers submitted by the participants, chosen because of its intriguing focus: Do the standards of legal scholarship apply to postings on Twitter from law professors? All of the proceedings are available in the *Marquette Law Review*, in print and online.

**Joseph D. Kearney**, *Marquette Law School Dean* [in opening remarks]: I also admit or claim a certain particular affinity for your topic. I have my own views about professional ethics within the law professoriate. No doubt they are less well-developed than (and thus easily displaceable in favor of) whatever principles you collectively arrive at here. Yet I will indulge myself by making one specific point—an observation of a phenomenon that I find distasteful at best. This is the phenomenon in which law professors participate in amicus curiae briefs—or sometimes even represent parties—in litigation outside of officially recognized law school contexts (such as clinics) and yet nonetheless associate themselves with their law schools in the matter. While it happens all the time, I think this inappropriate, even apart from the immodest self-denomination by some of these professors as “scholars” when they file these briefs. This is not to suggest that I myself act against this phenomenon any more than other deans seem to do, at least on the amicus front (you may be sure that I would take action if a colleague purported, in a capacity associated with the law school, to represent parties in litigation). None of this is to disdain the legal practice. In fact, considering myself professionally, most fundamentally, to be a lawyer, I keep a hand in litigation, and I myself on one occasion even filed a brief for myself as an officious intermeddler—that’s a loose translation of amicus curiae, I know from my study of Latin. But I do none of that cloaked in Marquette Law School garb. There we have a principle that I would commend for your consideration in your work this weekend.

**Robin West**, *Georgetown Law*: What prompts my interest in this topic is that it became clear to me, as I was writing a book about law teaching and scholarship, that the legal academy is in a very severe sort of “identity crisis” with respect to what legal scholarship is and what the point of it is.

To just give a flavor of the split, when I was writing one of the chapters on the nature of legal scholarship, I started asking people unscientifically, randomly, “What do you think of normative legal scholarship?” That’s the phrase often used to describe legal scholarship that more or less takes the form “the law is X, and it ought to be Y.”

And I noticed right away, one afternoon in the same 10-minute period, colleagues telling me, on the one hand, “Normative legal scholarship is just not legal scholarship” and “It’s not legal scholarship because it’s not scholarship. If it’s normative, it’s not scholarship. So, it’s not legal scholarship if you’re saying the law ought to be this. That’s something else. It’s advocacy or it’s adversarialism or it’s op-ed writing in the guise of the law review . . . .”

At the same time and on the other hand, there were others telling me, including some extremely distinguished law faculty, that “legal scholarship that is *not* normative is not legal scholarship because it’s not legal. If it’s not normative, it’s not legal. Legal scholarship has to be normative.” This comes out in tenure debates. You will have colleagues saying, “We can’t credit this as scholarship. This is normative.” And then you’ll have others saying, “We can’t credit that as scholarship because it’s not normative.”

So how deeply that difference cuts, I think, makes it very difficult to think about the ethics of legal scholarship as a defined, understood entity.

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**Leslie Francis**, *University of Utah*: I come pretty close to holding the position that we're in such a world of hurt about how law reviews operate that it may be very difficult without tackling that to think carefully about how scholars ought to operate. And maybe just a quick observation related to that, something that was kind of a theme around here was that a lot of people think about lawyers' ethics. I just want to put out on the table that I'm not sure lawyers' ethics are at all relevant to law professor ethics or that at least we ought to have it be an open question whether anything that is a principle of lawyers' ethics has any particular relevance here. I've been thinking about confidentiality. Also, you don't have a duty as a lawyer to cite to the court authority from another jurisdiction that's antithetical to the position you are maintaining. You don't have an obligation to give the court your methodology.

**Stanley Fish**, *Florida International University College of Law*: Long ago I became enamored with a statement, and of course, have forgotten its author. It went this way: "Our thoughts are ours; their ends none of our own." [Ed. note: It's from *Hamlet*.] And I take that to mean, as I'm sure you immediately understand, that as we work things out, we are responsible for the product of that activity. What then happens, when and if the fruits of our labors are put out into the world, they are not something that we can control, although there are, of course, many ways in which you try desperately to control them.

