

# Taking Note of Notes: Student Legal Scholarship in Theory and Practice

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What is legal scholarship? Having posed the question, there is a strong temptation to follow the sensible example of Pilate and decline to stay for an answer.<sup>1</sup> Alternatively, one might canvass the attempts to answer that question which have been propounded, much- or little-debated, and largely ignored by a host of legal scholars.<sup>2</sup> A consideration of the legal scholarship on legal scholarship, however, reveals no consensus as to what it is or ought to be.<sup>3</sup> In the absence of any agreement at the level of theory on the nature of legal scholarship, one might instead attempt to define it inductively by looking at the contents of law reviews, the typical repositories of American

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1. See Francis Bacon, *Essays* 61 (John Pitcher ed., Penguin Books 1985).
2. Scholarship about legal scholarship is itself legion. Fortunately, the content of that scholarship is largely irrelevant to this article. Those curious to behold what prominent legal scholars have to say about the nature of the enterprise could do worse than consult a symposium on the topic. See, e.g., *A Symposium on Legal Scholarship: Criminal Law, Criminology, and the Small World of Legal Scholars*, 63 *U. Colo. L. Rev.* 521 (1992).
3. It has been argued that legal scholarship should stick to its traditional strength—i.e., doctrinal scholarship with a strong prescriptive component—either because that is what law professors are best equipped to produce, or because that is what will be most “useful” for judges and lawyers. See, e.g., Dennis Archer, *The Importance of Law Reviews to the Judiciary and the Bar*, 1 *Det. C.L. Rev.* 229, 229-30 (1991) (arguing that academics would be well-advised to abandon their quest for the “abstract and the esoteric” and instead concentrate on writing “eminently more useful” articles on “topics that confront judges and practitioners of the law”). Against this, it has been argued that nontraditional interdisciplinary scholarship has both practical value to the profession and independent theoretical importance. See, e.g., Richard Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 *Mich. L. Rev.* 1921, 1927-28 (1993) (admitting that much interdisciplinary legal scholarship “is bad,” but arguing that legal scholarship is significantly “enriched” by the best of it and that it has “more practical relevance” than its detractors acknowledge). These articles only begin to scratch the surface of the debate. Instead of providing yet more representative articles to constitute evidence, if any is required, that there is a lack of consensus about what legal scholarship should be, I direct the interested reader to a bibliography of law review articles about legal scholarship compiled in 1998, which lists a huge number of works on the subject. See Mary Beth Beazley & Linda H. Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 *Mercer L. Rev.* 741, 745-70 (1998) (compiling, literally, hundreds and hundreds of articles about legal scholarship).

legal scholarship.<sup>4</sup> But even a cursory survey of the unruly sprawl of America's law reviews makes one thing clear: "legal scholarship" is whatever an author manages to get published in a law review. And that, it seems, can be almost anything. There are, after all, hundreds of law reviews, each of which has to fill hundreds (if not thousands) of pages each year with . . . something.<sup>5</sup> The result: if you have institutional credibility,<sup>6</sup> and if you turn out some number of more-or-less-Bluebooked pages that you present to the law reviews of America as a work of legal scholarship, your effort will likely be published somewhere.<sup>7</sup>

It is not for me to say whether the uncertainty about the nature of legal scholarship is a good thing. Instead, I want to inquire about the nature of *student* legal scholarship. Law reviews, after all, contain more than the effusions of law professors, judges and other established figures in the legal profession. One of the things that makes legal scholarship distinctive<sup>8</sup> is that law reviews

4. The caveat is important: this article has nothing to say about legal scholarship outside the United States. In America, for better or for worse, "legal scholarship" is essentially "whatever gets published in the law reviews," as the law review article is the prevalent mode in which scholarly ideas are disseminated. *See, e.g.*, Robert Weisberg, *Some Ways to Think About Law Reviews*, 47 *Stan. L. Rev.* 1147, 1153 (1995) (noting that "law professors rarely write or have to write books").
5. I know of no source that quantifies the precise number of currently active law reviews, though the number is clearly large. To get a sense of what the exact number might be, I looked at a website platform that enables authors to submit their work to law reviews, figuring that if anyone would know the number, the keepers of the website would—after all, they are in the business of seeking out venues for legal scholarship. At the moment, that source—the ExpressO online delivery service—comprises more than 750 reviews. *See* ExpressO, Express online deliveries to law reviews, *available at* <http://law.bepress.com/expresso/> (proudly asserting that it offers a list of "750+ law school reviews" to which authors may submit their manuscripts). Law reviews also vary widely in length. The behemoths publish between 2,000 and 3,000 pages of material per year, if not more: a recent volume of the *Fordham Law Review* checked in at a whopping 3,200 pages. *See* Damien H. Weinstein, *New York: The Next Mecca for Judgment Creditors? An Analysis of Koehler v. Bank of Bermuda Ltd.*, 78 *Fordham L. Rev.* 3161, 3200 (2010) (wrapping up what must have been an exhausting year for the Fordham editorial staff). By contrast, recent volumes of the *FIU Law Review* (to stay only in the "F"s) have only run to a few hundred pages. *See* Christopher B. Carbot, *The Odd Couple: Stadium Naming Rights Mitigating the Public-Private Stadium Finance Debate*, 4 *FIU L. Rev.* 515, 552 (2009) (bringing a close to what must have been a relatively unstressful editorial year, compared to that endured by the Fordham students).
6. I know of no empirical research on the types of authors who get published in law reviews. Extensive impressionistic research (i.e., "lots of trolling through law reviews") indicates that if you hold a position of authority and want to see your thoughts in print, a law review will cheerfully provide a forum for your work, no matter its quality. *See* for yourself, as any examples I might provide would only enrage the authors and law reviews cited.
7. This is an observation that I am hardly the first to make. *See, e.g.*, Robert L. Bard, *Legal Scholarship and the Professional Responsibility of Law Professors*, 16 *Conn. L. Rev.* 731, 740 (1984) (remarking that there are "so many law reviews clamoring for articles that anything in sentences can get published somewhere").
8. "Baffling" is another word that comes to mind, if one is accustomed to other scholarly disciplines. Let us just say that the *American Journal of Sociology* rarely publishes articles written by second- or third-year sociology graduate students.

