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Transcript - Conference on the Ethics of Legal Scholarship

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TRANSCRIPT—CONFERENCE ON THE
ETHICS OF LEGAL SCHOLARSHIP

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Conference on the Ethics of Legal Scholarship

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TRANSCRIPT—CONFERENCE ON THE ETHICS OF LEGAL SCHOLARSHIP

MARQUETTE UNIVERSITY LAW SCHOOL
SEPTEMBER 15–16, 2017

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DAY ONE

JOSEPH KEARNEY: Good morning. Stanley Fish told me just now that when he was dean, he loved opening remarks. This, of course, is why I support

conferences such as this. I would deny it, but it will so obviously be true by the end of the next few minutes that it would not be a plausible denial.

I do want to welcome all of you. My name is Joseph Kearney, and it's a great privilege for me as dean of Marquette University Law School to welcome you here. To be sure, I appreciate that I welcome you to your own conference. That won't stop me. I know that most, perhaps indeed all, of you have been engaged on this matter, together with my colleague, Chad Oldfather, and one another. I understand this to be a working conference, and you may be sure that my welcoming remarks will not keep you long from your work.

Certainly, this is the sort of gathering that we at Marquette University Law School really consider it a privilege to host, especially since we opened this building, Eckstein Hall, in 2010. But even for some time before that, we at Marquette Law School have been known as Milwaukee's public square. That's an appellation that the *Milwaukee Journal Sentinel*, which we think to be a disinterested entity, gave us. We have been about the business of welcoming the community, engaging it in substantive ways on important and difficult topics, long and often. The Marquette Law School Poll, which we launched in 2012 and of which you may have heard, and our new endowed Lubar Center for Public Policy Research and Civic Education are only recent examples of this outreach.

But it is no hyperbole to say that we are especially glad for this conference. That's not only because Chad gave me a pass on all aspects of organizing it or planning it. Admittedly, he did that in part because he knows that with me it's all or nothing, and so to have me organize part of it would have been probably not a happy collaboration for us. But really the reason that we're happy to host this conference is that the topic is truly important. And for us to be able to gather here, at Marquette University Law School, substantial scholars from around the country is really a privilege for us. We are somewhat by ourselves here at Marquette University Law School, with Milwaukee's being unusual among cities of its size in the sense that there is only one law school. I'm not lamenting that as a general matter, but, for gatherings such as this, it does mean that we have to persuade people to come and join us. It is true that Madison is only 75 miles away and Chicago is not much farther, but we are really quite glad to have you here today in our home, rolling up your sleeves.

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 of law professors' participating in amicus curiae briefs—or sometimes even representing parties—in litigation

outside of officially recognized law school contexts (such as clinics) and yet nonetheless associating 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, as one did before I became dean). 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.

So that is my welcome to you, which I mean to be warm and sincere, as well as my short specific rant, which is perhaps self-indulgent but germane. The last time Chad organized a conference and allowed me to introduce it (this was on law clerks), I unburdened myself at somewhat greater length of my views of the growing phenomenon of career law clerks. I liked my remarks so well that I republished them in the *Marquette Lawyer* magazine, our semiannual publication (I expect that the legal academics in the room are familiar with it), where they attracted some attention. I do want you to know that I included in the magazine not only my own remarks but various of the remarks of the conference participants on their own pet peeves—I mean, their own deeply supported views. Perhaps we will get to the point of doing the same again. I said that I considered myself professionally most fundamentally to be a lawyer, and I do, but as dean I also consider myself to be a magazine editor. So we’re always on the lookout for good content, and we do hope that in conjunction with the *Marquette Law Review*, which unlike us will include footnotes qualifying your various views, we can get to a point where, when your work is done, we can ensure that it receives adequate publicity in the legal academy.

But between now and then no doubt you have a lot of work to do, and, as I’ve already mentioned to Chad and Paul, I, with apologies, have to run. I have to meet with someone who at least on the phone a few minutes ago represented himself as a donor. Now, that’s an old trick, of course. It could be a disappointed applicant to the law school, but I’m reasonably confident in this case. Best wishes for a great conference.

CHAD OLDFATHER: A few words on how this conference came to be. It is, in an important sense, a child of social media because it has roots in mutually sympathetic commentary on Facebook that led at one point Paul to say, “You

know, I've had this idea for a conference and I think Carissa might be interested as well." And I was interested, and she was interested, and now here we are. So thanks, Facebook, for this.

Our format here is a little bit unusual. It's kind of a hybrid of a roundtable. Not round obviously, but tables. And freeform discussion rather than a series of presentations, which I think is enjoyable and hopefully productive, and we want it ideally to be productive in the sense that we make some progress towards the production of some sort of document that purports to set forth some shared conceptions of ethical principles that relate to legal scholarship.

We are recording this, and I have to give credit here to the good folks from the *Marquette Law Review* for coming up with this idea. That's what accounts for all of the microphones. The video camera is up there in the corner. Their suggestion was that we might transcribe some portion of the discussion here and potentially something could appear in the *Law Review* based on our conversations. So, speak in complete sentences that cohere into nicely formed paragraphs and we'll be good to go. And we will obviously give everybody the opportunity to edit anything that were to come out of it in that format.

A. Participant Introductions

NEIL HAMILTON: Well, just very briefly, I was teaching legal ethics for ten years and then in the early '90s got interested in academic ethics broadly across the university, not just in the law school. So, I spent 12 years with scholarly focus on academic ethics. But, you know, there is no field of academic ethics essentially across the university. I got very involved with AAUP, got very involved with American Association of Colleges and Universities, some other organizations.

So, my main goal was, could I encourage some sort of mandatory acculturation into the—what we did have in terms of academic duty—academic ethics. And it didn't go anywhere. I couldn't get any national organization to really buy in, so I finally threw in the towel about 2006. Done that. But I still am very much devoted to legal ethics and a lot into medical ethics now, so two of the main professions are very much engaged in this, but the academic professions so far in my view are not so very interested in this simply because you're in a new initiative trying to think through how to do better.

STANLEY FISH: Good morning. Unlike many of you or perhaps not, since I don't know your biographies, but I've had another life in another part of the academy in humanities departments and also as an administrator. And especially as an administrator I became interested in specifying the limits of scholarly activity and the relationship with scholarly activity, two part of saying, political activity. And that interest now extends or encompasses rather

both my history in the humanities and my tenure in law schools. And I continue to be alarmed, as many of you know, at the politicization of academic work, which takes somewhat different forms in the humanities and in the law schools, but is, in my view, equally pernicious.

LESLIE FRANCIS: I'm Leslie Francis and I'm a professor of law and a professor of philosophy at the University of Utah. Probably the way I got roped into this is I'm a former colleague of Carissa's but I work in ethics. My original field was philosophy of law. I've taught legal ethics over the years. I've taught all kinds of applied ethics over the years. I publish and review pretty regularly in medical journals because I do a lot of work in bioethics. I've also taught research ethics all over the place, mostly for scientists who are on various kinds of post-docs, so questions like "how you might make your Photoshop pictures that are in your articles of your autorads look better? What's fraud and what isn't?" are the kinds of things I've taught to scientists over the years.

I've also been involved in a lot of discussions in philosophy of academic ethics. I've been on the board of officers of the APA a couple of times, once as chair of the committee for the Defense of the Professional Rights of Philosophers where there were a lot of academic ethics questions that came to our committee, and another time, more recently as president of the Pacific Division of the APA and in that capacity, I was involved in drafting the main document on the APA's website now about good practices in philosophy.

So, I hope I'm going to bring a kind of comparative sense because I live in the law world, but I live in other worlds, too. And there's been a lot more discussion I think of academic ethics in some of those other worlds. I think Professor Fish is probably aware of that, too.

RYAN SCOVILLE: So I think I'm interested in this as a relatively junior scholar, someone who came into academia directly from practice, and thus as someone who initially approached scholarship as an advocate. I've since come to view advocacy work as problematic, but it took a while to get there. And so, I come to this conference as someone who has probably breached some of the principles that we're going to be talking about. All of which is to say that I sense from personal experience that there's a real need for something like this, perhaps particularly for junior academics who are coming directly from law practice and have not already internalized what it means to approach a topic in a scholarly manner rather than as someone who is trying to win an argument or prevail for a client.

PAUL HORWITZ: Well, good morning. I'm Paul Horwitz and I'm very happy to be here from the University of Alabama. I will be slightly too long as usual. I've always been, and increasingly so, interested in the history and sociology more or less of the legal academy, the kinds of culture we have, the ways that we live it. It seems to me that law professors have never been fully

acculturated into the academy in the way that others in the academy are. They don't have the same process of graduate study leading to developing a canon and a set of norms. This is, I think, changing the growth of fellowships and the fact that so much hiring is done from those fellowships. It's kind of serving the proxy graduate study period. But I think it's not necessarily as fully thought out as I would like it to be. Although I think more of those people are developing a sense of a canon of legal academic literature, my outside perspective, and I think Robin was very informative about how this can differ from school to school, is so much of that practice is about getting a job and the strategies it takes to get a job and not about what the norms should be in the first place, that they're not always being properly acculturated. So, I worry about that.

Like many of us, I have long been interested in practices in legal scholarship, generally from a critical perspective but as my paper suggests, not without some ambivalence or inconsistency or what have you. And I often post about these issues on PrawfsBlawg and I also have often found that the private conversations that law professors have about the ethics of legal scholarship are more revealing and more cynical than their public statements, which obviously I find unfortunate.

A last thing, which is self-serving, but connected, is, in theory, I'm working on a book that's under contract whose sub-title is "Social Class and the American Legal Academy." Chad and I have often talked about this, and his thesis, is that law professors' social class in kind of a I guess more of a *voir dire* than a socio-economic sense but their position and what people have called the professional managerial class affects what they write in ways that are not always evident, affects their agenda and the issues that they think of as the most salient.

Whether or not those are the issues that are most in need of legal reform, I say this because it seems like a relevant background topic in thinking about how law professors write and what they write, how they frame it, but also because the book is long enough past deadline that it's not quite approaching its bar mitzvah but it's kind of past the toddler stage, I mean, of lateness, not of existence.

So, when I meet a new room of people I'm happy to say—especially people who have kind of relevant expertise and interest, happy to learn from you or chat about it.

OLDFATHER: So, I'll piggyback off some of what has been said and end up being kind of autobiographical. I don't have specific expertise in the sense that I have previously written directly about any of these topics. I have certainly, as I think we all have, noticed certain things and had conversations about those things, including some of the phenomena that other people have already

mentioned. Like Ryan, I came to legal academia directly from practice and, indeed, from an extraordinarily long time in practice by the standards of these things, which is, it was basically eight years in practice. And in that sense, I'm fortunate to be here at all.

I'm also piggybacking off of the social class aspect of it. I'm a first-generation college student, lawyer, the whole works who grew up in a tiny town in southern Minnesota not knowing any professionals at all. And it is both a feature and a bug of my personality that, as a result, I have always tended to be somebody who is inclined to try to figure things out for myself rather than ask for help, which has meant that as a scholar, I've tended to pursue things in whatever direction my interests took me rather than necessarily trying to conform to, some mentor's program or something along those lines. Certainly, I think it's something that comes out in the piece that I wrote.

With that said, I will not claim at all to have been immune from many of the concerns that we're going to be addressing. I am in my second teaching job, and getting here involved a certain amount of strategic behavior on my part. When I was submitting those first articles I said to myself, I'm not going to place these except in a journal that is going to get the attention of appointments committees elsewhere because I have this personal interest in attempting to relocate. And I was able to do that and I'm quite sure it had an impact on my ability to move.

I don't feel great about that, but it is something that I did, and that in order to achieve that goal I had to do it and it worked out. But I think it also speaks to something that is off with the system. I think it's also been true for me that the articles I've written since have been more sophisticated, better, and have also not placed as well. And I think there is something going on there that's worth talking about as well that may point to an aspect of the production of our scholarship that could perhaps be fixed.

So, I'll stop there. I'll ramble more later, but I'll let Carissa talk for a while.

CARISSA HESSICK: Thanks. So, I was really struck by what Ryan said about how people who are junior should think about the ethics of legal scholarship because I have to say when I was junior I thought about them not at all, right? I thought about scholarship as a way to get tenure and promotion and a way to try to get other people to think well of me in the academy. And, you know, maybe because I'm a criminal law person I think to myself, "well, maybe that's what this is about." This is about trying to get the profession to explain what we think people need to do in order to be thought highly of. It isn't just where they place their articles but it's other things as well.

I will say, I didn't stop to think about the ethics of legal scholarship until just a couple of years ago when I was at a workshop for non-senior scholars

where people would bring very early projects and get feedback on the project. And I was struck by someone who I like quite a lot and I think of as very intelligent who had a project and everyone in the room was pushing this person telling him that the obvious path to take this article was down this certain line of thought. And his response was, “I can’t do that because there are obvious doctrinal problems with that.” And we’re like, “well, who cares? This is a law review article.” And he responded, “I’m working with a group that’s litigating this and we’re going to be filing a brief in whatever circuit and I don’t want something to be out there that makes clear how weak that argument is under existing law.” And I was appalled, to put it mildly.

And it had a really, really big impact on me such that a couple of months later when I went to WALS, the section on scholarship had a panel. Dick Fallon, among other people, was speaking on that panel and I was really caught up in it. And I happened to have been sitting next to Paul and I harassed him quite a bit about all of this and I think he, through that, got an invitation to help out with this conference in part to just leave him alone.

But since then I’ve been struck, especially after reading Fallon’s article¹ on scholars’ briefs, about what it is that we’re trying to do as law professors because I did a short stint as associate dean and was constantly telling my colleagues, “It’s wonderful that you’re working on this project. Is there some way that we can get the word out there about what you’re doing?” And we spent a lot of time talking about how we could get publicity for them, which meant publicity for the school.

But in more recent years—or I should say more recent months—especially since the most recent election I’ve been concerned by what I see law professors doing in the public sphere when talking about legal issues and how they bear on political issues of the day. I don’t know that I think that that is scholarship. You know, certainly when I talk to my colleagues about what we get to put down on our end-of-year form for what we’ve accomplished and what you would get to put in the scholarship section, I don’t think that you should put op-eds. I don’t think that you should put blog posts. I know different people can disagree about these sorts of things, but nonetheless, I do feel as though maybe we need to have a conversation as a profession about what’s expected of us when we make those very public statements because that’s, after all, sort of the face that we present to the outside world.

So anyways, I’m very interested to speak with you about all of this stuff as a relative newcomer to thinking about these things. I actually think that these questions are very difficult and, in some ways, they bump up against what we

1. Richard H. Fallon, Jr., *Scholar’s Briefs and the Vocation of a Law Professor*, 4 J. LEGAL ANALYSIS 223 (2012).

have been told are in our careers about what it is that we're doing and what it is that we're supposed to do and the impact that we're supposed to have.

ROBIN WEST: Thank you so much for inviting me. I'm Robin West. I've been a Georgetown faculty member for 26 years and I, too, am an ex-associate research dean. I've been involved in appointments process, and therefore, in the evaluation of legal scholarship for 35 years. I'm presently chair of the board of editors at the Journal of Legal Education. I also, as we discussed last night, do run a fellowship program at Georgetown for folks who want to join the legal academy where we talk about these issues constantly.

I did write a book about law teaching and legal scholarship that addresses many of these issues. It came out a few years ago. I focus in the book on the history of the legal academy's relationship to both the university and to the Bar. It helps to know where we came from to understand why we are where we are today.

What prompts my interest in this topic is a set of concerns that became clear to me as I was writing that book 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 legal scholarship, the nature of legal scholarship, I started asking people unscientifically, randomly, "what do you think of normative legal scholarship?" That's the phrase that's 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 ten-minute period, colleagues telling me, "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 its op-ed writing in the guise of the Law Review, but anything that takes the form of the law is X, it ought to be Y isn't legal scholarship because it is not scholarship." This was stated most definitively and most emphatically by colleagues who are empiricists of various stripes, social scientists, and economists.

At the same time, 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, the depth of that difference and how, to restate it, how deeply that difference cuts, I think, makes it very difficult to think about the ethics of legal scholarship as a defined understood entity. It's not like there's this thing there and we have to decide how to do it ethically and do it well. We have very fundamental differences about the nature of the thing. And I mean, one could go on. There are other deep divisions about what legal scholarship is, what it should be, et cetera.

I think some of these issues are pretty easy. It seems to me people should not be listing these things under scholarship. If you want to list them under service, that raises a host of other problems. I do think there's a role of legal academics as public intellectuals where there's a commitment to the rule of law at stake. That's the sort of lens that I use to think that through.

So, I concur with what Paul said in his statement that preliminarily to a discussion about ethics, it seems to me there has to be some sort of statement of at least the difficulty of specifying what legal scholarship is. In my view, I have this very pollyannaish, pluralistic view of all of this and think that there's room for all sorts of forms of legal scholarship. And I don't care what you call it actually, but there's much value to be had in normative legal writing and there's much value to be had in non-normative legal writing, but I do think that the efforts that follow from these different types of legal writing including critical and including anti-disciplinary are sometimes quite different.

ELI WALD: Good morning, everybody. I'm Eli Wald. For the past 15 years I've been teaching and researching about lawyers and lawyers' ethics. In particular, I've been interested in what it is that lawyers do, rules of professional conduct, professional identity, and professionalism. One way to introduce my interest in this conference is this: because I'm interested in what lawyers do I'm interested in what academic lawyers, that is, law professors, do. It continues to be true that most law professors are lawyers. Perhaps no longer practicing lawyers, but at least the vast majority of law professors hold a J.D. degree and passed a bar exam. And yet, we know relatively little about what academic lawyers do. It's as if by virtue of having gone to law school and having attended a few lectures over three years and having read a few excerpted law review articles, one is supposed to know when one becomes a law professor what to do, how to teach, how to write, what is scholarship, what is teaching, and what is service. There's a significant gap there, so the opportunity to participate in a conference that in some way—thinking about legal scholarship—might narrow that gap was interesting to me.

One other introductory remark. Lawyers' rules of "ethics" are not rules of ethics at all. Rather, the rules of professional conduct are rules of law, as promulgated by states' supreme courts. As rules of law, the "ethics" rules reflect political and statutory compromises that are not quite about the ethics of

the matter. Similarly, the required “legal ethics” course at law schools is primarily not about ethics but about law—the rules of professional conduct. Some leading commentators argue that often the ethics gets lost in rules of “ethics” and in “legal ethics.”² If we are to come up with some set of rules for ethical legal scholarship, I hope that we remember the ethics and that it does get lost in some legal formulation in our proposed rules.

AMANDA SELIGMAN: Good morning. My name is Amanda Seligman. Chad said at the outset that we all know each other but I think none of you know me, except for maybe Chad. So, I’m just going to take a minute or two and talk about how I happen to be here which is very much by happenstance. I’m a historian. In my real life I’m the chair of the history department across town at the University of Wisconsin-Milwaukee and I come to the law school once a week as a Visiting Fellow in Law and Public Policy at the invitation of the dean.

A colleague did call me yesterday, a “semi-law prof,” which I think was a compliment, but I really don’t know much about law or legal ethics and this is, for me, an opportunity to do some learning in thinking about what I do as a historian and perhaps to have a little bit of effect on what you do, but I really am a free rider in the sense that I’m not writing for the symposium. I am very interested in what you all have to say.

Just to tell you very briefly about my scholarship, which is very different from what you do, I work on the history of ordinary people and how they intersect with public policy—mostly in Chicago. Another goal that I have as an urban historian is to help people who read my stuff a little bit more on the public history side, see when they walk around an urban environment what the history of that place is and to be aware that what’s on the site now isn’t what was there before.

I’ve learned a lot over the years by working more closely with social scientists. I teach and have previously directed the Urban Studies Programs at UWM. Especially in working with sociologists, I’ve learned a lot about talking about methods and I’m impressed with how social scientists make discussion of methods an explicit part of what they do—which is not something that historians by and large do. Historians love narrative. We hide our methods. Even in the footnotes our methods are hidden, so that as a reader you do not know what choices we made and what research we did and did not do. And I was so impressed with the notion of research methods I actually put a

2. William H. Simon, *The Trouble with Legal Ethics*, 41 J. LEGAL EDUC. 65, 66 (1991) (discussing “legal ethics without the ethics”).

methodological appendix in my last book as a guide to future researchers on that topic.³

One of the favorite classes that I teach—and this brings me a little closer here—is the undergraduate history methods class. When I was sitting and chatting with Chad about this conference last month, on a whim said, “Why don’t you come along?” I started thinking about how I put ethics into the methods class. I actually came up with a list of about a half a dozen points that I bring into the class, at least implicitly including ethics. At the start of the class I share with the students a historian’s code and at the end of the class the last assignment is to write a historian’s code. But I really don’t think that historians think very much about ethics and it might be good for us to do so.

I also didn’t know until I was sitting in Chad’s office last month that historians have a set of professional standards. I saw them on his desk and read them last night for the first time. They looked pretty good, but I also found a hole in them right away, so that I immediately wrote to the executive director of the American Historical Association and said, “Here’s something you need to put in.” He wrote back and said, “Oh, yes?” So, this conference has already had an effect on historians and I’m looking forward to finding out how it’s going to affect the teaching I do going forward, if not the scholarship that I conduct as well.

NICOLA BOOTHE-PERRY: Good morning, everyone. I’m Nicky. I have a similar background to Chad and Ryan, in that I practiced for ten years before I went into academia and I did not purposefully pursue a career in academia. I kind of fell into it and it was probably the best fall I’ve ever had in my life and so I’ve been there now for 14 years. But when I got into academia I approached it as I had in practice. I was a litigator for ten years. I was very aware of the rules of professional responsibility and so I approached my academia the same way. And once I got on the tenure track and I had to write scholarship, I approached my scholarship the same way and I started realizing that not everybody has the same approach to even think about why I write, what I write, how I write, for whom I write, and what impact it’s not just having on myself, but on the legal community.

And so, my scholarship for many years was on professionalism and ethics, a lot about professional identity, very heavily influenced by Professor Hamilton’s work, and in writing about professional identity and the importance of law students having professional identity so that they can be these amazing lawyers. The last article I wrote started focusing on the law professors

3. AMANDA I. SELIGMAN, *CHICAGO’S BLOCK CLUBS: HOW NEIGHBORS SHAPE THE CITY* (2016).

themselves. If we are asking our law students to have these certain standards and ethics and professional identity, what about our own professional identity?

So, the last article I wrote discussed the obligations of law professors to the law profession, to academia, to our students, with this new normal that we have. And so, it has the obligations of law professors and as I was writing the article, I found it to be really aspirational. Even though I'm using the word "obligation," it was very aspirational. And so, when maybe Paul or Chad read the article and contacted me about the conference, I hadn't really thought specifically about specific duties and a restatement of duties of law professors, but I had certainly thought about the culture that we have as law professors and what was lacking in that, not just for our students but for ourselves. And so, I was really excited when I got the invitation to participate in the conference to actually come out of this with some actual duties and obligations, even though they may be good practices but definitely a restatement. So, I'm really excited to be here and to participate in this, so thank you again for inviting me.

B. Session One: What Counts as Legal Scholarship and What is the Obligation of Neutrality?

HESSICK: So, our first discussion session has two questions: "What should count as legal scholarship?" and "What is the obligation of neutrality?" What I thought it might make sense to do is spend a little bit of time talking about different types of scholarship, both in terms of scholarship that isn't a book or an article, but also, when you're talking about books and articles, the different types of books and articles that people write because I think that as we'll talk about a little bit later, it might be helpful to be precise about those different types because we might think that there are different norms that apply to different types of scholarship. And then I want us to take up the very easy question of "What makes for good scholarship?" because a number of people mentioned this at least in passing in the writing that they did for this conference. And then I wanted to tackle some more concrete topics, how topic selection plays into these issues, then get to the idea of different norms for different scholarship and then sort of more specifically, "What's our obligation or norm with respect to neutrality?"

HORWITZ: I want to say I know you have raised an invaluable email. I think it was your email last, right? The question, "What is the role of the publishing process itself?" And I would say, that's not necessarily off the table I think. At least it's a possibility that that seemed important to say it early rather than late so that it's not forgotten.

FRANCIS: Yeah. Thank you for pointing that out because one of the things that I just think is really hard is how we think about all of this in the context in which we are. And 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 a lot of people think about lawyers' ethics and I just want to put out at 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 ought to be applied to law professor publication ethics. I've been thinking about confidentiality, for example; lawyers have presumptive duties of confidentiality to their clients but law professors in publishing may have presumptive duties to reveal their sources (with possible exceptions, as well as of course obligations to protect the confidentiality of human subjects in research). I've been thinking about—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 were maintaining, in a way the problem that Carissa raised and how that would even play into scholarly stuff. You don't have an obligation to give the court your methodology to go to Amanda's point.

HESSICK: No. I think that those are really good points and I think it's something that we should keep in mind and I've actually flagged this idea in light of the publication norms that we have. Does that actually mean different things for different types of scholarship as I think Leslie suggested in the submission that she made for this conference?

I do hope that at various points we might be able to come to agreement about certain things that we think are uncontroversial and then, of course, I think that there will be things that will be more controversial. But I really liked Eli's point that doing nothing isn't enough. That scholarship isn't simply something that we do because it might inform us to read more or we might feel good by sort of putting some things down on the page, but that we literally have an obligation to engage in scholarship and for that to be part of our habit as scholars, even if we can't quantify what that obligation is.

I thought Nicky actually made a point, too, though, that's—although I agree with it, I've sometimes seen push-back from some colleagues and that's the idea that we have an obligation to increase the reach and impact of our legal scholarship. That it's not enough for us to simply write legal scholarship, but that as the authors of legal scholarship we should also take affirmative steps to ensure that what we've written, I suppose, reaches the audiences that ought to have it and can then actually change things.

I suppose who that audience is and what it might change might be controversial but I was wondering if people agree with Nicky that we have an obligation as the authors of legal scholarship to also help ensure that it has an impact.

WEST: I disagree. I don't know. I don't quite understand the impulse behind it but I think you have an impulse. I think you do have an obligation to get your views out there, to get the scholarship out there. I don't think that there's an obligation to maximize its impact and I think that the worry is that that will quickly shade into a kind of, at least unpleasant, self-promotion that is antithetical to the academic spirit. I think that what trumps it, really, is an obligation of humility and of openness to contest and contestation. And when you're advocating on your own behalf for the impact of your work, it can cut the other way.

I know that tenure committees increasingly look at this, look at not only citations from other scholars, but citations by courts. I think that's a pernicious practice and does not necessarily correlate with quality. We should be concerned, I think, less with impact and more with quality and I think those two things can cut in opposing directions.

FRANCIS: I think it also risks confusing scholarship with advocacy. It's like the difference between pure science and applied science.

BOOTHE-PERRY: And just to comment, I don't think that we actually disagree, Robin. I think we're saying the same thing. When I'm saying "impact" it's not necessarily a narrow impact. The idea is that you don't just write as a legal scholar just to write. If you just want to write, then go journal. But your writing should have some purpose and some meaning and not just, "oh, I write and so I publish and it's in a law review, but nobody reads it." It doesn't change anything, or it doesn't have any kind of impact, not necessarily a large impact that would be influenced by political or other ideas.

WEST: Yeah, I just worry that much of the scholarship that we do highly value and should highly value is not aimed at changing anything. It's aimed at understanding.

BOOTHE-PERRY: But there's an impact, so—

WEST: Okay. Then "impact" has become quite broad. I do have a colleague who says that he writes just for self-enlightenment, to sort of work it out for himself and that strikes me as a little odd. It is a bit like journal writing, but I would just hesitate. I mean, I don't want to sign on to what I view as an increasing and pernicious practice of the citation counts and particularly the citation counts by courts or even by legislative committees. That, I think, is a worrisome trend.

FISH: 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.”⁴ 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 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, 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. And I’ve been struck by this many times, but most especially when I go to conferences and, I must now confess something which many of you will know, I am a card-carrying originalist, that curious group whose mothership is the University of San Diego where we originalists congregate once or twice a year.

Now, it just so happens that many of those who espouse this faith are politically conservative although I myself am not. Many are. But I’ve been to many of the conferences, originalist conferences, and never has there been a second in which the spirit of advocacy has supplanted the spirit of trying to get it right. And I’ve also often come out of those conferences, as I’m sure I’ll

4. WILLIAM SHAKESPEARE, *HAMLET* act 3, sc. 2.

come out of this one feeling, “yes, that’s what the scholarly life is about and that’s the excitement of it, that’s the pleasure of it.”

Now, then that leaves the key—a key question, not the key question—always be suspicious of anyone who says “the key question”—that leaves a key question, “What is the value of it?” And to that question I don’t myself have an answer, although I must confess that I don’t very much care.

WEST: It’s just an add-on to what Stanley said. I do remember Paul Brest telling me when I was a fellow out at Stanford, he was dean. He said, “Look, your published articles are like your grown children. You just can’t control them and so they’re on their own. They have to defend themselves. Let it be.”

WALD: Three points about the impact of scholarship. First, scholars have a duty to write and publish, not to actively promote the impact of their scholarship. When we talk about impact it would be odd if we were to find or impose a duty to promote one’s scholarship or advertise one’s work, although there is nothing wrong with some forms of advertisement, for example, it used to be common to mail a reprint of one’s recently published article to colleagues in the field. Hopefully, impact is achieved through the quality of the work, without active promotion. But, while there is no duty to promote scholarship, one can certainly promote work unethically by manipulating citation counts, increasingly a common way of measuring impact.

Second, impact matters. Certain types of citation counts, by courts and by peers, are relevant and important because they tend to reflect the level of engagement that one’s scholarship generates.

Finally, 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 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.

HAMILTON: The conversation—because the first topic you talked about was just what are we going to include definitionally, which I think is fundamental. We’re on impact. Just as somebody who has been associate dean and an interim dean, one of the puzzles goes to Leslie’s comment. Without a peer review process, you’re trying to figure out, “Does this thing make a contribution to some scholarly conversation somewhere?” And you know, I just have never believed in placement given that the apprentices are making the decision as to whether that’s a quality screen of some sort and also the fact we don’t have a peer review. We’re the only discipline in the world, I believe,

without a peer review construct in the scholarship process that would itself have some acculturation into what it is that's quality.

But anyway, so then you get stuck as a dean into a citation count and downloads or some surrogate that indicates that someone is involved in a scholarly conversation, which I think is a fallback position.

HESSICK: Amanda.

SELIGMAN: I've translated that sort of self-defensive idea into a way of thinking about the role of the academy as a cultivator of creativity in a broad sense, so that one of the social functions of at least the humanities academy in which I exist is to allow all sorts of interesting ideas, some of which are productive and some of which are not productive, to bubble around and see what happens to them.

And I think about the long conversation in which a work of scholarship might exist even if it has no particular currency at the moment. This is an answer to your question. 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.

HESSICK: I want to give Robin a chance to respond but before she does I want to jump in. And I understand that Leslie and Chad also want to talk and I want to make sure we can do other things. Who knew moderator would be so difficult?

I wanted to touch on the idea of humility as scholars and I'm entirely sympathetic to Robin's concern that impact can devolve into these crude and, I would say, misleading, if not imperfect, measures of impact with citation counts.

But I'd add that I'm not sure that humility is a virtue for a scholar, especially someone who's trying to get at truth, because it's a collaborative process. And if we're trying to get at truth and we're trying to build off the work of others and have them build off our work as well, I think that the norm of humility that was engrained in me as a child, as a young adult, can get in the way of that, that we ought to try to reach out to people who are doing the things that we're doing or doing the things we think are relevant to what we're doing and try to engage with them and to try to get them to read our things. And we shouldn't see that as a lack of humility, but rather that humility is subservient to these other goals of the pursuit of knowledge.

WEST: Excessive humility is no virtue. You have an obligation to engage. I would put it that way. I was objecting to the idea that you have an actual

obligation to self-promote, to maximize your impact and so on. I understand the spirit. I think that it can slide into something that really can be pernicious.

On impact and how you measure it as a dean and so on, I would distinguish between measuring impact in terms of scholarly citations and measuring impact in terms of judicial citations. And so, it depends on what your project is, it depends on what your point is, but I think that measuring impact in terms of scholarly citations, if you don't have any other way to go about it, it can certainly play a legitimate role.

What's dangerous is this slide toward having it be the thing, that "this is what we're doing; we're trying to maximize our citation count." We talked about the value of work before there were little computer mechanisms for doing these citation counts at the drop of a hat. What I see as most alarming is the absence of evaluators, whether it's the faculty as a whole, the tenure committee, or the deans. Reading the work and then reading thoughtful evaluations by peers and coming to a judgment about the quality of the work rather than a judgment about the numbers.