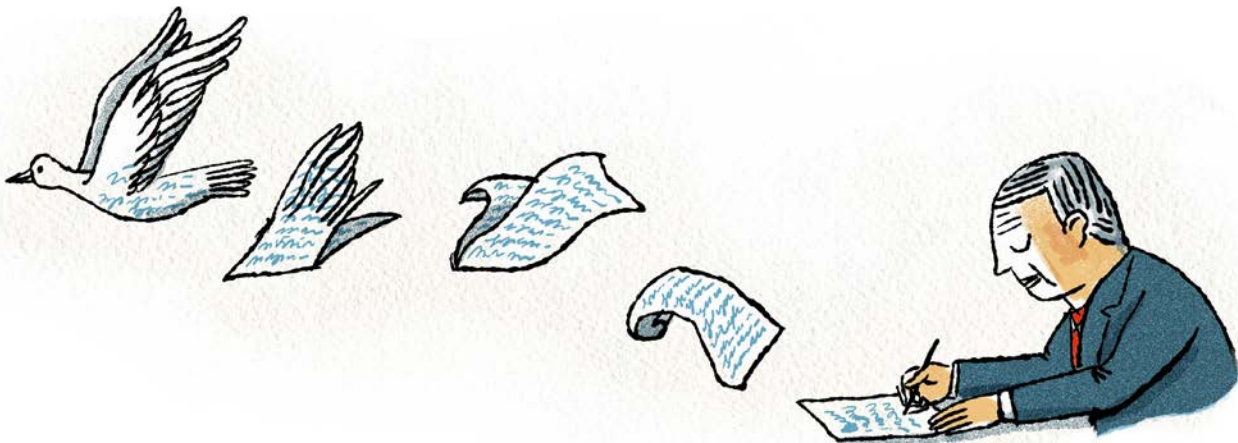
So, the question of impact is something that is so contingent. It doesn't mean that there aren't ways that we could increase the likelihood that contingency will swing in your favor, but nevertheless something can always happen in either direction that will completely surprise you—that is, something that you wrote and you didn't think that anyone would listen

to it, and it is suddenly picked up in ways that you couldn't predict. More frequently, it is something that you wrote that you were convinced the world needed to hear immediately and was heeded by no one.

One other remark. This goes back to a general question of, "What is scholarship and what are scholarly activities?" In general, when I'm doing scholarship, and I think most of you would say the same, I'm trying to get it right. I don't know what "it" is, and "it" varies and the complexities of "it" certainly vary, but I'm trying to get "it" right. And I'm trying to get it right because a puzzle or a problem has attracted my attention and I just can't quite figure out how something works or what's wrong with this answer or what's missing. So there's a satisfaction, almost a satisfaction of engaging in athletic performance, when you can at least think that you've figured it out and then you can tell other people about it, and sometimes you're figuring it out in the company of other people.

But when I'm at a conference like this one, I have absolutely no doubt what legal scholarship is. It's what we're doing here—that is, the feel of a conversation like this one.

**Eli Wald**, *University of Denver*: Some scholarship, like highly specialized work, will tend not to generate mass referencing, and that's, of course, okay. But in general, I would really be quite concerned—or at least mindful of—if there was a work of scholarship that over time had no citations or references to it by scholars in the field. Unfortunately, it is not at all uncommon to have scholarly works that never get cited or engaged with, but at least one should be curious about why it is that a scholarly work is not gaining some recognition and engagement from some people in the field.



**Amanda Seligman**, *University of Wisconsin–Milwaukee (professor of history) and Marquette Law School (visiting fellow in law and public policy)*:

I think about the long conversation in which a work of scholarship might exist even if it has no particular currency at the moment. . . . But to plant a seed that will be picked up later on. And I think it's particularly important to think about the academy and the way the academy cultivates creativity in society in comparison to business, in which the ends are so much more particular—to make a profit, to create a different kind of product. Our social function has to do with starting conversations even if we can't see where they're going.

**Wald:** Not to exaggerate the scope of Stanley and Robin's agreement, I'm sympathetic to trying to define scholarship and its boundaries in the direction that they are advancing. What's legal scholarship? Seeking the truth and pursuing specific commitments unique to the discipline of law—for example, justice's imperative. What's not scholarship? Partisan advocacy. What are we not sure about? Forms of normative scholarship, because some (like Stanley and Robin) disagree as to whether certain forms of normative scholarship constitute the pursuit of justice or are mere advocacy.

So far, so good. Unfortunately, resolving disagreements about normative scholarship cannot be done by reference to legal expertise. I wish it was that simple to say that legal scholarship is about the deployment of expertise to explore the law. The problem with this definition is that it's not entirely clear what the expertise of law professors is. Some think of law professors' expertise from a historical-jurisprudential perspective. During the era of Formalism, the expertise used to be narrow and self-contained; it was about the "law." Then came Legal Process. Next came the "law and . . ." interdisciplinary schools of thought, like Law and Economics, Critical Legal Studies, and Law and Sociology, and legal expertise expanded to include economics, political science, cultural studies, sociology, literature, etc. That is one concrete way to talk about the evolving expertise of law professors.

