
Martha Minow
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“It has been my pleasure to be a sounding board and advisor to many people who consider becoming law professors and yet it has not always been easy to introduce people considering their own research projects to reflect on how their ideas connect with the varieties of legal scholarship. One day I decided to write up a ‘field guide,’ meant to be rather like the guides to birds that offer pictures and descriptions to assist the casual or serious birdwatcher. After sharing it and revising it, I have learned that this ‘guide’ now travels underground and electronically, so I thought it time to give it an official publication, and the Journal’s editors kindly agreed. The explosion of interdisciplinary research in law contributes to the variety of legal scholarship. So does the contrast between ‘inside’ and ‘outside’ thinking in law schools where we try both to equip people for practice and effectiveness within existing institutions and for roles as critics, institutional reformers, and scholars who may explain and analyze in terms quite different from those in the minds of actors operating within existing legal systems. So here with an invitation for supplements, critiques, and revisions is my Archetypal Legal Scholarship: A Field Guide.”

So began the first published version of this guide, published after several years of underground distribution. Now taught in law school workshops on scholarship and shared across faculty and students, this guide deserves to be updated. With enlarged categories, additional and more recent examples, and further thoughts about the writing process, the guide now has a co-author, who has used it for years in advising students.

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    a. Organize and reorganize case law into coherent elements, categories, and concepts;
    b. Acknowledge distinction between settled and emerging law;
    c. Identify difference between majority and “preferred” or “better” practice—ideally with some explanation for the criteria to be used.


    a. Gather more than one “line” of cases across doctrinal fields, categories, or historical developments, and show why they belong together or expose unjustified discrepancies;
    b. Offer a new framework or paradigm that can recognize past, present, and future material.


a. Usual structure: present a problem; canvass alternatives; propose an evaluative scheme or method; recommend preferred solution;
b. Attribute problem to: distance between goal and implementation; conflict with a powerfully competing goal; the lack of fit between legal rules or practices when compared with changing social, economic, biological, or technical circumstances; or mistaken assumptions as demonstrated by historical review, economic model, psychological research, or evidence from other fields;
c. Not a brief: include fair analysis of a range of alternatives and alternative criteria; offer useful analyses even for people who do not agree with the assumptions, methodology, or conclusion.


a. Take a widely assumed or commonly known proposition familiar to lawyers or legal theorists;
b. Undertake an empirical investigation about its validity or summarize and assess empirical work conducted by others or undertake model-building or summarize and apply model(s) developed by others;
c. Digest the findings for legal audiences.

16 WILLIAM W. FISHER III, PROMISES TO KEEP: TECHNOLOGY, LAW, AND THE FUTURE OF ENTERTAINMENT (1st ed. 2004).
18 ROBERT ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1994).


VI. Critical projects, e.g., Duncan Kennedy, “Form and Substance in Private Law Adjudication;” Robert Cover, “Supreme Court—1982 Foreword: Nomos and Narrative;” Kimberlé Crenshaw, “Race, Reform,

a. Expose unstated assumptions, patterns, or results, internally inconsistent structures or other tensions within a body of law or legal practices or institutions;
b. Highlight the tensions, contradictions, or paradoxes behind the surface of law or legal practices; sometimes they are not resolved but instead linked to larger psychological, social, or philosophic difficulties and political or normative efforts.


53 Benjamin Levin, What’s Wrong with Police Unions, 120 Colum. L. Rev. 1333 (2020).
56 Mary Ann Glendon, Abortion and Divorce in Western Law (1989).
61 Jennifer M. Chacón, Immigration and Race, in The Oxford Handbook of Race and Law in the United States (Devon Carbado, Emily Houh & Khiara M. Bridges eds., 2022).
a. Offer a rich description of an earlier era or contrasting legal regime;
b. Satisfy the criteria within the fields of anthropology or history in use of sources (including archival and primary), triangulation, and contextualization;
c. Suggest how this study illuminates differences, choices, or continuities when compared with contemporary domestic practice.
d. Present insight into the interactions across legal institutions or across law and society.


- a. Develop or elaborate a theory that tries to explain how all of law or chief portions of it hang together;
- b. Engage with alternative theories;
- c. Demonstrate the contribution this theory makes to a conceptual puzzle or set of doctrinal or practical problems;
- d. Advance view of justice or analysis of what norms law should pursue.

IX. Combinations. Some works combine elements from more than one category, e.g., Cass Sunstein, “Interest Groups in American Public Law;”\textsuperscript{69} Derrick Bell, Jr., “Brown v. Board of Education and the Interest-Convergence Dilemma;”\textsuperscript{70} Lani Guinier, “The Triumph of Tokenism;”\textsuperscript{71} Frank H. Easterbrook

\textsuperscript{62} Ronald Dworkin, Law’s Empire (1986).
\textsuperscript{63} Catharine MacKinnon, Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence, 8 Signs 693 (1983).
\textsuperscript{68} Benjamin Eidelson, Respect, Individualism, and Colorblindness, 129 YALE L. J. 1600 (2020).
\textsuperscript{70} Derrick Bell, Jr., Brown v. Board of Education and the Interest-Convergence Dilemma, 93 HARV. L. REV. 518 (1980).

Getting Started

How do you start on a project? In advising students, we have suggested the following. First, be excited about your idea. You can’t write a good paper unless you care about your research question. Spend time thinking about the question itself. What makes you mad? What needs to change? The beauty of being a legal scholar, as Martha has said, is getting to own your own mind. Once you’ve identified your motivating question, write a concise paragraph about it, explaining the question as if you were talking to your grandmother. Identify the idea or the problem and explain your argument, without including a literature review or introductory wind-up. What’s the elevator pitch? Share that pitch with mentors and colleagues as you begin to develop your argument and situate it in the literature.

Genre

Projects differ in scope, size, and timeliness. When writing up the one paragraph of your idea, you should consider the form that idea will ultimately take. In this guide, we have cited books and articles as exemplars of each category. With innovations in communications, scholarly debates are also taking place in new settings beyond books and journals, especially when relevant to topics of immediate concern. Examples of scholarly blogposts and podcasts on legal doctrine and scholarship include Martin S. Lederman, “Understanding OLC Torture Memos;”75 varied authors, The COVID-19 Blog Project76; Leah Litman, Melissa Murray, and Kate Shaw, “How the 303 Creative Case Threatens to Roll Back the 21st Century,” Strict Scrutiny (podcast).77

Audiences

As a scholar, you may find that your audience includes other scholars, judges, practitioners, law students, or the public at large, or, more likely, some combination thereof. As you situate your contribution in the literature, think

about whom you want to reach and use framing, vocabulary, and explanations appropriate to those audiences. A prospective legal academic may find it helpful to think about the diversity of hiring committees and also to demonstrate more than one approach or tool while anticipating and responding to likely counterarguments.

**Methodology**

Legal scholarship draws on a number of methodological influences; as you work on your piece, consider which ones make sense for you. Are you engaged in empirical work (qualitative or quantitative)? Are you working entirely or largely with judge-made doctrines? Drawing on philosophical frameworks? Using historical research methods? Some combination? Being mindful and even explicit about your chosen method can assist readers and also remind the author to consider what is left out, what counterarguments to engage, and what to acknowledge but locate outside the scope of the project.

**Additional Scholarly Writing Resources**


When deciding on a topic, consider what you care about—what will sustain your interest through many stages of work—and consider both existing types of scholarship and innovations that could belong in the next edition of the field guide.