I'm just raising that as something to worry about. I don't mean to say we need to codify some rule that you're not allowed to look at impact.

FRANCIS: So I'm kind of getting back to the question of what's scholarship and I really liked what Amanda said a minute ago. One of the problems we have is we sort of sit at an intersection between humanities and the social sciences. And law is, at least some aspects of law, and for purposes of the National Endowment for the Humanities, is considered a humanity. We sit at the intersection between that and social science. Some of what we do is thought of as social science scholarship. That's more the empirical. Maybe even some science as people are bringing neuro-science, for example, into law and looking at those sorts of things.

Something that might be a resource for us to think about is the way those disciplines broadly make the distinction between scholarship and advocacy. So, if you look at what you can submit to NEH as law, you can submit a certain kind of normative legal scholarship but you can't submit what you'd be writing for an amicus brief. For example, there's been really interesting controversy about the social sciences aspect of the National Science Foundation. But there's a place to look at how we might think about what's social science law and what's social advocacy. And the same kinds of questions have come up in science.

HESSICK: And I'm going to give this to Chad, but I actually think that's a good thing to try to focus on. I like Robin's definition of normative scholarship, "the law is X and it should be Y." But I think sometimes when we talk about advocacy scholarship we're—

WEST: That's different.

HESSICK: It's different. Right, there might even be sort of a Venn diagram there.

OLDFATHER: I wonder if a way to approach that distinction between normative scholarship that is scholarship and that which is not is that some of it is a product of a process that starts with a question and some of it is a product of a process that starts with an answer. The sort of thing that leads to an amicus brief starts with the answer and builds toward it.

The sort of thing that I think is appropriate, potentially, as normative scholarship starts with a question and works in good faith towards whatever answer the scholar ends up determining is the appropriate answer. So, it may be a question of orientation. I think it's at least a helpful distinction to think about.

Another thing that occurs to me as we're having this discussion is—and this is related—that this is in some ways parallel to the question of ideology in judging in the sense that you've got the political scientist's view that takes this very reductionist approach to the appearance of ideology, finds a correlation between some indication of ideology of a judge and the judge's decisions. Part of the response to that has been to point out that there are some senses in which law is inherently ideological and builds in space for ideology to work within limits, which is not the same as saying, I'm a Democrat, therefore I come out this way or I'm a Republican, therefore I come out that way. That is, there's a distinction between the proper influence of ideology and the improper influence of ideology. And a lot of what I struggle with in the scholarship I do relating to judicial processes is trying to figure out how to channel judicial behavior towards the proper and away from the improper.

And I think some of what we're struggling with here relates to those sorts of questions in that there's room for normativity, but it's not always proper. And maybe this "starting with a question versus starting with an answer" is an approach to it because I think the real risk here is when we are looking at impact and looking at other-directedness and building a name for ourselves, it's the risk that Leslie identified of falling into advocacy. There are no bright lines. It's a matter of degree, but we can all recognize that at some point I'm becoming too much of an advocate, whether it's for a cause, whether it's for myself and my own personal or professional interests.

Actually, I would love to meet your colleague who writes only to work things out for him or herself.

WEST: You probably have.

OLDFATHER: As what I wrote suggests I have a great deal of affinity for that sort of position. I don't think in extreme form it's right but, I find it very attractive.

HORWITZ: I guess I'll segue and say, provided that it is occurring within the domain of one's expertise and according to the kind of academic norms and practices of one's discipline writing because you just want to write, because you just want to figure out interesting things or a question occurs to you, that seems to be totally legitimate. More than legitimate. For me it's almost a default.

Often what interests you is going to be, especially in law, related to ongoing events. I mean, you have an impetus given by court decisions and so on. Here's a problem that seems to me totally valid.

So, I wanted to do this. I wanted to talk about again—and as I think a couple of people have gone back to the question—what is scholarship and part of that is, as a co-organizer, I'm kind of thinking about the work product, the thing we have in mind at the end. And I want to say this about that.

So, part of my answer here, or comment, is going to be kind of schematic because I'm thinking about what the product might look like. And the other thing I'll say is I'm a big advocate, within the structure of the conference, of the idea that whatever one comes up with as a consensus document or statement of ethics is not only not immune from the possibility of somebody writing a concurrence or a dissent or kind of a statement that's like, "This is a pretty good document but, in fact, it's not possible to have a code of ethics of legal scholarship." I actually think those kinds of contributions would be very interesting and valuable. In talking about what a code of ethics of legal scholarship would look like, I am, personally, not at all opposed to the idea that people can also then come at that document from the outside, critique it, attack it, add to it, et cetera.

So, it seems to me, determining what is scholarship or legal scholarship would be something like the practice of applying one's relevant scholarly expertise and, I guess, armature, the relevant skills and tools as a scholar in that discipline to explore issues relevant to, in our case, the law. Nothing more or less.

I don't think it's quite a tautological description. It does beg a number of—or leave open a number of questions, but that I think is the essence of it. If I'm thinking in terms of a document, and a kind of a restatement like document, that's where I'd start.

And then I imagine in the caveats or sub-questions, one of which would be, What is legal scholarship by clinicians? By clinical legal scholars? We handle these things differently in different places. Some places clinicians are tenured,

in others they have kind of a security of employment. But whatever the promotion process is, anybody who's been through it knows that there are debates both within the clinical community and then sometimes between the clinical and doctrinal community about what counts as scholarship by clinicians both in terms of what they write about and what they submit for purposes of evaluation. And I'm happy, as it were, to bracket that question, but I think it should be noted. One of the responses to what I wrote on Twitter the other day about some of these kind of political issues was, "Well, the responder's definition would count out what clinical scholars do." And that wasn't my intention and so I'm happy to kind of bracket that question while noting it so that people don't misunderstand from the get-go or have a hostile reaction from the get-go.

Some of the questions we've addressed seem to me to be super structural, so I'm very sympathetic to the idea that self-promotion can be distorting, can have its negative effect, but that seems to me to be a "figure out the definition of scholarship and then what one does with the scholarship might be subject to separate considerations or norms." Do you send it out to people, do you send it to the newspapers? And so on. But if the thing itself is done properly as a piece of legal scholarship, that's kind of your first desideratum.

And maybe a third question here that seems to be raised has to do with the motive for scholarship and that, given the definition of legal scholarship that I've provided, I haven't really talked about why you're exploring it, what your motives are for writing a piece. Could be for fame, advancement, could be to intervene in a legal issue for partisan or ideological reasons, why the law has nothing to say about email servers or why it does or whatever. And so, there's some question of whether scholarship should be disinterested and what it means for scholarship to be disinterested, whether it should be kind of academic.

I guess that to me is the real distinction. I mean, scholarships should have an academic motive. I don't know that you have to call that disinterested. It might be passionate. I think Stanley would say where the passion comes from is the academic question. For me, the question would be, "Is your passion, whatever the source, properly filtered through the brain, body, blood barrier, whether it's filtered through that academic barrier so that the output is correct, whatever the input is, whatever the motive?" There's some question there about why you're doing it.

HESSICK: I want to hear from Stanley because I know that he indicated he had something to say about the advocacy/normative line. And then I'm going to turn to Eli. But before I do that I know we've started touching quite a bit on what makes for good legal scholarship and I collected some of the statements that people had in their submissions. I thought there was quite a lot of overlap so I just wanted to sort of report on that.

FISH: I've adopted it as one of my missions here, one that I assume will fail, to wean Paul from his pluralism, so—

HORWITZ: You're not the only one, Stanley.

FISH: So I'm quite happy to produce a definition that would exclude much of what clinical scholars do. That's just a side comment. Another side comment on impact. Often impact will occur because your work is picked up in fields to which it was not originally directed and there's no way that you could predict or design that.

And then there are, of course, literary examples that talk about the contingency of impact. As many of you will know, Melville's *Moby Dick* was entirely unrecognized and unappreciated while he was alive and only came to be thought of as a prime candidate for the great American novel in the early part of the 20th Century. A woman named Louise Rosenblatt in 1938 wrote a book on the relationship between literature and the reader which had to wait until the early '70s, when reader-oriented criticism became something people were talking about. There are so many variables here.

The main issue I wanted to address was, yes, the question of normative scholarship and advocacy. And in reading Robin's piece, I realized something that I wanted to share with you and test with you. Whereas I had been dividing scholarship into legal scholarship and other forms of scholarships and genuine scholarship, the real thing in advocacy, I think that my taxonomy has to be increased and made more sophisticated, at least by the addition of one new category.

So, here's my new category entirely influenced by what Robin wrote in her piece. First, I would think of scholarship as an extension of the liberal arts enterprise and, therefore, permitted to accurate true accounts of whatever.

And second, scholarship is—which is specific in some way to the discipline, and this is where Robin's essay comes in because she points out some scholarship is committed to following out justice's imperative—to make the law more just, to make it better. And there is a parallel, interestingly enough, in the history of literary criticism, although most of us think of literary criticism as the act of producing interpretations of text. That's quite a new phenomenon, late 19th century to the present. Before that, literary criticism was philological, entirely descriptive. As you notice things, you pointed out allusions to rivers in Scotland or you talked about certain kinds of constructions and how they could also be seen in poetry of the 14th Century and stuff like that. But you never thought about putting this all together (a) into an interpretation of a poem and even (b) even more rare, into the evaluation of the poem.

So, in literary studies, interpretation and evaluation, which are now considered absolutely commonplace, are new. So, this second category, that is responding to the discipline's specific commitments and, therefore, being committed to following out justice's imperative.

And then, the third, which I think Robin and I both agree, which is just, frankly, partisan and then to pick up on what Chad said, which begins with the answer rather than the question, which has as its aim, the securing of victory for some political or ideological or some political or—

WEST: Opaque reason client.

FISH: Oh, yeah, sure. Ideological position. And that's a much more, for me at least, a more capacious definition than the one that I had before I began to read these essays. Thank you all very much for that, and Paul, try not to be so ecumenically generous.

HESSICK: A few quick words on what people said about good scholarship or what I gleaned from what people wrote that they were saying about good scholarship. So, a few people emphasized the importance of critical analysis and careful analysis. I saw that in both what Nicky and what Leslie wrote. I also saw it on some of the reading by Quinn. I thought the idea there that the conclusions of scholarship have to be based on reliable inference and evidence. This idea that analysis and the quality of analysis matters for whether scholarship is good or not.

I also saw, in a few of the different submissions, people talking about the importance of scholarly norms or community norms and saying what is good scholarship, that that's not a question that we answer in the vacuum, that we have to look at what our colleagues in our profession have set up. I saw this in what Eli wrote, that this isn't something that we all get to choose on our own. I saw this in what Chad wrote about talking that, it's impossible to determine if something is good scholarship without making reference to the norms. And I even saw it in Paul's comment that academics take a variety of approaches to scholarship, but not an endless variety, that these norms matter, and that the idea that what's good or not is, at the end of the day, sort of a communal decision.

I also was very interested to see both Nicky and Robin talking about the idea that scholarship is laborious, that there's a process and a labor that's not simple that has to be involved in it in order for it to be scholarship. That really resonated with me and made me feel better about myself.

And then I also saw the idea that maybe what makes good scholarship different from less good scholarship is the idea of novelty, of breaking new ground. I saw this both in what Nicky wrote but also in the Jarvis reading. That's not to say that it necessarily has to break new ground but that it advances

the ball, that it advances legal knowledge. I know that that can be controversial for us because people's over claims on novelty, so I will let Paul, I am going to assume, complain about the role.

HORWITZ: No, not much complaint. Philosophers have written about, you know, standard works by contra Aristotle for centuries. So, when you talk about novelty I would say, contribute usefully to the discussion as opposed to—I mean, everything doesn't have to be a point that's never been raised before. It might be a question of depth, application and so on.

FISH: A moment of self-promotion. In my last book, *Winning Arguments*, I explained how academic work is impelled by the obligation to originality. And that extends even to people who are busily and actively arguing against the possibility of there being anything like originality. They still want to get that original argument against originality out there.

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.

I fear, however, that when we talk about the expertise of law professors what others might mean really is some broad and ill-defined "engagement with the law." And if expertise was to be defined in such an open-ended manner, then we really haven't advanced the definition of what legal scholarship is at all by saying that it is the deployment of expertise to explore the law.

The framing by Robin and Stanley—on the one hand truth and justice (both scholarship) and on the other hand advocacy (not scholarship)—allows us to hold

onto something concrete and build on it, whereas the expertise of law professors is somewhat dubious to me. What we need to do next is explain in much greater detail what is unique and specific to legal scholarship. If it is to be justice, what exactly is the relationship between legal scholarship and justice?

FRANCIS: I would add to your list an explicit and defensible methodology picking up on what Amanda said. And also, the discussion in—I don't remember the article, but the one where a string cite without an explanation for how you picked the cases is bogus.

SCOVILLE: This picks up on Eli's comment. On the issue of expertise, it's a little bit unclear to me what expertise requires, and I think that's an issue because even in my own work I find myself sometimes using radically different methods. Sometimes I might want to pursue an empirical answer to a question, but other times I might want a theory-based or a historical answer. So, I think there may be a tendency for legal academics to adopt a pretty wide range of methods, if my own experience is indicative. Sometimes someone might be an originalist and sometimes they might do a statistical analysis. Is it okay to do that? If expertise is necessary the answer seems like it might be no, but the cost of that is you have limited range—there will be fewer possibilities for creativity and less freedom to follow whatever your interests might be.

WEST: Another distinction that I've heard made often and that is helpful to some people is distinguishing between scholarship that originates from inside law and scholarship that originates from some point outside law, which is the reference to the inter-disciplinary voice. I do talk a lot to fellows and students about the difficulties that people have coming into the academy from a legal practice and locating a scholarly voice within them. And having their lawyerly identity evolve into that of a scholar, it's a real struggle.

And it seems to me that there's an ethics that does follow from a normative legal scholarship, if we can all agree that that's not oxymoronic, and that what's distinctive about it is the degree to which that scholarship cannot be interest-dictated. And so, I appreciated Chad's note about having the question dictate rather than the answer. But I think it's also that the interest can't dictate and, in other words, there's a difference between writing toward the end of better protecting victims of domestic violence—which I'm all for with passion—and writing up a piece of scholarship about DV law, I think, and it's that the interest can't dictate. And so there's an ethic of disinterestedness that I think needs exploration because I don't think we have a very good grip on it in the legal academy, which is why we have so much trouble distinguishing normative legal scholarship and what's good about it, if anything, from advocacy scholarship and why that sounds to many people, including me, like something that's oxymoronic that just isn't possible and it seems to me the difference does have to do with this disinterestedness. I don't think it's the case of clinical faculty

are not capable of achieving that kind of disinterestedness, but it's work. It's work to achieve it. It doesn't mean that you don't care, it doesn't mean that you're not passionate, it doesn't mean that you're cold and calculating. You better care or you're not going to be able to finish the work. And passion helps but there's a difference in the scholarly voice and the advocate's voice when dealing even with scholarship that has to do with these issues and at its root, I think the difference is this disinterestedness.

HESSICK: So, I want to hand this over to Amanda. But before I do, I just want to point out that I think here what we're talking about—the disinterestedness point—is an important one. And I also think that it raises questions the extent to which that norm affects different types of scholarship or different situations. I think people feel pretty comfortable saying that the funding source needs to be disclosed or perhaps people ought not write research that had been funded.

But I do think that there are other questions about when people have a point of view or activities that aren't directly motivating it. Paul suggested that people should be transparent about all these things and that disclosure can solve these problems. I'm less confident that that's true. I do wonder whether—

WALD: Tell us what you find dubious about the effectiveness of disclosure.

HESSICK: Oh, because I often think that those disclosures sometimes are seen as a mark of expertise rather than a mark of “don't take me seriously.” Maybe I'm wrong. Maybe that's just how I read them and I also think that maybe it might let people off the hook, that they feel as though if they make this disclosure, that's enough for them to have filtered what their views were. I guess what I'm trying to say is I think that the disclosure can both set the wrong signal and also not accomplish its goal.

But I wonder how much more we need to worry about when we have to worry about disinterestedness. When clinical faculty choose to write pedagogical scholarship as opposed to non-pedagogical scholarship and if that pedagogical scholarship is to talk about a method that they're using at their own institution, would we expect that to be a disinterestedness piece of scholarship? I've personally never seen one that has said, “And the program that we use is actually really terrible and we should have done something else,” for example.

What about getting invited to a conference? You get invited to a conference to write on a phenomenon or something that happened and if you happen to write something that's negative it's quite shocking. Everyone talks about Judge Posner's contribution on the death of Justice Brennan. “How could you possibly write something that was critical of Justice Brennan?” That raises perhaps other questions, but I don't think that it goes away.

I want to raise these questions but not necessarily answer them and then also say, we have this norm of methodological disclosure, I think, for empirical papers and I think Baude makes a good argument that maybe we need a similar methodological approach to doctrinal scholarship and do people have to be especially worried. There was something in one of the readings talking about how if you are writing normative scholarship it's less important to disclose the interests that you have than if you are writing descriptive scholarship, because if you are writing normative scholarship people would be on guard for the idea or that you might have a point of view, but that's not the case if you're writing a treatise. This is actually one of Eisenberg's points.

SELIGMAN: So, I want to make a kind of observation about the kinds of questions that I'm hearing here to help move the goal forward a little bit. I'm hearing four different kinds of questions and I want to know about what they matter for. So, one question is, "What is scholarship?" The only thing that I really heard that matters in answer to that question is tenure and promotion.

I also have been hearing questions about what is good and bad scholarship. I've been hearing questions about why do we create scholarship, what are the motives or goals. And then implicit in what I'm hearing as an outsider is kind of taxonomy about kinds of scholarship assuming that you count things like tweets as scholarship—which is not necessarily the case—but there's a whole bunch of things that you as legal scholars do, not all of which are narrow. Some of which are broad.

So that it might be worth in the final document to enumerate different types of things whether or not they count as scholarship. The question I want to throw back with that observation is, "Which of those are questions that matter for the ethics of legal scholarship and which of them are just sort of interesting?"

FRANCIS: So, I want to go back to how people get into the legal academy a little bit to reflect back on methodology and scholarly quality. The methodology that lawyers have been trained in, who move into the academy, is advocacy. For example, how do you write a good brief, how do you construct a good oral argument, do you stand up?

It's not just that people who are in graduate programs in disciplines typically have lengthy discussions about the ethics of their discipline as part of graduate training programs. It's also that they learn a scholarly methodology. When a historian is trained as a historian, there are things you learn about how to be a historian, how to find documents, what kinds of documents you find, how to analyze documents, and so on. Same thing in literary theory.

I see a lot of normative scholarship where people are not trying to be advocates but it's really terrible normative scholarship because they don't know

a thing about how to do moral analysis and they're trying to do moral analysis. They need a good ethics course.

WEST: Right.

FRANCIS: They come out with some piece of junk about utilitarianism or whatever and I just cringe when I read this stuff.

Now, I put a little a plug here about the expertise point. Frankly, there's nothing wrong with co-authoring and there's something to be said, I think, for if you want to do statistics don't go to two minutes or half-a-day workshops at the ALS and think you're done. Associate with a good statistical methodologist and so on.

BOOTHE-PERRY: In the same vein with Amanda to try to get a document out of this and to answer some of these questions and kind of piggybacking on what Leslie said about how those of us who move from practice into academia and we don't have any instructions on how to do this, I think what's important for our discussion as we talk about an ethical obligation of a scholar and, in thinking about what is legal scholarship, the question of expertise, I think we would need to be very careful about what that is because if we're talking about what is good scholarship, certainly your scholarship, if we're going to classify it as being good, will not be good if you don't have a background in the subject matter.

Certainly, if you come from practice into academia—I didn't know how to write a law review article, I didn't know how to do scholarship, so I had to start somewhere that either I was drawing from my experience in practice or maybe it was a new topic for me. And actually, it was a new topic for me. So, I certainly wasn't an expert in the sense that I had spoken at a number of conferences or published widely on the issue, but through research, it's parallel to the Rules of Professional Conduct, Rule 1.1 says that you have to be a competent lawyer. And it says you can develop that competence through appropriate study or with associating with someone who has the expertise, which would be like a co-authoring piece, so certainly the expertise is necessary, whether it comes from your years of experience in writing this type of scholarship or speaking on it or in your research, but I think expertise would be part of the obligation of a scholar to determine what something is that's legal scholarship, going with Paul's definition that he has, that expertise is important in that sense, though. I don't want us to dismiss it that easily.

WALD: While a common misconception, it is not true that the dominant methodology of law practice is advocacy. It's false. It has always been false. Certainly, zealous advocacy has historically been a preoccupation of codes of conduct and is the cornerstone of the adversarial system and the dominant

ideology of the legal profession.⁵ At the same time, most practicing lawyers are not trial attorneys or litigators and will never see the inside of a courtroom unless they are defendants. Of course, corporate lawyers and many other attorneys sometimes engage in advocacy when negotiating transactions, but it's not what we think of as advocacy when we have a litigator in mind because negotiation is often not a zero-sum game of winning, losing, and slicing up the pie, but rather about getting to a yes and increasing the size of the pie. So, we should probably shy away from simplistic assumptions about advocacy as the central methodology of law practice with an image of a litigator, Atticus Finch style, in mind.

By the way, even if advocacy was the methodology of practicing lawyers, it would not necessarily help us define or identify the methodology of legal scholarship for academic lawyers. In fact, as we have already discussed, we all seem to agree that zealous advocacy pieces are not scholarship.

WEST: I also want to pick up on the really interesting point. I think the problem is bigger. I agree with what was just said, but I think the problem is bigger. The academy, and the bar and the bench do not have a history of developing an understanding of justice. And this is perverse and it is shocking to realize but there's a history to it. Langdell thought that justice equals law and so the expertise in law is all you need. He said this quite explicitly over and over and over again in after-dinner talks. If you want to know what justice is, go read the law.

So, to be able to accurately state the law for Langdell meant that you were doing justice. So, if the law scholar who is not advocating a client's interest is writing within a legal method that assumes that law equals justice, then expertly and accurately explicating the law is doing this moral project, is doing this normative thing, but there's no jurisprudence, there's no philosophy behind it that celebrates what that justice is.

Now, on the other hand, at the same time Langdell was writing, Holmes, who disagreed with Langdell on everything, agreed that justice is [nonsense]. He said it explicitly over and over and over again. He said, "I hate justice." He wrote that in a number of letters. What did he think we ought to be doing with law? Promoting utility. That's why you get all the normative scholarship that carries on about utility. And so, between those two poles you don't have the developed philosophy that would give this method of the legal scholar actual content and moral depth.

FRANCIS: And where did Law Reviews originate? They originated with Langdellian legal education.

5. William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

WEST: And with the restatement projects, just the straight explication of law.

HESSICK: So, we are out of time, but because I moderated I will take 30 seconds to add two things. One, I was very struck with Leslie's point about the training that we get, but I actually thought many of us got a particular type of training that does teach us how to be disinterested, or at least we tell ourselves that it does, and that was a judicial clerkship. I actually think that that experience could be a model that we could try to reference and ask people to try to think back on.

And then the last thing that I'd say is I love the idea of a norm of disinterestedness and I think that probably many, if not all of us in the room, could agree on it. But I'm thinking about my colleagues in criminal law who are often hired precisely because of their experience as a defense attorney or as a prosecutor and I wonder how easy it would be to sell them on disinterestedness as a norm.

FISH: Is there a literature devoted to studying people who transition from practice to the academy?

HORWITZ: There are guides, but I don't know that they are often guides that involve the kind of, let's say, ethics or norms of practice. More like "how to get a job."

FISH: In other words, the experiences that some of you are reporting could, I think, be made analytically interesting. And I wasn't aware that anyone had written on this phenomenon, what happened.

C. Session Two: The Obligations of Sincerity, Candor, and Exhaustiveness

HORWITZ: The official title of this session is "The Obligations of Sincerity, Candor, and Exhaustiveness," and I don't think this is a sign of creeping pluralism, but I acknowledge upfront treating it as a topic does not mean that one can't dissent from it, but here's how I'm going to proceed just the same. We have the three terms. I'll start at the broad level of definition. I will then ask—and I think I'll do it early rather than at the very end—whether people think that there should be other values, whether we're missing anything that might be productively added at this point by way of kind of broad "umbrella" values that ought to be mentioned at this point, and then we can perhaps talk about caveats, applications, and so on. So, let me start kind of with the big picture. So, sincerity, candor, exhaustiveness.

So, let me start with sincerity. If people were coming up with a definition of sincerity, or again, if they don't have a complete definition, if they have, as I've said, key words or basic concepts that they think would help us illuminate what sincerity is, where would you start?

HAMILTON: I thought it was an ambiguous term, but could the author tell me up front what's the motive? It goes back to I think what Chad 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.

HORWITZ: And I can see or anticipate that we might have some question about when something belongs under the category or rubric of sincerity and when it belongs under candor, but we can kind of take each as they come. Are there other suggestions? Again, key words or ideas. What constitutes sincerity in the context of the ethics of legal scholarship? Stanley?

FISH: I just don't think that the sincerity requirement or bar should be made too high, so that it begins to approach something like transparency, which is both psychologically and existentially impossible.

FRANCIS: Could I ask you why you've got that as a separate category? I guess the reason I'm asking it is I haven't ever seen that proposed as a scholarly norm in other disciplines. I've seen other disciplines have enormously difficult conversations about why you select the research problems that you do, whether there are things you should never do, which is something we don't have up there.

HORWITZ: Right. Well, so I think I can take the co-organizer's privilege and say it is not clear that there is any perfect answer to that. That's to say it's not that we had a long debate and decided sincerity has got to be on the list, and if it's productive, we can move pretty quickly. What I'll do is ask, whether anybody has anything more to say about sincerity and then we can move pretty quickly to candor, which I suspect will capture some of the things. But I'm not, in my moderator's capacity, counting out—people may say yes, it belongs there.

BOOTHE-PERRY: When I think about sincerity, I think about one of the pieces I wrote, the author was writing about intellectual honesty. So maybe that could be something we have in there, being honest about the evidence that you're presenting, and then it kind of goes back to what we were talking about, about what constitutes legal scholarship and problem of promotion, but also being honest with what your purpose is in doing it. Is it for financial gain or something else, those disclosures, so some form of intellectual honesty.

SCOVILLE: Two points. One, it seems like everything we've talked about so far is actually 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.

WALD: What about the opposite of X? You said not X, what about the opposite of X? Can you argue X and the opposite of X?

SCOVILLE: Yes.

HORWITZ: And that may end up applying to candor or transparency or whatever one argues for. I want to explore the possibility of not X seems valid. I have argued a lot for what I call an institutionalist approach to religious liberty and religious autonomy, but it also seemed to me at some point, for a particular conference I was doing, I was interested in the economics of religion and I wanted to come at the question that I had advocated for, from a contrary position and take a kind of poke at it, and sometimes I think a scholar might say, "I've argued for X and now it's also time for me to ask some of the negative questions that have occurred to me along the way," and that seems to me valid. But again, I'm not categorizing here, it may end up being a question of some other category.

OLDFATHER: So, this isn't directly responsive to any of the things on the board, but is just tossing out some related ideas from codes of ethics from history and political science. The historian's piece speaks about—under the heading Shared Values of Historians, Integrity, so "historians cannot successfully do this work without mutual trust and respect. By practicing their craft with integrity, historians acquire a reputation for trustworthiness that is arguably their single most precious professional asset."⁶ Political scientists do use the word transparency and in two senses, there's production transparency, which is with respect to data generated or collected. I think more pertinent for our purposes, there's analytic transparency, where "[r]esearchers making evidence-based knowledge claims should provide a full account of how they draw their analytic conclusions from the data."⁷ That is, clearly explicate the links connecting data to conclusions.

FISH: Why do we call that transparency? Why not just making a good argument? I hate transparency. I wish I'd never heard the word.

HORWITZ: Well, if "Against Transparency" hasn't yet been taken as a book title, I'm looking forward to your next book.

6. AMERICAN HISTORICAL ASSOCIATION, STATEMENT ON STANDARDS OF PROFESSIONAL CONDUCT (rev. 2018) (1987), <https://www.historians.org/jobs-and-professional-development/statements-standards-and-guidelines-of-the-discipline/statement-on-standards-of-professional-conduct> [https://perma.cc/B5ZM-PJAT].

7. AMERICAN POLITICAL SCIENCE ASSOCIATION, A GUIDE TO PROFESSIONAL ETHICS IN POLITICAL SCIENCE 10 (2d ed. 2012), <http://www.apsanet.org/portals/54/Files/Publications/APSAEthicsGuide2012.pdf> [https://perma.cc/DR35-3GF4].

[LAUGHTER]

FISH: I'm trying to think of moments when the question of sincerity might arise and I've only been able to think of one; someone who gives a presentation or even hands someone a piece of work and then the response is "Well, do you really mean that?" Which I take it to be a question like, "Are you just trying to get a rise out of us, are you just trying to be provocative or contrarian?"

HORWITZ: You've heard that question?

FISH: Yeah. I always mean everything. So, is that what you have in mind? Do you really mean that and are there good reasons, even in scholarship for sometimes, not saying what you mean, but just following out a line of reasoning because it might provoke helpful responses, or is that a form of meta-sincerity? These things get me.

SELIGMAN: I have a naïve, non-lawyer question: is sincerity an issue here? Lawyers, as opposed to legal scholars, sometimes represent people or entities that they do not like, that they think are bad, but don't particularly really want to have them win, because they think—believe—that people deserve access to the court process, that they need due process?

FISH: Well, sincerity's a test sometimes, in some parts of the world.

HORWITZ: As people have noted, there's been some suggestion that it is not clear that sincerity is necessary as compared to candor. It seems a good time to move on. So, candor, people may have more positive views on that. Again, I think the question is—leaving aside, and I think we can do this at the end, whether one or more of these values should be stricken from the list, assuming it is a value and one that counts for the ethics of legal scholarship, What do we mean when we say candor?

HESSICK: I just want to repeat what I said at the end of the last session, which is I'm not a big fan of the idea of disclosures. Both, because I think that they can send the wrong signal, they can actually send a signal of expertise. But also, because I think that to the extent that we expect them to do work, that's problematic. If we have some sort of tie to an issue that might require a disclosure, I think we can sort of take one of two approaches. We can either try to guard very much against whatever those interests or biases or prior commitments might be, or we should not engage in the process. And I'd extend this to—maybe it's a little bit different when we talk about funded research. I'd be quite comfortable with law schools not doing funded research, although I understand that it's quite common at some institutions and for some types of work. But if I'm writing this book review because this person's my friend and I want to get them good publicity, and so I'm going to put a little footnote, "This person's my friend and that's why I was asked to write this review," then you shouldn't be writing the review, if you can't write an honest, straightforward

review, and if you feel as though people need that information in order for—but I understand that not everyone's going to agree with me.

SELIGMAN: I'd just like to offer a different way of thinking about what candor might mean other than simply disclosure, although I appreciated that point very much and I'm going to be thinking about it for a while. But let's think about what anthropologists (particularly those who do ethnographic research) do. In their scholarship, they write about how they are situated, which affects exactly what they were able to see and not see. That's something that's very well worked out in anthropology.

FRANCIS: I just wanted to point out that I think we need to ask the question, "Candor about what?" Because I think candor about methodology matters a lot. Candor about—so, that's part of the anthropologist. I mean, if you're doing qualitative work, you describe your methodology and that includes, if it's participant-observer research or whatever, what your connection is. I also think that there's pretty well worked out norms about candor about what would be called a direct conflict of interest. That's usually defined in monetary terms. And also might be spousal terms. There are also, in other disciplines, and I thought a bunch of the articles were great on this point—there's a lot worked out about disclosure of authorship and the law profession. Law scholarship has been pretty bad about that and—

HORWITZ: Can I ask you what you mean by that?

FRANCIS: I mean, you'll actually see in science journals where there's a laundry list of folks who might or might not be authors, an exact description of what each person contributed. "So, so and so brought patients to the table; so and so did the primary drafting; so and so did the this." In the footnote, at the beginning. Now, there are a lot of allegations that law professors use their students' work in a way that would actually count as authorship in other fields, and that was actually the point that I had in mind. Or don't even disclose their research assistants. But the development of norms about what you need to say about who was an author or the contributions that people made. So, those are three areas where we might start—methods, direct conflicts of interest of whether your relative is different from your good friend, and authorship.