**Neil Hamilton**, *University of St. Thomas School of Law*: I thought *sincerity* was an ambiguous term, but could the author tell me up front what's the motive? It goes back to, I think, what Chad Oldfather was talking about here, "What is the motive behind this piece?" And then I can decide whether they are what I would

call traditional scholarly ethics or whether they are advocacy ethics. I have up front "what am I looking at here?" in terms of the piece.

**Ryan Scoville**, *Marquette Law School*: Two points. One, it seems like everything we've talked about so far is actually [dealing with the question of an author's] candor. Second, I'm not sure sincerity should require consistency. I think "sincerity" was in a couple of the draft codes that we read. To me, it seems fine for someone to argue X in one piece and then not X in another, just to test out ideas. I don't see why you should have to have some sort of logically consistent end-game that ties all of your scholarship together.

**Carissa Byrne Hessick**, *University of North Carolina School of Law*: I just wanted to say something briefly about the decorum point and about whether there's too much politeness—as Amanda put it, I think, "a culture of politeness." And I want to say that I'm pro-politeness, because I actually think that at least at some schools—some faculties are known—you give a talk there and it's going to be all about ripping you down and blah, blah, blah, and they pride themselves on it. I actually think that the problem with the politeness norm is that sometimes it leads people not to engage because people fear that engagement is inherently impolite, and I actually think that what the politeness norm ought to be is all about figuring out how to engage politely. That is—and maybe *politely* is the wrong way to think about it—how to engage on the substance in a way that is productive, that isn't mistaken for an attack on the author, and that isn't seen as anything other than engaging with the author's idea in good faith in order to further sort of the joint enterprise. . . . I think that we should engage with people's ideas, we should reframe their ideas in a way that presents them in their strongest light, and then say the extent to which we think that those ideas are valuable in what they add, and then talk about the extent to which they fall short.

**Nicola Boothe-Perry**, *Florida A&M University College of Law*: When we were having the discussion, I was just jotting down recurring themes or recurring words. So what I have is when we were defining what is legal scholarship. It's a good-faith, collaborative, engaging process that contributes usefully to the law or the legal landscape. And then underneath that would come, well, what types of that collaborative process would qualify, where we would go into those. I'm again just thinking of writing the restatement.

**Chad Oldfather**, *Marquette Law School*: Do we want to expand on the idea of “collaborative”?

**Boothe-Perry**: By collaborative, we were talking about, everybody kept saying, “You’re engaging with other scholars,” or “You’re engaging in some conversation.”

**Oldfather**: Does the audience for scholarship consist primarily or exclusively of other scholars? Does it necessarily extend to the bench and bar? Does it possibly extend beyond that into the general public?

**Boothe-Perry**: Every type of writing will have a specific type of audience. But you’re still engaging in some collaborative process for that audience, whether it’s to influence judges in their opinions or whether it’s to influence the public in an op-ed or whatever else. We were thinking of scholarship, but it’s still collaborative, right? Just collaborative in a different scheme depending on what the scholarship is.

**Wald**: Let’s talk a little bit about what may, or should be, distinctive about law and legal scholarship—justice. In an excellent book, Robin talks about justice and its neglect in law schools and legal education. Assuming and hoping that justice will one day play a more significant role in law, what role should it play in legal scholarship? I don’t think that every piece of scholarship necessarily has to directly engage in some way with conceptions and the application of justice to count as legal scholarship. Of course not. But, should legal scholars generally be committed to, think about, research and write about, aspects of justice, to correct for the suppression and irrelevance of justice in law schools, legal education, and legal scholarship?

**Paul Horwitz**, *University of Alabama*: Given that I’m at least a self-identified or a card-carrying pluralist, I obviously agree with a lot of what’s been said. The goal is not to read people out of the legal

academic profession in the first instance, and so I’d rather be broad as well. And this, I think, goes to the first part of your statement. There are three things we can say, again, whether they’re said in the document or elsewhere, and one is there is a large amount of perhaps unacknowledged or un-explicit consensus . . . that people have concerns, and that this is not limited to people on a particular methodological or ideological or prescriptive path, it’s a widespread concern among law professors. And second, that maybe more than one would acknowledge, there are a lot of things that everybody can agree on. Not everything, but there are probably a number of things where the reaction would be similar across, again, internal and external and so on, and that is important. And the third, I think, is that the value of a document and a symposium on this subject is to have a document and a discussion, physical or, I guess, electronic corpus, that says law professors are worried about this, need to be explicit about it, need to bring that discussion out into the open and try to figure out where the agreements are and where their intentional differences lie. And in other words, the usual large statement, that this is not a perfect document, but we need to have a discussion.

