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# The Truth of the Matter: Why the Social Contract Dictates Legal Scholar's Sincerity, Candor, & Thoroughness

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# THE TRUTH OF THE MATTER: WHY THE SOCIAL CONTRACT DICTATES LEGAL SCHOLARS' SINCERITY, CANDOR, & THOROUGHNESS

NICOLA A. BOOTHE-PERRY\*

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*“God has many gifts which He lavishes upon his creatures: among them is the gift of scholarship . . .”<sup>1</sup> and “[t]o every gift [including the gift of scholarship] attaches an obligation.”<sup>2</sup>*

## I. INTRODUCTION

Legal scholars have filled books, treatises, magazines, journals and law reviews with various writings ranging from highly intricate and complex theses to oversimplified and homogenous explanations. In all its forms, legal scholarship has been both touted and taunted by external and internal critics throughout the years.<sup>3</sup> Some suggest that legal scholarship should holistically

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1. David Lefkowitz, *The Obligations of Scholarship*, 5 PHI BETA KAPPA KEY 502, 503 (1924).

2. *Id.* at 502.

3. See, e.g., Carlo A. Pedrioli, *Professor Kingsfield in Conflict: Rhetorical Constructions of the U.S. Law Professor Persona(e)*, 38 OHIO N.U. L. REV. 701, 717 (2012) (tracing the contours of the conflict over the construction of the role(s), or persona(e), of the U.S. law professor, Professor Pedrioli summarizes some of the conflicting views regarding the purpose of legal scholarship); see also Lee Epstein & Gary King, *A Reply*, 69 U. CHI. L. REV. 191, 192 (2002) (contrasting the purposes of legal scholarship, as articulated by Goldsmith, Vermeule, and others, with that of empirical research, which aims to “learn about the world” (quoting Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1, 9 n.23 (2002))); Robin West, *The Contested Value of Normative Legal Scholarship*, 66 J. LEGAL EDUC. 6, 8 (2016) (summarizing the criticisms from both inside legal academia and the outside bar as follows: “[A]ccording to one of these various camps of either internal or external critics, much

“frame recommendations to responsible decision makers,” and more specifically “help the reader understand law.”<sup>4</sup> Others suggest that it should be used to bring “restraint, proportion, perspective and atmosphere” into the legal landscape and society at large.<sup>5</sup> Whatever its stated purpose and whether it be doctrinal, descriptive or practical, legal scholarship remains an intricate and influential factor in legal academia, the legal system as a whole, and shaping cultural and professional discourses. As such, the varied and broad topics of

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of what we call ‘legal scholarship’ may be scholarship but it’s not ‘law’—it is too academic, too disciplined, too theoretic, and too detached, of no use to the profession and therefore of no value; or, according to another camp, much of what we call legal scholarship may be ‘legal’ but it’s not true scholarship—it’s nothing but legal writing in disguise, elaborated memoranda for courts, legislators, or regulators, but it’s not scholarship. Legal scholarship, in short, is on the horns of a ‘normativity’ dilemma. To some critics, legal scholarship isn’t scholarship, because it’s too normative, while to another camp, it may be scholarship, but it isn’t legal because it’s not normative enough. For every critique, both inside and outside the academy, one can find its opposite, also forcefully voiced. Legal scholarship does not want for critics.”). Much of the dispute about legal scholarship stems from disputes regarding the *purpose* of such scholarship. For example, disputes as to whether legal scholars write for each other or for legal decisionmakers outside academia? Whether doctrinal analysis is the core of legal scholarship versus whether such scholarship is “too pedestrian and practice-oriented”? Whether scholars should engage in “internal” critiques of legal rules, or “external” critiques of legal practice (including the practice of scholarship)? Whether legal scholarship should be prescriptive, or mainly descriptive? This Article will not debate the intricacies of legal scholarship’s purpose per se; it posits that despite the objective of legal scholarship, whether it be prescriptive or descriptive, analytical or practical; the overarching purpose must include a satisfaction of the social contract between the public and the legal profession. For more in-depth reviews of the purpose of legal scholarship, see David Monsma, *The Academic Equivalence of Science and Law: Normative Legal Scholarship in the Quantitative Domain of Social Science*, 23 T.M. COOLEY L. REV. 157 (2006); Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 840–42 (1993); Robert Weisberg, *A Symposium On Legal Scholarship*, 63 U. COLO. L. REV. 521, 521 (1992); *Papers from the Yale Journal Symposium on Legal Scholarship: Its Nature and Purposes*, 90 YALE L.J. 955 (1981); David Hricik & Victoria S. Salzman, *Why There Should Be Fewer Articles Like This One: Law Professors Should Write More For Legal Decision-Makers And Less For Themselves*, 38 SUFFOLK U.L. REV. 761, 763 (2005) (joining the debate on the role of legal scholarship); Edward L. Rubin, *On Beyond Truth: A Theory for Evaluating Legal Scholarship*, 80 CAL. L. REV. 889, 889 (1992) (suggesting that much of the dispute stems from our lack of any theory of evaluation); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 75 (1992) (“[T]he growing disarray we now see in the profession is directly related to the growing incoherence in law teaching and scholarship.”); Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession: A Postscript*, 91 MICH. L. REV. 2191, 2219 (1993); see also Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1436–37 (1996) (discussing why legal scholarship is mainly prescriptive in suggesting that a new synthesis of discourse for legal scholarship can be developed by incorporating law, social policy, and social change).