HORWITZ: So, let me offer a comment or two. Regarding authorship, there are the big, kind of the scandal issues, the ones that occasionally pop up. I don't know whether it's an endemic problem in the legal academy, in part because I'm really bad at using research assistants, but others might have a different empirical or other take on this. Yeah, I would say there seems to be an increasing norm toward listing co-authorship with law students, that that has become, I think, more frequent. I'm not sure exactly why, it might just be that some leading people, like Marty Redish, made a habit of doing it and so others felt more comfortable doing it, or it might be because authorship counts

increasingly in the job market, there's more of an incentive if you're pushing your student forward to want to do it. But clearly, that's fair as a concern. The other thing I'd note, and this goes a little bit to Carissa's point, with which you're right, I don't completely agree. The Model Rules of Professional Conduct for lawyers might be relevant here in thinking about conflicts of interest in that there are—and it's a nebulous standard—but there are cases of conflict where you're completely conflicted out. It's what I tell the students is a consent plus regime—consent alone is not enough, disclosure alone is not enough. In some cases, you are incapable of serving your client or may be incapable of serving your client and the consent can't be worked around, so you have to withdraw. There are other cases where you may have an interest, but the interest is not sufficiently strong that you believe, in good faith, that you can perform a diligent and competent job of client representation. So, there may be cases where I could not write that book review or should not. I have in mind a review that appeared pretty recently, within the last three or four years, where two friends and colleagues at an institution reviewed the book of a third colleague who was at the same institution. One of them might have moved on, but at some point, they'd all been colleagues and co-authors and so on together. And without any disclosures, that seemed to me a pretty obvious problematic case. On the other hand, I just criticized Nelson Tabby's book in a book review and I kind of said "I've worked with him on this and that." The review was pretty critical. I think one can quarrel with it, with my choice, which I did run by the editor of that magazine, but there may be cases where you have a potential conflict, and this is where candor may be relevant. So, we can imagine—this is a little different from exhaustiveness, but we can imagine candor as being some kind of requirement to give information in a piece of scholarship, relevant to evaluating that scholarship, which can include a variety of things including funding, personal interests, even ideological interests so that the reader-critic has the tools needed to evaluate it.

FRANCIS: Could I just throw in, it's not just "candor about what"—we might also want to think about "candor to whom?"

SELIGMAN: The flip side of writing positive or negative reviews of one's colleagues is holding back the full weight of your negative evaluation of a work out of politeness.

WEST: I just want to push back a little. First, against the idea that one needs to expose one's ideological priors. That strikes me as indulgence, not candor. There's no need and let the work speak for itself, so to speak. And then second, perhaps there's a worry about not letting loose with the full fusillade, but there are also other ethical constraints on one as a human being and so, I don't know how to deal with that, but there's ethics of politeness, of friendship. Someone who's being asked to vote negatively on a tenure decision involving of someone

who's become a friend shouldn't make the vote on the basis of friendship, but let's not deny that this is an ethical conflict. And so, I just don't want these rules to become sort of trump-like. "Trump" meaning in the cards sense of the word.

BOOTHE-PERRY: While you're writing, just a quick comment on the other norms that we are concerned with when we're talking about our scholarship, as Robin just pointed out. In the ethics of friendship and the ethnics of politeness, maybe it might be wise for us, in this document, to maybe put a distinction between ethics as being more like the Rules of Professional Conduct and some specific obligations and a moral compass or a societal separation from the actual restatement that we're doing. There was some differentiation there.

HORWITZ: One thing I've done, just in response to Robin, to the way I put it is kind of note other ethical issues, so to speak, external to scholarship, which is to say we obviously have certain role ethical obligations, but that does not exhaust our ethical obligations as human beings, and so candor is, in that sense, not a trump. I guess I'd say one of the answers is there are times when the answer is to abstain, don't write the article and so on, because you might be able to do this, but you can't then properly follow other obligations.

WALD: The distinction between common morality and role morality is a well-known one in legal ethics.⁸ The basic idea is that acting as lawyers, members of the legal profession may follow a specific role-differentiated morality that may at times conflict with common morality, if their role is justified and legitimate. The distinction between common and role morality gives rise to interesting ethical questions such as, "Can a good lawyer be a bad person?"

It is not, however, clear to me that we can import the idea of role morality to the realm of legal scholarship and law professors. The problem, or challenge in doing so, and part of what we came together today to discuss, is that we do not have an agreed upon understanding of the role and ethics of law professors. Remember that role morality is only justified and one is only permitted to deviate from common morality, if one's role is justified and legitimate. If we do not know exactly what law professors do and should do and if we do not have a well-reasoned definition of their role, it makes little sense to talk about law professors' role morality.

It follows—and this may sound surprising coming from someone who makes a living teaching the Rules of Professional Conduct—that it may make little sense to borrow from lawyers' Rules of Professional Conduct when thinking about rules of professional conduct for legal scholars. The Rules of Professional Conduct give life and operationalize, if you will, lawyers' role

8. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).

morality. To the extent that law professors have a role morality different than the one lawyers follow, then I'm not sure that the Rules of Professional Conduct are generally helpful here in delineating specific rules for academic lawyers.

But the Rules may be helpful in some limited circumstances. Rule 8.4, for example, deals with lawyers' trustworthiness and honesty⁹—

HORWITZ: That's the catch-all chapter.

WALD: Right. Borrowing from 8.4(c) makes sense in thinking about law professors' duty of trustworthiness and honesty. But more generally using the Rules to help think about law professors' duties may make less sense. Think about the rules pertaining to conflicts of interests. The conflict rules are so embedded in the notion of lawyers' role-morality as representatives of clients, such that borrowing from them, out of context, in thinking about law professors' duty of loyalty may be confusing. For example, one basic notion in the conflicts rules is that there's something called a conflict, and if it exists, then it may be cured when a client gives her informed consent. That's Rule 1.7. How might this notion apply to legal scholarship? Suppose a law professor writing a law review article has a conflict of interest. Who is the "client?" The readers? The law professors' home institution? And even if we can identify the "clients," in what meaningful way can we empower them to give something akin to informed consent and what would that mean? Borrowing from the conflict rules of lawyers, as you can see, might be quite difficult to do.

Or think about the notion of giving clients notice in the Rules as an alternative means of, in some circumstances, curing a conflict of interest—and this is going back to Carissa's point about whether disclosing a conflict is sufficient to cure a law professor's conflict. When I read scholarship, sometimes disclosures are helpful to me, because but for them, I'll read an article with an eye toward deferring to the author's subject matter expertise. I'll assume that the author has the expertise and that the article reflects it. In contrast, if I know, for example, that some work has been funded by an interested party, an institution with a particular agenda, it's not that I won't read the paper, but I might read it with a more critical disposition, not deferring to the author's expertise to the same degree given the disclosed conflict.

The same thinking applies to the conflict that arises when academics review or engage with the work of colleagues in their own institution. I don't think there ought to be a ban on such practices, that strikes me as ridiculous, because colleagues in an institution that work in the same area and have complimentary expertise should be permitted and perhaps encouraged to review and engage

9. MODEL RULES OF PROF'L CONDUCT r. 8.4(c) (AM. BAR ASS'N 2018) ("It is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

with each other's work. But, to the extent that some people are unaware of those relationships that might in some way color or influence how we read or how we ought to read the review or scholarly engagement, these relationships ought to be disclosed.

Can we or should we then borrow from the notice and disclosure requirements in the conflict rules when we think about the disclosures law professors should make? I doubt it. The Rules' notice requirements are so grounded in the particulars of representing clients that they make little sense outside of that context.

HORWITZ: I'm going to offer two quick responses. I guess I get to be both, kind of manager and occasional participant. So, I agree with—Eli makes the valuable point, that the lawyers' ethical rules involving conflicts are there in part because you are an agent for a principal and so you're worried about, kind of, agency slippage and so on, and you actually have a client to represent. That's not true for scholarship. One might rightly or pompously or somewhere in-between, kind of say "Well, I'm serving the muse," or "I kind of represent the truth" or something of the sort, but it's not quite the same thing. Again, it may be that the response to this is more disclosure and less disqualification. It's not necessarily the response, but if you have a wide audience and the concern is how the audience will receive or evaluate it, then it might be that that's one of the ways to address it rather than kind of the lawyerly disqualification model. Whatever my second point was can't have been that important, so I'll leave it.

OLDFATHER: All right. Just a couple points. This, I think, goes back to Neil's point with respect to sincerity, but I think candor, as well, is tied to motivation and I like the "no other ethical issues external to scholarship" because it seems to me as well that what we're talking about here really concerns at what point does something imperil the status of the project as scholarship and that disclosure is tied to things that might lead one to question whether the person, the author, is engaged in something that we want to call scholarship as opposed to something we want to call advocacy, what he or she is actually motivated by. And I think in some instances, the disclosure strikes me as fine. It's the author saying "I am aware of these facts, I have accounted for these facts that might make my analysis seem to be not disinterested, but I'm attempting to set them to the side as I conduct this." I think at some point though, they become too extreme. It starts to remind me now of the "appearance of impropriety type standard," with respect to judicial recusal. There—we expect and we allow for judges to bring all sorts of priors to their analysis of cases, but at some point, it becomes too extreme and we say you can't do it, you can't be a judge under that circumstance. I think we will draw the lines very differently, but there comes a point at which we should be willing

to say you're not a scholar at that point, you're doing something else, you shouldn't be doing it.

HORWITZ: So, let me first of all, steal the opportunity to mention the point that I had forgotten about Robin's comment about ideology. I'm not unsympathetic. I think that cannot always be useful or relevant, or terribly important, and sometimes it's clear. My concern, I guess the reason I bring it up, is maybe, particularly in constitutional law, it's often the case that is what is doing a great deal of the work is—I won't call them priors, but the premises that go unstated about relevant values. So, I don't care if somebody's goal, for instance—to kind of paraphrase Mark Tuffin is, "What's going to serve the goal of socialism in the United States?" But it helps me sometimes to evaluate an article if a premise that's not clearly stated or a baseline that's animating the piece and it's really underwriting a lot of the work is stated—and maybe that's just the question of what constitutes well done versus not well-done scholarship, so—

WEST: I agree with where you wound up. That's a bad argument, if there's also a premise in a constitutional argument that is a statement of general political moral theory and so sure, if it's not explicit, then it's a poor argument. I don't think you need to add an additional obligation of candor with respect to one's ideology.

HORWITZ: Yeah. And I certainly don't want to confuse questions about the quality of scholarship with questions about the ethics of scholarship, at least not in every case.

FISH: Two points. One is I'm uncomfortable with sincerity as belonging here at all. I'm not sure that it's available to the kind of standards or even quasi-formalization that you might desire, and I'm remembering in the conscientious objector cases, *Seeger*¹⁰ and *Welsh*¹¹, how unsatisfactory the sincerity standard, which was the only one the Court left itself, was at the end of that process. My second comment had to do with the question of tone in relation to candor and goes back to someone who talked about reviewers—all people responding to essays pulling their punches, being less than "candid." Well, this might be a matter of disciplinary difference. When I taught some years ago at Columbia University, a young woman who was visiting from Oxford was writing her dissertation and wanted to sit in on my classes, because she told me my work would be part of her thesis. Of course, no one can resist that request and I simply did not. And then after a certain amount of time, she asked me if I would look at some of her work, and of course, I did. So then I met with her and had this following conversation. I said, "Have I ever, in any way, harmed you?"

10. *United States v. Seeger*, 380 U.S. 163 (1965).

11. *Welsh v. United States*, 398 U.S. 333 (1970).

She said, “No.” “Have I ever, in any way, harmed anyone that you loved or cared about?” And she said, “No.” And so, I said, “Why are speaking, then, so viciously about me?” Not in terms of disagreeing with one’s arguments, but in terms of something that grows to the level occasionally of name-calling, almost name-calling. And she replied, I’m not sure about whether this is accurate or not, and I’ll ask Leslie. She replied that that was the decorum in philosophical debate. That’s what she said.

FRANCIS: That’s Oxford philosophical debate.

FISH: Perhaps it was only the decorum that her mentor had delivered to her. But I know, again, in literary studies, one usually tries fairly hard to be polite and to have ready locutions, like “I think the point that was raised is an important one and I’m grateful to Professor X for directing us to this line of inquiry, but I don’t think that his way of pursuing it will lead us to the best result,” or something like that. As opposed to “Man, this is stupid, how did this person ever get a position in a university?” And so forth. So, is this a matter of what we might call a general requirement of collegiality even in the midst of fierce difference of opinion or does it vary across disciplines? I don’t know.

HORWITZ: Neil? And then let me say, since everybody’s at least had one round, and I know there are hands up, I’m going to move to exhaustiveness, which I suspect is a briefer topic, not necessarily. Okay, we’ll try to keep them short and let’s move to it as quickly as we can, in part, because I suspect the others are relevant questions and I’m keeping an eye on the clock, but go ahead, please.

HAMILTON: Well, two points. I’m agreeing that on the sincerity piece, at least to my experience, I’m not seeing it in other disciplines, it’s a bit of an outlier to me, and on that point, since our target audience ultimately is the legal professorate and they’re going to be most influenced by whatever we can point to in other—particularly the medical profession, the social sciences, the liberal arts tradition—I mean, to where we see it well-developed these concepts, whatever their title is in these other disciplines, would be well served, especially, I think the medical, but in terms of what influences the legal professorate. Just back to if we had agreement on the various major categories of scholarship, which goes back to Stanley and Robin’s comments, the discussion earlier, let’s say, the scholarship of the liberal arts tradition, the normative scholarship, the frankly partisan, that’s what I meant. If I knew which tradition they’re in or which context, then it helps me with exhaustiveness, because then I know. Because if it’s the first type, I think I’m reading a piece where they’ve done their best to explore all the counter arguments and all the counter evidence, whereas if it’s in the last group, I’m quite confident I’m not looking at that.

HORWITZ: So, Amanda, is it a short order or is it—

SELIGMAN: Yeah. I just wanted to speak briefly about pedagogy since Stanley raised this question as well. It's very good that your discussion is limited to legal scholarship, as opposed to legal teaching, because I think that there are situations in pedagogy which call for us not to be candid with our students and certainly not to disclose things. So, I think that part of what we need to think about in this process is the code switching that you as faculty do between your roles as scholars and your roles as teachers.

WALD: Well, if you're moving on, would you just mind adding to the other list Stanley's point about—I'm going to loosely call it decorum, so we might get to talk about it later.

HORWITZ: All right. And I'll say, by the way, that question about code switching is, I won't say newly controversialized, but again, controversialized in part because of the accessibility of social media, op-eds and so on. But I'm thinking of debates about whether Amy Wax at Penn should be allowed to teach first year students, in part on the basis of extra academic writings, maybe academic writings, but not specifically classroom statements, so those code switching debates are a matter of controversy right now. They don't need to be addressed here, but I do think there is a connection between candor and exhaustiveness or a potential one because, there may be a duty to exhaust relevant research sources but sometimes there's also a duty to explain the scope of your research or the scope of your investigation, and so that maybe segues us into exhaustiveness. So, let me, at least in the interest of time, push us in that direction. So, what does exhaustiveness mean? And maybe part of the question here is, Are there different kinds of exhaustiveness that are relevant, ethical scholarly duties? Anybody want to lead off on that?

FRANCIS: Well, my "to whom" comment—the reason I wanted to just sort of expand on it, is often conflicts are disclosed to expert bodies, which then make a judgment about whether or not they rise to the level of more general disclosure, so there are conflict of interest committees at universities and frequently, people will be expected to make disclosures to editors, and that's another place where—and the editor can make a judgment—but where student edited journals could be a real problem for us because students are just in a very difficult position, not only not having the expertise, but not having the authority, so I just wanted to raise that. About exhaustiveness, we use footnotes in law publishing very differently from the way footnotes are used in other disciplines, and it might be worth reflecting on that. Just two little quickies. Often in philosophy writing, the thing that you're setting aside, that's not the topic of this article or that somebody might want to think much more about, but you're not doing it here, that's what footnotes do a lot of the time. And footnotes for us tend to be some sort of bizarre notion of authority and either it's everything like, "*See generally* Locke." Anyway, I'll stop there.

HORWITZ: Yeah, and just to raise Eli's blood temperature, add that there are cases in legal ethics where one cannot split off a particular portion of a case or particular piece of legal work, that is to say sometimes you can limit what you're going to do for a client and sometimes it's not ethically permissible to say, "I'm going to do X but not Y," which is intimately connected to—and it seems to me that although we often make scope statements, and that's part of the exhaustiveness question in a sense, there may be cases where it is not proper to—at least it seems to me, to say, "I'm setting aside this question that is clearly relevant and determinative on the issue I'm writing about," particularly if you're doing so for strategic reasons. "I know I can sell the ultimate outcome I want by kind of presenting it as a sheep and I'll leave out the wolf that I know is kind of really hiding in the weeds on this argument." You know, "This argument has the following implication, I know that if I know that there's an intimately connected issue that has bigger implications, that are going to make people disagree with me, I'm setting it to one side." I think there are cases where that's unproblematic and others where it might be problematic, but, Robin, you had a comment, I think, on exhaustiveness.

WEST: A few, yeah. So, first, I think it's worth remembering that the older idea of legal scholarship was really neither normative nor inter-disciplinary, it was descriptive. The point was to describe accurately the content of the law, and I think our fixation with footnoting and with citation to authority comes from that tradition. If the point is to say what the law is and if we understand as lawyers that to say accurately what the law is, means to be completely steeped in authority, you are not supposed to be original here. You're saying something that has been authoritatively laid down in the past and so you've got to get the past right, so there's this compulsion about having authority for every proposition that's stated. And then as we've moved away from that, as sort of the normative—in the other sense of the word, normative, form of what legal scholarship is towards other things to do, we haven't dropped the habit of, perhaps, excessive footnoting. But, even in normative legal scholarship, and I would say also—and we haven't talked about this at all—but in critical legal scholarship and theoretical legal scholarship, which are just forms that I talk about when I do my whole taxonomy, it still is a distinctive feature of legal scholarship, to be embedded in authority and that counts against originality, it counts against a lot of things that are valued in these other disciplines. It's all about being embedded in—working one's position in—interweaving it with authority so, there's just going to be more citation of authority. I think the sad thing with law review editing is that the students are habituated to that and so push for the citation, the unnecessary citation, the citation that says, "See Locke" for everything, et cetera, when it just isn't appropriate. I want to say that this is an example of what underscores Leslie's very first, very well-taken

point, that it's hard to talk about this apart from what should be the ethics of law review publication, so much of this is generated by habits of law review editing. Oh, and I also wanted to add, under other, if we could just add disinterestedness. I don't mean to keep hammering away on this, but I would just like to have a focused point where we can address that.

OLDFATHER: I really liked Robin's point about that there's this origin story for why we have so many footnotes and there's the reality of what they've come to be. I'm reminded of when I was working on the very first article I wrote as an academic and was still transitioning from being a practicing lawyer to being an academic. I thought that—and I think I thought correctly—that one of my jobs was to survey all of the past history of legal scholarship to see who had talked about the thing that I was talking about and what had they said and how could I situate what I'm saying within that. And I tried to do that and fortunately, I identified a pretty good topic and it turns out that there was almost nobody who had said anything about it, so that was a win for me. Later, doing a different article, I had the following experience. I was doing some research and I found this very well-done, I thought, piece on an issue that was written by—I won't name any names, but somebody at a law school of no great renown, published in a pretty good, but not exactly great journal, and I thought, "Oh, that's really well-done, it's too bad that didn't place better." And then I'm continuing along, and I find a piece written by somebody whose name you would all know and it took up the very same question, analyzed it in roughly the same way, and did not in any way acknowledge that anybody had spoken at all about the particular point ever in the past. It seems to me there's a decent amount of that, that goes on, and I find that troublesome, and that seems to me to violate a norm of exhaustiveness.

FRANCIS: Or perhaps plagiarism?

OLDFATHER: Well, I don't even know that it was plagiarism. I don't think that there was any direct lift. Now, it may well be that there were research assistants involved in the process, who might have impacted this. But it wasn't that there were words lifted or that the analytical path was necessarily identical. But the topic, and the general track of the analysis were such that there ought to have been acknowledgment.

HORWITZ: So, I'll make a short two-part intermission. One is, obviously again, this is related to peer review. Obviously, peer reviewers are imperfect, particularly in a profession in which it's not clear that we've been steeped in a canon, but that's one way to ferret out these problems. And the second is, it may be related to the pressure, both in terms of placement and so on, to be novel. So, I like to joke that every—almost every law review article these days, certainly many well-placed ones, have the paragraph that says, "This is the first article to ever," and then at the footnote, soon after, that says, "Of course there

are honorable exceptions,” and then lists a bunch of articles, which ought to make you question the first article proposition. So, exhaustiveness may be damaged by the incentive to appear novel. It doesn’t mean not reading them.

OLDFATHER: I certainly agree with that point, and I have another story that I’ve shared with you, that relates to that specific problem. I think, given the identity of the person who wrote the article that completely ignored the second one, novelty claims, worries about placement were completely non-existent. This really seemed to be a situation where the author thought, “I’ve got something interesting to say and because I have this thing to say, and it’s interesting to me, I assume the rest of the world will find it interesting, too.” The idea that someone else might have thought of it before might not have even occurred to the author.

WALD: When we talk about exhaustiveness, we might mean at least two things, both of which are important. The first is subject matter exhaustiveness, and I find Robin’s departure point fantastic in thinking about this notion. It used to be that the law was primarily about case law and statutory provisions, so subject matter exhaustiveness had to do with getting the law right, citing and discussing all the relevant cases and statutory provisions, and if one missed some of these references, that was poor scholarship, in terms of exhaustiveness. And then, Robin points out correctly, things have changed. Today subject matter exhaustiveness includes not just case law and statutory materials, what we refer to as primary sources, but secondary sources as well, such as law review articles. If someone has written about one’s topic before, if there’s a law review article on point and one fails to spot, acknowledge, and discuss it, that’s a problem of subject matter exhaustiveness. Robin even pushes us further to acknowledge that these days, it’s not just primary and secondary sources, there are also non-law materials that come in, so not knowing what you don’t know could trigger an exhaustiveness concern. But we’re not experts in everything, so one might miss a few non-law sources, and do we still call it failure of subject matter exhaustiveness?

Another issue of exhaustiveness is strategic exhaustiveness. For example, can a scholar ethically follow this line of thinking: “I’m going to leave out from the argument certain components that are going to be more provocative and more problematic because I have an agenda or because I want to drive home in this article a particular part of the argument and leave more challenging questions to another day?” If a scholar engages in such strategic exhaustiveness, must she disclose it to her readers? And note that subject matter and strategic exhaustiveness can intersect in a Venn diagram, when one identifies a relevant and important line of inquiry related to her subject matter but decides not to engage it in detail because she does not know the issues well and the discussion is likely to be complex and distracting to her agenda.

We can then talk about the ethical qualities of strategic exhaustiveness. It seems to me that perhaps all we might require is good faith, if only because it will be quite hard, I think, to scrutinize strategic exhaustiveness in a meaningful way other than to insist on good faith. And to that end, let me give an example of what we might mean by good faith. Unrelated to this conference, I have written an article for the *Marquette Law Review*, in which I wanted to explore social and cultural capital.¹² As many of you know, when one talks about the use of social and cultural capital, often these issues are mired in debates about gender and racial inequality and discrimination, and I didn't want to go into this usual rabbit hole not because gender and racial equality are not exceedingly important—they are—but because I wanted to explore the use of social and cultural capital and its relationship with merit and success not in the context of gender and racial inequality. In other words, I engaged in strategic exhaustiveness, deciding not to explore in this article phenomena—gender and racial inequality and discrimination—clearly relevant to my subject matter—social and cultural capital. So, I picked as an example for my subject matter, a novel about academic life that some of you have read, called *Stoner*. It was in the news quite a few years ago and I picked it exactly because the protagonist in the book, one William Stoner, was a white male who lived and worked in a time and an era that for better or worse featured predominantly white males in academia. The choice allowed me to explore Stoner's experiences and highlight social and cultural capital without getting into gender and racial discrimination because women and minority professors were not featured in the novel. Now, is there a problem of strategic exhaustiveness here? Is it legitimate to examine social and cultural capital without discussing gender and racial inequality? I acted, I hope, in good faith, intending to advance the scholarship, not to hide the ball. My article explicitly states, "I'm sidestepping these issues because I want to focus on aspects that sometimes get bogged down in other issues."¹³ But what if I had not provided an explicit disclaimer? Would not disclosing constitute a failure of strategic exhaustiveness?

HORWITZ: Let me do this, with the time available. I know people have particularly wanted to at least put on the board, so to speak, disinterestedness and integrity, so I'll certainly eat a little bit of our lunch time, so to speak, but not too much. Do people have comments about these or things they want to add, think should be on this list?

FRANCIS: So, I've been wracking my brain to try to think of one, but I think we ought to have on the table the question of whether there are some areas of scholarship that people should think twice before they ever enter into or at least

12. Eli Wald, *Success, Merit, and Capital in America*, 101 MARQ. L. REV. 1 (2017).

13. *Id.* at 3–4.

open up the question about that. So, the examples from the sciences might involve how human embryos are used past so many days or stem cell research, cloning research. There have been environmental issues about things like GM products and there have been various moratoria, there have been public bodies that think about those questions, and I don't know whether there are areas like that in law, but there might be, and whether we ought to at least attend to that possibility.

HORWITZ: So, I'll put this down, I'll say probably to the extent that law is part of the humanities, the answer would be maybe not to the extent that it is—legal scholarship to the extent that it's part of the professions. I think you would at least find some people who would make that argument. I would not be one of them, but it's possible that someone—

FRANCIS: “No go” areas.

HORWITZ: Yeah, I was going to call it “problems areas.”

FRANCIS: Or areas that should be thought about publicly before they're “go” areas. Cyber security, certain forms of cyber terrorism are coming to mind.

HORWITZ: So, one can imagine, for instance, an article about “here is the perfect strategy for concealing all your investments off-shore, here's a law review article saying there's a terrific gap in the law that would enable people to get away with just straight out theft.” That would be maybe a good or bad illustration of the kind of thing you're talking about.

HESSICK: So, I just wanted to say something briefly about the decorum point and about whether there's too much politeness, I think, as Amanda put it, “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. So, I think that those sorts of conventions that Stanley mentioned, I don't think that those are a bad thing, 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. I think that's

more likely to get the author to engage with your criticism, but I also think that if we can see engagement as having both sort of the “pat on the back” aspect to it that’s a genuine, “here’s what was done well,” and then the “here’s what left me wanting more or dissatisfied,” that’s something that could really help the community. But I think that maybe the idea is it needs to be framed as constructive engagement so that the idea of being polite isn’t then failing to engage, because I think that’s a real error.

HORWITZ: And I don’t want to—and I could do it wrongly, ventriloquize Stanley, but it seems to me if an issue was academicized, it’s easier to have strong disagreement, the danger in our discipline with its debates about how normative the work is—and I’m not saying that’s a good or bad thing, but it’s not fixed, and the fact that we write about current events is people often kind of assume an article is a stalking horse for a political position and that makes it sometimes a more fiery engagement. If we agreed, we were fighting over the article might be a different situation.

WEST: Okay. I’ll be quick. I just remember teaching an article in my fellow seminar about whether or not *Roe v. Wade*¹⁴ led to the plunging of the crime rate 20 years later, and a couple students opined that this research should not have been done and the article should not have been written and we shouldn’t be reading—it smacks of eugenics—even though the authors of that piece were very careful to say this is not an argument for *Roe v. Wade*, so it’s an example. I’m not sure that anything about that can or should be codified.

BOOTHE-PERRY: Actually, to piggyback on what Robin just said. I have some discomfort in accepting the idea that there are areas that legal scholars should avoid. I think we have an opportunity to push the envelope in many cases, and as legal scholars, that might be something that we should be doing in some instances. Again, if we know what the end goal is of our scholarship, if we are not trying to write the manual for the thieves to get the off-shore accounts, but to maybe instruct or persuade the legislators to change the laws or the statutes, then if we academicize how we write it, we should be able to attack any area, really, even the taboo areas that people don’t want to talk about as legal scholars, that’s part of what we do, we talk about these areas for some better good, some end goal.

HORWITZ: Stanley?

FISH: Yeah, going back to the candor and decorum questions and the tone question. My thinking about these matters, is dictated by three events. One, the first talk I ever gave at a law school was at Columbia Law School at a workshop, presided over by Bruce Ackerman. Here was his introduction to me.

14. *Roe v. Wade*, 410 U.S. 113 (1973).

“Here’s Stanley Fish; go get him.” And then I received, much earlier, when I was an assistant professor at the University of California–Berkeley, and had not yet given any talks on anything, when I began to give talks or, I got a couple invitations, I got two pieces of advice from senior scholars. One was from the philosopher, John Searle, a friend of mine, who said, “Watch out for the head hunters,” by which he meant that any time you give a talk, there’s someone in the audience who believes that he or she should be up there on the podium and not you, and wants to take your head home as a trophy. And the second thing that was said to me was by a historian, by the name of Hayden White, who said to me about going out to give a talk, he said, “You’ll know you’re in trouble when the second question is about the Holocaust.” These were really good pieces of advice and have proven true time and time again.

HORWITZ: I don’t want to take too much from lunch, so consider it kind of a miscellanea—miscellany, or concluding comments or what have you, for this section. Anyone?

SELIGMAN: So, I’m going to take advantage of the opportunity to say something I wanted to say about exhaustiveness, which is that I really actually wanted to speak against exhaustiveness. As a historian, everything is related; you could get to the point where you can’t actually publish anything because you have to continue to research and you have to continue to write and your footnotes will take up the entire universe. So, in my discomfort with the word exhaustiveness, I wondered if thoroughness might be a better word.

HORWITZ: That’s right. Yeah, and I think some of it, hopefully is reflected in the regarding scope so that you’re not trying to do the history of the world, you’re trying to do what happened on a street in Chicago, but—

SELIGMAN: But I have to say, I mean, as somebody who writes about what happens on a street in Chicago, I don’t look at all the primary sources. The litmus test that I get myself to is when do I have enough to say something that’s new, that no one’s said before?

HORWITZ: Fair enough. Yeah.

WALD: At the risk of sounding like a lawyer, maybe Amanda will take the following as a friendly amendment. I don’t know that renaming exhaustiveness “thoroughness” will do the trick. Perhaps what she means is reasonable exhaustiveness? One doesn’t have to cite and substantively engage with everything that has ever been written on one’s subject matter because that might be redundant. Instead, one has to be reasonably exhaustive when it comes to subject matter, exercising reasonable professional judgment as to what to cite and what to engage with.

HORWITZ: In a restatement, reasonable papers over all matter of differences, right? Other kind of concluding remarks or things people want to

sneak in on this topic before we have lunch? All right. Appreciate it. Let's eat.

D. Session Three: The Mechanisms of Legal Scholarship, Especially Law Reviews and the Issues They Create

OLDFATHER: Moving now into the section where we're talking about the mechanisms, and particularly law reviews and the various issues that those might create. During the break, Stanley pointed out, I think, quite appropriately that we might broaden the focus a little bit—whether it's at this stage or looking back on what we did this morning—to potentially include case books as scholarship. I think at least some of them might fall into that basket. Certainly, one can think of something like "The Legal Process" as a set of teaching materials, that became extraordinarily influential both as teaching materials and as scholarship. So that certainly those might be accounted for somewhere along the line. With respect to the mechanisms, and focusing on law reviews especially, I think we've got several sets of questions to consider. There's the question that Leslie raises most directly, which is whether this approach to the production of scholarship is appropriate at all, and whether we ought, instead, to move to some sort of peer review model. My instinct with respect to that is yes, ideally, we would, but also, I don't think that's likely to happen anytime soon, and so I wonder whether it makes sense for us to spend too much time on that topic because I think, to some degree, we just have to take the world as it is and comment on that. Then there are questions with respect to our obligations on the author side of things. And I think that is probably our primary focus. The ethics on the journal side of things we might touch on a bit, but they were the subject of the last model code related to these general topics, published in the *Marquette Law Review* twenty-six years ago.¹⁵ I think as well that Scott Dodson's model code does a fairly nice job of covering a lot of these issues as well. So, we may want to consider to what extent we want to leave them largely to the side.