**Oldfather**: I think there’s another point to consider, and this is one that Dan Farber makes, encouraging a greater willingness to engage critically with one another, right? So, I think there are problems in two respects there, and we spoke about the first, but not necessarily the second, which is that there may not be enough critical interaction with other people’s work, and that that sort of interaction is actually a significant part of advancing the scholarly enterprise.

**Scoville**: I mean, that’s sort of a product of an overemphasis on novelty, isn’t it? At least in part. You’re not viewed as doing sufficiently novel work if you’re simply responding to the work of others.



# A Short List of BASIC NORMS

## Draft Statement Sets Forth Principles on Ethical Legal Scholarship

In describing the draft statement on the ethics of legal scholarship that emerged from the Marquette Law School conference (see article beginning on p. 31), Professors Chad Oldfather of Marquette University, Carissa Byrne Hessick of the University of North Carolina, and Paul Horwitz of the University of Alabama wrote:

Like most such ethical guides, whether for academics, professionals, or others, these basic principles are necessarily general in form. They comprise a short list of basic norms—exhaustiveness, sincerity and good faith, candor, open-mindedness, and disclosure—that can guide legal scholars . . .

. . . [A] duty to “acknowledge” and “engage” with “pertinent past work” on the topic on which one is writing enables readers to evaluate that piece of writing against the backdrop of other work, from a variety of perspectives and methods, addressing the same subject. (Not incidentally, it also forces the writer him- or herself to confront that work.) In each case, these principles, applied carefully and in good faith, do not tell scholars *not* to be politically engaged or *only* to be politically engaged; they do not tell them to adopt liberal or conservative (or other) political principles in their work or urge them to strive for “objectivity” or “neutrality”; they do not, in short, tell the reader what kind of legal scholar to be. Instead, they tell that scholar to be whatever sort of legal scholar he or she is in an open, and open-minded, fashion, one that acknowledges and is upfront about one’s animating premises, influences, agreements and disagreements, goals, sources, and internal or external constraints. They give readers—whether other law professors, scholars in other fields, or a more general readership—the ability to judge that work more knowledgeably for themselves. . . .

. . . Our attempt, unusual for academic symposia such as this, to put something specific on the table, agree on it, and share it with our colleagues was never meant to be a final and definitive answer to the questions that confront us concerning the ethics of legal scholarship. It was not meant to end the discussion. But we have attempted to provide a useful place from which to *begin* and continue such a discussion.

**Here is the text of the draft statement of principles, omitting footnotes:**

### Defining Legal Scholarship

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.



## 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."

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.

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 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.

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.

**Open-mindedness:** *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 open mindedness 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.



**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. 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 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.



# WHAT U GAIN & LOSE by Law Prof's Tweets

*This is an edited excerpt from Carissa Byrne Hessick's article, "Towards a Series of Academic Norms for #Lawprof Twitter," which was part of the Conference on the Ethics of Legal Scholarship at Marquette Law School on September 15 and 16, 2017, and published in the summer 2018 issue of the Marquette Law Review. Hessick is Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law at the University of North Carolina School of Law.*

When we talk of legal scholarship, we ordinarily mean law review articles, university press books, and similar publications. But those are far from the only outlets for a scholar's research and opinions. Many legal scholars write briefs, comments on agency action, popular press books, opinion pieces, and other works that are aimed at a wider audience. Legal scholars also maintain blogs, post on Twitter, testify before legislatures and other policy bodies, and give statements to the press. From time to time, law professors have questioned what professional norms ought to apply when scholars engage in these non-scholarly activities.

In this short symposium contribution, I offer some tentative thoughts on what professional norms ought to apply to law professors who engage in a now-popular form of public discourse: Twitter. Specifically, I suggest that law professors should assume that, each

time they tweet about a legal issue, they are making an implicit claim to expertise about that issue. I also suggest that when law professors participate on Twitter, they should do so in a fashion that models the sort of reasoned debate that we teach law students.

One might legitimately question the value of discussing Twitter in a symposium devoted to legal scholarship. With its rigid character limits and focus on "hot takes," Twitter is arguably the antithesis of scholarship. And yet there is little doubt that Twitter has an increasingly important role in public discourse and legal discourse in particular. There have been a number of exchanges criticizing how some law professors use the Twitter platform. Nevertheless, I think that there is value in law professors participating on Twitter, and thus it is worth discussing whether, as a profession, legal academics ought to endorse or criticize certain behavior on Twitter. . . .