4. Edward L. Rubin, *The Concept of Law and the New Public Law Scholarship*, 89 MICH. L. REV. 792, 796 (1991); Farber & Sherry, *supra* note 3, at 809.

5. Lefkowitz, *supra* note 1, at 504.

legal scholarship (the empirical, the interpretive, the normative, and the prescriptive) provide innumerable opportunities for legal scholars: opportunities that are truly a “gift” as noted by Professor Lefkowitz.<sup>6</sup> This “gift” should not be taken for granted, and “should comport with [both] the goals and attributes of the academy”<sup>7</sup> and with the goals and conditions of the legal profession.

However, a 2015 empirical study concluded that legal scholarship, “in its present form, is a massive and unsupported investment in what benefits a few people in a narrow universe.”<sup>8</sup> In fact, research indicates that current legal scholarship’s benefit to any groups outside of law professors is “attenuated at best.”<sup>9</sup> To passively acknowledge this as fact without a conscious effort to change the reputation of legal scholarship should be unacceptable to legal scholars. As members of the community of higher education, legal scholars must fulfil their basic responsibility of refining, extending, and transmitting knowledge.<sup>10</sup> This responsibility extends beyond the ears of law students and the doors of law schools. Legal scholars have an obligation not just to academia, but to law schools, the greater legal community, and society in general to increase the reach and impact of legal scholarship. This obligation, owed to society as a whole,<sup>11</sup> requires legitimacy that entails a few basic responsibilities such as sincerity, candor, exhaustiveness, and thoroughness. This Article will explore the basic tenets of these responsibilities in an effort to articulate the legal scholar’s obligations owed under a “social contract” with society. Part II will briefly discuss the scholar’s social contract with society which serves as a foundation for the accountability of legal scholarship. Part III will explore the scholar’s obligations of sincerity and candor. Part IV will discuss the obligation and importance of exhaustiveness and thoroughness. Part

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6. *Id.* at 503.

7. Farber & Sherry, *supra* note 3, at 809. In providing an overview of the legal storytelling movement and evaluating its claims, the authors discuss the fundamental purposes of legal scholarship and how storytelling can contribute to the same. *Id.* at 811.

8. Jeffrey L. Harrison & Amy R. Mashburn, *Citations, Justifications and the Troubled State of Legal Scholarship: An Empirical Study*, 3 TEX. A&M L. REV. 45, 50 (2015) (identifying fundamental problems with legal scholarship such as use of citations).

9. *Id.* at 58 (indicating that empirical studies evidence that “[t]he benefits of legal scholarship to any constituent group (other than law professors) are, as [the authors’] study demonstrates, attenuated at best”).