I don't have a particular framework for our discussion in mind. Looking at it from the author side of things is probably the most logical place to start given that our focus has been on scholars and scholars' obligations. We can consider things like puffery. We can think about things like the phenomenon of, as it's often referred to, "walking a piece down the hall" on behalf of a friend or a colleague at another institution and recommending it to the law review editors within one's own institution. And I'll stop talking, but only after raising that I

15. 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 (1992).

saw in the ethical standards for the political scientists a requirement on the part of peer reviewers to “disqualify themselves if they have a reasonable doubt about whether they can exercise the responsibility with scholarly detachment.”¹⁶ So, there’s a discipline that is asking of reviewers that they be able to review things in a scholarly detached manner and, boy, our process does not seem to be one that includes such a norm to any real degree, at all. That’s what I’ve got by way of an introduction. I’ll open it up to comments.

HORWITZ: I guess I’ll make three comments. One, and I know Carissa wrote about this specifically, it’s not clear where in the schedule the question of work by legal scholars not in law reviews or book form falls. It might fall here if we widen the scope to case books, it might make sense to at least briefly discuss that question. I do think some of that work is subject to standards or that people should leave off the institutional letterhead if they’re unwilling to abide by certain standards. And that will be good for democracy if more people wrote as citizens rather than writing as ostensible experts. But that’s one question. How do we do with non-scholarship or when do we deal with it? Tomorrow morning there is a “what have we missed” session so it could very well be placed there if we had to. The second is, particularly in an age of increasing empirical work, some question about data, access to data seems relevant here or kind of what obligations you have to make your work replicable or falsifiable where it relies on data. And I think the third was the—I think this can be formalized, but while I would, on the whole, prefer peer review, and I will say not unaware of all the controversies over the peer review, so it’s not that it’s ideal. It’s like democracy. It’s better than the alternative. So, while I might prefer peer review, in its absence I would probably, or I could imagine a kind of restatement section that says peer review is kind of the gold standard to the extent we don’t have it, law reviews should move toward having anonymous professional evaluation of articles. And faculty, when reviewing scholarship, are obliged to review the scholarship, not review the placement. So, particularly when you’re reading, read the article, judge it for itself as you’ve said earlier don’t be overwhelmed by the fact that it appears in a fancy school that does not necessarily have peer review or where something’s been walked down the hall.

OLDFATHER: And I’ve taken the point about data disclosure here and I use the word “transparency” because that’s what the American Political Science Association uses in order to do that. So, sorry Stanley. I felt I had to. But there’s one where another discipline certainly has a provision speaking exactly to that.

16. AMERICAN POLITICAL SCIENCE ASSOCIATION, *supra* note 7, at 14.

WALD: At the risk of being somewhat of a devil's advocate, I most certainly don't think of peer review as a gold standard. It's anything but. It's complicated, it's messy, and it has its own downfalls. Peer reviews take forever to complete. Although anonymous in theory, in practice they are often not blind because the pool of experts in a specialized field is small such that reviewers realize who the author is and the author often knows who the reviewers are. And the process is often tainted by academic politics.

Accordingly, I was wondering if we can talk a little bit about some of the reasons for the background assumption that law reviews are second best to peer review. One place to start this conversation is to talk about the ongoing shift at elite law reviews to a hybrid peer review model. The so-called elite law reviews have recently introduced a quasi-peer review process. One gets a call and is advised that, "Your article is going for a vote before the entire board. In conjunction with that vote, we are soliciting outside reviews of your article." This hybrid model, initial selection by article editors and a vote by the students-editors, informed by outside peer reviewers' input, strikes me as a problematic process, even if one generally favors a move toward peer review. This evolving hybrid model, in which there are no clear standards for soliciting peer reviews—sometimes an author will be asked to identify the peer reviewers and sometimes the peer reviewers will get three days to respond substantively before the vote with the incredible pressure of trying to give a meaningful assessment without costing a colleague the opportunity to publish in an elite law review—is quite troubling.

I'd like to suggest that although the current law review process is far from ideal, it is not clearly inferior to either traditional peer review or to the emerging hybrid model adopted by some law reviews. Moreover, the idea that we law professors are subject to the review of the best and brightest editors who are second and third year law students, such that we have to write articles that make sense to smart and well-intending student editors, does not offend me. It's far from ideal, to be clear, but I'm not at all sure that it's inferior to the peer review.

OLDFATHER: I kind of like this moderating thing because you get the microphone whenever you want it. I think that, and this may be the point that Robin is about to make, but that the historical point she made with respect to footnoting may have some applicability here as well, in the sense that, traditionally, law reviews were about the doctrinal work that had as its audience not specialists, but generalists, practicing lawyers, and judges. And that it would serve then the very useful function of making sure that legal scholarship was pitched at a level to be understandable by and useful to those folks. As we have moved to a world in which there is more specialization and more scholarship that is more academic in nature, that may have fallen away. There may still be value to an approach that has this gatekeeper that forces us to use

language in a certain way that appeals to those young in the discipline. So, there is something to build off your point.

WEST: Thanks, not what I was going to say but I'll sign onto it. So, at Georgetown at any rate, the students increasingly use faculty as outside reviewers and it leads to its own problems which are, I think, quite severe. The main one being that calls from a faculty member at one school to a faculty member at Georgetown or at the receiving school asking for that faculty member's assistance in getting one's own article published or the article of a junior colleague or the article of a friend. And that has to stop. And so, it seems like this is a solvable problem that law reviews from each of us, our own law reviews could be encouraged to seek out outside reviews, but to do it anonymously and to resist all pressure from their faculty. And pressure from the faculty should be regarded as an ethical problem. I mean, not a fireable offense, but as something that should be discouraged.

FRANCIS: So, I agree very much with what Robin just said. And to expand on it a little bit, we're not going to be able to change the current structure of law reviews directly, but we could indirectly make recommendations to law faculties about best practices for the law reviews which, after all, they sponsor.

WEST: And give credit for it.

FRANCIS: That's right, yeah. And then give student credit for. And it seems to me that maybe a way to go about it is to look at what are the worst problems, as we see it, with current law reviews that, and I'll go to what you were saying because you're right, the hybrid doesn't solve the problems at all. And it seems to me that there are two problems, one of which, what Robin just mentioned—favoritism. So, that's a real problem, with who gets published where. And we need to work to end that. And on masked reviewing and getting comments. But the only way you can start to tamp out favoritism is to mask the identity of authors.

The other thing that I think is a very serious problem, and it came up in the puffery discussion, is that no matter how smart students are, they don't have the whole sweep of the field. And so, there's really a lack of expertise in making decisions about what gets published or not. And a start on that is using people in the field in your own—if it can be masked at your own law school. But another way to do that is to have an identified pool of people around the country or at other law schools that, and now what journals in other fields do, they protect very carefully the anonymity of the peer reviewer, but they'll publish at the end of say every two-year period or something like that, a list of the folks who have reviewed for them, with a thank you. And the advantage of that is you can tell the quality of the folks who review. You could also figure out whether everybody who reviews for a journal is from the Federalist Society, just to take one example. You know, you could figure out whether there are

systematic biases that go into that. So, maybe what I think we ought to do is make a set of recommendations for law faculty as supervisors of journals about some of what we think are the worst abuses.

HAMILTON: Well, let me build off what Robin and Leslie just said. I might have pushback on Eli here because I just published an article on *Professional Lawyer* on the faculty's ethical failure with respect to law review. The basic theme is in all the professions, I think without exception, except ours, the properly qualified credentialed and licensed people are responsible for supervising the unlicensed, uncredentialed people, reasonable supervision in all professions, except ours, on this, because we don't, although we have examples around the country as you suggest and others, of faculties who are stepping forward more and, obviously, we have increasing number of peer review journals, but, even among the student-edited, we do see examples of more faculty involvement. I just think it's absolutely fundamental that there be some kind of reasonable faculty supervision that the apprentices are doing this competently. But I don't want the perfect to get in the way of the good in this whole project. And on this particular one, I'm agreeing with Chad. I mean, we're not going to change this culture. This has gone on for decades and decades. So, maybe it is just some suggestions about good practices and this would be one where we observe some of the key problems of the current system. Frankly, as we have discussed this today, I think this drives a lot. Because without peer review, you don't have these qualified scholars who are insisting on some sort of academic ethics, some sort of scholarly ethics. And the students are not in a position to do it. Again, these are bright young people who can—sometimes they're not young—bright entrants who are deeply committed and they give us their time. But are they in a position to push back on a piece that doesn't, has some of the problems we've discussed, especially if faculty members in the building are pushing them on something. I see so many problems here that relate back into the general themes we've been discussing.

HORWITZ: A couple of points on these I think. First of all, on this is a point of information. The *South Carolina Law Review* is experimenting with or has launched a, I think they call it, "Prism." What it is, is a group, double blind peer review process, where law journals that sign up to be part of this kind of consortium, people who participate, who submit within that network, the article is then subjected to this kind of peer review generally. So, you know there's a pool and that solves some of the selection bias problems that are involved in own-school review or a journal coming up with a list so you know you have a pool of reviewers. That's one thing, one resource we might look at and/or encourage as an example of sound movement toward a better process. The second, although again I appreciate that the students have their own interests

and also, it's harder for them to resist, but we could certainly recommend as a best practice that review be of the article, not of either the resume, the cover letter, or the abstract, all of which are subject to—I think it's a sad, but true fact that there are many journals where people will start with the resume and then put something on the read-sooner and read-not-at all pile. And letters, cover letters and abstracts are both subject, as we've talked about a little bit, to the kinds of manipulations that, can again, be problematic. It's a tough process but to the extent that we have a law review process, making them read the article would be a recommendation that I'd stand behind, if that's not too radical.

HESSICK: So, a couple of quick words. I'm sort of with Eli on this. I actually think that there are some virtues of the law review model. And one of the virtues that I see is it allows us to have a format for work that should be of interest to a more general audience. To the extent that we do want lawyers or judges to pay attention to what we do, I think it is helpful to have that format. And I understand that it's contestable about whether we want lawyers and judges to pay attention to what we do. I do know some people who, their scholarship is they are engaging with three other people. Sometimes it's three and sometimes it's fewer. And it's a back and forth between them. And I don't think that it's a bad thing for that discussion to happen in a specialty journal or to happen on blogs. I don't know that that has to go into a law review. That's my own personal feeling about that thing. If people are hashing out really minor disagreements about a much broader topic, I don't think that that's the worst thing in the world. But leaving aside the virtues of law reviews, maybe there's something about law reviews that we could then use to try to help these pathologies. If people are making claims about novelty, why not have, or what their contribution is, why not have that be something that we footnote, that we explain where that claim about the impact of the paper comes from? Why is that not the sort of thing that we would then expect the students to be able to look and to check? Because I suspect if we turned that into a norm, into the profession, people wouldn't say, "This article is the first to whatever." They would instead say, "This article contributes to the following literature in the following way." And in the footnotes, could explain a little bit more about what that literature says, as opposed to what the article is doing. I know the footnoting of articles is something that we don't like because of how ridiculous some of the requests are about what ought to be footnoted, but it strikes me that that's not a crazy thing for us to have to footnote. If we're making a claim about the potential impact of our work, why is that not the sort of thing that we wouldn't have to back up. And then the last thing, I'm sympathetic to what Neil said about how the students are looking for guidance. They're coming to us because they're concerned about whether they're publishing something that's valuable or not. They're grateful if you say, "I know so and so has a

piece and it hasn't been picked up yet, and I read it at a workshop and it's good." They're not grateful with "so and so is my friend." I think there they feel pressure, I think that's right. But why not have that then more formalized? Why not, if you really feel as though this paper that you read at a workshop is a great paper, peer review could be the sort of thing that journals ask people to do or we could do it voluntarily. That could be part of the cover letter to the journal. "These three people have said that they think that this article should be published," because, I bet if we had to write down "I endorse the publication of this article," we'd probably be really limited in the number of articles we'd be willing to do that for. And I don't know, anyways, these are kind of, you don't think so?

HORWITZ: I don't.

HESSICK: Okay.

HORWITZ: Unless there were some reputational penalty, I think it probably happens as a matter of course. I mean, not as a matter of course, but it happens and I don't think anybody suffers for recommending a piece.

FRANCIS: Just quickly, another problem. Law reviews have no institutional memory. It dies with the existing editor. With their graduation. So, if so and so really did a horrible thing to your journal two years ago, there may well not be any memory that you've gone through the editorial process and then they pulled it because they got a better offer.

OLDFATHER: Let's actually ask the question. Michael, Nick, and Apallonia, do you guys have a list of problematic faculty members or authors? Any sort of institutional memory from past years? No is the answer. I've wondered about that sometimes because you do hear horror stories of authors acting in particular ways. And I would think as a journal editor I might be inclined to make a list and leave it for my successors.

FRANCIS: There's also no obvious way to do retractions or to do, if there is some sort of a discussion about whether there was a scientific problem with a piece, how to make sure that gets appropriately investigated and then considered.

OLDFATHER: Right. What I've seen in terms of corrections are stickers placed on the published copies of articles because somebody missed a comma in a footnote that really should have been there or something along those lines.

WALD: Two quick points. The first is about the notion of institutional memory. Law reviews often lack it, but that's as much a function of poor faculty advising and mentorship as it is a critique of law reviews and their editors. Oftentimes, the institutional memory of a law review is its faculty advisors, but that ought not be necessarily the case. Maybe one recommendation we could make is about the institutionalization of faculty

support for law reviews, including the creation of infrastructure for institutional memory that does not depend on who on the faculty serves as the journal's advisor. So, that's the first suggestion.

The second is less of a suggestion and more of a question to everybody. As late as 15 years ago, when I started publishing, I seem to recall that it was the habit of law review editors to offer substantive feedback to authors. Certainly at the so-called top law reviews, but also throughout the system one would send in an article and would get back, in addition to requests to fill in the 412 missing footnotes, some substantive feedback. That was fantastic, both in terms of faculty mentorship of law review editors who would benefit from the substantive exchange with the authors, and in terms of the insights to the authors and the resulting improved articles. Another pair of eyes, or more than one pair of eyes, of editors who actually read the article start to finish, thought about it, and then came up with some substantive suggestions, that was often very helpful. It appears that substantive feedback is increasingly a thing of the past. The vast majority of law reviews will say as a point of pride, "We give you complete freedom of authorship and we don't edit for substance anymore." Even at elite law reviews, substantive feedback appears to be less common. It's too bad, some kind of a race to the bottom in terms of law reviews fearing that if they offer substantive constructive criticisms they might lose the article to journals that offer fewer edits. Should faculty advisors at least suggest or intercede or have a discussion with editorial boards about whether or not the students should limit themselves to comments that sound in "are you conforming to Bluebook or not?"

SELIGMAN: I just want to bring some perspective as somebody who works in the field with lots of peer review. One of the things that I've done in recent years is to become involved in digital history, although I do not go so far as to call myself a digital historian. I blog as the Reluctant Digital Historian.¹⁷ One of the things that digital history is doing is pointing to the ways in which the notion of peer review can and should be expanded. So, what Leslie calls masked peer review is really a very specific form of prepublication peer review. Digital history suggests there's lots of other things that can count and should count as peer review. It might be worthwhile thinking about your culture as law professors and how you have institutionalized peer review that doesn't happen at the law review itself. So, to the extent that you have faculty workshops (I don't know how normal that is), to the extent that you give

17. Amanda Seligman, THE RELUCTANT DIGITAL HISTORIAN, <http://reluctantdigitalhistorian.blogspot.com/> (last visited May 23, 2018) [<https://perma.cc/282W-DNQV>].

conference papers, to the extent that you shop around your articles and ask your colleagues to read them ahead of time before you send it off to a journal for review. In digital history, one thing that people are experimenting with is an open writing process in which they draft on the web and then use Twitter to get their colleagues to come and read and leave comments.¹⁸ There's essentially a process of peer review during the writing. There's also a process by which you can have a peer review period for a digital publication so that you try to round up people to come and read stuff. And it's not blind at all. I participated in a very fun experiment.¹⁹ When you write a grant application, there's peer review involved in the grant application. And one more suggestion for the student law journal editors is that you might think about either a peer review process that's before publication that's online. People might be encouraged to come and leave a comment or a post-publication peer review where people leave comments and give meaning to what's in an article, even though it's fixed in print in some sense.

FISH: Well, I'm working off the comment about peer review during the writing process with the aid of technological developments. Not being blind at all, in fact, of course that's obviously true. Almost 40 years ago now, I wrote an essay called *No Bias, No Merit*²⁰ against blind submission. And I still stand by the argument there, which is basically that the distinction between intrinsic merit and extrinsic merit doesn't hold up. And what you have when you switch from non-blind to blind is a whole other set of political factors which are unacknowledged operating, including the great game of guesswork, "Who wrote this piece? To whom is this piece really addressed? Or, against whom?" Is it [indiscernible], so I still stand by that argument at least as a theoretical argument, which says, in effect, that blind submission cannot live up to its claims, which is the claim to produce more objectivity, less bias, et cetera. So, I'm in the uncomfortable position of, at the same time, being against the politicization of scholarship, as I have said earlier today, but for the acknowledgement and inclusion of political factors in assessing essays. And the reasoning behind this is very simple and I'll just use a literary example,

18. Michelle Moravec, *Writing in Public*, MICHELLEMORAVEC.COM, <http://michellemoravec.com/michelle-moravec/> (last visited May 23, 2018) [<https://perma.cc/T6MY-9MF5>].

19. WRITING HISTORY IN THE DIGITAL AGE (Jack Dougherty & Kristen Nawrotzki eds., 2013), <https://writinghistory.trincoll.edu/> [<https://perma.cc/XJ7N-MTX7>]; WEB WRITING: WHY AND HOW FOR LIBERAL ARTS TEACHING AND LEARNING (Jack Dougherty & Tennyson O'Donnell eds., 2015), <https://epress.trincoll.edu/webwriting/> [<https://perma.cc/JW83-LARP>].

20. STANLEY FISH, *No Bias, No Merit: The Case Against Blind Submission*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 163 (1989).

which may not be familiar to you but it's easily rehearsed. Under blind submission, if you had in the 1980s a submission—I think this is a humanities context—on myth theory and the author of the piece was Northrop Frye you would then, in fact, have received a piece on this topic by the person who invented the topic. So that, by definition, whatever he had to say about this topic was of intrinsic interest because he said it, not because it seemed to be intrinsically interesting, independent of any knowledge of what he said. Now, I'm quite aware that my ability, or at least what I think of my ability, to totally undermine the arguments for blind submission. That does not necessarily mean that it's a bad idea because, again, like democracy and some other things that have been named, it may be a bad idea but better than the alternatives. So, those are just some of my musings which go back, as I've said, many years.

OLDFATHER: I want to go back to one of the points Eli made, with respect to substantive feedback in the editing process, and particularly since Robin is here, maybe she knows something about what I'm about to discuss. I've published twice with the *Georgetown Law Journal*. And the first time, they sent my article, after it was accepted, to one of your faculty colleagues who wrote a very lengthy, detailed, incredibly helpful letter of commentary on it, that I was then able to incorporate into my changes to the piece. Second time, there was none of that. And so, I'm wondering was that a regular practice? Was it something that fell by the wayside? It certainly led to feedback that was more substantive than what I often get.

WEST: I know at Georgetown this just comes and goes with the various boards. There's no law school policy over time. So, your first editor wanted to get the outside read and then the faculty member happened to be very engaged in it. But sometimes the faculty who are asked will just say, "Yeah, you should take it," or, "No you shouldn't." And then sometimes, they'll be, as you said, a detailed read. But I'm not aware of there having been an actual change in policy.

OLDFATHER: I think it would be an interesting thing to do. One of the difficulties here would be that we have a smaller faculty than we used to and our expertise only goes certain places. Now, that's not to suggest we couldn't say something useful about an article anyway, because we probably could. It's an interesting idea.

HORWITZ: So, I'll try to keep it short. I have found that I've gotten some very helpful memos and so on from law review editors. I have to say it has varied with the school, for better or worse, but it's varied with the school in ways that tend to meet the standard credentials as rankings and so on. It seems to be some of these best practices are good ethical practices. Others, I'm not sure whether I'd consider them strictly ethical norms or just better or worse. So, I'm trying to think about what absolutely belongs and what doesn't.

Another reason, I think, that there's less substantive reading going on is in the era of straight doctrinal or normative scholarship where it was case-crunching, at least in theory, the students could kind of do some of that. The more interdisciplinary the work gets, the more difficult it is to provide that. The third thing I'd say is just try to focus shift a little bit, which is, maybe people disagree that we can or should do any of it. But is there an ethics of, "What are the obligations on the author side?" So assuming that people either agree that the current student-side system is broken, or at least acknowledge that it could use some fixes. What about authors? Either in terms of placement or in terms of, I guess we're talking about the mechanics, so the way we're writing the articles or the way we're trying to place them or so on, I still think there's probably more to be said there.

OLDFATHER: And is that something that is distinct from the sincerity and candor-type obligations? How do we isolate those things? I know Amanda had something she wanted to get out.

SELIGMAN: Yeah, but just a small point that if you move to a model in which peer review was used more often or it was a standard rather than a student review, my question would be, "What is the obligation of faculty members to participate in peer review?" So, what does that do to your workload if suddenly all the journals are requiring you to review things for them and it adds to the amount of labor that you have to do?

OLDFATHER: And could we, as one of the potential standards that we offer up, state, at some level of generality, the idea that service to the law journals at one's home institution is a prioritized piece of service?

FRANCIS: One other thing I bring up that we haven't talked about that's related to the question of obligations of authors, is that I did some Googling of different law reviews to see whether they had an "instructions for authors" page of the kind that journals in other fields have. It's very uneven whether they do. And actually, I could only find the South Carolina Prism thing. The last stuff I could find on that went back to 2013, I think. So, it was difficult to find out what the current situation was, with respect to that. But if you're an author and basically all you know is they take ExpressO. There's nothing that tells you this law review objects to the colleague carrying it down the hall. And it's going to be quite rational behavior, after all, if you're desirous of moving ahead in the profession and getting your work published. You're going to do what seems rational. I think a minimum expectation is that an author shouldn't violate the stated policies of law reviews. So, that could go back to saying, maybe, another obligation of faculty would be to work with their law reviews to publish instructions for authors that made it quite clear that certain kinds of behavior was inappropriate.

HESSICK: I just had a really quick thought about some of the other obligations that authors might have to law reviews. And it reminded me of two things. One, it reminded me of a woman who I know, who I respect a lot, and she asked me to read an article that had already been accepted for publication. And the last part of it was really unfinished. There were like some sentences in a couple of paragraphs and some brackets saying, “Fill this in, whatever, whatever.” When I asked her, I was like, “How did this get accepted by insert fancy journal that we all get excited about?” And she said, “Oh, I had submitted a paper that focused more on X, but after it was accepted, and I spent some more time with it, I realized that I really wanted to sort of shift the paper and change it and improve it.” And it struck me that there’s a tension there between us trying to be thoughtful and careful and produce our best scholarship and, possibly, giving law reviews not what they accepted to publish. And maybe this happens in good faith and maybe it doesn’t.

But then, more recently, I was at a conference and had a fascinating dinner with a very junior person at a top five school, who informed me that his colleagues routinely submit papers that are incomplete and they’re noticeably incomplete. And they are routinely accepted by top five law journals who think, “So and so fancy person, this sounds like a good idea. I’m sure they’ll make it sound good.” So, I’m not offering anything prescriptive, I’m just flagging these two things. The first, I think, is a difficulty. Do we have to stop trying to improve the piece after it’s been accepted? I think we’d all say “no” to that. But how much can we improve it before we have to worry about the bait and switch problem? And then the other thing, which is just, you know, part of this, might just be that the law review submission process looks really different for some of us than it does for the rest of us. And I would say I’m the rest of us.

FISH: Well, speaking to your second question, that was part of the point that I made in that long-ago essay where I said I’ve been in this game for a while. I’ve done X, Y, and Z. The result is that, when my name appears on something and they submit it to someone, they’re going to pay more attention to it. And I said, “Why shouldn’t I have the benefit of that? I did the work.”

WALD: Carissa raises interesting and troubling questions. Do law reviews apply different standards for accepting articles to different authors based on status, or for that matter, based on any consideration other than merit? And if so, how? Is it that informally law review editors are somewhat susceptible to advice about what articles to publish from their own faulty members who know some authors but not others—I suspect this has long been the case, or is it that partial submissions from elite professors get accepted based on their potential whereas non-elite professors are required to submit complete polished articles for consideration? It would be quite helpful to find out what the realities on the ground are.

HESSICK: No, no, I'm with you. I was like, "Are you punking me?"

OLDFATHER: I will say that it's been a good quarter century plus, but I distinctly recall, as an articles editor at Virginia getting a submission from somebody at Harvard, looking at it, and we all said basically, "Well, this doesn't look so good to us and if somebody at Harvard is trying to publish with us, it must be their worst work, so we're not going to take it."

FISH: You made three mistakes then.

OLDFATHER: It wasn't just three.

HORWITZ: I mean, it's not that I have any more than anecdotal experience. Yes, it happens and there's also, of course, the "this is so and so's tenure piece" thing, which I don't know how much of that happens now, certainly, was once common. And is talked about in *Rising Star*²¹ by David Garrow on Barack Obama, that was roughly your period, right?

OLDFATHER: I'm in there twice.

HORWITZ: There you go. So, it seems to me, Stanley, I don't know enough about the community in which the reader reception was going on and so on, but in 1977, the American legal faculty was smaller in number than it is today. There were all kinds of problems involved in it being a small community. I'm not glorifying it, but it was potentially easier to make substantive judgments about Stanley Fish, we know he's going to make good, or so on. The larger the community gets, maybe the harder it is to make that judgment and the more that it makes a difference that the editor who is saying, "It's Stanley's work and I know he's going to make good," is a faculty member, as opposed to a grad student in English, who probably would still be in better shape than some law students. But the larger the community is, the more likely it is that the person that says, "Well it is so and so is making a very shallow judgment of that sort rather than a meaningful judgment." And that the person who writes the breakthrough article who is at school X. Sometimes it'll happen for them but it's just more unlikely that it's going to happen.

OLDFATHER: Do we want to try to move toward making this a little more nuts and bolts? What might we actually find ourselves including in a model code?

HESSICK: Can I actually just say one thing? I understand that we're here to talk about the ethics. But I'm a criminal law person, so I always think about how people will react to things. And I actually wonder if ExpressO and Scholastica aren't something to be embraced here? Why is the pressure not on ExpressO and Scholastica to say, "We will perform a scrubbing function so that this is a blind submission process?" As opposed to what they've done instead

21. DAVID J. GARROW, *RIISING STAR: THE MAKING OF BARACK OBAMA* (2017).

which is to say, “Authors, law review editors have told us that a CV is the most important piece of information that they have about you, please don’t forget to include your CV.” So, I understand that we’re talking about the ethics here. But I just wanted to point out, to the extent that we have a practice or we have systems in place, the systems right now are pushing us in precisely the opposite direction of blind review and so, if people like blind review, the fact that this has become centralized into two platforms could facilitate that sort of blind review. I think that that’s just at least worth noting.

OLDFATHER: Am I remembering correctly that there’s at least been a proposal out there that AALS should undertake to create its own article submission platform? Maybe I’m confusing it with SEALS and the hiring market. But maybe that’s a legitimate question, too. Should this be something that AALS could do?

WEST: I can just tell you that I’m on a panel at the next AALS meeting about the role of AALS in scholarship and I don’t think, from what I’ve seen, that there’s any set agenda on that or that there are any commitments that have already been made. So, I think the answer is no, there is nothing on the table right now, but there may well be recommendations that come out of this next meeting. Oh, I just have one more anecdote and that is a top five journal, that we’d all be excited to hear about, accepting an article—not one word of which had been written—from a very junior person.

OLDFATHER: I’m going to try that.

HESSICK: Yeah, I mean, I don’t know that about a junior person, but I do know the whole, “Oh, we’re full.” I mean that’s not to say, “We’re definitely full.” So and so’s research assistant says he has a piece coming. If that doesn’t happen, we may have one more slot but otherwise we’re full.” And I should add I don’t think that that author knew what was happening, I don’t.

I don’t think that it’s someone that I think highly of. I think it might have been like the research assistant talking to the journal. I don’t think it was. I could be wrong.

OLDFATHER: Let’s throw out on the table, too, if we want to talk about it from the journal side. And I am still skeptical of focusing too much on that. The practice of internal submissions and the differential treatment of internal submissions, that’s another topic that comes up quite a bit.

SELIGMAN: I just want someone to find me during the break and explain to me why student journals have so much status.

HORWITZ: We are status oriented.

HESSICK: Yeah, that’s true. That’s what it is.

FRANCIS: So, one thing we could do empirically, it is an expected practice of any professional journal to publish what your reviewing process looks like

and to publish your instructions for authors. I mean, there is a very interesting group called the Committee on Publication Ethics. And we could go to at least a random sample of law reviews, some of them flagship, some of them not, and we could see from their websites. I would actually be happy to get an RA to do that. Whether they even have the appropriate documents on their website. And if we made a list of some of the content things we think ought to be in there, to see how many of them do or do not include that, if they do have such statements. It wouldn't be hard.

OLDFATHER: And if [the editors] want to get in and defend your honor at any point, by all means. We're more than happy to have your contributions.

SCOVILLE: Just to extend a little bit on something I said in the little piece that I wrote for this conference, I think that you could conceivably do something similarly useful with respect to the contracts that authors sign with law reviews. They seem to be pretty bare-bones in most cases, although I must confess that I don't read them all that carefully, on the presumption that issues aren't going to arise. Conceivably, law reviews could add stricter requirements with respect to author behavior in order to enforce some of these standards. Something to consider.

OLDFATHER: And I think too there is some limitation on putting too much of the burden on law reviews to enforce this. The boards are around for a year and they spend a bunch of time trying to fill their slot full of articles. I suspect that there are a lot of disincentives to playing hardball with an author. Yanking an acceptance will just entail more work and, "Oh, by the way, I've got classes and I'm a third year and somebody told me I could actually enjoy the second semester of my third year and relax a little bit." So, there are other sorts of limitations in addition to all the power imbalances in the process. The incentives, I don't think, necessarily line up well for the editors to enforce a lot of these things.

HESSICK: I just wanted to say about the ethics of home submissions. It gives me the heebie jeebies to submit to my home journal. And it was interesting because some of the folks who wrote about law review submissions in the '80s and the '90s seemed concerned that faculty would use the home submission to try to expedite to another journal. I'm actually less concerned about that sort of dynamic than I am of law review editors potentially feeling pressure to accept articles from the professors that they see every day, that they might currently be taking a class from, that they might be trying to get a recommendation from. Depending on the school, the law review, the identities of the articles editors could be very well known. The process at some schools is very well known. And, I don't want to get into too much detail, but my impression is that at least some of the editors that I have spoken to feel pressure when they're reviewing an article by someone who teaches at the school. And

I think that that's worth thinking about whether that's an appropriate dynamic to create.

HORWITZ: So, I guess it's a bifurcated problem. Most schools that are not Harvard or Yale or one or two others are not going to be impressed by a tenure piece published in their own home journal, I think. When we're looking at—and I actually think it's a problematic practice—but when we look at tenure, we're looking for our juniors to publish and what I think somewhere we can call like schools, journals that are better ranked than ours. And it would be nice if we just focused on the substance of the article. But if you're a Harvard professor seeking tenure, at least up until recently, then getting a tenure piece in Harvard was counted. Post-tenure, it's kind of maybe a different story. I think the worry then is about pressure rather than about advancement. And this can be true for elite or non-elite journals. I'm the faculty advisor for my journal. There's probably one particular faculty member who used to have a bad habit of this and my introductory speech to the new editors every year was, "I'm here to run interference for you so, if so and so is pushing you to publish a piece, send them my way. That's my job to tell them to leave you alone." So, again, what I want to say is everything said has had some merit. Where the push should be targeted is a question. I think your point about *Scholastica* and *ExpressO* was valuable, and I'd abstract it to say the question is, I guess, "What internal ethical duties do we have as scholars?" And then, two, "Structurally who's the least cost avoider?" I mean, if we're going to prescribe something, the question is, "Where is the prescription most effectively and efficiently aimed?"

FISH: I tend to agree with Paul that law schools that see themselves at a certain level or at a certain rank are going to want their junior colleagues to publish in law reviews that are at least deemed to emanate from a higher ranked school. I've had two experiences over my lifetime with Yale University. And they have been exactly the same in one important respect. When I was a graduate student in the English department, the idea that anyone who was not a member of the Yale English department had anything interesting to say was never even entertained. So, all of the references in any of my classes to essays or books written by someone other than my present instructor were to people residing down the hall. Then, when a few years ago, I taught at the Yale Law School, it was exactly the same thing. The idea at Yale that someone who is not at Yale would have something very significant to say was simply not entertained. So, I think we have to understand the cultural/political/hubristic differences in these matters.