## Twitter and the Dissemination of Ideas

There are a number of reasons that a law professor might want to post on Twitter. As compared to the other platforms available to law professors, Twitter has distinct advantages as a method of communication with other law professors and with the public more generally. Twitter allows law professors to broaden the reach of their ideas, increase their professional profiles, and communicate more easily and more quickly than other media.

A law professor who wants to communicate an idea to other law professors has several options. She can publish that idea in a law review article or an academic press book. This process takes a long time, not only because writing those manuscripts involves a lot of time and effort, but also because it takes a significant amount of time, after a manuscript is complete, for it to appear in print. Consequently, a law professor who has an idea about a timely topic may find that her idea is obsolete (or no longer of public interest) by the time it is published. It is also uncertain how many people will read a professor's law review article or academic book. . . .

The professor can attempt to communicate her idea to other law professors by speaking at academic conferences or faculty workshops. But many conferences and workshops are by invitation only. Whether one receives an invitation to such a conference may depend on the strength of one's personal connections to the organizer or whether one is already considered a "big name" in the field—issues over which most law professors have limited control. . . .

Technology has made the communication of ideas within the academy somewhat easier. Law professors are able to post their manuscripts on the Social Science Research Network (SSRN) or other repositories. This allows professors to disseminate their manuscripts almost as soon as they are finished writing, thus eliminating the time lag associated with publication. The title and abstract of those manuscripts are emailed to other professors through digests or e-journals every few weeks. Thus, more people may learn that a professor has written on a particular topic.

Law professors can also communicate their ideas by blogging. A blog post is usually short, and therefore takes less time to write than an article or a book. Law professors also have the ability to make a blog post immediately available. This short time lag between when the law professor has the idea and when she makes it publicly available makes blog posts a good medium for law professors to disseminate their time-sensitive ideas.

Although blogging allows for quick communication, blogging is not necessarily a good medium for ensuring that an idea is widely disseminated. There is no guarantee that other professors will see, let alone read, a blog post. . . .

Unsurprisingly, it is easier for a law professor to disseminate her ideas within the legal academy if she enjoys a strong professional reputation. A professor with a strong professional reputation is likely to get more citations to her scholarship and receive more conference invitations. She is more likely to be invited to join an established blog; and if she chooses to start her own blog, the site is likely to receive a significant amount of traffic. But a professor who is looking to develop her professional reputation must do so largely by trying to disseminate her ideas. This creates a Catch-22, especially for junior faculty or faculty outside of the most elite law schools: They want to disseminate their ideas widely in order to develop a good professional reputation, but not already having such a reputation hampers their ability to disseminate their ideas widely.

A law professor who wants to communicate her ideas outside of the academy is even more limited by her existing professional reputation, and she has even fewer options both to communicate her ideas and to increase her reputation. She can try to publish op-eds or popular press books. But it is much more difficult to publish in those venues than it is to publish in law reviews or with academic presses: manuscripts are not blind-reviewed, and thus authors who already have strong reputations are more likely to be published. The professor can speak with reporters and try to get quoted in an article or to make an appearance on radio or television. But media calls are usually initiated by the journalist, rather than by the expert. . . .

Twitter makes the communication of ideas both inside and outside of the academy much easier. Twitter allows professors to offer their opinions quickly and in an easily digested format. Because tweets have character limits, they allow professors to express an opinion on a topic without expending the time required to write something longer, like an academic article or a blog post. . . .

Twitter also allows professors to offer their opinions on their own initiative. A professor who wants to comment on a newsworthy topic need not wait for a reporter to call her. Twitter allows law professors to reach a national audience at the click of a mouse. What is more, an idea or an opinion offered on Twitter can come to the attention of a journalist writing on the topic. While journalists are unlikely to



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read law review articles or even law professor blogs, they often search Twitter. And so a tweet may lead to media opportunities, such as quotes in newspaper articles or appearances on television shows, which will increase an academic's professional profile.

Twitter also makes it easier for law professors to communicate with other law professors. Many law professors are on Twitter, and it is easy to interact with other professors by commenting on their posts or jumping into "conversations" that other professors are already having. Indeed, it appears that this behavior is expected, even between professors who have never met each other before. Twitter thus enables professors to increase their professional network without having to travel to conferences.

The Twitter platform not only allows professors to more easily disseminate their ideas, it also gives professors more information about how many people have seen their idea, as well as who agrees or disagrees with the idea. Ordinarily, law professors have to wait for years in order to assess whether their ideas have had an impact. . . .

### Twitter's Virtues as Vices

. . . But the very features of Twitter that make it a good vehicle for expressing ideas are also its most problematic features for academics.