10. 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/8J7S-BMW9>] [hereinafter AALS STATEMENT].

11. *See infra* Part II (regarding the social contract).

V will offer suggested criteria for legal scholars' fulfillment of these critical obligations.

## II. LEGAL SCHOLARS' SOCIAL CONTRACT WITH SOCIETY

In 2014, the ABA Task Force on the Future of Legal Education reported that “[s]ociety has a deep interest in the competence of lawyers, in their availability to serve society and clients, in the broad public role they can play, and in their professional values.”<sup>12</sup> This societal concern and investment is a crucial factor in the relationship between law and society. As lawyers, legal scholars are an intricate part of the profession whether or not they realize “that they are engaged in a common enterprise—the education and professional development of the members of a great profession” or view themselves “as [being] separated [from practicing lawyers] by a ‘gap.’”<sup>13</sup> Beyond the duties of teaching students, furthering scholarly pursuits, and ensuring the substantive competence of tomorrow’s lawyers, law professors have a broader obligation in this “common enterprise”<sup>14</sup> to ensure that scholarly contributions “uphold and enhance” the professional values and “standards of the legal profession.”<sup>15</sup> As with all lawyers, these contributions are instrumental in the “effective functioning of ordered society” and their interplay in society creates what has been posited as a “social contract” between lawyers and the general public.<sup>16</sup> The basis for this social contract is the autonomy granted by the public to the legal profession wherein the legal profession should foster the core ideals and values of the profession and regulate itself via peer review, standards for entry into and continued membership in the profession, and standards for “how individual professionals perform their work so that it serves the public good in

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12. ABA TASK FORCE ON THE FUTURE OF LEGAL EDUC., REPORT AND RECOMMENDATIONS 6 (2014),

[http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/report\\_and\\_recommendations\\_of\\_aba\\_task\\_force.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/report_and_recommendations_of_aba_task_force.authcheckdam.pdf) [<https://perma.cc/NJ7D-KRN5>] [hereinafter ABA TASK FORCE, REPORT & RECOMMENDATIONS].

13. See ROBERT MACCRATE ET AL., LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM 3 (ABA Sec. Legal Educ. & Admissions to the Bar ed., 1992), [http://www.americanbar.org/content/dam/aba/publications/misc/legal\\_education/2013\\_legal\\_education\\_and\\_professional\\_development\\_maccrate\\_report%29.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report%29.authcheckdam.pdf) [<https://perma.cc/PZ7N-QKRC>]. This report is otherwise known as the “MacCrate Report.”

14. Nicola A. Boothe-Perry, *The “New Normal” for Educating Lawyers*, 31 BYU J. PUB. L. 53, 71–72 (2016) (“[L]aw professors have a broader obligation in this ‘common enterprise’ to ensure that the attributes and qualities displayed by new lawyers will serve to uphold and enhance the standards of the legal profession.”).

15. *Id.* at 72.

16. ABA TASK FORCE, REPORT & RECOMMENDATIONS, *supra* note 12, at 6.

the area of the profession's responsibility."<sup>17</sup> In return, the profession has duties to the public to

maintain high standards of minimum competence and ethical conduct to serve the public purpose of the profession and to discipline those who fail to meet these standards; to promote the core values and ideals of the profession; and to restrain self-interest to some degree to serve the public purpose of the profession.<sup>18</sup>

This social contract produces moral responsibilities that should be upheld by every legal professional, including legal scholars.<sup>19</sup>

Paragraphs 10–12 of the Preamble to the ABA Model Rules of Professional Conduct emphasize the importance of the legal profession fulfilling its obligation under this social contract, with Paragraph 12 stating that “[t]he legal profession’s relative autonomy carries with it special responsibilities of self-government . . . . *Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.*”<sup>20</sup> Society trusts that the contract will be honored and it is this public reliance that is key to the tenets of the social contract. Doubt or distrust in the legal profession’s ability to uphold its responsibilities could result in potential revision of the social contract and threaten a reduction (or elimination) of the profession’s autonomy. It is therefore imperative that the legal profession, including legal scholars, fulfill their correlative duties to ensure that the social contract is being satisfied. These duties necessarily require sincerity, candor, and thoroughness in production of legal scholarship.