OLDFATHER: Things that we have missed. Are there things that we ought to be saying in this session about non-law review means of scholarly output and the mechanisms there?

FRANCIS: This isn't about non-law review, but we haven't raised the question of author behavior—trading up—and that practice, and the, “You need to take the first offer,” or some version of that. I think we ought to think very seriously about the whole expedite trade-up phenomenon and what it does to scholarship.

OLDFATHER: Right, and I would broaden that to include the practice where one submits in the first place with the idea that the goal is to provide a source of an expedite and with no real intention to publish. And then the behavior that follows after that.

WEST: Just two quick thoughts. I think you should worry about what trading up does to the practice. You should also worry about what it does to character. I find it just so offensive, but I also find it shocking that the law review student editors themselves expect it. So, it's become a widely accepted practice, which I think is really a reflection of something that's wrong with the culture. But I'm not sure it's fixable. We haven't focused really on the virtues of student-edited law reviews with the exception of the comments that you raised. But I do think that there are an awful lot of student-edited law reviews. There's so many of them. A lot of what's published isn't very high quality. But just the fact that there are so many does provide us a solution or sort of safety valve for some of these problems. Yeah, there are these terrible stories of people getting their friends' work published and so on. But just because there are so many law reviews, people do get their work out there. And now with SSRN, if the work is out there, it'll be read by the people who have an interest in it. And so, I just don't want us to lose track of the fact that there's a lot that's fine about this culture, the publication culture in law schools.

FISH: Yeah, I would second that and say that one of the things that's fun is the symposium collections. If you're working in an area and trying to figure out what's going on and you know that there's been a symposium on the subject recently published in a law review, it's invaluable, not necessarily solely because of the quality of the essays, but because of the volume of the footnotes. And you can quickly educate yourself, at least to your obligations, what pieces or books you should now read. That's a genuine service.

HORWITZ: So, I'll make a practical suggestion. It feels very “faculty-politics” or “politics in general.” The next step is the “blue-ribbon commission” or the “more-study is needed” approach but it does strike me that, to the extent that we can batten down on hard standards or recommendations here, all to the good. But there are serious arguments about which path the legal publishing process should take. The ethical duties and responsibilities are going to vary depending on the environment and so the legal academy needs to “come to Jesus” and amass information on the following and have a meaningful institutional resolution, pan-institutional resolution of some of these issues. I

know that's weak sauce, but I feel bad, as a character matter, about some people gaming aspects of the system. If the system is what it is, but not all of them strike me as unethical and some do, and some just strike me as, kind of, sleazy in a different way. So, maybe it's just time to figure out how clearly the problems can be identified and put to the academy as a matter of questions that need to be dealt with.

SELIGMAN: I'm going to pretend that Chad asked this question that I'm going to answer, which is, "What else should we be thinking about there?" I'll just say, again, as an outsider, that it's striking to me that the question posed is here, generally about the mechanisms of legal scholarship, but the focus has been almost exclusively on law reviews, as opposed to some of the pieces that you all wrote in preparation for today. There are other venues of publication or for the output of the ideas of law professors that I think might be worth discussing for a little while. I might be wrong about that. And it's also quite notable to me as an outsider influenced by social scientists that there's been zero discussion of the ethics of the research process, which is the foundation of publishing and scholar publishing.

HORWITZ: I did say we should make data sets available. I think that was -

OLDFATHER: Yeah, but that's right and be exhaustive. Or at least thorough, reasonably. I would like us to speak to the other outlets mentioned and we don't have to limit ourselves to mechanisms. We are running close to the end of this session as it's formally designated, but next is thinking in terms of nuts and bolts. So, we can start to orient ourselves in both of those ways.

BOOTHE-PERRY: My comment might actually be a little bit more nuts and bolts, kind of piggybacking on what Paul was saying as we were thinking about doing the restatement and having some ethical obligation specifically regarding the law review process and not really discussing revamping the law review process because I don't know to what extent we could do that in quick form. But, in discussing the law review process, and not to borrow from the Model Rules of Professional Conduct because they don't apply to us as legal scholars, necessarily. I think we had that discussion a little bit earlier. But in the teaching and when you write about legal ethics, and you write about professionalism, legal ethics are a standard of rules that you have obligations and you have a duty to abide by. And if you don't, there are some ramifications. Professionalism, on the other hand, is something a little bit not as concrete for some people. And so, when Paul talks about those things when we're talking about law reviews that might feel kind of sleazy or they don't feel right, it's kind of like, the judge once said, "Pornography, you know it when you see it." I think we might want to be thinking about that when we do the actual drafting of this to know that there would be some ethical obligations we're talking about

and then these other “good standards, professionalism” sounding things that are, the sleazy things.

WALD: I’d like to clarify and add to my earlier point about the Rules of Professional Conduct. As a matter of law, some Rules, as codified in whatever state those of us who are lawyers are licensed in, certainly apply to our conduct. A law professor, who happens to be a lawyer, who commits an act of dishonesty, say plagiarism, is subject to discipline per rule 8.4(c) under the rules of the jurisdiction where she is licensed. As a lawyer, I’m mindful of the fact that I must comply with the Rules of Professional Conduct and that some rules apply to my conduct as a law professor. But, importantly, I’ve always thought of myself primarily as a professor who’s subject to some Rules, not as a lawyer who happens to be teaching at a law school. And so, while as a technical matter, yes, some of the Rules of Professional Conduct apply to my conduct, as a law professor I do not think of the Rules as playing an important role in guiding and shaping my conduct as an academic. I suspect most law professors who are lawyers are in the same boat: they are mindful of complying with applicable rules but the Rules do not meaningfully inform their conduct as law professors. By the way, there are more and more—yet still a minority—but increasingly more law professors who are not lawyers, and I don’t mean because they haven’t kept up with the licensing. I mean professors who are not lawyers, such as sociologists, economists, so on and so forth. These law professors, of course, are not subject to the Rules of Professional Conduct at all.

FRANCIS: One other observation that I don’t know where to take, I’m sort of making a whole bunch about the current landscape. The law reviews that occupy the current landscape come in many different flavors. There are the so-called flagship law reviews of institutions. There are ones that come with particular political perspectives. For example, the ones that are associated with Federalist Society views. And there are ones that are special area ones. And I don’t know that there’s anything to say or whether we want to have out on the table, something about whether it’s appropriate to have ideologically driven law reviews or, I mean, maybe there isn’t anything we can sensibly say about that. That may not be a fair characterization in any event.

HORWITZ: There are a few [law reviews] that I think are explicit about it. There are one or two, maybe more than one or two. There are a few that are not just about a subject matter or not just environmental law but with a general preference for saving rather than destroying the environment. There are a few that are kind of explicitly political, but there are not a ton. Of course, it is true that, you know in the JLPP or a few others you can generally guess where things are going to come.

FRANCIS: My own view is that disclosure on the part of the review is the right way to handle that. But again, I think it's just a phenomenon that's out there in the territory that we shouldn't entirely ignore.

FISH: There have been cases in which the law review at a law school had a higher reputation within the law reviews than the law school might have had and, in part, this has happened—at least in the ones I am thinking of—because there was a deliberate decision to strike out in a path that might amount to occupying a niche of some kind. So, it was a strategic decision. Not to be “just a law review” but to be known as “the” law review, the “go-to” law review or one of them at least. I have no normative conclusion to draw from that observation but I just thought it should be put on the table.

E. Session Four: The Mechanisms of Legal Scholarship, Continued

OLDFATHER: So, to the nuts and bolts. We begin with modesty and humility. As we move into this last phase, let's bear in mind that we've got Stanley for exactly one more hour, so let's make the most of it. So, go get him. Was that what it was? Have at him, something like that. An issue that came up during the break that we want to put on the table is the question of author behavior with respect to law review editors. I've had to involve myself in situations where authors sent intemperate emails to editors.

FISH: Intemperate in what direction?

OLDFATHER: Intemperate in the sense of generally being difficult to deal with and accusing the student editor of being unprofessional in various sorts of ways. I don't remember all of the details. I do remember my response where I confronted this person with being intemperate and unprofessional and so forth, and the matter was resolved.

FISH: Is this bullying or attempted bullying?

OLDFATHER: Bullying is a word that would work, yeah. It was, I'm oversimplifying here, but “I don't want to do your stupid footnotes. Don't make me do them. I'm coming from a different discipline. We don't do it that way. I think this is all ridiculous.” That sort of thing.

FISH: Not a law person.

OLDFATHER: This is somebody from outside the legal academia. So, I think there is something to be said there for a norm of civility in dealings with law review editors, recognizing once again that there is this power differential there, among other sorts of differentials.

Having started with that, we're now at the difficult part of our endeavor here, which is to attempt to take these discussions and turn them into at least the basis for a first draft of a set of ethical standards. I think I'm going to work off of Paul's draft here as we start our discussion. It takes us back to the

beginning, right, which is what are we talking about? What is our subject? What do we mean by scholarship? Do we approach it, I didn't capture in my notes the three-part definition that, I think, Stanley formed based on a reaction to Robin's piece, but that was mentioned a couple times as a, what was it, scholarship in the tradition of the humanities?

FISH: Just [indiscernible] scholarship which has its compelling motive getting something descriptively accurate truth and so forth. And then scholarship second, the scholarship is responsive in a particular sphere of the enterprise that is the law realizing the incurring of justice or making it a little better. And then there was work that was, frankly partisan, precisely endorsing—that is, it started with the answer.

OLDFATHER: Is that a useful division of the world?

FISH: I thought so.

HAMILTON: This approach made a lot of sense. I had it really defined into, the frankly partisan form, which to me was in the advocacy ethics. "No affirmative lies" was kind of my outer boundary on that. But you can certainly leave out a lot of evidence that doesn't support your position versus—this goes to exhaustiveness actually—versus the other model which I thought was signaling that it was a good faith effort to explore all the evidence, conflicting as well as favorable to your position, and then coming out. It doesn't have to be exhaustive to everything but at least good faith. But this picks up a nuance that I didn't have.

FISH: Yeah, and I would prefer good faith to sincerity because good faith obviously refers to patterns of behavior even though the word faith is there. It's not being used to refer to some inner-mysterious thing or, as sincerely always seemed to me to be, some inner-mysterious thing. So, I like good-faith.

HORWITZ: So, if I'm thinking again about what a hard copy looks like and I should say two things. Three of us here will do as much of the work as possible, not to steal it from you but to take the burden off your shoulders and—this session in part is about, "You give us the map, or the skeleton and we'll try to fill stuff in with what you said or vice versa." We gave you the basic map, you can argue with it and/or provide flesh on the bone. This seems to me a place where I guess caveats or qualifications start coming in, so you have a definition of legal scholarship and then one of the questions is, "What about non-scholarship?" It seems to me, it would be a relevant comment if I'm thinking in the restatement fashion. Or maybe to put it differently, the question is not just, "What is good? What is the purpose of scholarship?" but, "What is scholarship as an entity? Does it include an op-ed written by a law professor? What does it include written by a law professor?" Maybe put it in a more open-ended way.

OLDFATHER: Including potentially books—case books and other teaching materials and so forth. Nicky.

BOOTHE-PERRY: 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.

OLDFATHER: 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." But that word kept coming up with the collaboration.

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: So, would that go to a comment under that when we're talking about what types of writings qualify for scholarship? Because 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.

FRANCIS: I guess, I'm a little puzzled about, and I thought scholarship had something to do with the production of knowledge, or maybe I'm not quite sure how much the dissemination of knowledge here also matters. But I'm not sure it's scholarship to write a letter to the editor or an op-ed or blog or a Tweet. If all I'm doing is expressing my opinion. It might be—suppose I've written something that's aimed to contribute to new knowledge and I, then, disseminate it to a different audience by a different medium which involves some rethinking about presentation. That might count. But I think we need to be really careful about what the scope is. And just on collaboration, there is always going to be collaboration with audience. But I think we have to be really careful not to have it look like it always has to be co-authors or something like that.

SELIGMAN: Just to amplify a piece of that that I think got buried, was the piece of "what makes it scholarship is the new knowledge." And so, the focus, I think, of your thinking needs to be on the production of what went into the output, rather than the place that it is put out. So, what I could imagine putting new knowledge out in an op-ed, although that would not be very wise. So, that

would give research underneath that. The key isn't the final place. The key is the process behind it.

OLDFATHER: And does motivation matter?

HAMILTON: Well, I mean, I think it's good to look back as to what others have thought about this. So, going back to Ernie Boyer in *Scholarship Reconsidered*²² in 1990 that coming out of Carnegie, remember, he argued for the four categories that it's scholarship of discovery, integration, application, and teaching. Because they wanted to create a new field of the scholarship of teaching, which I think was a wonderful new initiative and fits with some of the teaching materials, ideas, and then they proposed in the '97 book, "Does the scholar identify important questions? Does the scholar adequately consider existing scholarship? Does the scholar use appropriate methodology recognized by the field? Does the scholarship add consequentially to a field?" So that one you can see, if you go that route, then we're not including the op-ed piece, that category doesn't get included.

WALD: We fairly casually drew a distinction between codes of conduct and restatement-style documents, and should spend a little bit more time talking about it. The goal or objective of the Rules of Professional Conduct is two-fold. One is to guide the conduct of practitioners, the other is to protect clients—assuming that clients will often be vulnerable vis-à-vis their lawyers and in need of protection. In contrast, restatement projects, in general, are primarily meant to codify the existing law and guide practice. This distinction suggests that we might gravitate toward a Rules-style document, at least to the extent that what we have in mind is not just the guidance of the practice of academics, but also the protection of others, such as readers of legal scholarship and editors of law reviews. It doesn't mean that at the end of the day our work product must look more like a code as opposed to a restatement, but it does mean that if we draft a restatement like document, we might want to keep in mind the objective of protecting readers and others who interact with legal scholarship.

Unrelatedly, it seems that we are making a background assumption here that all law professors regularly engage in scholarship. But some of our colleagues do not have strong scholarly work habits, and therefore we might consider making a statement about the duty to regularly engage in scholarship and what such a duty might entail. To be clear, by a duty to engage in scholarship I do not mean to suggest some magical standard of productivity—so many articles or book chapters a year—rather, I mean a statement about what

22. ERNEST L. BOYER, *SCHOLARSHIP RECONSIDERED: PRIORITIES OF THE PROFESSORIATE* (1990).

it means to consistently research, have strong work habits, read and comment on the work of others, publish regularly, etc.

OLDFATHER: Two quick reactions to that before you pass it to Robin. One is, I think that should be a non-controversial sort of idea in the sense that if one looks at the university faculty handbook for Marquette University, for example, there is a clear statement of an obligation of a faculty member to continue to produce scholarship throughout his or her career. And I would expect that's a fairly common sort of provision. With respect to the counting, I went to an associate dean's conference this summer because that's where I find myself these days sometimes. And one of the panels there was some folks who were or have been deans, and among the questions they were dealing with was how do we assess scholarly productivity. And somebody remind me to bring up the rubric that Don Weidner at Florida State used to assess faculty productivity there because it was very much, "If you do this sort of thing, you get one point. If you do this other sort of thing, you get a half point." And it all factored into a number at the bottom which worked quite well for Florida State, but I don't know what I think about the idea in general.

WEST: Okay, much of what I was going to say has been said, so I can be very brief. I do think the question, "What is scholarship?" has to be couched as, "What is scholarship for, what purpose? Why are we engaged in this definitional project?" Because the content of the definition will depend somewhat on why you're doing it. The context in which this definitional question is often posed is a tenure or a hiring decision and that's not what we're engaged in here. So, "What is scholarship for purposes of generating a code of scholarly ethics?" is a better question to start with than simply, "What is legal scholarship?" I do also, though, just want to stress that I don't think we should be overly pluralistic. On the other hand, I don't think we need to assume that we can say something about all forms of legal scholarship. There are other things. There are other kinds of scholarship which we haven't discussed and which we don't need to, perhaps. But there is still a lot of straight descriptive legal scholarship that just aims to elucidate what the content of the law is. There's analytic jurisprudence, you know, a bunch of people used to talk about in the 19th century. There's scholarship that's quite self-consciously critical, which is not normative but it is also not particularly inter-disciplinary. There's theoretical scholarship and then there is something called adversarial pedagogical or "clinical written" work, which I don't want to sign onto a document that disclaims the value of that. Again, I don't care that much what things are called. But I don't want to sign onto something that disclaims the value of that. Okay, why it matters what type of scholarship we're talking about: I do think for ethical purposes, the virtue that you ascribe to scholarship does determine some of the ethics. So, to say that the purpose of scholarship is

knowledge is to imply a certain set of constraints, all of which make sense to me. I do believe that the purpose of much normative scholarship is to improve the justice of the legal system. That implies a different set of constraints—overlapping, of course—but that’s why I wanted to keep insisting the disinterestedness stay on the table because to my mind disinterestedness is right at the core of it. And then my last comment is that I think it’s important for us to say something on a preamble or otherwise about the obligation to do scholarship because the question facing so many law schools right now is whether to have any scholarly role at all for legal academics, given the expense of a legal education, given the need of their students to find jobs, the question that a lot of faculty and a lot of administrators are trying to answer is whether we should ask faculty to do this at all or is it simply a luxury that we cannot afford, we have to focus on training our students and the skills that they need to be functioning lawyers. And so, I think it’s important to just—and in any gathering like this that talks about the ins and outs of scholarship—to just continue to insist on the importance societally, as well as professionally, of having an academy that’s independent of the bench, independent of the bar, that produces a body of work that is about law and all these various ways but including critically as well.

HORWITZ: So, one thing, you haven’t quite weaned me from pluralism, but you all have made me think carefully about what, I, in a more disinterested fashion, think needs to be there and which things that I bring to the table are kind of “hobby horses” that are important to me but don’t necessarily have to be addressed. And it seems to me that one way to deal with this more generally is by a careful statement or limitation on scope. There are questions that we might not want to answer or be able to answer, without having to make a statement. But to say, for instance, this is not a statement about, I’m thinking of the classic joke—have any of you read Thomas Reed Powell’s mockery statement of constitutional law where there’s the bit about the dormant commerce clause and he’s kind of like, “Some amount of interference with commerce is too much—note how much is too much is beyond the scope of this restatement.” It’s a very clever bit. But it’s possible to say, for instance, “What counts as clinical legal scholarship is beyond the scope.” And I don’t consider that fudging. I’m actually more willing than I was to accept Stanley’s answer that we might value it, but still not call it “scholarship.” But I am happy to just put it aside and make a scope statement. And that might apply to a couple of things. So, scope exclusions, these are valuable here. And the second thing I’d say, the reason I asked about what I’ll call legal academic non-scholarship is that partly because things like amicus briefs and professors’ letters are so prevalent these days and partly because they specifically involve what I think of trading on authority—they specifically involve not just, “Here’s a

statement,” but, “Here’s a statement coming with ostensible authority” cloaked in the, whatever it is, mystique or expertise of the legal academy and the institution. I don’t know whether it, therefore, in my view, must be included in dealing with the ethics of legal scholarship or whether one says we are not addressing—except in so far as it’s immediately relevant—legal academic non-scholarship but there may be duties that appertain to it. And that is an important issue but beyond the scope.

OLDFATHER: I think Neil and then we’ll go to Leslie.

HAMILTON: If we’re including Stanley’s frankly partisan as part of the definition of scholarship, it would pick up—

FISH: I wouldn’t want to.

HAMILTON: Oh, you don’t want to. Oh, I see. The other point I was going to make is if you want to start with, “Why is there a duty?” you’d go to social contract which I think was in Nicky’s piece as the social contract argument.

FRANCIS: So, we’ve been talking about whether scholarship includes dissemination or advocacy and whether there are lines there. One other line, I don’t know if it’s a line, but I just want to bring it up is creative works. So, would *To Kill a Mockingbird* be legal scholarship? Well, it might be, I don’t know.

HESSICK: I know why you’re asking those questions.

FRANCIS: Well, we had an example like that in law school of somebody who wrote plays. A colleague of mine in the philosophy department is a fiction writer, and she wrote a lot about bioethics dilemmas and her fiction involved bioethics dilemmas and there was a question about—now that goes back to Robin’s point—would you account for tenure, but whether any of the kinds of standards that we’re thinking about might also apply to certain sorts of creative works that people might do—as calling on their legal expertise, and in an interesting sense, contributing to how it is that people understand the law. I mean, if you’re thinking about the justice project, that’s partly why I thought of *To Kill a Mockingbird*. But I just wanted to mention that could potentially be part of the landscape.

OLDFATHER: There certainly are plenty of law professor fiction writers and not just at Yale.

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.²³ Assuming and hoping that justice will one day play a more significant role in law, what role

23. ROBIN L. WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2014).

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 at law schools, legal education and legal scholarship?

FISH: What are examples?

WALD: My concern is that law teaching and the practice of law more generally is completely, practically speaking, devoid from commitments to and engagement with justice. Examples? I believe I've read recently a piece that points out that although we have approximately two hundred accredited law schools in the United States, all are called and referred to as schools of law, and not a single one is known as a school of justice. Is that a coincidence? More generally, most law schools do not have a required class called Justice, although many teach Jurisprudence as an elective, a course that may or may not explores conceptions of justice, and do not systematically explore justices pervasively throughout the curriculum or outside of it.

WEST: I know. No, let me just clarify. I'm not saying that law has always been about the suppression of justice. Legal discourse has neglected the topic of justice. And so, in my essay I wanted to insist on two things. One was this disinterestedness point and the second was that law scholars who do normative legal scholarship, I think, have a sort of general, ethical obligation to say something about their normative structure, if you want word less loaded than justice. And so, some people do this, the people who feel very strongly about efficiency, say lots about it. Many of us don't share that commitment. And so, if there's another way to describe what you think it means to say that this is a better legal solution to this problem than that. What's the better and they're referring to. I think for a lot of people it's not stated explicitly. But the implicit premise there is justice. This is more just than that and so we should be doing it this way rather than that way. And if that's true, then I think we have an obligation to think a little bit more clearly and explicitly about what that norm means.

OLDFATHER: Thinking about it in terms of our code, then, is that something that would be part of a disclosure-type norm? I mean it's not the same, but on the other hand it's—or is it candor or transparency to use that word again. How do we formulate the norm?

WEST: I meant it as an intellectual project, not that you've got to disclose your hidden thoughts about this, but that one should be—partly it has to do with candor—but one should be open to argument about what it is that you think the point of this field of law or the point of the rule of law, generally.

OLDFATHER: Could we state it as something like an obligation to articulate one's premises as best as one is able?

WEST: Yeah, I would say one's moral premises. But yeah, I just resist, or I recoil, at the sort of subjectivity of that because I think that what I would envision would be an obligation to engage in an inquiry about the—sorry to use the expression—objective truth of the matter. So, what does justice require? And it's not a question that's been a familiar one in the legal academy. I think we've neglected it, the neglect of it has had consequences and most of them have not been good. So, at any rate, if so many law professors continue to engage in normative legal scholarship that takes the form, "This is the way the law ought to be," and it's not all bad writing and it does have scholarly virtues of depth and breadth and so on. It seems incumbent to have an obligation to say something about that moral structure. And we haven't, as an academy, as a group done much of that.

HESSICK: So, that's why I'm glad that you've kept the value of disinterestedness on the table. I think that that's when we talk about candor and when we talk about exhaustiveness, I think disinterestedness needs to be in there and maybe we should flag it when we define scholarship. And I think that the definition of scholarship should embrace normative scholarship with the caveat that it's especially important for normative scholarship to adhere to an ethic of disinterestedness. And then that would be dealt with below and the code. Maybe I'm wrong.

WEST: I'd be really happy with that.

HESSICK: As I've been listening to you, that's where I thought we were going with it and it made me quite happy that you pushed disinterestedness back to the forefront because I think that when people hear the word normative scholarship, they necessarily worry that it is interested or partisan or adversarial. And so, I think it could be helpful to flag that in the definition of scholarship and then to make reference to the value that will be explained more later.

FISH: I agree completely with the desire to put disinterestedness in a particularly favored position in whatever statement is produced. But we should be aware of the, shall I say, political/rhetorical pitfalls of doing so. Because some people will read disinterestedness as a neutrality, which brings with it a whole other host of definitional problems. Some people will read disinterestedness as a hands-off ivory tower kind of thing. So, I don't know exactly how this could be accomplished, but one has to. One would hope it would be possible to promote or celebrate disinterestedness as a genuinely thick value, rather than the antiseptic character traits that some people will immediately jump to.

OLDFATHER: Note takers, are we satisfied on the definitional question? All right, so then we should move into the topics from the second session. We had sincerity, which I took to be an idea that there was some sympathy for excluding from our project here. Candor, we talked about disclosures. Candor about what, whether it was about methodology, whether it was about information relevant to the evaluation of the scholarship, including, but not limited to, ideological considerations. Maybe we should focus on that before we move to exhaustiveness because I think there's a lot on the table with respect to the candor point.

FRANCIS: As I understood it, the predominant one wasn't so much political or ideological persuasion as it was methodology, conflict of interest in the more classic sense.

WEST: On candor?

FRANCIS: Yeah, what sorts of things were needed to disclose.

OLDFATHER: Modifications to that.

WEST: No, I don't want to lose track of Carissa's point, that there's a point past which disclosure is not sufficient and you really want to discourage going there. It's not just a matter of disclosure. If you're in the middle of litigating a case, you can't be writing about it at the same time in order to influence the judge. I don't think.

OLDFATHER: Disclosure is a partial remedy but for some situations recusal, so to speak, is the real remedy. Not doing the project.

WEST: I don't know. Does everyone agree with that?

HORWITZ: Yeah, so my assumption will be something like, whatever the duty of candor describes, either in a comment there or elsewhere, one says, "It's not a necessary remedy for all evils," and, "See conflict of interest below." Something of the sort. I guess that's how I'd put it. In terms of how I'd define candor, maybe this is overbroad or over-vague, but something like, "The scholar has a duty to provide information," or maybe, "Non-obvious information," takes care of the point that you don't think it's always necessary to disclose every political viewpoint, for instance, necessary for a sound evaluation of the work on a piece of scholarship.

WEST: Are you going to provide examples like in the restatement?

HORWITZ: I think so.

WEST: Okay, but what would an example be of something that should be disclosed?

HORWITZ: That the project is funded by a particular group, to take an easy one, I guess, that the person has filed an amicus brief in this case. Not that they're simultaneously gaming the system, but let's say they're analyzing a case

where I filed an amicus brief in this case. Those are the kinds of standard disclosures that might be relevant.

FRANCIS: The third disclosure was any data sources. So, the way social science journals—if you collect the data, the raw data are available.

SCOVILLE: It might also be useful to reference the value of more substantive forms of candor, not necessarily process candor like most of the issues we've been talking about so far. In other words, candor about uncertainties regarding the implications or the strengths or weaknesses of a piece. Candor about counter-arguments obviously. That sort of thing.

WALD: Does that fall under candor?

OLDFATHER: It is kind of related to the humility point.

SCOVILLE: So, where would you put it?

WALD: Well, I'm reminded of Stanley's point at the beginning of the day that "you just do the work." Not engaging with likely critiques of your own work, not anticipating them, not responding to them to the best of your ability would simply constitute weaker, poor scholarship. A good scholar would anticipate and respond to reasonable challenges, as part of what we referred to earlier as subject matter exhaustiveness and competence. The "geographical" location of this argument, if you will, is not candor. It's about doing the work and doing it competently.

HORWITZ: It would be Rule 1.1, right?

WALD: Right. The issue is one of competent legal scholarship, unless by candor you mean to revisit strategic exhaustiveness.

OLDFATHER: In some respects, are we not, here, defining what constitutes competent scholarship? It is candid. It is exhaustive. And I think with respect to the disclosures we might borrow from the securities laws and use the word materiality, the concept of materiality.

FISH: Not only is acknowledging and anticipating objections an important part of doing the work: It's a wonderful teaching tool because, as you know, I'm sure all of you had the experience of realizing that some of your students don't know what an argument is aside from thinking it's a quarrel of some kind, and have one way of talking about it, and therefore, have difficulty in knowing how to organize the presentation. And one way is to teach them the "I-know-what-you're-thinking" move, meaning at this—which, more formally, is "at this point someone might object that," you know, which is not only an obligation under the heading of exhaustiveness and perhaps of candor, but it's a wonderful way to facilitate the unfolding of your argument.

SELIGMAN: Chad, I'm not sure that good scholarship is the same thing as ethical scholarship. I think that there's a Venn diagram in which they overlap and we would probably all like to be in that overlap, but I'm not sure that as I

have heard you define the project today that the project is to make recommendations about how to have quality scholarship so much as to have ethical scholarship.

OLDFATHER: The implications for our definition of candor being?

WALD: Stanley offered a compelling example earlier. Once you author something, it's out there and you no longer have control over it. You could adhere to the best ethical standards, produce a piece of scholarship that you stand behind ethically and then down the road it's being used for very bad purposes. As a scholar, you would not be accountable for the manipulative uses of your own work.

OLDFATHER: It can certainly just be horrible scholarship and be completely ignored. And I agree with that.

SELIGMAN: I think what I was responding to particularly was the piece about figuring out what all the objections to your argument might be and building them in. I don't see that as a point of ethics, I see that as a point of quality.

HESSICK: Well, I see that as a point of ethics. I think that it's one of the things that distinguishes, I think, legal scholarship from legal advocacy is that you actually make the case on the other side and then, in light of the case, have to argue why you nonetheless don't think that that's correct. And I should qualify that by saying and sometimes you don't do that. If you're doing an empirical project all you're doing is acknowledging the shortcomings but it's really important that you do that. I do think that that's ethics. And it's true. Sometimes we say, "Oh, this isn't a good piece of scholarship because" but I've heard other people describe it in terms of, "This person wrote this paper, they know there is this other argument and they did not talk about that." And that wasn't just a lapse in quality, I think we would say it was a moral lapse.

HORWITZ: There's the distinction though: One can sloppily, incompetently fail to spot. One can carelessly, incompetently omit a counter argument. One can knowingly and deliberately omit a counter argument and it seems to me the intent to conceal or avoid the fact that there is an authority or an argument that you know exists is an ethical problem. The first is just something to be judged as poor scholarship.

SELIGMAN: I think we may be at the point of disciplinary difference, because I'm not sure that historians would feel quite as strongly as clearly the legal scholars do. And we might hide it in our narrative anyway, glossing over the problems. But it sounded to me in what you said like the legal scholar has a responsibility for imagining all objections to that scholar's points. And then writing about it and including them. But what if they didn't think of them?

WEST: No. I think the objection is to the decision. I've seen this in colleagues' writing—and I hope not in my own—in consciously deciding not to address a counter argument that you know full well is out there and you don't include it and address it because you don't want a court to pick it up.

SELIGMAN: And I wouldn't object, I wouldn't argue with that point.

HESSICK: And I don't care about why you don't address it, I care that if you don't address it, that's a problem.

SELIGMAN: So, you would say it's okay for the scholar not to think of everything and that there to be room for some other scholar to move in later on and think of this?

WEST: Yeah, of course.

HESSICK: That's right.

BOOTHE-PERRY: For purposes again, and a lot of what I'm saying at this point aren't really my views, but I used to serve as a rapporteur, so I'm trying to formulate in my mind how a code or something would look. So, tell me what you said again because I just got so caught up in making sure you knew these aren't all my views. When you were just talking about—

SELIGMAN: That a person can think of something and you wouldn't call it unethical if they didn't think of everything.

BOOTHE-PERRY: I was saying, maybe we can put this under the thoroughness or the exhaustiveness section because if you do exhaustive research you know what the counter arguments are, just thinking, "Oh, I wonder what there could be," but it's actually that you're aware of counter arguments, not just imagining.

SELIGMAN: I think you might need the word sort of consciously in there.

HESSICK: I agree.

OLDFATHER: Should we move to exhaustiveness then? Having exhausted candor. And I think there we have on the table the notion of having explored all of the criteria, inputs, whatever, within the subject matter. We had a proposal that there was then non-law exhaustiveness and strategic exhaustiveness and a suggestion of a good faith related standard here. Also, a proposal that thoroughness be a better word or in any case the word reasonable be appended to either of them.

FRANCIS: I don't know that this is quite on exhaustiveness, but you brought up the example of the article in the lesser law review not cited. And I said, probably too quickly, "plagiarism," but I think there's strategic choices people make about what not to cite to make their stuff look more original. It's not just they don't want the court to think of it. It's that they're downplaying other work or they're just, maybe it's conscious suppression of other work in the field and that's problematic. Another problematic practice in some other fields that

I think happens in law is this so-called salami slicing. You publish five articles when it should really just be one.