Take, for example, the ability of a professor to express an opinion easily on Twitter. One of the defining features of academic scholarship is that it is the product of considerable time and effort. Tweeting, as compared to traditional scholarship, takes almost no time or effort. This makes Twitter an attractive venue for expressing ideas. . . . But eliminating the time and effort associated with legal scholarship has other, quite negative consequences.

Twitter is not designed to highlight or encourage effort. Unlike longer formats, such as law review articles and blog posts, an idea expressed in a tweet is unlikely to contain much in the way of reasoning. Tweets are conclusory. . . .

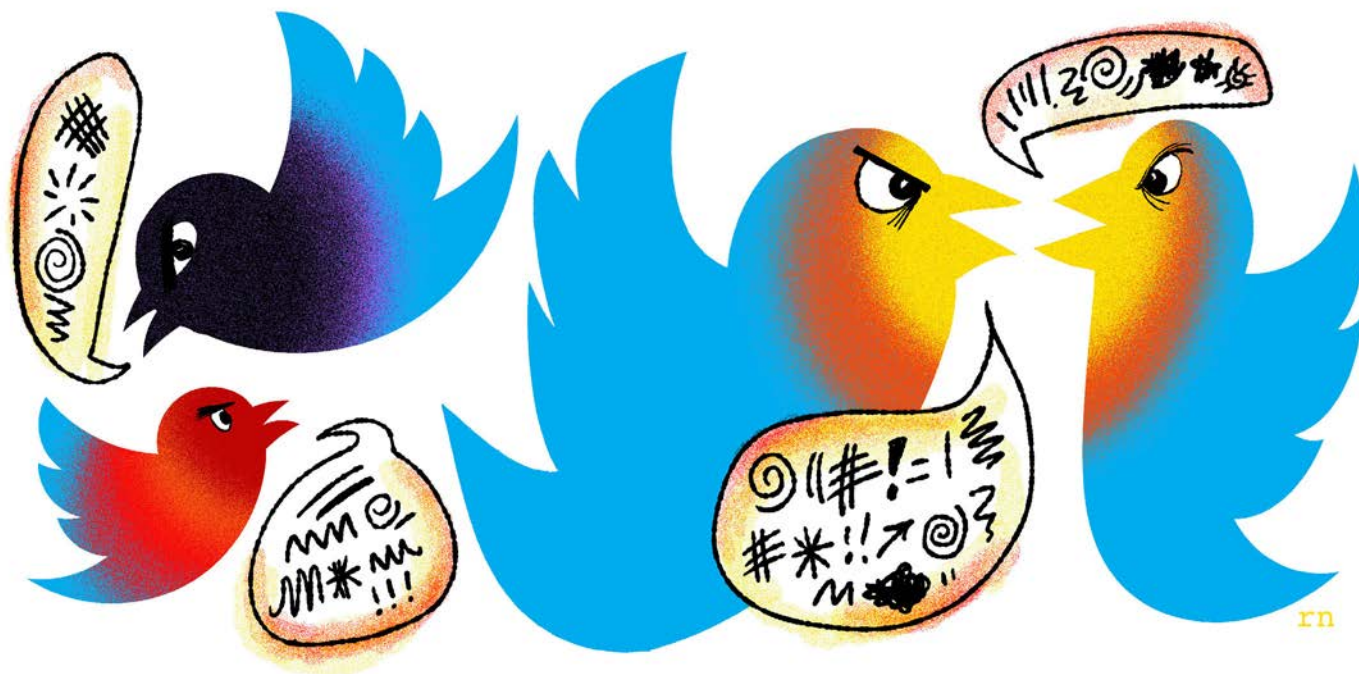
What is worse, the shortened format may also distort ideas. Because of the shortened format, professors must make choices about what information to highlight, what information to omit, and what information to treat superficially. Space constraints may create incentives for professors to treat an idea superficially—particularly ideas with which they disagree. . . . This tendency to oversimplify may transform substantive disagreements between academics into little more than virtual shouting matches.

Twitter's shortened format also encourages professors to share ideas that are not fully formed or vetted. Because it is so easy to communicate ideas on Twitter, professors will often present ideas on Twitter for the first time. Precisely because the barriers to communicating an idea are so low, those who use Twitter will often use the platform to make statements that they would never make in other contexts—statements well outside of their areas of expertise, or statements that they have spent no more time thinking about than the time it took to type them. It is the process of reasoning that forms the core of most legal analysis. And it is reasoning (rather than just our conclusions) that separates academics from non-academics. Thus, if a professor tweets casually—without reflection or depth of knowledge—then she is using the platform in a way that does not help her communicate her ideas *as an academic*.