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17. Neil Hamilton, *Professionalism Clearly Defined*, 18 PROF. LAW., no. 4, 2008, at 4, 4–5.

18. *Id.* at 5 (citing WILLIAM M. SULLIVAN, *WORK AND INTEGRITY: THE CRISIS AND PROMISE OF PROFESSIONALISM IN AMERICA* 21 (Jossey-Bass ed., 2nd ed. 2005)).

19. *See, e.g.*, JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 24–25 (Donald A. Cress trans., 1987) (1762) (“[The social contract] produces a moral and collective body . . . which receives from this same act its unity, its common self, its life and its will.”); *see also* Hillary A. Sale, *Educating Lawyers: Preparation for the Profession of Law*, 49 J. C. STUDENT DEV. 71, 71 (2008) (book review) (noting that lawyers operate under this social contract both “in the public sphere and with the public trust”).

20. MODEL RULES OF PROF'L CONDUCT PREAMBLE paras. 10–12 (AM. BAR ASS'N 2007) (emphasis added).

### III. OBLIGATIONS OF SINCERITY AND CANDOR

*“You can’t have a high standard of scholarship without having a high standard of integrity, because the essence of scholarship is truth.”*<sup>21</sup>

The “desire to find or to say what is true” is commonly acknowledged as one purpose of legal scholarship.<sup>22</sup> Implicit in this is the goal to create a community of academic inquiry that is solidly based on truth.<sup>23</sup> In order to serve the profession’s public purpose under the social contract, legal scholars must therefore have a commitment to truth. This requires open-mindedness, “intellectual honesty,”<sup>24</sup> and exercising some “meaningful restraint on self interest.”<sup>25</sup> Certainly scholars should be aware of their audience, and purpose (be it to inform or persuade).<sup>26</sup> Even if scholars’ writings are a result of the process of thinking things through with a goal of providing arguments, suggestions or recommendations; or to publicly “test out and develop one or another intellectual project,”<sup>27</sup> the scholar must be honest in presenting evidence. The scholar should also be open to “revealing the extent to which he has [or has not] conformed to the methodological conventions of the discipline.”<sup>28</sup> To do otherwise creates a cloud of manipulation and can reek of deception or some hidden motive or agenda. This cloud could undermine the integrity of our legal system and the laws it interprets and creates.

Although judges and other legal scholars have criticized legal scholarship’s relevance to the judiciary,<sup>29</sup> empirical studies evidence that, in fact, the use of

21. *About Us*, JOHN HOPE FRANKLIN CTR., <https://jhfc.duke.edu/about/> [<https://perma.cc/N6WP-FZDF>] (last visited Jan. 26, 2018) (quoting Dr. John Hope Franklin).

22. Nancy L. Cook, *Outside the Tradition: Literature as Legal Scholarship*, 63 U. CIN. L. REV. 95, 124 (1994); see also Robert Post, *Lani Guinier, Joseph Biden, and the Vocation of Legal Scholarship*, 11 CONST. COMMENT. 185, 186 (1994) (“The purpose of legal scholarship is the achievement of truth.”).

23. Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 5–6 (1986) (noting that the scholar “must be honest in presenting evidence”).

24. AALS STATEMENT, *supra* note 10, § II (“The scholar’s commitment to truth requires intellectual honesty and open-mindedness.”).

25. Neil Hamilton, *Assessing Professionalism: Measuring Progress in the Formation of an Ethical Professional Identity*, 5 U. ST. THOMAS L.J. 470, 494 (2008).

26. Carol Sanger, *Editing*, 82 GEO. L.J. 513, 515 (1993) (“Law professors write in law reviews in order to inform or persuade a particular public—the bar, legislatures, courts, colleagues—on some point of legal doctrine or theory each author thinks is important.”).