HORWITZ: We usually have the opposite problem, don't we? Publish with a couple hundred-page article which should be in a book or five articles.

FRANCIS: Yeah, that's another, well, we have both problems. But the salami slicing one is that you make a whole lot of articles out of, essentially, one idea. And I've seen people do that in law.

WALD: Can you say a little bit more? What are some possible ethical failings in what we refer to as salami slicing? Is it that you repeat yourself or self-plagiarize?

FRANCIS: Self-plagiarism is something that's considered unethical in other disciplines. So, copying something you have had somewhere else. I keep having a lot of trouble about how to write this without some reference at the front to we're working in the context of the current landscape, which we regard as problematic in many ways. One of the reasons salami slicing is regarded as problematic in the sciences is the way it consumes scarce resources. And the scarce resources consumed include journal space, the expense of publication, the genuine involvement of peer review. Now, in law somebody made the comment a bunch of times and it was so wonderful to get to meet you.

FISH: Well, I'm very pleased to have been here. Thank you.

[Stanley Fish leaves]

FRANCIS: But those resources were sort of infinite. "There's always another law review." Well, I'm not so sure that we should think about it that way because a lot of resources go into the publication of the law review. There's the editing, maybe student labor is infinite, but we ought to be husbanding our students' time and not having them work on stupid stuff. There's also the question that it costs law schools time and money to produce journals and we kill some trees. So, I don't think resources are infinite. And so, I think that's a problem with salami slicing in law reviews too.

WALD: Other than self-plagiarizing, which is a significant ethical failing if done without proper citation and attribution, what are other examples of salami slicing?

FRANCIS: Well, so here might be an example. You have a clever tool or you know the clever distinction and it can help make sense of three different problems. Well, one way to do it is to publish the little methodology, the distinction and problem A and then you do it for problem B and then you do it for problem C. So, that could be one kind of example, when you could write an article that is actually a richer article in a way because it shows the comparative of how the tool works and another way would be you have a data set and you publish this little result from the data set and then you publish this

little result, when you could be publishing a more comprehensive account from the data set.

SELIGMAN: Yes, I agree entirely with what Leslie is saying. When I was a junior faculty member, somebody came around on some occasion, was giving advice, and this was sort of negative advice, but advice nonetheless to think about. What was the least publishable unit of your scholarship? The example that he gave was of somebody who had written an article in which his research had discovered that the favorite color of people with schizophrenia was orange. And that was published separately. And I agree with all of the arguments that Leslie made and I would like to just point back toward Ryan's piece on puffery that basically what you're engaging in when you go with the LPU is résumé inflation.

OLDFATHER: Right, and I specifically recall as a junior scholar having people say to me, "It's always two articles, always make it two articles. Always split it up as much as you can." So, I have certainly received similar advice. I want to go back to the example that I had raised of the situation of the scholar not citing or, I think probably not even noticing the existence of the prior piece that had taken up the same question and analyzed it roughly the same way. I think there are some scholars out there and I'll mention a name and use an example because I think incredibly highly of this person's work. If you read a piece by Fred Schauer, for example, there are not going to be a lot of citations there. It's certainly not because he's plagiarizing, but he knows exactly where in the puzzle this particular piece fits. And I guess kind of expects the readership to know it as well. And there's really no effort at all to place it in any sort of context. I find as a reader, I'd really like a lot of the time to have had it placed in context because it would help me in undertaking the research project that I'm involved in to be able to know what's he drawing on here, where does this fit, what are the other things I should be reading. I don't think that there's any sort of intentional violation of any kind of ethical norm going on there. And so, I think one of the things to account for in an exhaustiveness norm is whether there are circumstances in which it can be waived.

HESSICK: I want to say that the example that you gave initially about the law review article—not mentioning the first law review article. I think that there are two pieces to that. The first is, "Did the person actually bother to read in the area before writing?" Because, and I guess this gets at subject matter exhaustiveness. Do we have an obligation to be well-read in our field and to continue to be well-read in our field? I think that the answer to that is "yes" and I think it's relatively uncontroversial and I think that that's a pretty easy one. What I think would be a new norm would be that there's an obligation to signal in the paper how our contribution fits into the existing field. And this pushes back directly on claims of novelty and those sorts of things. I'm just

mindful of the extent to which we're stating things that people probably agree with and things that might be controversial. So, I think it's not controversial to say we have an obligation to know where the field is and what's being written, especially in an area where we're going to be spending enough time to write something new. But I think that it would be useful if we came to a norm of instead of spending the beginning of our articles saying how different what we're saying is from everything that's been said before, instead trying to talk about the ways in which it's the same or borrowing. I don't see that as plagiarism. I see it, instead, as—it could be a signal of expertise. I don't know what the other signal would be. I do think that the number one is uncontroversial. The idea that being an expert in the field includes continuing to read, because I think that there are plenty of people who stop reading at some point.

FRANCIS: You know, plagiarism can be straight out copying, obviously. But if the scholar had actually read that piece and it played a role in how he structured it, or she structured it and it wasn't cited, that's a wrong to the scholar whose work was used. And I think we ought to say that. I also, maybe you said it might have been a research assistant. And another point we haven't made, if I'm a lab supervisor in science and the post-doc in my lab does something that involves what's potentially an unethical practice and I haven't appropriately supervised that post-doc, that's on me. So, suppose your RA—if you haven't given your RA instructions about what they're supposed to do in terms of making sure that you appropriately credit other peoples' ideas, I think that's on you, not on the RA.

WEST: I don't know if we should keep walking around like that. Anyway, I just want to agree strongly with the first half of what you said. I don't have views on the second half, but on the first half, I think that's completely right. And I do think that it's worth saying because my sense—and it's completely speculative—is that people may be aware of the existence of an article, may not have read it carefully, but they look at it, "It's in this rinky-dink law review by somebody teaching at rinky-dink law school, I don't need to bother, and more credit to me if I can present myself as the first person to say this." But I do think it's very hierarchy driven. I also think it's got a gender and a race component, not that we need to go down that road. What gets cited and what doesn't is a problem and it's an ethical problem.

OLDFATHER: Should we, in our 30 seconds remaining here, talk about the last piece, which is our obligations with respect to the mechanisms of scholarship, the law review process. Or have we fulfilled the exhaustiveness norm for the day? I guess, we will then pick up again in the morning with that.

DAY TWO

A. Session Five: What Have We Missed? Additions and Modifications

HORWITZ: All right. So, first of all, let me—I guess on behalf of everybody, express our thanks for a lovely dinner last night and your hospitality.

And again, we're delighted to have our friends from the Law Review here. So, the title of this session is "What Have We Missed? Additions and Modifications," and prior to that, off-transcript as it were, there were discussions about the nature of—and I think unsurprising question—but the nature of the enterprise, specifically what the lead document that we foresaw would look like. And I think that's a valid question. It's certainly something I know that Chad and Carissa and I worried about along the way. And so, a couple of people have specific comments about that and before I kind of give the floor to them, I'll say a couple of things. Yesterday, there was some talk about restatement versus code versus aspirational principles versus something else. In other words, the format—having a document, agreeing that it starts with a document—but what the format should be, so that is very much I think on the table. Our assumption, I think, had been that it would be valuable to have some kind of document, not because we expect that it would perfectly capture the exact sentiments of everybody in the room, or because we think it would be taken as a document that people would then use, but because it would be good, and also unusual for conferences, to come up with a discussion, to a document that could be used to provoke further discussion. So, we do our best to come up with something, we comment on it, eventually a journal like the *Journal of Legal Education*, for instance says, "Look, here's this document, we're going to reprint it, solicit views." So, it is a starting point for conversation. In that sense, we expect it to be imperfect, but I think there are valid questions about doing it or how to do it. And the second thing I'll say is that I think—although everybody has done admission tickets, done papers, certainly—at least in my view and depending on space and so on, at least it's always been my view that dissents, partial concurrences, commentaries on reactions to are also valid ways to respond to the imperfections of a document. And so, I ask you to keep that in mind, as we think about how it might be done, not done, restructured, and so on.

FRANCIS: I agree with you that it's really important to have a document. My question has to do with what kind of document and at least as a start, I wanted to suggest we think about drafting something that could look like best practices or guidelines or something like that, rather than either a model code or a restatement. And I'll just flesh that out a little bit. It's much more in keeping with what you would see in other fields. So, if you get on the website,

for example, of the Committee on Publication Ethics, you will see documents like that. You'll see them for authors, you'll see them for journal editors, you'll see them for publishers, you won't see them in the form of a model code or model rules, or restatements. So, it would put us more in the family of publication and how this kind of thing is done. Second, I have some specific concerns about a model code, which is, first of all, the question about obligation and aspiration, that's one piece of it, but secondly, when you promulgate a code, you assume somebody's going to adopt it, that there will be an entity that enacts it like a legislature. So, I'm curious about what enacting entity we have in mind, for a model code. Is it going to be law schools? Is it going to be law journals? And if so, what kind of enforcement authority will any of them have? With respect to a restatement, it's super controversial what the role of restatements are. Are they recommendations? Or are they what they initially purported to be, restatements of law? So, as for a restatement, I have a question about what we're restating. So, those are my more specific—if we were to produce a best practices document, or, if I lose on my little contrarian rant, I think if we do anything, the best thing we could do, that could go along with any of these, is a model document of instructions for authors, that law reviews could put up on their website, and it could be a template, it could say something about how you submit and then there could be some suggested alternatives for law reviews, like directly to the law review or to some *Scholastica* or whatever. There could be instructions for authors about what you may or may not do after you get an offer. You know, there are all the kinds of topics [such as], “What information you can send us? Do you send us your CV?” for example. And law reviews could make choices. And actually, another piece of my slightly contrarian suggestion is that I think the three of you [speaking to *Marquette Law Review* editorial board members] should be up at the table, helping us to think about what would help you, if you're going to be either the enforcers, if it were a code of some kind, or if you're going to want a document of instructions for authors to have up on your website.

HORWITZ: Let me say, first of all, I don't want to impose on you at either a distance from the table or coerce you to the table, so to speak. [Speaking to *Marquette Law Review* editorial board members] You are very welcome to sit in and participate in the session. If you prefer, kind of to be there, because you've got work to do and you're thinking about how this all looks, I understand, but you're welcome to participate and to interject.

WEST: Okay. Maybe we could all have a contrarian rant. I won't just repeat what you said that I agree with, but my main reservation about the way we proceeded yesterday is that we didn't seem to pick up what strikes me as the two major problems facing legal scholars and facing legal scholarship, particularly as I hear them voiced by new entrants to the legal academy and by

candidates and by my own fellows. And the first—we don't have to go on and on about this, because there's a huge body of literature on this now, but there's skepticism and outright disbelief, both in law schools and outside of law schools, about the value of legal scholarship. As I said, it's coming from both inside the legal academy and outside the legal academy. Schools that are in precarious financial straits are seriously considering cutting way back on scholarship, meaning cutting way back on what they expect or demand or even allow of their law professors in scholarship. Others are talking quite explicitly about eliminating all together the mission of legal scholarship or eliminating legal scholarship as a part of the mission of the law school. Rather, the mission is to train lawyers and to do so in a way that prepares them for law jobs—legal scholarship doesn't contribute to that—and therefore, we shouldn't be paying for it. It's a luxury, if people want to do it at home in their spare time, they're free to do so, but it's not part of their job. So, even if it's brief, I would think some code or some aspirational statement should say something that amounts to an argument, it could be no more than a paragraph, about why legal scholarship should be part of the legal academy's mission and say something about the mission of legal scholarship. So, that's the first thing, that if we're really writing a code about legal scholarship and I think it would be the best to defend the value of the enterprise, because it is under attack. That's a little different from other parts of the academy, where the academy's also, of course, under attack, and in a defensive posture, very broadly speaking, but legal scholarship in particular, I think, is under attack because it's not obvious what the point of the whole thing is. And then the second problem that I still feel we haven't satisfactorily addressed is the distinctiveness of legal scholarship definition. Much of the conversation yesterday, that worked toward a definition of scholarship, would work as a general definition of scholarship. If we looked at what is distinctively legal about legal scholarship, my own attempt to do so is to say something like, "Except for the interdisciplinary work, legal method is at the heart of legal scholarship," and I explained that in terms of an orientation toward justice rather than simply the truth in knowledge. Maybe there's a better way to explain it, but my idea, just having read this stuff and written some of it for three decades is that normative legal scholarship is still most of what legal scholars do, it's not all that different, in method, from what lawyers or judges do, except to the degree of it borrows from disciplines. But what the legal method of legal scholarship is not only different, but for two dimensions, disinterestedness—it's not done on behalf of a client or an interest—and depth. And so, depth and breadth I guess. But anyway, when I talk to fellows, new entrants, junior faculty and even J.D. students with an academic orientation toward law, that's what's expressed sometimes with a real sense of panic—people coming into the academy who don't have Ph.D.s in other disciplines—

coming in as J.D.s, plus a clerkship or plus a fellowship. This is what they worry, worry, worry about, “What is my method?” What do I say to appointments committee when the person says “Well, what’s your method?” “Do I have one? I don’t know, but what is it?” And again, I think we should address that. The other thing about the code, what’s the response to well, “Who are you?” addressed to all of us. And so, I wonder what the claim of authority of this group is and should we address that? Should we just say at the outset, “This is intended to begin a conversation about what our aspirations should be?” If we wind up with an aspirational statement, or what the code should be if we wind up with a code, inviting not just comments but inviting the beginning of a conversation toward this thing. And then lastly, I’ll say, I think the Journal of Legal Education would be quite interested in participating in this.

HORWITZ: So, roughly speaking, I want to give everybody a chance to weigh in on this general question, and either it will emerge organically or I’ll kind of make sure it’s there, the second part to the question will be, “What to do about it?” That’s to say—assuming we come up with either a consensus about what some document should look like or not quite agree to disagree—but we do our best to reflect these things in a document imperfectly, what are good ways to respond to that? And to acknowledge these broader questions. And I will note that I’ve been trying to think as we go—and one thing is I assume there will be an “editor’s introduction to the symposium” and I think one of the things that the introduction will do is contextualize the document. That is to say, “Here is why we thought it was worth doing, here is our lack of authority. We hope to start a conversation, we think it’s valuable to have a document to do it with, and receive it in that spirit, why it’s different from or not a code,” or what have you. So, some of this can be addressed there, not all of it, and I just want you to keep that in mind. But I hope that the three of us are extremely responsive to these concerns and that whatever happens again, given our discussion yesterday, we try to be open about them in print, so that people can understand and make reasonable judgments about it.

WALD: The type of statement or document we end up producing should take into consideration who we are trying to reach and how we expect our work product to be used. Is our audience individual law professors? Deans of law schools? Roof organizations like the Association of American Law Schools?

Yesterday we talked about the tradeoff between drafting rules of conduct and a restatement, and I suggested we keep in mind that the former are designed to guide practice and protect vulnerable constituents whereas the latter usually focuses on codification of existing law. Another aspect of the tradeoff is promulgation and enforcement. The Model Rules of Professional Conduct start as a model drafted by the American Bar Association. Then every jurisdiction contemplates and adopts a version of the model, usually in a process involving

its state supreme court. The process is important because by the time the rules are adopted in each state they have been vetted and have considerable buy in from the regulated. After the rules are adopted they become state law and enforced by a disciplinary agency. In contrast, restatements are published by the American Law Institute. With that in mind, if our desire is to one day simply publish a statement that informs the conduct of individual law professors, then a restatement format might be appropriate. If in contrast we'd like to promulgate rules that may be adopted by the AALS and by law schools, we might want to circulate our work product widely and get buy in from affected constituents akin to the process entailed in the Rules' promulgation and adoption.

I also want to completely second and join Robin's other two points, in terms of the importance of acknowledging in our text the value of scholarship and exploring what might be distinctive about legal scholarship. As we do that, we should be mindful of the charge of lawyer exceptionalism. On the one hand, when we talk about the distinctiveness of legal scholarship we need to do that without being perceived as engaging in a form of legal exceptionalism, that is, saying that there is something unique about law professors as opposed to other professors and something special about legal scholarship as opposed to other forms of scholarship, unless we mean it and can explain the uniqueness. On the other hand, if we are going to say something about the distinctiveness of legal scholarship, for example, its inherent commitment to justice, I'd like us to say something substantive and meaningful and avoid platitudes. One thing I dislike about the Rules of Professional Conduct is that they lead off in the Preamble with high rhetoric about justice stating that "A lawyer is a representative of clients, an officer of the legal system, and a public citizen with a special responsibility to the quality of justice,"²⁴ only to then essentially abandon justice infusing it with little substantive content in the body of the Rules. I'd like us to explore legal scholars' commitment to justice meaningfully and avoid such empty rhetoric.

HORWITZ: So, two quick points. One is why—the initial restatement idea—the way it came up, and some of it is, so to speak, "marketing value," that it's a clever way to frame it, that might draw attention in a different way than another code or best practices. What it turns out to be, in fact, is kind of a different story, but I think that's one reason we thought about it in those terms. And the second is, again, I just want to—not that it is unimportant to focus on what the document contains, you're all here, you all have a stake in it—but I do want to also say introductions, and commentaries are also places that can

24. MODEL RULES OF PROF'L CONDUCT, Preamble, cmt. 1 (AM. BAR ASS'N 2018).

contextualize, and to say, “We have a paragraph about justice in here, it is important that it be in there, here’s why it’s important.” So, there are ways to address some of these that might be outside the document, although again, I think this discussion about the doc so, have an intervention? I want to make sure everybody gets a chance, editors included, if you would like it.

FRANCIS: I want to make sure that if we say something about justice, we do it in a way that’s not perceived as having a certain political slant, that’s the risk of it. An alternative would be to say it is in some way or another, scholarship without law. If you’re writing about the circulation of the planets, you’re not doing legal scholarship, if you’re doing something about how we ought to think about the law for outer space, you are doing legal scholarship. So, it’s more a topic area than a direction of a point of view.

WEST: Yeah. I’m just trying to characterize what other people call internal legal scholarship as opposed to external. External legal scholarship is scholarship about law; internally, the scholarship participates in the legal realm of this and that is doable, and that’s what I think is distinctive about legal scholarship is well, a lot of people call it not scholarship at all, I don’t think we should do that.

FRANCIS: I guess I’ll just push back on that because I think we want to cover both internal and external legal scholarship.

WEST: Right. And so, sure, we can say, “It’s all scholarship about law in some sense.” It just doesn’t seem to me to capture the kernel of it, that internal scholarship is scholarship that adopts a legal method for one thing. That is not, I think, all that different in kind from lawyerly writing except for disinterestedness and depth and what is it that all of that legal writing does? It aims toward justice. I don’t want to use a loaded term, I certainly don’t want to use an overly politicized term, and you always have to drop a footnote saying, “I’m not talking about social justice here,” and so it could be aiming toward legal justice. I don’t know, I completely acknowledge the problem, but I would like the document to be written in such a way as to not take a stand on this, I think, quite divisive and damaging issue about this legal scholarship, isn’t really legal scholarship. I think we should embrace both, there is so much of both and so, I’m just looking for a way to do that.

HORWITZ: Can I just ask, as a question of interest—I think I know the answer. Let’s say appearing in the *Journal of Empirical Legal Scholarship* that there is a piece on settlement rates by jurisdiction, just pure data, no conclusions. I take it that it would called legal scholarship?

WEST: Yeah, that’s true.

HORWITZ: Yeah, as opposed to some other statistics or some other discipline about law?

WEST: Correct. Sure.

HORWITZ: Yeah. No, I'm not surprised to hear that but wanted to ask.

WEST: No, I don't know where the question was coming from because again, what I want to do is be inclusive of those two very basic types of scholarship that appear as legal scholarship in journals—to referee to not referee, to peer or not to peer. The bulk of articles that appear in law reviews are not of that type you just described, that you just gave an example of. It's more like, "This circuit is right and that circuit is wrong and here's why and here's a bunch of legal reasons for it."

SCOVILLE: Two points. One is that I agree with Leslie that the "restatement" term in particular seems problematic; it just seems inaccurate because there's really too much of a blank slate on the matter of scholarly ethics for that term to describe what we're doing. It's also inaccurate in the sense that the apparent plan seems like it will be too prescriptive to constitute a "restatement." The second point is that it's a little unclear to me how we'll be adding to or improving upon draft codes that already exist.

WEST: I have just a quick one. I know I've talked too much already. Another way to get at my point would be just to use Dworkin's phrase, that much of legal writing in law reviews, as well as judicial opinions, is aimed at making the law the best it can be, and so your empirical piece of it suggests jury deliberations, et cetera, would redeem them, but this piece about, sort of, [indiscernible] that's problematic.

HORWITZ: Thank you for the comments. Particularly the question, again, whether the restatement term is inept. Let me ask, plus comment. I think the Dodson, et al, point is a valuable one and I hope the journal doesn't mind adding depth, numericity, and volume to a discussion even where it's been broached before, but certainly if it is mere recapitulation, that is a separate question, so that is food for thought. And let me ask do you have—you don't have to—but do you have a proposal or a suggestion about what you think the right kind of title would be? I understand that it depends on what the document is, but do you have views on that?

SCOVILLE: Well, just by process of elimination, taking off "restatement," taking off "code," it seems that something like "draft principles of scholarly ethics" might be best.

BOOTHE-PERRY: I actually echo a lot of Leslie and Robin's thoughts, so I won't repeat a lot of those. My concern with having a model code is the enforcement and the consequences, the ramifications, if you don't abide by the code who is going to police that. And thinking of a different way to frame it, I know that there are best practices, but there aren't specifically best practices for legal scholars, with specificity. I was thinking about MacCrate, when

MacCrate came out with lawyering skills and values and it started a huge conversation. I don't know if that was the intent when MacCrate got together and drafted that, but maybe if we could have something similar to that. So, using maybe Ryan's terms about maybe "principles and scholarly values" with "best practices," combine a lot of it, because I agree with Robin particularly with younger scholars, they don't know what to do, where they're going, where to start, and there needs to be some guideline and certainly there's literature out there, but how many of them are going to look up a law review or articles that specifically discuss how I'm supposed to go about with these scholarly values. So, I think there is great value in having a document, a source of reference, at this space, particularly with, as Robin has pointed out, people are questioning what's even the value of legal scholarship. Well, it's valuable and we know that it's valuable because the values we have that make it valuable, so—

HORWITZ: And let me add to that if you're thinking about audience. One obvious possibility, if you're thinking about who do you mail the complimentary issues of the symposium to, who do we follow up with via email and personal contact, the AALS New Law Professor Conference is an obvious thing to think about. Let Dean Kearney secure yet more sources of great wealth and then every new law professor will get a copy. On the principle that the most important are first, do you all want to add anything? Not obliged, but welcome to.

MICHAEL ANSPACH: Along the lines of what Professors Francis and Scoville brought up, a "restatement" to me doesn't seem to make a lot of sense, because the question is, "What are we restating?" I really like the idea of the guidelines, especially for me, as Editor in Chief. I came in here, I had to make my own guidelines, which is to say I made my own rule to live by, which is, as I mentioned yesterday, to do what's in the best interest of the law review. No one told me that, it was just, "I'm going to take lawyering principles, and that's going to direct my conduct." However, for a predecessor of mine a few years ago, this individual's idea of best interest was to have the most pages in our law review history. And this person may have done that, but if that is what one considers to be the standard to live by, then what standard is it, for what qualities in the paper and that sort of thing. So, like I said, it is a standard that I've kind of put upon myself, but it would be nice if I had that off the bat, someone said to me, "Your job as Editor in Chief is to do what's in the best interest of the law review," and every time I have to ask a question of what do I need to do, that's the first question I ask myself. But it's something like that, that I don't know that every Editor in Chief or every editor asks that question. And just having guidelines that set that up, on the editorial side, I think would be very helpful for me and law reviews everywhere, in terms of what the quality of the work is, and what their goals are in putting out the best possible volume.

HORWITZ: So, I thank you. Hesitate to remind you that at the end of the day, you wield a red pen, maybe not the only one, but a red pen, do not get drunk with power. So, let me kind of feed it to the organizers or just—and briefly what should we do about it and then again, what have we missed.

HESSICK: I think a lot of people have said a lot of really important things here and I don't want to wait until what is a code versus what is a restatement and I want to ask what maybe is just a super obvious question, which is, when we say something like "best practices," are we saying, "We would hope that people would do this, it would make for a better scholarship if people did this?" Or are we trying to set norms? Are we trying to say, "We should all be doing this and to the extent that we're not doing it, it's a shortcoming?" It's not just that it wasn't as good of scholarship as it could have been, but that we perceive there to be a flaw in the scholarships, that we don't just judge as a matter of quality? An ethical floor. Although, I think, implicit in this discussion about whether it's a restatement or whether it's something else, is that we're not just articulating norms here, we're also trying to shape them, so maybe the phrase, "draft principles" is appropriate. I'm not sure, because I don't know what people usually say, what they're trying to say is to both articulate and to shape norms, and I think that that's where the value comes, because I think a lot of the principles that we're talking about tie into problems that people are complaining about now: the puffery, the claims of novelty, methodological questions, whether there has to be methodological rigor and doctrinal scholarship. It's important for me, for us to keep in mind that if this is about articulating and shaping norms, that I think that we want those norms to extend to everyone, so I like Robin's intervention about talking about scholarship in terms of both what it's about, but also in terms of—it's about rigor, it's about depth, it's about legal method. We're not leaving people out then. And then we just have to make sure that when we're saying what we think the norms ought to be, that it sweeps as broadly as possible. I'm comfortable saying that pedagogical scholarship should be disinterested, and I like having a really broad definition of scholarship, to try to say that these norms should apply across all of the various points.

HORWITZ: I'll say given that I'm at least self-identified or card-carrying pluralist, I obviously agree with a lot of what's 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 kind of 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 something—that people have concerns, and that this is not limited to people on a particular methodological or ideological or prescriptive path, it's a wide-spread 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—although again, one can acknowledge, to the extent that there are deeper disputes, it is a good thing to argue about it, and I think that really leads to the third point—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: Just to sign onto a lot of what's been said, and really to pick up—in particular, I think what Carissa, was saying—I'm persuaded to the position that something less concrete, less prescriptive than restatement or model code is an appropriate approach, to the “draft principles” sort of idea, the idea of being much more explicit about it tending to start rather than conclude any sort of conversation. I think, in part, that has to be the large part because this is really a norm driven activity, a norm driven profession. Certainly, as an associate dean, one sees that a substantial number of law professors are not into rule following in any sort of precise way.

I think as well, and this—this is a point—I'm going to give Ryan a lot of credit for, we talked about it at dinner last night, that we could at least think about acknowledging what might be a root cause of some of the behavior that we are here talking about, which is that it is also a profession that is almost ridiculously status conscious. So, that you can take Stanley Fish's—you know, Yale talks only to Yale—I mean, it really is sort of one of those “Lowells speak only to Cabots, and Cabots speak only to God” type situations, to a large degree. And that drives, I think, a great deal of the pathological behavior that we see.

I think that the context in which it is taking place has also shifted dramatically since when I entered this profession to now, largely as a result of the advent of electronic submissions to law reviews.

WEST: Wait, what do you mean?

OLDFATHER: Maybe I overstated the point, but it has certainly changed the game of legal scholarship in substantial ways, I think, to have gone from a world in which the almost physical limitations placed on the submission process made it much more difficult. You couldn't easily send a piece to 100 journals, because that meant somebody had to make 100 copies and stuff 100 envelopes and there had to be 100 separate cover letters printed and signed. And on the journal side, it was physical manuscripts coming in. There were fewer of them

and so the process was easier to manage, there was a greater likelihood that things were getting read, there was less of a felt need to rely on proxies.

HORWITZ: Were there abstracts when you were reviewing?

OLDFATHER: I don't recall abstracts when we were looking at the physical pile of paper, and we had a process by which every single piece was read by at least two people, and I just don't think that happens anymore because I don't think it can happen, realistically.

HORWITZ: All right. And I definitely will suggest, by way of, structure—I think everybody's had at least one shot in, and let me say, in addition to that, I will try to take a quick round. I guess a combination, because of time constraints, of what to do about it but also because some of these, I think, have already been that, what have we missed. And I know that Francis might want to weigh in, for instance, on SSRN and the point that Chad just brought up, possibly, possibly not, but yeah, go ahead.

SELIGMAN: Just weighing in with a point of process, since I didn't know until yesterday what a restatement was, I'm actually pretty neutral on what you call the document. But it might be worthwhile to think of it as writing something that's draft or preliminary, and to think about what a follow-up might be, so you might plan that there would be a larger conference of people who respond to the symposium and the statement, and get something a little bit more permanent at that point.

FRANCIS: First of all, I really love what Ryan said as a way framing it, and I think we can link that to what Carissa said. Because when you draft principles, some of them can be obligatory and some of them can be recommendatory. So, I would suggest linking those two together and going along those lines. Secondly, I brought up the role of SSRN and it might be worth our just thinking about it a little bit because I think it does several things: One is people can post stuff on SSRN and try to preempt, in a way, so before you actually had something, go through any kind of review process, you can stick something up on SSRN and expect other people to cite it, which might or might not be pernicious. So, it's essentially a self-publishing vehicle and it can undermine a bunch of what else goes on. Second, I think SSRN can undermine journals in a funny way. You know, a lot of journals in other fields, you're not permitted to publish until the journal publishes. That's the policy of *Science*. So, if you give a paper at a professional meeting then *Science* will no longer publish it. Now, that's good and it's bad. I mean, it's good because it gives a special pride of place to the fact of journal publication, but it may hinder the sharing of ideas. So, SSRN has the advantage of the sharing of ideas, but some of those disadvantages. I also worry that any time the journal holds the copyright, it's very hard to put something up on SSRN except the abstract. So, if I publish something in a peer reviewed publication, where the journal holds the

copyright, I—before it went through the editorial process, but still it’s not the official copy in a way, and I think that skews, in some ways, what people cite and potentially devalues peer-review publications over stuff that’s coming out in law reviews. I also worry for you law review editors whether—my personal policy is I never put anything up on SSRN until it’s out in the journal, because that way people can cite to the actual journal page numbers and so on. But, if somebody puts it up on SSRN before you have gone through it, it’s just as likely to get cited to the SSRN as it is to the journal, depending on when something comes out and the result of that is that you guys get less in the way of credit. So, I think in law, SSRN has kind of had a pernicious effect, but I don’t know whether people use SSRN in the same way I use PubMed and I use Glosser’s Index and I use other sources when I’m looking for work in other fields, and I use SSRN when I’m looking for work in law, and I think that skews what I see and is problematic.

HORWITZ: So, if I can, comment and then pass it along. I’m always a big fan of means of production analysis and in the legal academic profession, combination of means of production, technology, norms, which are largely, kind of, ungoverned. These two working together, and then the “go-ahead” or “get-ahead to go ahead” kind of spirit that sometimes prevails in a credentialist and/or ambitious academic profession can have bad combined effects or under-examined effects. So, for instance, Chad and I were speaking about the lamentable absence of book reviews in many of today’s law journals. Book reviews are not cited as often and that’s one reason they don’t appear as much, even if once upon a time, if you were thinking about what a book looks like, an issue of a journal, it would make sense to have different kinds of content. Moreover, SSRN generally does not treat book reviews as part of the main body, so if you want your downloads to count, then don’t write a book review or call it something else and hope that it squeezes by the SSRN review process. These are unobserved influences and incentives to act in a particular way, right? Also, again, questions about workshopping for instance, whether you present the half-baked paper because that’s when you can actually learn and therefore, the peer review is real, or whether you present the polished, “already-through-the-editorial-process” paper for purposes of looking fancier when you’re in a room full of strangers, or if you’re thinking about lateral hiring and so on and so forth. Lots of determinants of behavior—to my mind, all the more reason therefore, even if we want some structural remedies, all the more important to have law professors educated and steeped in thinking about the ethics of conduct, so that they can negotiate these things with something more than advice about what it takes to get ahead, right?

SCOVILLE: I agree with part of what you said, Leslie, but I’m a little more comfortable with the posting to SSRN before publication, in part because,

insofar as the draft that you post is, as far as you're concerned, complete, and insofar as law review editing is largely stylistic, there will often be no material difference between the version that goes up on SSRN and the version that comes out in press. In those cases, pre-posting to SSRN doesn't seem all that bad. In addition, my impression is that authors typically submit to law reviews soon after posting to SSRN. I think that also reduces the significance of the practice.

HORWITZ: Unless you're Larry Solum, in which case, the law review article is an ongoing iterative process on SSRN, and I mean that with affection. He's done this great work on originalism that keeps on being a work in progress, where we get different versions.