The ability to tweet casually is especially attractive when it comes to newsworthy topics. Twitter allows those who have expertise on a topic to disseminate their ideas when that topic is timely. . . . But Twitter does not distinguish between those law professors with expertise on a topic and those without. . . . And, unfortunately, one rarely gains large numbers of followers or garners large numbers of retweets by offering sober, nuanced analysis. Pithy generalizations and partisan fodder are more likely to generate interest and followers. . . .

. . . Because the process of writing and publishing scholarship takes so long, a professor will publish an idea only after considerable reflection. In contrast, a law professor's tweets on noteworthy events do not require generally applicable principles. Professors can offer an opinion on a particular event—such as an opinion on whether a particular government action is constitutional—without having to articulate or defend a generally applicable principle. Because a professor is expressing an opinion only about this particular instance, the opinion may have been influenced by her intuitions or preferences about the outcome of that particular case. That is to say, it might reflect a political or personal preference rather than a considered legal opinion.

Perhaps most importantly, if a professor is using Twitter in order to express an idea on a noteworthy topic, then she is using the platform in order to avoid the time lag that would ordinarily provide an opportunity for reflection. Like most law professors, I have often changed my mind about legal opinions after reflection. . . . Twitter encourages and rewards



those professors who offer opinions quickly, rather than those who leave themselves time for reflection.

The increased control that Twitter gives over one's opportunities to increase professional reputation can also be problematic. Although the traditional scholarship model does not give professors much control over their professional reputations, the little control a law professor does have is over the quality of her scholarship. For most people, high-quality scholarship requires significant reflection and great depth of knowledge. Twitter rewards the opposite. . . . A professor who published law review articles on current events and without reflection would be mocked; but a professor who tweets in such a manner will likely be rewarded by a large Twitter following. . . .

Even Twitter's ability to facilitate communications between law professors has its downsides. Twitter's quick communication sometimes allows professors to refine their ideas more efficiently. But the ability to communicate quickly sometimes leads professors to communicate rudely. Time for reflection doesn't just help professors refine their ideas; it also gives them time to cool off and couch their disagreement with peers in polite (or at least professional) terms. I am sorry to say that I have witnessed more than one professor whom I otherwise admire behave very rudely on Twitter. And because Twitter is a constantly available platform, it allows people to tweet when they are tired, angry, or otherwise not their best selves. This probably makes unprofessional behavior far more likely.

I should note that I am personally guilty of many of the Twitter vices that I have identified. I have tweeted outside of my area of expertise; I have allowed newsworthiness to eclipse rigorous analysis and reflection; and I have sometimes tweeted in an intemperate tone. The fact that the Twitter platform facilitates, and at times incentivizes, such behavior is not an excuse for what I've done. But I do tend to think that, to the extent more law professors exhibit this behavior on Twitter, the behavior is likely to increase. Indeed, the legal literature on norms suggests that our behavior is, in many respects, influenced by the behavior we see in our environments rather than by legal prohibitions. Thus, if more law professors were to eschew the vices of Twitter—if, as a profession, we were to develop informal social norms to counteract the incentives of the platform—then we could see a real positive change in how law professors behave on Twitter.

### Suggested Norms for Law Professors on Twitter

. . . [A] law professor's participation on Twitter isn't necessarily limited to shaping a law professor's individual public image; the law professor's participation can also shape public perception of law professors as a group.

To be clear, not everything that a professor does necessarily reflects on the academy as a whole. If a law professor tweets about a sporting event, complains about the state of public transit in her city,

or tweets about some other relatively mundane issue that has nothing to do with the law, then the tweets are unlikely to have an effect on the reputation of the legal academy as a whole. But when professors tweet about legal issues, or when they tweet false and incendiary information from Twitter accounts that identify them as law professors, then their behavior on the platform may reflect not only on them as individuals, but also on the legal academy as a whole.

Because law professors' tweets may affect public perception of law professors as a group, we, as a group, should work to develop norms associated with law professor participation on Twitter. Indeed, we should work to develop norms associated with all types of non-scholarship public discourse, including op-eds, legislative testimony, and amicus briefs. But this short essay is focused on Twitter.

I have two suggested norms for law professors who tweet: First, law professors should assume that, each time they tweet about a legal issue, they are making an implicit claim to expertise about that issue. Second, professors who participate on Twitter should keep in mind that they are part of a profession that is committed to promoting reasoned debate. These norms will not correct all of the Twitter vices identified in this essay—they are far too modest to do that. But my hope is that, in proposing relatively modest norms, they are more likely to be accepted by other professors.