27. *Id.*

28. Cramton, *supra* note 23, at 5.

29. See, e.g., Hricic & Salzmann, *supra* note 3, at 778 (claiming that the “trend” toward “‘not merely unhelpful,’ but ‘useless’” legal scholarship is “‘already apparent’”).

legal scholarship by the federal circuit courts of appeals has increased.<sup>30</sup> It is therefore imperative that scholarship that impacts the law be accurate and honest. Furthermore, the social contract dictates upholding the values of the profession including the maintenance of the integrity of the profession.<sup>31</sup> This necessitates avoidance of any “professional misconduct” such as “dishonesty, fraud, deceit or misrepresentation.”<sup>32</sup> As an old wise woman once told me, “If you are not speaking truth, you are telling a lie or a half-truth: both of which are dishonest and insincere.” The truth hurts sometimes. However, truth given without any malice or negative intent will be received and appreciated. Legal scholarship must therefore be committed to telling “the truth, the whole truth, and nothing but the truth.”

#### IV. OBLIGATIONS OF EXHAUSTIVENESS AND THOROUGHNESS

Implicit in the truthfulness and sincerity of legal scholarship are the correlative obligations of exhaustiveness and thoroughness. In general, legal scholarship can involve the process of explaining, expounding or even rejecting ideologies of the legal and economic systems; developing/creating something new; or reclaiming the old with modifications that provide improvement. Critical analysis is crucial regardless of the form or purpose of the scholarship. The importance of critical analysis is illustrated through certain aspects of legal scholarship that directly impact society such as scholarship on difficult social issues. Scholars necessarily often have to confront difficult issues such as inequality and divisions in race, gender, environmental, and economic systems.<sup>33</sup> The present political and social climate highlight divisions, inequalities, and deep rifts in the foundation of our society.<sup>34</sup> Laws and policies that either support or repair these rifts are often fodder for scholarly debate. The contemporary moment with potential dangers of oligarchy and authoritarianism highlights the need for critical and analytical scholarship. In order to accomplish this and fulfill the legal scholar’s obligation under the social contract necessarily requires exhaustive research and analysis. There must therefore be a commitment to critical legal analysis which includes thorough review and engagement with the work of other scholars. This does

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30. David L. Schwartz & Lee Petherbridge, *The Use of Legal Scholarship by the Federal Courts of Appeals: An Empirical Study*, 96 CORNELL L. REV. 1345, 1352 (2011) (citing results from an empirical study that evidence an increase in the use of legal scholarship citations in federal court of appeals decisions).

31. MODEL RULES OF PROF'L CONDUCT r. 8.4 (AM. BAR ASS'N 2007) (“Misconduct”).

32. *Id.* at r. 8.4(c) (“It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . .”).

33. See West, *supra* note 3, at 10.

34. See Boothe-Perry, *supra* note 14, at 55.

not simply envision an exercise in intellectual oeuvre. Rather, it is an integral component of the legal scholar's responsibility under the social contract.

Exhaustive and thorough research must necessarily include both the individual scholar's perspective of the subject matter and a collective discourse on the topic. To flesh out the sincerity of an issue requires critical review of the body of knowledge and information on that issue. The lack of bluntly-criticized scholarship indicates a hesitancy to cause potential denigration or disparagement of other scholars' work. However, that hesitancy undermines the scholarly enterprise by failing to adhere to the tenets of truth, sincerity, and candor. Conversely, legal scholarship can strengthen the scholarly enterprise by fairly presenting both sides of an argument to highlight the pros and cons of perspectives thereby strengthening the truth of the writings.