So, again, everything on this board will graphically, I think, be either recorded or included. Other considerations, other values, things that need to be considered or haven't been or what have you, and this, of course, goes to anything, the document or broader discussion issues.

SCOVILLE: I think we might have dismissed the sincerity issue a little too quickly by overlooking some sub-issues. One is withdrawal obligations: if you no longer believe that a piece is accurate, or no longer agree with one of your prior conclusions, do you have an obligation to try to remove the piece from online sources? It seems like the answer could be "yes," if sincerity matters. And then also, I think I disagree with my comment yesterday on the importance of consistency.

[LAUGHTER]

HORWITZ: Well-played, sir.

SCOVILLE: I think my earlier concern was just that an obligation of consistency might be interpreted too broadly. If you are taking a position at point A and then at point B, you take a logically contradictory position without any attempt to justify or reconcile the two, that's a problem. But I don't see any problems with, for example, publishing an article saying that under an originalist interpretation of the Constitution, the conclusion is X, and then later publishing another article arguing that the conclusion is the opposite of X under a different modality. As long as the obligation of consistency is not too broad, that's fine.

HORWITZ: Well, I wouldn't say more than fine and I would probably add—and I can think of one article where I criticize this—if you have changed your mind, you should not do so sub rosa. I mean, if you have a major work out there that says X and then you come along and write Y, and possibly the only thing that has changed is the topic under dispute, one would expect you to have an obligation to say either, "I changed my mind," or, "But see my earlier work," or something.

SCOVILLE: Right. And this also goes back to the issue of, “What are we adding to the existing draft codes?” One of them already talks about consistency, so do we have problems with the way that the principle has been articulated or are we just copying and pasting on some issues—maybe that’s okay, I don’t know.

HORWITZ: Others? Again, this can cover a pretty wide variety of what have we missed initially, and it’s also what else would you want to say before time’s up?

OLDFATHER: So, one point, as I was going through things yesterday, that we might not have talked about. We did discuss some ideas about the form of discourse, I guess treating one another respectfully in our interactions. But 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 over-emphasis 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.

HORWITZ: Other additions?

HESSICK: So, I’ll just say, I think that Ryan’s probably right, that part of it is because we want to come across as novel, but I also think that might be because the respectfulness norm isn’t well entrenched enough that—I will definitely admit that I have worried about engaging with particular people because they don’t have a reputation for—I’m going to go with politeness—I would rather use the colloquial word there than anything else. But, I think that Chad’s right, that those are two sides of the same coin and maybe if we could increase the sort of “respectfulness of tone,” it might encourage people to engage more critically or more substantively. I like the word substantively better because I think critically has a connotation of maybe being less polite. But I also want to say, and this is just circling back to something we talked about briefly yesterday, I think it’s worth saying the things that are not scholarship, but then to also make clear that we can nonetheless have certain obligations for our non-scholarship behavior, in which we identify ourselves as law professors, and I think that we can do that briefly; it doesn’t have to be a big part of the code, but I think it’s worth saying that these particular norms exist, in part, because we’re professors and not just because of the enterprise that we’re engaged in. I mean, I think that they apply maybe with less force or that there are other countervailing considerations, for example, when we teach,

but we nonetheless care about a lot of these things, in all of the roles that we perform.

HORWITZ: And as I said yesterday, that is certainly a huge hobby horse for me in part because of what I see as the general increased phenomenon of trading on authority, of using one's status as a legal academic and the authority or cache that that gives one—to push ideas—ideas that are not always entirely related to or in the best practice of one's legal academic status. So, whether it's done in a document or noted in a document as an important issue, and then I know a couple, at least, of our pieces that expand on it is an open question. I'm glad it will be dealt with; I think it is important, how it's dealt with. I'm more catholic on.

BOOTHE-PERRY: Just a quick comment. We touched on this a little bit yesterday, but when you're sitting in the choir, you don't think about the people who just came to the church because somebody dragged them here, and they don't really know why they're here. And when I teach or I write or even when I present on professionalism, a lot of times I'm preaching to the choir. It's those individuals who understand why there is a need for professionalism in the legal profession, but there is a whole percentage of individuals who think, "Why do we need it?" like, "Why should I care? why should this matter?" And so I think we need to address in our document, whatever it is, "Why should you care about having some ethical standards or ethical principles for your scholarship? Why does it matter? Is it just because of the status of being a law professor or is it because we have some social contract with society?" But I think we definitely need to include in there, for the non-choir members, why this should be something that they should be talking about too.

HORWITZ: And let me say, one of the responses I've gotten, particularly privately, and I know I mentioned this in my contribution, when I raise these kinds of concerns on the blog or in-person or elsewhere is, "You don't need to worry about this or that or make a disclosure about this because everybody understands what's going on," let's say talk about the professor's letter, or the amicus brief, where people have signed on, where they may not actually agree with propositions or whole pages in an amicus brief and so on and so forth. The answer, I get it, "Look, everybody kind of understands this," or the op-ed thing, "Everybody knows that you're just trying to be persuasive and doing it in 800 words," and so on. And I get this, especially, I think, this is just annex data, but I get this especially from people higher up in the hierarchy. So, I worry about that. I certainly worry about it if it's the whole explanation, and there's no best practices, agreed upon practices, et cetera, as a background. I also think that people who are in a small and select discussion either are thinking about only the people in that discussion or are making too many assumptions about what everybody outside knows and whether everybody's in on the game and so on.

Especially where the audience is law clerks, some of whom have been mentored and tutored by these people in the so-called realities of the game and some of whom haven't, and so on and so forth, or if the audience is the public or the media. Also, even if they're right that everybody knows, I'm not sure why living with, accepting—encouraging the cynicism is the right way to proceed. But this relates to, I think, something that Nicola said, which is a word that I want to at least throw out, not least because of the location where we're holding this conference, is the idea of vocation. It's not quite antiquated but not a word used with frequency these days. I would like to think that one ought to have a vocation to be a law professor or at least treat that work in vocational terms; "calling" may be putting it strongly, and I don't think it is for everybody. I would like to think that one thinks it is a necessary and sufficient reason for thinking about the ethical obligations of being a law professor or a legal scholar, that this is your profession, but also your vocation and so you ought to want it to be undertaken with a sense of the larger goal in mind or the larger ethic in mind, and it's not easily codified, but it's a word that I would like to at least have kind of on the record.

FRANCIS: When you were talking, I thought of something that I'm not quite sure how to formulate, because I think what you said is super important and we talked a little—part of the vocation of a law professor is that we're teaching law students and we've talked a little bit about how some of the obligations of the professoriate are to mentor folks as journal editors and not to be mean to them and not to be rude. Here's what's sort of an inchoate thought and I don't know quite what to do with it, but are there ever circumstances in which authors could do things that put journal editors in a context that could actually harm them, and what might those look like and what are our obligations to protect them? And by harm, I mean not just that their dealing with somebody who's being an asshole, but that they're dealing with somebody who might put them in a position of having to sign on to something that could harm them professionally or make them feel deeply uncomfortable morally. There's a concept of moral harm. I'm trying to think of some of them but it could be a situation in which it's not just that the author is being rude to you, but you think that the author is cheating in some way, and you might be implicated in that cheating, and the journal has accepted it, but then the author might come back and bite the journal in some way or another or, well, I'll leave it at that. It's speculative because I don't have great examples, but I worry that there might be situations like that and we need to be very clear that law schools should step in.

HORWITZ: And if one digs through Westlaw—two things. If one digs through Westlaw, one can find some histories of retractions and things of that sort, so if you're failing in your obligation of thoroughness, of course, you're also putting the editor at risk. And one last thing I'll note about novelty or

originality means of production, the fact that many of the law reviews only exist in easily searchable form on Westlaw elected from 1980 is a further structural aspect, at least where people don't go and do thorough print research. That affects the novelty question. Mark Tushnet has a great piece in the Supreme Court Review—a few years ago, reviewing a couple of articles from the first issue, I want to say, of the Supreme Court Review—I could be wrong about that—but from an early volume, and he talks about how many times he's seen these points come up since then in subsequent articles without those earlier articles being cited. Some of that is a function of, again, the way electronic resources work. Let me give it to the Carissa for the last word on this session, and then a break.

WEST: I was just going to say that there's a role for the advisors to refuse to intervene and perhaps the student should be more cognizant of their right—not just an obligation—but their right to rely on the law review advisors to add this media and mediaries and as advisors in those instances.

HORWITZ: All right. So, let's take a break, refuel, recharge and then have the last session. And thanks to everybody for a very productive discussion.

B. Session Six: Final Session

HESSICK: Should we go ahead and get started? So, this is our last session and, in a fit of practicality, I'm wondering how much progress we can make towards securing this sort of document; so I've outlined, I think, not necessarily the structure of the document itself, but a few issues that I think it would be worth seeing if we have consensus on, or a few issues where we need to make a decision or at least make some progress on a decision. And wow, did that sound like an academic-sane thing to say—if we can't make a decision, can we make some progress on a decision? I'll use that at my next faculty meeting. So, I'm not sure if it's the first thing that we want to deal with, but something that obviously came up in the last session is the idea of what the document would be titled. I think that Ryan's suggestion of a draft statement of principles seemed to resonate with a number of people, even if it's not their first choice. I like the word "norms" in addition to "principles," but I wonder if anyone would prefer to call this a restatement or do we want to call it something like "a draft statement of principles" or "a draft statement of norms." Do people have strong feelings about this? Or do we put a pin in this and come back later?

Does that sound good to everyone, should we call it draft principles and revisit? Does anyone want to voice doubt about draft principles? Draft principles, it is, woohoo! I guess the good thing about putting this last is everyone's like, "I'm tired." Okay. Then, I think, we have a question of introductory paragraphs or paragraphs that sort of set the stage. I agree with Paul that there should probably be some sort of editor statement, so I guess the

question is which ideas do we think are important enough that they need to be in the statement itself and which could be a sort of editor's type statement? The two that I wrote down as possible candidates for the document itself are the importance of scholarship and then why we need scholarship ethics.

FRANCIS: This is just a research ethics question. You were using the word "editors." I think we need to have a brief conversation about who are the authors and to be entirely honest, I am happy with either the three of you being the co-authors with the rest of us being footnoted as participants. I'm also happy with the possibility that we're all co-authors and the recognition that that means that we all bear equal responsibility for everything from drafting to editing.

SELIGMAN: I just wanted to say that I don't think I should be an author, though I'm happy to be listed as a participant since it's so far outside my field, I don't think that I can authoritatively sign on to anything. It's humility.

HESSICK: Anything else on this question?

WEST: Well, I think you've reached—you should get a pride of authorship and I'm happy to be signed on as a participant, and that's assuming that you actually do write it.

OLDFATHER: Come up with something?

WEST: Good.

HESSICK: Okay. I'll have to say honestly when it came to the statement itself, I didn't imagine there being authors for the statement, that the editors' preface or whatever it is, mentions that this was a conference and that these are the people who participated, we organized the conference, here is a document that grew out of the conference, but not that every participant in the conference necessarily signed onto it *in toto*, but maybe that's a crazy thing to think.

SCOVILLE: The only argument for including more authors is that it may help with notoriety. For better or worse, a publication with the names of people like Stanley, Robin, and others at the byline will attract more eyes than one that doesn't have those names. We may not like that, but I think it's the reality. So if the point is for this to be influential, it might be worth adding more authors.

HESSICK: We're doing this in part to counteract sort of the role of hierarchy and prestige.

[LAUGHTER]

HESSICK: People with better places in the hierarchy and more prestige.

[LAUGHTER]

WEST: Well, you might want to wait on this until you see what the work entails.

HESSICK: Good idea. I'm happy to put a pin in it.

FRANCIS: Yeah. And I don't have an answer.

WEST: No, I don't either.

FRANCIS: I mean, what I was going to say is I don't have an answer—I'm happy with whatever you all and all the participants feel comfortable with, but I think you all, because you've done so much work to convene it, have some kind of special role in that.

HESSICK: Okay. So, we'll go ahead and—

SCOVILLE: I agree with that, by the way.

HESSICK: Pardon?

SCOVILLE: Yeah, I'm not trying to upset anyone.

HESSICK: We're not and I love that you said it. It was [indiscernible] and some truth. Okay. So, let's leave it for now, but I think Leslie's right, it's something that we need to think about. In addition to the importance of scholarship and why we need to have a conversation about scholarship ethics, is there anything else that we think belongs in this sort of introductory statement to the statement itself?

SCOVILLE: Yes. Chad made a comment in the last session about some of the underlying causes of the pathologies we've been talking about. It might be good to mention some of those in the preamble.

HESSICK: Anything else? I was once told by a trusted colleague, you have to count to seven in your mind before you move on. Ryan?

SCOVILLE: Purposes, broad goals, including what we hope to achieve with this.

FRANCIS: Who's our audience?

WEST: Now, I'm counting with you.

HESSICK: I know, right. You're like, "Think I'm already at eight." You got to go Mississippi. Okay. So, then I think from there, we move onto the definition of scholarship. And I want to hear from people about the—did you have something to add?

BOOTHE-PERRY: I'm actually—I know you counted and you waited and I shouldn't go back. Just the document title—it's not just going to be "draft principles," right?

HESSICK: "Of Scholarly Ethics" or "Scholarly Norms," that's right. Okay. Thank you. So, in terms of the definition of scholarship, I think this is something that we talked about a bit this morning, I'll weigh in pre-emptively to say that I really like the idea that came out in some of the admissions tickets about—that there has to be sort of substantial analysis, there has to have been substantial labor that goes into scholarship. I also really liked Robin's points from earlier today, that would both include interdisciplinary scholarship, but would also make clear that legal method is not just a legitimate, it might also be the predominant methodology of legal scholarship. And you made one more

point about—that it would include clinical scholarship, I think that that’s right, yeah. Do we all have additional things to add beyond that? I’ll write down really quickly what I—and please, feel free to disagree with me. Analysis and labor, inter-disciplinary and legal method, and then I think an explicit nod to inclusiveness.

FRANCIS: I think that it needs to include what Robin was calling both internal and external legal scholarship and it needs to do so in such a way that it embraces work of all political walks and points of view, so it’s not—we need to be very careful to be non-ideological—how do we frame it.

HESSICK: I guess, I should also add, we did say about specifically excluding—I’m so sorry I was not paying attention—explicitly excluding amicus briefs, op-eds, those sorts of things, so—

SELIGMAN: So, actually, I was going to address that. I wanted to just remind you that yesterday I suggested a typology of things that could count as scholarship, that might be worth listing explicitly. And then throughout this conversation, I’ve been bothered by the term “non-scholarship.” It seems to me like there should be some sort of positive expression of what that other stuff is. Even if it doesn’t count as scholarship, it might be useful to have a list of whatever the positive name of “non-scholarship” is and say, “These are all legitimate activities but we’re not counting them as scholarship for purposes of this conversation.”

WEST: Such as blogs. This is a big issue. Right.

HESSICK: It is an issue.

OLDFATHER: Just as a point of departure, here’s what AALS, somewhere in its standards, defines as within the scope of scholarship “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.” It seems to me we’re doing something broader than that, the—

WEST: Wait, that’s not scholarship or that is scholarship?

OLDFATHER: That is scholarship.

WEST: Oh, I think the scope is going to be narrower.

OLDFATHER: Well, it’s both broader and narrower, right, if we’re willing to include things like blog posts. I think there are two dimensions to this. There are—there’s the field of the forms it might take and then there’s the component of it that starts to lead us into candor and neutrality and originality and so forth, such that one could, I think, write a blog post that advances a new idea and does it in a relatively exhaustive way, and so forth, that could count as scholarship, even though that’s not going to be the meat and potatoes of what scholarship means.

WEST: Okay. Again, I would just raise a red flag here. I think it's important for us to define scholarship for purposes of these ethical norms or some other way to put it, and remain neutral on whether these different kinds of forms are in some absolute sense scholarship because it's a hot button issue at a lot of schools what to count, what not to count, for purposes of tenure and promotion and they just can't weigh in on that. I don't think we want to.

FRANCIS: Yeah, I think that—just to second that. I think it's very important that we make it absolutely clear we're not weighing in on that and we could even drop a line to the effect that the AALS may list different things and maybe doing that precisely for different purposes.

HESSICK: Okay. I want to flag that there's disagreement here and I think that we might be able to craft something that both says that there's legitimate, I think, disagreement about whether blog posts, op-eds, comments submitted to administrative agencies, expert testimony, whether these things count as scholarship or whether they are ways of furthering scholarship. And I think that we can simply say either, "We're not going to take a position on this," or "We ourselves don't necessarily agree on a particular position." Either way.

FRANCIS: So, I think the critical thing to do is to say that we don't think the same ethical norms necessarily apply to them, because if you're doing an amicus brief, or if you're trying to persuade a legislator, to go back to what Chad said yesterday, you start with the outcome and how you frame it and the ethical norms that go along with that might or might not—I just don't want to take a position on the norms of advocacy—be quite different from the ethical norms that apply to what we're really focusing on, which is what you publish in more standard sources, like law reviews.

HESSICK: I'll say, quite frankly, this is something that I struggle with because I think that something could both not be scholarship and yet we could have professional norms that people could violate when they engage in it, under the auspices of their expertise as a law professor, but I'm not sure that this is the document to get into it. Maybe the answer is—in light of circumstances, it may be fluid—the amount to which they apply.

OLDFATHER: And I should say, I'm okay with bracketing these other things. I think maybe this is something for the introductory paragraph, to explicitly note that we are speaking about only a certain variety of scholarly activity or scholarship or—it would be phrased better than that—that we believe that some of the same sorts of ethical norms that we are articulating here apply to other things that academics do in their capacity as academics, but that there may be differences that we're not specifically addressing.

HESSICK: Did you want to add something, Ryan?

SCOVILLE: No, I was just agreeing.

HESSICK: Okay. Do we think we're good with the definition of scholarship, both trying to capture, I think, variation in methodology and types, but then also not try to take position on the blog post/amicus debate without? Okay. I don't know that this will be the structure at the end of the day, but I thought it made sense to try to separate out the individual principles or the individual norms that we wanted to talk about and then have article placement as a separate issue to comment on, but I understand that people might not agree with that approach. In some ways, I think that that might help to answer Ryan's concern about whether we are simply repeating Dodson & Hirsch, because I read what they were doing as very explicitly about article placement process, and I think, from my perspective, our project is much broader—and it may bear on behavior during the article placement process, but that might also be something else to think of. I'm curious about your thoughts on that, Ryan.

SCOVILLE: Well, I think my comment was inspired not just by the Dodson & Hirsch piece, but by the others as well. There's a collection of pre-existing draft codes, so I think we need to account for that in deciding what we put to paper.

HESSICK: Does it make sense to start talking about individual principles, Leslie?

FRANCIS: Okay, if you're going to go for that.

HESSICK: Are you sure?

FRANCIS: Yeah.

HESSICK: Okay. Again, not that we're agreeing on format and structure at this moment, but in my mind, at least, the idea that there could be conflicts of interest, sort of "un-consentable" conflicts of interest if you wanted to think about it in Model Rules of Professional Conduct terms. And then also sort of conflicts that ought to be dealt with in disclosures, so sort of hint at the fact that there might be some situations where writing an article would be unethical and then other situations where there would be an obligation to make particular disclosures. I mean, what that conflict would be—I don't know if people would agree, but there are some times where an article would not be appropriate. Maybe it's something as simple as when writing an article would require compromise with other duties that someone has, such as if someone is representing someone and then writes an article in that area, where the article would necessarily be limited by those duties, or if there's a confidentiality duty, say because someone clerked on a case or something like that.

FRANCIS: Yeah, I think those are important. A thought—this is another sort of inchoate thought that I don't know how to deal with. We're talking about law professors as authors here. Law journals often get submissions from practicing lawyers as well and whether the same norms apply. I think one of

the things that's really problematic is if you know you're going to be involved in litigating the case and you write an article, or maybe you've even been looking to litigate a case, and you write an article that you specifically are writing to give your client a litigational advantage. I think that sometimes happens when law firm folks are authors and I wonder whether we ought to at least raise that question. You know, "Are the ethical obligations the same? What's the story for law reviews when we get these?" et cetera.

WEST: I think we should raise this. I think it's a really complicated question because there are instances in which people will write an article and will say, "I'm writing this as an outline to guide future litigants on my side of this issue," particularly in public interest and I'm not sure that disqualifies it from being a scholarship. I do think that the other extreme, that's a clear case, is when somebody's being actually paid at the moment as a lawyer and writes as a scholar, they're compromising the roles [indiscernible] as well. So, I think it should be raised, but I don't think there's a cut and dry answer to it.

HESSICK: Let me just clarify. When I was talking about a conflict of interest, which would suggest the person couldn't write the article, I was too trying to limit myself. I don't even mean necessarily to paid representation, but when someone had ethical obligations that could impede them from these ethical obligations such as—

WEST: Zealousness.

HESSICK: Right, if they have confidentiality or zealous or zeal-type obligations to a client, but I don't know if people agree with that.

OLDFATHER: Would it be too broad or too controversial to say that a scholar should—a law professor, and I think maybe one way to address that issue is just to get our scope provision, say we're dealing only here with scholarship written by legal academics, understanding that other forms of legal scholarship present other issues. But with respect to the specific disclosure question, say that a law professor should disclose any information material to the evaluation of a piece of scholarship, which sort of inherently incorporates neutrality, disinterestedness—any factor that a reader might want to know in order to assess the value of this piece as scholarship, whether there is some potential motivation or other factor that could be affecting this person's analysis or perspectives, consciously or unconsciously. I've killed the conflicts.

[LAUGHTER]

HESSICK: I'm thinking about what Chad said, so I agree with that, and the only thing that I would want to add is to the extent that they think that that is necessary, in order for people to evaluate whether they've complied with our obligations, I would just want to make clear the disclosure itself does not

somehow lessen their other obligations, but I assume you don't care if I add that.

OLDFATHER: No, I agree with that.

SELIGMAN: I just want to say that I think this question seems to go to the point that Robin's made several times about defining the purposes of ethical principles, for what purpose, so that people who are litigators wouldn't need to worry about this in the same way.

HESSICK: Are we good with disclosures? Is there anything else that someone wanted to add on the issue of disclosures or conflicts?

FRANCIS: I think we want to make clear that getting money is over the line in every case. So, if you're being paid to represent a client or if you have a grant or a contract with the foundation, whatever, you need to reveal your funding sources.

HESSICK: So, just so that we're all on the same page, we're not going to say that they can't write the article, because otherwise there are people who couldn't write their articles, even though I may someday write about how ridiculous it is, but it has to be disclosed, I agree. Financial funded research funding has to be disclosed. Should we move onto candor? Okay. So, I know we've spoken a lot about candor up until now. Do people—and one could arguably think about disclosure as sort of part of candor. One of the things that we've spoken about is that people would need to be explicit about the methodology that they're using and explicit about the substantive assumptions that they're making, and I think we also talked about—and that that sort of explicitness would probably be worth sort of drawing in the work by Baude and his co-authors, whose names I don't remember. And that we think that there should be disclosure of data sets. Is that true? Would empiricists agree with that or would they freak out if we were like, "And you need to disclose your data set?"

SCOVILLE: No, I think that's smart.

WEST: Well, I know of one instance, that's become a hot problem. The ALI is putting together a set of proposals about this grand bargain such that—I'm sorry, give up on the idea of consumers actually reading their shrink wrap contracts in exchange for the courts being urged to apply unconscionability doctrine more rigorously. This is on the basis of a large, data-driven study they did, which they're not sharing. So, I'm just passing these on—a colleague of mine is writing a piece about his attempt to say the people who did the study have an ethical obligation to share the data because it was based on a study that analyzed case results and the suspicion is that the people analyzing the case results are getting some of their cases wrong because they think they're actually accommodating a bunch people who coded the cases are not lawyers, and they

refuse to put it in. So, I'm not sure that there would be no push-back if we make obvious that people should share their data.

HESSICK: Yeah. And that's worth talking about. Does that then mean that this is not sort of "moral failing," but instead something that although it's controversial, like we should obviously flag the fact that it's controversial.

SELIGMAN: I think if you're going to make a pronouncement about data sets, you need to have an asterisk, because I can think of a bunch of social science circumstances in which the data set shouldn't be public, because people have gone through IRB process in which they say, for example, we're going to hold your results confidential.

OLDFATHER: And on that specific point, we can, I think, track what the American Political Science Association says, the provision on data access, "researchers making evidence-based knowledge claims should reference the data they use to make those claims. If these are data, they themselves generated or collected, researchers should provide access to those data or explain why they cannot."

WEST: And so, they lose the [indiscernible]?

OLDFATHER: APSA.

FRANCIS: Yeah, I think that's good. The most relevant ones are either Law and Society or the APSA. We might want to look at Law and Society as well. Law and society review whatever they say.

HESSICK: Let's see. I think that when we talked about candor, we also talked about two other issues. We talked about the value or the need to acknowledge uncertainty, to the extent that people project more certainty than actually exists. And then we also talked about counter-arguments, but in knowing omission of an important kind of argument would be unethical and that we all have a duty to carefully try to identify the counter-arguments and response to them, so one being a positive obligation and one being a failing, if you then have certain mens rea. Do you folks have thoughts either on the ideas of certainty or counter-arguments?

OLDFATHER: I agree with both. I think just for purposes of creating a record and a solid source to draw on, Dick Fallon articulated a similar sort of norm and called it confrontation, that seems to capture these ideas pretty well.

HESSICK: Agreed. I agree with you and I felt that way as well, about what he said.

FRANCIS: Yeah, I'm a little concerned with the "you have to reply to it" and I think it might be fair to say there are possibilities—there are circumstances in which what you would do is you would flag it, but either for reasons of space or maybe you just haven't figured out how to reply to it, you would flag the counter-argument without actually developing a reply.

HESSICK: I see what you're saying. I think that's been a question—I think that in some ways that leads into certainty, and, "Here's this counter argument and I really can't figure out what to do with it." I think that that would satisfy it, because the response would be, "I don't know."

WEST: Or, "It's my next article."

HESSICK: Right. Or, "It's beyond the scope for the following reason." Are we good on candor? Do you think we're missing anything on candor? You have a look on your face, Ryan?

SCOVILLE: Well, was this where we had the discussion about candor regarding research assistance?

HESSICK: Oh, it is. Oh, you know what? I think I might have that down here with attribution, but that's a really good point. I mean, attribution in some ways is sort of a sub-set of candor.

FRANCIS: And that's not just acknowledging your RA, it may be co-authorship or first authorship.

SCOVILLE: Can I just say, as someone who's relatively junior in all this, the point at which that sort of attribution or co-authorship is ethically required is a little unclear to me. So, to the extent that you try to verbalize some sort of formula on the issue, what would it be?

HESSICK: I don't know. The norms about this have changed over time, but it's unclear—let's put it this way. The statistics on co-authorship with students have changed over time, but it's unclear if that's because there was a change in norms or if there was a change in how much work the RAs were doing, or if there was a change in the idea that you would help out your RA by giving them authorship, so they could go on the market. I think it's a little unclear. I would say, I personally—I'd feel comfortable with something flagging the issue to say that—and sometimes the work of an RA may rise to the level where co-authorship is appropriate, if not necessary.

FRANCIS: I think we could also say some of the kinds of considerations that go into that. So, responsibility for the intellectual content, responsibility for drafting, those would be two things that would count in favor of co-authorship. Something that we'd count against, saying it rises to the level is pulling all the cases, finding sources, but a major contribution to the analysis, that's the kind of thing that in other fields you'd consider co-authorship.

SCOVILLE: I think there's some value in being detailed on these types of issues in the sense that a lot of the problems seem to arise from the fact that, with junior faculty in particular, it's not that people know the norm and are simply disregarding it. It's that people don't know the norm. They might accept that, yes, at some point an RA's contribution will be enough to warrant co-authorship, but I would imagine that few have a firm sense for what the

threshold is. So, it's an educational document in addition to a norm-reinforcement document.

HESSICK: I'd be interested in what Amanda has to say, but I'll tell you that my entirely unscientific impression here is that there is no real norm and that at some schools, professors routinely have RAs that write pieces of their articles for them. And if you doubt that, look up the plagiarism scandals that occurred in the 1990s and 2000s at Harvard.

SELIGMAN: I just wanted to observe that this is a problem that seems to be extremely muddled for your field, in a way that is not for other fields, because you're so promiscuously inter-disciplinary. So, imagine a J.D.-Ph.D. whose Ph.D. is the sciences, where the norm is you do a little bit of research on the project and you get to be on the nineteen-page list of co-authors for a physics article or whatever. That would be very different from a J.D.-Ph.D. in history, where a student RA help is almost never rising to the level of co-authorship.

WEST: I was going to make a similar point that on plenty of pieces in the social sciences someone does much less than what Leslie just described and is listed as a co-author and the person who is responsible for the number crunching and who may not have conceptualized the idea continues to get authorship. So, I think it's worth stating what some of the norms are in introducing their work and that there isn't any concrete norm, for paralegal cases that I'm aware of, and I know people have very disparate practices on that, and it differs from school to school. I don't know what maybe more could be said.

HESSICK: Maybe note the lack of agreement and then flag other areas, and maybe even flag this as an issue that we, as a discipline, need to spend more time talking about and grappling with, so that we can have clearer norms for the fields.

FRANCIS: In some fields, what has emerged as a norm is disclosure, what the relevant contributions were. And I think it's Anne Hudson-Jones that has a particularly interesting discussion of that in the scientific integrity area and basically, it's a discussion of—it's you describe what you've contributed and so in some fields, you'll actually see a footnote at the beginning of what everybody did.

HESSICK: Do we want to leave attribution and go to neutrality and disinterestedness? Or does anyone have anything else to add on attribution? Oh, I guess, I should say, questions have arisen, on whether there's attribution that has to occur beyond for RAs. Like if you speak to someone and they talk to you and they really help with a particular section, or they come up with a counter-argument that you hadn't, do you need to have particular attribution or is it enough to thank them in your star footnote? I have to say, I've never encountered this being particularly controversial, but what do I know?

SELIGMAN: This is a question about what's norm in your field. Do you need to disclose or attribute that you've presented previous iterations of the project at a workshop or a conference?

HESSICK: I think people often do, but more to show off because there's a sense that it's you're indebted to them and it needs to—but maybe I'm wrong.

SELIGMAN: Well, that can also be a way of thanking or not (or condemning) colleagues for their contributions to your project.

HESSICK: Okay. Well, if folks don't have strong feelings on this issue, then maybe we should turn to neutrality and disinterestedness. I know we talked about this a lot yesterday. I think Chad had a comment that resonated with me initially about, "Do you start with the question or do you start with the answer?" But I was actually speaking with Robin at dinner last night and she flagged, I think, something that I knew, but wasn't thinking of, which is, sometimes we work on a project because we have very strong feelings about something that happened, so we don't necessarily start—it depends on how you might frame the whole starting with the question versus starting with an answer—but sometimes we go and we think to ourselves, "That case can't be rightly decided, that's got to be wrong. Now, let me try to figure out why." So it's almost like you're starting with the answer and seeking the question. That's not to say that I don't think that there's such a thing as disinterestedness, because I do think that there's a difference. Me personally here, I'm just speaking, between saying "I can feel that this is wrong, I need to try to figure out why," and maybe, "I might change my mind and actually come to the opposite conclusion," and maybe it's that last bit that matters. I'm getting some positive reinforcement here from Chad. And maybe it's that idea that we're trying to capture.

WEST: So, last night, I was remembering this piece that I'm sure most of you have read in which [the author] said judges always start with the answer and then they look through the precedent to see if there's any case that actually prevents them from writing the opinion, Posner says something similar in his most recent book. Nevertheless, I think the formulation is fine because of that qualification. I just want to say, disinterestedness, my idea was not so much neutrality as it was that there's a shared legal method between lawyers, judges and academics, but the difference, again, is the scholar has the luxury of time and depth and breadth, and also that the scholar's just plain not representing their client. That's pretty much all I meant, it's a kind of bare thing. That's what makes me queasy, frankly, about an ecumenical definition of scholarship that includes amicus briefs. There's no client, per se, but there's an interest. And my gut instinct, institutionally, is to think of that work as service and not as scholarship. I know that plenty of other people disagree, but that's where

it's coming from. I do think of scholarship as something that just can't have a background client, that that's the difference between the lawyer and the scholar.

HESSICK: So, I want to hear from other people, but I wonder if open-mindedness might be part of it though, maybe open-mindedness?