Importantly, these suggested norms are directed only at those who publicly identify themselves as law professors on Twitter. A law professor whose Twitter profile and tweets do not identify her as a law professor is “tweeting in her personal capacity” and should feel free to tweet only with her own reputation and interests in mind. And a law professor's posts on other non-publicly available social media, such as Facebook, are also more appropriately considered personal.

Perhaps more importantly, I am offering these norms as a starting point for discussion. . . .

### **1. Assume you are claiming expertise when you tweet about issues related to law**

Law professors who identify themselves as law professors on their Twitter profiles are making a representation to the public. They are identifying themselves as an expert on legal issues. Thus, a person who identifies herself as a law professor on Twitter should assume that others will interpret that identification as a claim to expertise. That claim to

expertise lurks in the background of all tweets on legal topics.

An implicit claim to expertise does not necessarily mean that a law professor should only tweet in areas where she is an expert. Because Twitter is populated by many people who know very little about the law, a law professor will often be able to clarify or dispute a legal issue that is being mischaracterized by others, even if that issue is outside of her core area of expertise. . . . [W]hen tweeting on legal issues outside of their area of expertise, law professors should take care to dispel the implicit claim to expertise created by their self-identification as a law professor. . . .

One might question whether law professors' tweets about political issues also carry an implicit claim to expertise. After all, it is often difficult to disentangle law from politics (and vice versa). Take, for example, a law professor who tweeted that a particular presidential action should or should not lead to impeachment. Whether impeachment is warranted is both a legal and a political question, and so it may be unclear whether the professor is making a legal statement—in which case the implicit claim is present—or a political statement—in which case it likely is not. Reasonable minds could differ on this issue, but I believe that, to the extent that a law professor's tweet on a political issue could be viewed as a tweet on a legal issue, then she should err on the side of caution and assume that there's an implicit claim of expertise.

To be sure, assuming an implicit claim to expertise can be burdensome, and it may lead law professors to tweet less outside of their areas of expertise. After all, a tweet that is framed as a question or that includes a disclaimer of expertise is hardly going to be thought pithy and retweeted widely. And so some professors may find it is simply not worth tweeting on newsworthy topics outside their area of expertise. I'm not sure that is a bad thing.

### **2. Help promote (or at least do not undermine) reasoned debate**

Whenever law professors express ideas, at least some people will disagree with them. Disagreement is nothing new to law professors. We often disagree with judges or other professors in our scholarship. And when we publish our own scholarship or speak at conferences and workshops, people often disagree with us. Engaging with those who disagree with us is part of our job as law professors.

Using Twitter to engage with opposing views is not easy. The character limits lead many Twitter users to

be abrupt. Those same limits also pose a challenge for offering explanations, rather than simply conclusions. Some people appear to use Twitter primarily as a platform to inflame the passions of others, while others proudly proclaim that their tweets are meant to be “snarky.” Dealing with abrasive and downright rude people does not lead a person to be calm, cool, or collected.

Even though the Twitter platform makes civil disagreement more difficult, law professors should strive to uphold the same norms of reasoned debate that we have in our disagreements about scholarship. When disagreeing about ideas in scholarship, law professors are often able to do so in a professional manner. They identify the precise grounds of debate, concede when appropriate, and keep the discussion focused on the substance of the arguments. Twitter disagreements should follow the same form. A law professor should ask herself, before tweeting, whether the tone and the content of her disagreement are appropriate given that she publicly identified herself as a law professor.

One might wonder why a law professor ought to have a special obligation to promote reasoned debate. What is it about law professors—as opposed to dentists, accountants, or elementary school teachers—that should require them to maintain a civil tone on Twitter? The difference is that one of the major skills

we aim to teach our students in law school is to be able to argue dispassionately about controversial topics. Our ability to disagree civilly with one another about our scholarship is not simple professionalism; it is part of what helps set legal thinkers apart from those without legal training.

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Twitter can be a useful platform for law professors. But it also poses a number of challenges. Many law professors whom I admire avoid the platform altogether; several others tweet, but express great ambivalence about doing so. The avoidance and ambivalence are attributable, at least in part, to the problems with the platform I’ve addressed here.

But if the more circumspect and intellectually scrupulous law professors stay off Twitter, that is not necessarily good for the legal academy as a whole. Twitter may be a passing fad. But right now it is a major platform by which the general public is exposed to law professors. The law professors who are the most active on Twitter are, in a very real sense, the public face of the legal academy for a large segment of the country. That is why the rest of the legal academy should take an interest in setting norms for the platform. ■