Authors rely on their expertise and experience to fuel the creative process of legal scholarship. The ideas that result from this process create laws and legal norms. It has been argued with some sincerity that "there are no original ideas."<sup>35</sup> "On the other hand, it may be argued that all ideas are original to a given individual, regardless of how many times the idea has been proposed by others."<sup>36</sup> Either way, to have true scholarly value, the ideas (original or not) should contribute to the "building blocks" that construct the law.<sup>37</sup> The social contract demands legal scholars' contribution to these building blocks, and an expectancy that there will be some analysis, evaluation, and assessment of same. A necessary component of authorship is inevitable exposure to criticism or analysis of one's work. The legal profession prides itself on breeding civility and professionalism. If civility is the norm, any criticism of other scholarship will not be perceived as an attack or negative censure. In fact, judgment on the merits and faults of scholarship encourage engagement with other scholars. Law professors often instruct students who are writing scholarly articles to figure out how they can "join" and "contribute" to the scholarly conversation on the topic they are researching. The intellectual discourse is just that: a form of conversation. To be the only person talking in a room full of intellectual resources would minimize the scholarly voice into a narcissistic monologue that fails to provide any meaningful contribution. One person speaking is not a conversation. It is not an exchange. Therefore, in order to meaningfully engage with the "conversation" topic of any legal scholarship, "the scholarship of

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35. Michael L. Closen & Robert M. Jarvis, *The National Conference of Law Reviews Model Code of Ethics: Final Text and Comments*, 75 MARQ. L. REV. 509, 526 (1992).

36. *Id.*

37. *Id.* at 525-26 (noting that the law is a "set of building blocks that is constantly being used to fashion new ideas").

others is indispensable to one's own."<sup>38</sup> It is the participation in this intellectual exchange that allows legal scholars to test and improve knowledge in a given field "to the ultimate benefit of their students, the profession, and society"<sup>39</sup> in adherence with the social contract. Where a community of scholars engage in "an endless process of discovery, reflection, and dialogue concerning ideas, facts, and values carried on in an atmosphere of mutual support and understanding," the "best and most important scholarship emerges."<sup>40</sup>

In addition to reflection and dialogue with other scholars, impactful legal scholarship gives homage to relevant historical foundations that provide greater understanding for the reader, or a basis for either descriptive or novel ideas. As Professor Lefkowitz noted:

Life has come to mean so much to the scholar that he cannot treat it so cavalierly. He has reverence for the past, for he knows all that it has given to the present. He does not think that the world began but yesterday, that the contribution of art and science date but from the day before yesterday. He knows that each age gave marvelous contributions . . . . He is reverent of the past, of the wonderful truths that it has uncovered. But knowing all this, he is yet confident of the future; that much yet remains, that the miracles of the universe are still waiting for revelation, that a high road leads from today to tomorrow and that it always goes upward.<sup>41</sup>

These comments underscore the importance of historical perspectives or the understanding of historical foundations. Some scholars have disagreed with the usefulness on the premise that legal scholarship's normative nature does not require a review of history because the relationship between present and past neither "generate[s] or even influence[s] conventional legal scholarship."<sup>42</sup> Although history might not be critically instructive or necessary in all forms of legal scholarship, where scholarship is seeking to institute change in our laws or legal systems, reviewing relevant occurrences of the past that led to changes is instructive and inescapably a necessity. Critical analysis through exploration of similarities and differences in historical management of laws, arguments,

38. AALS STATEMENT, *supra* note 10, § II.

39. *Id.*

40. Cramton, *supra* note 23, at 2–3 (citing excerpts from a talk the author gave, noting that "[t]his talk to a Cornell Law School alumni gathering drew freely on an excellent paper by Michael J. Graetz & Charles H. Whitebread II, *Monrad Paulsen and the Idea of a University Law School*, 67 VA. L. REV. 445 (1981)," *id.* at 2 n.5).

41. Lefkowitz, *supra* note 1, at 503–04.

42. Stuart Banner, *Legal History and Legal Scholarship*, 76 WASH. U. L. Q. 37, 40 (1998).

motives, and outcomes is essential. Thoroughness becomes particularly crucial when producing scholarship that can be useful in the law and other disciplines.<sup>43</sup>

