

Legal Scholarship For Professor Burke's Seminars



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The Role of the Legal Scholar

**To critically examine existing practices
and propose better ways of doing or
analyzing things.**



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Types of Legal Scholarship

- **Case Cruncher (Duncan)**
- **Law Reform (Buckles)**
- **Legislative Note (Kettles)**
- **Interdisciplinary (Chandler)**
- **Legal History (Joyce)**
- **Comparative (Curran)**
- **Casenote (Reeder)**



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Case Cruncher (Duncan)

- **Analyzes case law in an area that is confused, in conflict, or in transition.**
- **Makes claims that doctrine is antiquated or incoherent and needs to be reshaped.**
- **Often offers a solution to the conflict or problem.**



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Law Reform (Buckles)

- **Argues that a legal rule is bad, has evil consequences, is inequitable or unfair.**
- **Shows how to change the rule to avoid these problems.**



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Legislative Note (Kettles)

- **Analyzes proposed or recently enacted legislation.**
- **Often analyzes the legislation section by section, offering comments, criticisms, and sometimes suggestion for improvement.**



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Interdisciplinary (Chandler)

- **Shows how insights from another field can enable law to deal better with problems.**
- **Sociology, psychology, economics, etc.**



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Legal History (Joyce)

Describes the origins and development of a legal rules or institution, perhaps shedding light on its current operations or shortcomings.



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Comparative (Curran)

- **Explicitly makes comparison between or among different legal systems.**
- **Focuses on differences and similarities, and perhaps gives reasons for the differences and similarities or analyzes the significance for the cultures being studied.**
- **May show that other legal systems treat a problem more effectively, equitably, or humanely than the U.S. system does.**



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Casenote (Reeder)

Examines a recent decision, together with its antecedents, deficiencies, and likely consequences.



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Finding a Problem/Topic

- **Cases read for class**
- **Class discussions**
- **Questions in casebooks after each case**
- **Recent Supreme Court decisions**
- **Faculty members**



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Finding a Problem/Topic cont'd

- **Practicing lawyers**
- **Newspapers**
- **Westlaw Bulletin and Westlaw Topical Highlights**
- **<http://www.lawtopic.org>**



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What Does Your Professor Want?



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Characteristics

Good legal scholarship should make

- 1. a claim that is**
- 2. novel,**
- 3. nonobvious,**
- 4. useful, and**
- 5. sound.**

Good legal scholarship is well-written and well organized.



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The Claim Your Basic Thesis

Descriptive: Telling readers something that they did not know about the world: what courts have done, how a legal rule changes people's behavior, or why a rule has developed in a particular way.

Prescriptive: Suggesting what should be done. Criticizing judicial opinions, proposing how legal decision-makers should solve a problem.



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Novelty

- Add to the body of professional knowledge.
- Say something new to those who work in the field.
- Preemption. Must review the literature to make sure that you are writing something with a suggestion, slant, idea, or analysis that has not appeared before.



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Nonobviousness

- **Add some twist that most observers would not have thought of. Think creatively.**
- **Do not just apply settled law or well-established arguments to slightly new facts.**



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Utility

- **Make as useful as possible for those interested in this area of law.**
- **Focus on issues left open.**
- **Apply your argument to other jurisdictions.**
- **Incorporate prescriptions with your descriptive findings.**
- **Consider making a more politically feasible proposal.**



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Soundness

- **Test your proposal on different cases or facts to determine if your proposal achieves the desired goals under all circumstances.**
- **Acknowledge the weaknesses of your proposal and use them to refine the proposal.**



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Structure of the Paper

- I. Introduction
- II. Background
- III. Analysis
- IV. Conclusion



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Introduction

- **Describes or summarizes the subject matter.**
- **Frames the issue.**
- **Plainly states the thesis.**
- **Provides a roadmap for the rest of the paper.**
 - **Part I sets out X**
 - **Part II analyzes X and concludes Y**



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Background

- **Factual**
- **Legal**
- **Methodological**
- **Specific**
- **Necessary to advance thesis**



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Analysis

- Focal point of paper.
- Original and closely reasoned.
- Building up to a convincing conclusion.



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Footnotes

- Used extensively.
- Documenting the text – providing the authority and bibliography
- Avoiding plagiarism – attributing the borrowed text and ideas to their original sources
- Textual – allowing the writer to express ideas that do not fit neatly in the straight and narrow path of traditional legal reasoning



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Legal Authorities: Research

- Casebooks, Hornbooks, and Encyclopedias (in the beginning)
- Statutes
 - U.S. Code
 - Texas statutes
 - <http://www.capitol.state.tx.us/>
- Regulations
 - Code of Federal Regulations (C.F.R.)
 - Federal Register
 - <http://www.gpoaccess.gov/nara/index.html>



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Legal Authorities: Research

- Cases
- Proposed Legislation
 - <http://thomas.loc.gov>
 - <http://www.capitol.state.tx.us/>
- Law Review Articles
- Newspaper and Magazine Articles



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Sources on Writing

- Eugene Volokh, **Academic Legal Writing**. 2d ed. (Foundation Press 2005).
- Elizabeth Fajans & Mary R. Falk, **Scholarly Writing for Law Students** (2d ed. West 2000).
- Williams Strunck Jr. and E. B. White, **The Elements of Style** (4th Ed. 2001).
- **Plain English for Lawyers** (4th ed. Carolina Academic Press 2001).
- <http://www.bartleby.com/usage/>



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Ask Your Professor What She Wants



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How You Will Be Graded?

- **Carefully read the syllabus and any materials provided concerning requirements.**
- **If you have questions about or are unsure of how to meet the requirements, ask me.**



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How You Will Be Graded?

- **Included in your final grade will be the quality of--**
 - **your first draft,**
 - **revisions to reflect my comments on your outline and first draft,**
 - **compliance with citation and other formats, and**
 - **your class participation.**



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Meet All Requirements

- **Make sure that your paper will satisfy the requirements of your particular LL.M. program.**
 - **Page length – 40 or 60 pages**
 - **Grade needed – “B” or “C”**
 - **Etc.**
- **Though it is called a “thesis”, it should be in the format of a law review article.**



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Observe All Deadlines

- **I will lower your grade for late assignments.**
- **I will be very unhappy with late assignments.**



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