Legal Scholarship in the United States

A presentation by Prof. Marcilynn A. Burke for foreign LL.M. students at the University of Houston Law Center
The Role of the Legal Scholar

To critically examine existing practices and propose better ways of doing or analyzing things.
Types of Legal Scholarship

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

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

- Shows how insights from another field can enable law to deal better with problems.
- Sociology, psychology, economics, etc.
Legal History
(Joyce)

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

Examines a recent decision, together with its antecedents, deficiencies, and likely consequences.
Finding a Problem/Topic

- Cases read for class
- Class discussions
- Questions in the casebooks after each case
- Recent Supreme Court decisions
- Faculty members
- Practicing lawyers
- Newspapers
- Westlaw Bulletin and Westlaw Topical Highlights
- http://www.lawtopic.org
What Does Your Professor Want?
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.
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.
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.
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.
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.
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.
Structure of the Paper

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

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

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

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

- Eugene Volokh, Academic Legal Writing (Foundation Press 2003).
- http://www.bartleby.com/usage/
Ask Your Professor
What She Wants
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 your professor.
Some professors include in your final grade the quality of—

- your first draft,
- revisions to reflect her comments on your outline and first draft,
- compliance with citation and other formats, and
- your class participation.
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.
Observe All Deadlines

- Some professors lower your grade for late assignments.
- Some professors refuse to accept late assignments.
- All professors will be unhappy with late assignments.