## V. CONCLUSION/SUGGESTIONS

Legal scholarship is a complex process of linguistic exercise. It is “mental training” that requires the ability and “the willingness to think, to think things through.”<sup>44</sup> “Outstanding scholarship typically involves high risk work that is based on substantial research, long-term training, a wealth of previous experience, and the use of unconventional methods.”<sup>45</sup> The legal profession and society in general “needs the open mind and the constant care and attention of the pedagogical expert.”<sup>46</sup> The pedagogical experts (i.e., legal scholars) should therefore take responsibility professionally and personally for their work. It is therefore important that scholars adhere to some ethical norms to ensure compliance with the social contract and promote values that are essential to the legal profession, such as trust, accountability, mutual respect, and fairness. Without these values, ethical lapses in legal scholarship can harm the author,<sup>47</sup> the credibility of academic institutions<sup>48</sup> and the legal profession, and violate the social contract. To preserve the relationship between the profession and the public, the adherence to the social contract is crucial.

In order to uphold their obligations under the social contract, legal scholars should endeavor to create scholarship that has independent value yet is still connected to a larger conceptual body of work with appropriate

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43. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1221–22 (1981) (noting that legal scholars need substantial amounts of time to develop an understanding of social theory that might usefully be employed in extra-doctrinal legal scholarship).

44. Lefkowitz, *supra* note 1, at 503.

45. Philip C. Kissam, *The Evaluation Of Legal Scholarship*, 63 WASH. L. REV. 221, 229 (1988).

46. Lefkowitz, *supra* note 1, at 505. “[A]bove all . . . the scholar is . . . the influence of urbanity in life and in the community. He must breathe the spirit of toleration, of the open mind, into the city of his residence; he must suggest breadth of view among his people.” *Id.* at 506.

47. Ethical lapses in published writings can negatively impact an author’s reputation. In addition, discovery of such lapses can directly affect academic career growth if included in deliberations regarding issues of promotion or tenure of the author. Academic career growth is a very complex process. The breadth and width of the reach of legal scholarship is oftentimes immeasurable. Exposure of scholarship riddled with ethical concerns will have far-reaching and long-lasting harmful effects for the author.

48. *See* Boothe-Perry, *supra* note 14, at 80 (“[C]onduct and behavior within the institution reflects not only on [law professors] as individuals, but more importantly on the status and perception of the institution itself”).

acknowledgement of cited material.<sup>49</sup> Fragments that contribute to a greater collective body will provide insight and encourage dialogue that enriches the legal community and society at large. Valuable scholarship will develop and present arguments or thoughts with an aim to improve the legal profession. This can only be accomplished coupling a foundation of truth with exhaustive research and analysis. Whether that is done through constructive criticism or by provoking thought, the goal should always be to improve the legal profession and satisfy responsibilities under the social contract.

As the AALS Statement of Good Practices states:

The fact that a law professor's income does not depend on serving the interests of private clients permits a law professor to take positions on issues about which practicing lawyers may be more inhibited. With that freedom from economic pressure goes an enhanced obligation to pursue individual and social justice.<sup>50</sup>

Legal scholars must use the privilege of academic freedom to produce unbiased and comprehensive scholarship that influences and instructs the law and legal systems.

Bertolt Brecht once wrote that

[n]owadays, anyone who wishes to combat lies and ignorance and to write the truth must overcome at least five difficulties. He must have the *courage* to write the truth when truth is everywhere opposed; the *keenness* to recognize it, although it is everywhere concealed; the *skill* to manipulate it as a weapon; the *judgment* to select those in whose hands it will be effective; and the *cunning* to spread the truth among such persons.<sup>51</sup>

The social contract demands no less from legal scholars.

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49. Thoroughness is essential to avoid plagiarism issues. Professor Deborah Rhode has noted that unintentional plagiarism can result from "sloppy research." See Deborah L. Rhode, *The Professional Ethics of Professors*, 56 J. LEGAL EDUC. 70, 72 (2006).

50. AALS STATEMENT, *supra* note 10, § V.

51. BERTOLT BRECHT, WRITING THE TRUTH: FIVE DIFFICULTIES 1 (1935), <http://ada.evergreen.edu/~arunc/texts/theater/brecht/fiveDifficulties.pdf> [https://perma.cc/LYZ9-NBDT].

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