HORWITZ: Yeah. So, I think Stanley in particular would have a conniption not only—but if we kind of treated disinterestedness as neutrality—while I don't mind terms like “neutrality” or “objectivity” in other areas and I don't treat them as anathema, yeah, I agree. That the goal is not neutrality as such and for me, a lot of it is covered by disclosure, but there are different ways to—I'm not pushing for that, so I agree on that point, and maybe a different conversation—it seems to me that somewhere in-between—I mean, insofar as you're a friend of the court, and insofar, more importantly, as you're using your affiliation with your institution, there may be particular obligations. But I don't feel it necessary to call them scholarship just to think that the scholar has some ethical obligations about how he or she does kind of work.

OLDFATHER: Just to riff on the judicial intuition point a little bit, because I firmly believe in that, as a thing. I think it's a valid thing. I think coupled with it though is the phrase you sometimes hear from judges, which is, “It just won't write.” And so, there's this habit of mind or a frame of mind that is perhaps best described as disinterestedness—is it, “This case is wrong?” or is it, “Can this case possibly be right?” And I think you're talking more about that latter idea. So really, I'm willing to call that, starting with a question rather than an answer, because you approached it with the right attitude of, “I think my reaction here is going to prove to be the correct reaction, but I'm going to test it.”

HESSICK: Oh, and I really like that you said test.

SELIGMAN: So, from my privileged status as outsider here, I'm hearing two entirely different things at work that are intermixed, one of which is about the process of scholarship and where does the idea come from? Therefore, where does it head to and whether open-mindedness is salient? The other thing I'm hearing is, is there some real-world consequence at stake, which would be more about neutrality, less about open-mindedness?

HORWITZ: Can you expand on that? Just the last part.

SELIGMAN: I don't know.

HORWITZ: Fair enough.

SELIGMAN: So, the first part was clear?

HORWITZ: Yeah.

SELIGMAN: So, the disinterestedness—I think this is the disinterestedness that Robin was speaking of, but I'm not positive since I'm not enmeshed in this. But it has to do with the person who wants a particular outcome for cases that

are currently under discussion and wants to influence the outcome. I think that's something different from the process by which one gets from point A to point B intellectually.

HESSICK: Yeah. And, I'll add the more time I spend thinking about it, the queasier I got about the idea that we had to have sort of like a purity of motive sort of test. For one thing, I don't think it would just accurately describe the norms of the profession, but also because when trying to think more about this last night, I think where I was, was the idea, as long as people are open to the thought, that they are drawing the wrong conclusions, and they are in the process, trying to test those conclusions and to test those arguments, and here, I actually thought there's a law review article by Eugene Volokh and he makes this point that, as a former computer programmer, he runs test sweeps with his theses, like his legal thesis. My understanding from his explanation of a law review article is you try out your code in lots of different ways, to see if it actually functions, and so that was sort of what he was proposing people to do, to make sure that it's not the circumstances that are driving the legal argument or the legal conclusion that you're drawing, that that legal conclusion or the legal argument would stand on its own in a number of different contexts, and if not, why not, and to think that that's part of what we have to do.

WEST: Let me just give the hackneyed example. One might imagine a law review article that argues that there should be recovery for tort victims of emotional distress even if there's no touching, and this is against the weight of considerable authority saying, "No, there should not be such recovery for emotional distress injuries." One can imagine a law review article that argues that and comes to the conclusion, strongly stated, nothing neutral about it, "Yeah, there should be recovery." One can also imagine, of course, a brief doing the same thing, on behalf of a client. What I mean by disinterested is just that the author of the law review article should not be, also, in the business of representing clients in those circumstances, and so then that frees that author to treat this subject in more depth, to take on the counter-arguments and more depth, and so on. And the lawyer, who's got the same basic argument in mind and is using basically the same method, is just engaged in a different enterprise of representing an interest.

HESSICK: So, I guess maybe the question then to you, Robin, is do you think that unlike the lawyer, the law professor has the obligation to be open to the fact that that actually isn't the right rule to arrive at?

WEST: Yes. Absolutely.

HESSICK: Unlike the lawyer?

WEST: Correct.

HESSICK: Okay.

BOOTHE-PERRY: An incomplete form thought at this point. Are we then back to defining what this legal scholarship, that these principles apply to? Because if you are writing, even though it applies to the law, but it is for advocacy purposes or you're bound by some other ethical constraints because of the capacity in which you as the law professor are writing, this doesn't apply to you.

HESSICK: So, I could be wrong, and Robin should correct me if I am. I do think that we are excluding people who have a client and are writing for a client, from the realm of scholarship. I don't think that we are excluding people who say, "I am writing this article because I think that there are tort plaintiffs out there, who could be making these arguments and here's an argument that we could use to change the law in this area." I don't think that this excludes that, because we're nonetheless imposing an obligation on the person who is writing that scholarship, that he or she may come to the conclusion that the law actually does not support this, right?

WEST: Absolutely right, yeah.

BOOTHE-PERRY: Right.

HESSICK: Okay.

SELIGMAN: So, I'm almost thinking, in response to what I'm hearing about this dual role, that law professors sometimes have advocacy as part of their work. That should be addressed in a major point, parallel to intro, definition of scholarship, and individual norms and principles. It should say, "Here's the conflicted role and these are some of the consequences: conflict of interest or disclosures are different, candor is different, disinterestedness is a problem." To say that explicitly and to say tenure and promotion committees need to realize that you're going to have to parse what somebody does.

HORWITZ: So, I guess a subject of scholarly interest for me these days is the concept of office. Not in a sense of how to interpret office or trust under the United States, although it's relevant to that, but kind of the idea that particular jobs, like judge, like scholar, are an office, and the kind of old-fashioned sense of the word. You enter into a particular realm where you have particular duties and so on. And that, I think, is part of how I respond to this thinking. Are you acting in the office of a law professor or acting in the office of a lawyer representing a client? And I'll say for me, one of the ways this plays out is—to add a third, are you acting as a citizen or, in my case, permanent resident, but as a civic resident? And there are ways in which, as I said, I think, for democratic purposes, it is valuable sometimes to offer your opinion without offering your letterhead because it's egalitarian and so on. But, for me, it plays out in part in terms of, "How is the person representing him or herself?" Is the letterhead there because it's the mailing address where you need to send replies

to the lawyer or is it there to give weight and authority and say “I am invoking the office of the scholar in this work?” What it’s not always doing, but that’s how it plays out for me, how it plays out in the document is a somewhat separate question.

HESSICK: I hear what you’re saying, and I actually just wanted to highlight one more thing. I think that in saying that people can write an article in which they’re saying, “I want to make this argument because I think advocates might be able to make it,” maybe they even have an obligation to do that, as a matter of candor. I don’t know, but, from my perspective, they would not be relieved of the obligation of confrontation or of any other obligations of candor as well. And I think in some ways, this illustrates the inter-dependency of these values and that—it-just-won’t-write idea is one that, by having to go through the exercise of confrontation, that’s how we help to ensure open-mindedness as well.

WEST: Just one more quick point. I like the way Amanda put it very much, but I do think we need to drop an asterisk or a footnote or something that we are not dictating to schools or tenure committees, what they will count as fellowship purposes of tenure. And Georgetown has a very broad definition of scholarship, that seemingly includes letters you write home from summer camp. And so, that’s a whole different conversation, right, what should be included for purposes of tenure.

HESSICK: I think that’s right, and I think we should be quite explicit about that, I agree with you, Robin. Is there more on open-mindedness? Do we want to call it open-mindedness? Maybe even, does it go a little bit beyond disinterestedness, that we want to link them together? I don’t know.

WEST: I say just try to write it and—

HESSICK: Okay. That’s fair. Does it write? Is it time to move on to exhaustiveness or thoroughness, do we think? I’ll count to seven really quickly as I look at my notes. Okay. So, I think that when we talked about exhaustiveness and thoroughness, we spoke both in sort of general obligations that a scholar has, that could arguably, tie into ideas of expertise, in terms of their general ongoing obligation to remain engaged and well-read in their fields. But I also think that we also said something more specific for a specific project, that not only do we have an obligation to treat our topic however we may have defined it in an exhaustive manner, but that also, too, we have an obligation to canvas what has come before, so that we can try to situate what we’re doing. And then, yeah, where that then ties into, do we have an ethical obligation to situate what we’re doing and what has happened before, and how that ties into concerns that we have about over-claims about originality and novelty. So, again, these things are sort of all inter—

WALD: Yesterday I jotted down competence, reasonableness, and good faith.

HESSICK: No, I think that that is helpful. Competence, reasonable—can you talk just a little bit more about—since you wrote those down, what you’re attaching to those ideas.

WALD: An example of incompetence would be failing to identify a previously published source directly on point in terms of one’s subject matter. Reasonableness entails questions such as how many hours of research must you commit to your work, how many cases and articles must you review and in what fashion before you say can reasonably say enough is enough? Must one cite and discuss every source ever published on or relevant to the subject matter? Can one make a professional judgment call and if so, applying what standards as to what to engage with substantively and what to omit? Finally, there’s the issue of good faith. If you find something in terms of competence and you decide to engage with it in terms of reasonableness, how do you do so and what do you do with it? Yesterday, we talked about how intentional exclusion or not giving credit when it is due is an ethical fault and an instance of bad faith.

HESSICK: No, I think that that’s really helpful. Do people have more on exhaustiveness or thoroughness?

SELIGMAN: Almost. Something about obligation not to suppress relevant sources.

HESSICK: Right. So, we have both an obligation to learn about what they are, but also an obligation to make sure that we include them or nod to them. I will say, I do have a little bit of a concern about this for people who write on issues that come up all the time. I think Chad’s example from yesterday really resonated, because it didn’t look as though the person tried to find out whether there was anything that had been written, but I do think that sometimes there will be a topic that’s been so well-canvassed and the question is how many of the 3,000 hits from the JLR database do you read? How far back in time do you have to go with what you’re doing? Do you have an obligation to look for law review articles that aren’t captured on those electronic databases? I’ll say I don’t think that that’s the norm of the profession.

HORWITZ: No.

BOOTHE-PERRY: Just to address that point really quickly then. That would go to Eli’s point about reasonableness and, somebody said it yesterday, reasonable exhaustiveness. I don’t remember, maybe it was you that said it, so I really liked that. On the thoroughness, the politeness norm that we’re talking about and the willingness to accept and to give criticism of other scholarship, would we put that under thoroughness or would we put it under candor? The

principles are so inter-related, but I think—I didn't see it on the board yet, so wanted to make sure we didn't forget about that.

HESSICK: No, I think that's a really good point. And if we're talking about engagement, and that we need to have substantive engagement and we also have to worry about tone, it's a fair question about where to put that on that list, we don't have it up there on that list at all, it's not—I agree, we need to remember that.

FRANCIS: Carissa, I really like the way you pose those as questions and I think, to the extent we're doing this as informative, there's room in this document for some things that don't take a position one way or another, but say in considering reasonableness, these are some of the things you might want to think about, because that really gives guidance to your fellows and folks like that. I also don't know where we want to bring up and I'm still a great proponent of peer review, and I think we sort of gave up on peer review, in the sense that we thought law reviews aren't going to do it, but we also talked about the way authors can do it. So, maybe it's remembering that scholarship is not a lonely process and that while peer review has a great deal of—we recognize the problems with our field, we also recognize the problems that peer review has, but some of the advantages are that the potential for getting neutral, if it's done in the way in which you mask your identities mask, getting neutral eyes that are expert eyes, and I think we need to talk about—somewhere, that needs to be on the table. Engagement of other scholars—attempting so far as possible to help—to move the quality of your scholarship in the direction of the kind of quality you get from peer review. I'm not quite sure how to phrase it but I don't want it to be forgotten.

HESSICK: No, I think it's a good idea and I just—in light of what Nicky just said and what you just said, I've added to the board that maybe what we have here is an independent norm of engagement that includes solicitation of feedback or review of one's own work. So, did I see a hand up here?

SELIGMAN: So, much as I agree with you about the value of peer review, Leslie, the way you described it sounded to me more like an argument that about quality rather than ethics, so I would sort of put a pause there. But I've also noticed that there was a series of issues that have come up over the course of the past couple days. I think we'll get to article placement, but also about the world of law reviews, that suggest a whole separate document, a separate statement of some sort is needed, which is not identical with this project, but is tied up to it.

HESSICK: Yeah. And I'll add—maybe we can disagree about whether the solicitation of feedback or engagement is in itself the norm. I think it might be. I've certainly had conversations with people where they say, "Look, you have a draft that's criticizing someone else's work, it is appropriate to send it to that

person, to ask them for their views.” And Cass Sunstein is not going to write back, and that’s fine, but for other people, you have an obligation to send it to them, so at the very least, they can push back on how you’re characterizing what they’ve said and that it is considered poor form to publish something without having engaged with the person first. I don’t know if other people have had that experience or share that view, but I have to say the idea that you have to give somebody an opportunity to at least respond to how you’re characterizing their work, I thought that that was a fair criticism and I now try to observe it.

FRANCIS: That’s actually something you wouldn’t be expected to do in many other disciplines. The peer review process would take care of that because presumably the peer reviewers would have read the views of the person you’re criticizing and would say, “You’ve mischaracterized Jones,” or, “You left out something really critical for the Jones’ line of argument,” and because Jones is going to come back and give you potential garbage, Jones isn’t neutral either.

SELIGMAN: Carissa, I just want to push back at you a little bit because this conversation makes clear to me that norms and ethics are different, right. You can have an unethical norm.

FRANCIS: Yep.

HESSICK: Maybe. I agree, I think puffery might be a norm at this point.

WALD: There’s a way to share your work with people you criticize and with those you agree with. A scholar needs to but also should want to share work with both to improve the quality of the work.

HESSICK: That it’s a failing if you don’t do it, that it’s instead something that can help further some of these other values or these other principles.

WEST: Okay. That’s all well and good, but it doesn’t really get to Leslie’s point, which is that the peer review process is a gatekeeping role and that there’s nothing comparable in the law review process in terms of peers doing this. And you send it to your friends, you send it to people you’ve discussed, you send it to people you’ve criticized who might get back to you, none of that is blinded and none of it is just genuine peer review, so I don’t know if we want to take the bull by the horns and say something about that, or if we don’t. It seems to me the threshold question is, “Do we want to address this or do we not?” And then we can talk about what we have to say about it.

HESSICK: How do people feel about me putting that here with article placement—article placement/peer review, and we take it up in just a minute after we—I don’t think that we have much left to go through, for the individual principles, does that sound good? Okay, great. So, sincerity made a bit of a comeback this morning, I just wanted to flag that. I remember Ryan said a

couple of things. Ryan mentioned the idea of a duty to withdraw and—oh, there was one more thing that he said that I’m—oh, and consistency—a duty to withdraw and consistency. I have to say, I thought that the duty to withdraw, that it not happen sort of sub rosa, I don’t know whether we would be identifying a norm that exists or identifying the fact that sometimes people do it and when they don’t, they ought to. But I thought that one in particular was certainly worthy of consideration.

OLDFATHER: This is another one of those instances where I was going back through the notes I had taken and found that Dick Fallon characterized it in a little bit different way that I think it’s helpful and I think I agree with it. He identified a principle of trustworthiness and here I’m quoting, “Which demands that she sincerely believe all of her claims or arguments and that she state them in ways not intended to mislead her readers about their relation to other arguments or evidence.”²⁵ Which isn’t quite sincerity, although it’s a piece of it.

HORWITZ: I don’t know what it means in this context to sincerely believe in one’s arguments. First of all, the second point that Ryan made, which he did under the rubric of sincerity, I see as potentially falling within kind of integrity or candor and so on.

HESSICK: Which was the second one, again?

HORWITZ: The second one with consistency. The first one, the duty to withdraw under certain circumstances. I guess I’d also view as it doesn’t have to be made as a consistency argument. The point is valid, but I’m not sure we need a new slot, so to speak, to put it there and I would think more in terms of good faith, thoroughness, some of the values that we’ve talked about, even again, candor rather than sincerity—at least I don’t think we need to—can’t speak for Stanley in his absence by relabeling it as sincerity, but I’m happy to hear everyone.

HESSICK: Amanda?

SELIGMAN: So, I’m actually troubled by the notion of a duty to withdraw. It strikes me as unrealistic and maybe even undesirable. If you want to have something like that, I might call it like a duty to reconsider. I can imagine the scholar who wrote something that twenty years later, they don’t particularly agree with anymore, but they also have moved on intellectually and they’re exhausted by that and putting on them a duty to withdraw or even to write an article rebutting what they wrote twenty years ago strikes me as something that’s simply is not going to happen. What if they change their mind after they retire?

25. Fallon, *supra* note 1, at 240.

HESSICK: Robin?

WEST: I completely agree. I'm not sure there's a duty to retract or withdraw a piece if you come to change your mind, you might change your mind again, and you may think there's value in the article, even if you no longer agree with it, and that there's something to be said for letting it be. You thought it at one time, so I would soften that anyway. I do think it's worth saying something about this because sincerity so clearly contrasts with our lawyer sense of consistency or lack of obligation to consistency or even to believe everything you say. I mean, there's that famous Daniel Webster line about argue in the morning for one side and the afternoon for the other side, and that's a clichéd observation, but it's one that's routinely fed to students, anyway, about lawyers. And so, I just think there may be something worth saying along these lines. Again, not a consistency over time, but a sincerity with respect to arguments made before [indiscernible].

HESSICK: So, in sort of Fallon's trustworthiness vein?

WEST: Yeah, I like that.

HESSICK: Okay.

FRANCIS: In another field, if I discover that I miscalculated my statistics, I have an obligation to let the journal know.

WEST: That's different.

FRANCIS: And if I discover that I inadvertently omitted 20% of my dataset and when I recalculate it, it comes out differently, there's an obligation to let the journal know. I'm stewing about whether there's an exact equivalent of that in law, but, certainly, if I'm doing empirical legal research, it would seem I have an obligation to meet some of those standards. It would also seem to me that, suppose I make a claim like there are no cases on point. Now, of course, there might be later cases, but suppose I realize that my Westlaw search, I got bored and I omitted twenty cases or my RA reported to me that searching everything in the Westlaw database up to a particular point in time, and then I later learned that the RA had been in a fight with a significant other and lied to me. I think I have got an obligation to let journals know those kinds of things.

WEST: I think that's right. I just don't think it's—I think when we overstate it.

FRANCIS: Oh yeah, I want to be really careful not to overstate.

WALD: Not to add to our can of worms, but when I asked Ryan yesterday about scholarly consistency, I had something totally different in mind. Not whether scholars can over time change their minds in published work, but rather the phenomenon of legal scholars testifying as expert witnesses and contradicting in court their own published work, or at least testifying in a way

that is useful to a particular client but not entirely consistent with their published work.

HESSICK: So, I know Amanda raised her hand. I do want to flag—maybe the duty to withdraw, at least it appeared to me to be the most important, if people are, sort of, *sub silentio* contradicting something that they had said before, that maybe part of the duty of candor that's also related to this idea of sincerity, but maybe it's not related to sincerity, is to then explain why. To both flag that you've changed your mind in whatever it is that you're now saying is contradicting something that you said previously, and why it is that you've chosen to contradict yourself previously, but I don't know how people would feel about that.

SELIGMAN: So, it seemed to me what Leslie was describing was discovery of errors in research or flaws in the research method, and that's something that definitely I would think would be an ethical obligation to report for correction, which is different from the notion of withdrawing or requiring somebody to write a new article explaining why they think something differently, which is also different from what you were saying.

WEST: You know, Richard Posner famously said that he no longer believes what he used to argue passionately, which is the pursuit of justice is fulfilled by the duty to maximize wealth. It's a pretty important claim he made there about maximization of wealth being the sole goal of law, and it's important that he changed his mind. But I think it would be quite regrettable if he felt the need to withdraw the 200 pieces in which he argued that, in the ten books. Those are still important resources. He doesn't believe it anymore, plenty of other people do.

HESSICK: No, I think that that's actually a perfect example, Robin, and so maybe that's, then, what he would need to do, is if he's writing something else that disagrees with it, explain why, that that is also valuable. More on sincerity? I think we're still on track to finish on time, which I am very excited about. I did have a question for you guys about originality and novelty, because I think when it comes to claims about originality and novelty, my concern is largely one of candor that's related a little bit to thoroughness, but I wonder whether it's worth breaking out, individually, here, to talk about originality or novelty because there was some of the reading that we did, talked about how scholarship needs to break new ground. Maybe it's enough to mention this issue when speaking about candor and when speaking about exhaustiveness or thoroughness. I actually have to say, I think it might be useful to say scholarship need not be original, it need not be novel in order to be good scholarship and perhaps we've overvalued the norm—or we've overvalued the worth of originality and novelty such that we've led people down this path, or

maybe it's enough to just deal with it when we talk about candor and exhaustiveness, but I'd be curious what you guys think about it.

WALD: It might depend on what we mean by originality and novelty. I don't know that we always need to either aspire to or actually attempt to reinvent the wheel in our scholarship. But presumably, everything we write has a component of originality and novelty, moving beyond the mere summary and synthesizing of existing work. In any event, whatever we do write, we must avoid puffery and describe the originality of our contributions accurately.

HESSICK: Thoughts on maybe drafting the question about how to deal with originality or novelty or other thoughts on it and its place and legal scholarship? Okay. So, expertise—it had gotten broken out at some point, but I wonder how much we think that expertise is something other than—or in addition to competence. Do we think that there is anything about expertise that's beyond trying to become competent in an area? I mean, I will add, expertise sounds like a different concept to me than competence, and I would personally hope that law professors are striving for expertise and not merely competence, and I guess that this goes to Robin's point from before, about how one of the things that differentiates legal scholarship from brief writing is the time and the thoroughness that sort of goes into it, but I'd be curious what others have to say.

SELIGMAN: So, when I heard this discussion yesterday, what I thought it was about was not overstating the depth of one's expertise in the non-scholarly context. So, if you were going to comment in a blog or in some other format on some matter that was really a civic opinion rather than something that came out of your scholarship, to not trade on that with your letterhead or whatever else one might use. So, this was less about the content of the scholarship itself and more about what to do with it in other contexts.

HESSICK: Yeah. Other thoughts on expertise?

OLDFATHER: This, I think, too, might be better characterized as relating to competence, but I recall seeing an—and I don't remember which of the standards I saw it in, but—maybe it's history, maybe it's political science, perhaps it's even AALS, at least one of them makes reference to an obligation on the part of scholars to continue to develop or refine their methodologies, their expertise, their scholarly apparatus—you know, to continue to grow, which isn't merely keeping up with the latest developments in the field, but, I think, continuing to be mindful about the approaches one takes. Maybe that's just competence.

FRANCIS: If what we're looking at is publication ethics, it might be a little different than what are our ethical obligations as scholars, which I think are broader than our ethical obligations as authors, but it's important.

HESSICK: And I'll add that, although I think that we have an obligation to become experts in our field, I certainly think that people who are just entering the field can publish scholarship, I just think that there needs to be a certain amount of modesty and humility involved in that, and maybe even special care associated with it.

HORWITZ: Well, I'll again, briefly—and acknowledging there are problematic applications—say the Model Rules of Professional Conduct have something to add here, I mean that you can develop an area of expertise, but you have to work up to it—and certainly, and it's a problem, given that our structure requires fellows to write ground-breaking huge claim articles, not your fellows—the job process seems to encourage them to make huge claim articles right from the get-go rather than modest ones, at exactly the time when we should be saying, “Write on the narrow field.”

HESSICK: And I'll add, maybe this is something for the editor statement beforehand, to say, “Look, we have all of these pathologies and the idea that we expect ground-breaking work from entry-level people is one of those pathologies.” Is there more on expertise? Did you want to add something, Ryan?

SCOVILLE: On audience, I think law schools are an important part of the audience in the sense that people engage in unethical behavior for a reason—they have incentives to do it. In our case, some of those incentives come from our institutions—from promotion and tenure policies and the like. To that extent, it's important for law schools to consider their own roles and whether they might reform their personnel policies to make it easier for law professors to abide by principles of scholarly ethics.

HESSICK: Yeah, I think that that's right. You know, Paul said this in our last session, but I don't think that there's any denying the fact that some of these pathologies are because ours is sort of a “hierarchical system” and we've created incentives for people to act in a particular way, that then there's a race to the bottom, to the extent that those behaviors are effective.

WEST: Do we also get to list our own egregious breaches of all of these norms?

HESSICK: Oh, I plan on just atoning for mine later.

HORWITZ: You know, the editor's introduction can have the sin-eater—

HESSICK: There we go. Sin-eater section. I like that. And yes, I actually was thinking about—as we're talking about these things, how often, I, myself, have violated these norms and why you even feel better confessing that publicly. Unless people had more on the idea of engagement or solicitation and feedback, which I'm actually not sure is going to make it into this, in any sort of broken out way, it was just something that I added at the end, sort of this idea

about, “Do we have an obligation of engagement or an obligation to solicit feedback?” Maybe it’s a good time to turn to article placement, peer review, those sorts of things. Did you have something to add, Leslie?

FRANCIS: Another way to do it would be to note in the editor’s note at the beginning, some of what this group regards as pathologies of legal publishing and that we don’t think that these can be changed by this document but this document is written within those constraints and we would hope that those constraints continue to be re-evaluated.

HESSICK: I like that idea. Are we ready to turn to article placement and peer review? So, let me just say a couple of things at the outset that we’ve already talked about, that are relatively uncontroversial. The first is the idea that so much of legal scholarship appears in law reviews that are edited by students, and because of that, it may lead to sub-pathologies or it may create additional incentives for people to behave in a strategic manner. Maybe it’s also worth noting the hierarchy concerns here or not, but I do think that a couple of the things that we want to highlight here are the idea that importantly, candor should extend to a submission process, that it ought not be accepted that people make affirmative misstatements, for example, in the materials that they submit, that accompany, their article placement, and that’s sort of directly misleading the law review staff. And there’s going to be sort of shades of this. I think Ryan’s right. A lot of people engage in puffery, I’ve engaged in puffery. I was actually advised to engage in puffery, it seems like a fabulous idea, and I benefited from it, I will say. But I do think that it’s worth pointing out, that these norms don’t just apply to things when they are published, but that they ought to apply during the submission process as well. But I’m happy to hear more what we’d like to talk about in addition to that.

FRANCIS: So, does it make any sense for us to recommend that that submission process be anonymous?

HESSICK: I think that it is worth discussing the fact that—I think it’s with the exception of Stanford—I think Stanford is the only one where you actually have to certify that you’ve removed your identifying information. I think Harvard and Yale may say that they prefer it, I don’t remember.

HORWITZ: Some of them say they do it and may or may not do it. Some of them do it, but also the authors are not—I mean—not without reason. Sometimes, obviously you’re going to discuss your own work or cite to, but the authors know ways to signal. Whether it’s totally prescriptive or, again, guidance and so on, I think it is a valid concern to raise. Whether it comes in the form—I think it’s both actually, obligations to authors but also, recommendations to law review editors that they review articles as the title “article review editor” suggests, and not review extraneous material.

FRANCIS: So, another little thing that we might tuck in here, and I'm interested in what the students think about it, is that law reviews must disclose fully and honestly the nature of their submission and review process, including whether review is anonymous, whether they consider pieces or give preference to pieces from their own law schools, et cetera.

HESSICK: Yeah, and I'm going to hand this to Paul in just a second, but I actually think that if what we're trying to state is an ethic or a rule of ethics or a norm, I think that it would be uncontroversial to say that the article submission process, that when articles are reviewed, the primary—if not the sole criteria should be the quality of the manuscript itself, and I understand that sometimes things are used as a proxy for that, but I think it's worth stating of the reason for acceptance or rejection should be the quality of the manuscript itself.

HORWITZ: So, I'll avoid a rant about disciplinarity and how that plays out in the use or overuse of proxies in our field, but the only edit or add-on I'd make to that is obviously we want to make recommendations to law reviews and law review editors without treating them as the primary culprit so we're burdening them. I mean, this is about what the profession, what the legal academic profession, ought to be doing and so part of the answer is the profession, through its bodies or otherwise, ought to encourage and compile accurate statements of the law review process or the journal in order to be published.

SCOVILLE: It seems like this part of the discussion—everything about the article placement process—doesn't really belong in the broader discussion on principles of scholarly ethics. I think it's an important topic, but we might consider putting it in a separate document, which we'd also publish.

HESSICK: That's a fair question.

OLDFATHER: And I think the point that it's covered well in the Dodson & Hirsch article already makes it less important for us to spend the time on it. I agree with the approach that they articulate. And the only thing that they really don't touch is the bit that we just did talk about, which is the process of review and what criteria should be—which I think ought to be non-controversial.

HESSICK: Yeah, and let me add, if what we're identifying in part are the pathologies that have created incentives for law professors to act other than ethically, we do have other places in the document where we can say—one of the pathologies is that the quality of an article—one thing that would have to change in order for these incentives to change, is that the quality of an article needs to be its primary, if not sole criteria for article submission and that law professors and law schools should work towards that goal or that end, but I don't know how people feel about that. Leslie?

FRANCIS: We might want to consult Neil because he just wrote the piece about peer review as well.

HESSICK: Good point. More on article placement or peer review? We're at 12:31. I am so proud of us. No? All right. I'm sure that Chad and Paul want to say things to you and here I don't have to hold this up anymore. I feel a little bit too much like a talk show host. I really appreciate all of you coming and doing this. Although I feel passionately about these things, I'm not sure that I had been very thoughtful about them and I actually feel very differently after having talked to everyone for a couple of days, and I do think that it's perfectly legitimate for us to come up with a document and have a bunch of back and forth on what that document looks like and not even agree on the document. I, in fact, am always shocked whenever a faculty group of more than two people agrees on anything. So, I really hope that this will lead us to talk—maybe even decide that, in addition to what we'd originally spoken about here, I may personally addend like a little statement that talks about the things that I think are particularly important and the things that I have reservations about, and I don't know if that's something that Paul and Chad think are good or bad. Or, I'll call it "Hessick, P., concurring in judgement" or something.

HORWITZ: So, let me say, I agree with Carissa first that—and I mean this as a good thing, not as an expert or anything—that I think people ought to feel free to respond and react to the document, not because I want to encourage people to do more work than they've already done, which is considerable, but they should feel the freedom to do so. I appreciate that we've talked so much about how much we value the law review editors and the mechanics of their process. You don't have X number of pages plus an extra two hundred and what's more it's not your personal goal to make this the most number of pages ever and I'll say my contribution, as—which is typical of hastily written case, was too long and I intend to shorten it as much as I can, but I certainly encourage people to have their addenda as they wish and I just want you to understand that that's something that people might want to do. To the extent that I am at all a co-organizer, I really want to thank you two and especially Chad and Marquette, the system, the resources, the helpfulness and the hospitality. I've never seen law professors not be decent about acknowledging this, so it's not a problem, but I think we all know that the staff who don't always get named are nevertheless lynch pins who make our lives much, much better and I just want to convey our thanks to them. And I would say, it's probably typical for any of us who organize round tables or conferences, feedback is always welcome and appreciated. This is not a format like an annual round table that we've been doing every year, but one can always improve and if there are things we can do better, by all means, we're happy to hear it. Or, if there are things that you thought were novel and good, so that we ought to—

HESSICK: Or even not that novel—

HORWITZ: Fair enough. We're totally not original, but a good idea that we ought to do the next time—you know, any of us individually are planning, we're happy to do it.

OLDFATHER: That we can recharacterize as completely novel.

HESSICK: That's right.

HORWITZ: Fair enough. It's something the three of us have been talking about doing for a long time and since you've urged for me to be on social media, the happiness is a two-day conference on this subject, at least some of which is a discussion of overclaims and novelty and it's something I've ranted on my blog for so long that it's nice to do it in a better format. Anyway, it's been a real treat and much appreciated.

OLDFATHER: Yeah, so just briefly, thank you all. Please take a coaster with Marquette Law School on it as a token of our appreciation for your coming. I really want to thank our law review editors who have been wonderful to work with, patient, as they have come to me and asked well, how many pages are we talking about here and saying, I have no idea because this is a new thing, and I think they were relieved to see the quality and even the length of the five pagers plus that came in, and so thanks to them, both of what you've done so far and your work going forward, thanks to you all. This was a lot of fun and I look forward to continuing to move it forward, and I hope that we get a transcript that we can work with. I hope that the mic that was out wasn't out too much. I suspect that there'd be some gaps in the transcript, but unfortunately—which we can try to fill in, but we'll get it transcribed as quickly as we can and get it out to everybody and we'll see what we have to work with. So, thank you all.