publish works by students, who almost by definition are not yet experts in the field.<sup>9</sup> For many student authors, the writing and publication of a note<sup>10</sup> is one of the central tasks of their law school careers. The business of producing a note is, for most students, an enormous investment of time.<sup>11</sup> In addition to being a remarkably labor-intensive enterprise, the note often will have (or will be perceived to have) far-reaching consequences for the student. While some students may regard the note as an end in itself—yet another law school obligation to be dutifully discharged, then never thought of again—many students regard it as a significant undertaking with important repercussions. The note will often furnish its author with a writing sample, which will be used when applying for clerkships or other post-law school jobs. At the least, the note constitutes a resume line which (the student hopes) will prove attractive to future employers.<sup>12</sup>

Given how much work goes into writing a student note, and how consequential an endeavor it is for many students, the enterprise bears closer

9. This is not to say that student-written articles are widely, or often, or even “more than occasionally,” influential. Most of the work that has been done on student legal scholarship has been devoted to assessing the “impact” of such scholarship; it has mostly concluded that the impact is insignificant. *See, e.g.,* Bart Sloan, *What Are We Writing For? Student Works as Authority and Their Citation by the Federal Bench, 1986-1990*, 61 *Geo. Wash. L. Rev.* 221, 230-32 (1992) (looking at a sample of federal court opinions to arrive at the conclusion that “federal courts do not consider student works a significant source of authority”). One survey of “law review usage” in the early 1990s determined that student-written articles were found to be “less useful” than “standard law review articles,” and “received middling ratings” from judges, attorneys and professors. *See* Max Stier, et al., *Law Review Usage and Suggestions for Improvement: A Survey of Attorneys, Professors, and Judges*, 44 *Stan. L. Rev.* 1467, 1468, 1497 (1992).
10. The nomenclature of student-written articles is a bit complicated. To simplify matters, I will use the word “note” to refer to “a piece of legal scholarship which is written by a law student and which aims to resemble law review articles written by law professors.”
11. It is often said that a law review article takes “at least 150 hours” to write. *See, e.g.,* Kevin Hopkins, *Cultivating our Emerging Voices: The Road to Scholarship*, 20 *B.C. Third World L. J.* 77, 83 (2000) (asserting that “most law review articles take the writer an estimated 150 hours to complete”). The source for this charmingly arbitrary figure is an article by Richard Delgado, *How to Write a Law Review Article*, 20 *U.S.F. L. Rev.* 445, 448 (1986) (asserting that “[m]ost law review articles take the writer at least 150 hours from start to finish”). For all one can tell, Delgado grabbed that number out of the air. And even if it were a more or less accurate estimate c.1986, it is impossible to say whether advances in technology since then have made it less time-consuming to write law review articles (because so many materials are available online) or more time-consuming (because *so many* materials are available online). It is the notoriously steep investment of hours required to write an article that presumably inspired the aphorism sometimes attributed to Nietzsche: “Man does not live to write law review articles; only the Yale Law School student does that.”
12. In a resume that may be crammed with relatively fungible “achievements,” a student-written article is bound to stand out. The fact that a student managed to get into Phi Beta Kappa as an undergraduate may be a commendable indication of academic achievement, but it is not exactly a conversation starter. By contrast, an article affords extensive conversational opportunities: “Oh, you wrote about X—interesting. What made you choose X as a topic? What did you conclude about it? Etc., etc.”

consideration than it seems to have received. Bear in mind that few students have written any kind of publishable scholarship before law school. How, then, are they to know what to do when confronted with the challenge of writing a note? In other disciplines, apprentice academics learn the conventions of scholarship in their field by immersing themselves in its scholarly literature over years of graduate study. Such an approach isn't available to law students, for a number of reasons. For one thing, law students usually are taught out of textbooks that, for the most part, contain snippets of appellate opinions. It would be possible to complete three years of coursework in most American law schools without reading a law review article in its entirety. For another thing, as noted above, the genre of legal scholarship is—to say the least—an inchoate one, consisting as it does of “whatever established legal scholars manage to get some law review to publish.” Reading, say, a year's worth of articles in a major law review—if anyone could manage to plow through an entire volume—would expose a student to a bewildering welter of approaches, but would hardly provide authoritative guidance on how legal scholarship ought to be written.<sup>13</sup>

And yet the students write their notes, and the law reviews publish them. How does this happen? How do law students decide what they will write about and how they will approach their subjects? And how do law reviews (which are, for the most part, edited by students) figure out which student-written works they will publish?<sup>14</sup> This article attempts to provide two kinds of answers to these questions.<sup>15</sup> First, I look at several of the leading “guides for the perplexed” that have been written to walk law students through the process of developing a piece of scholarly writing. My assumption is that these texts reflect mainstream opinion about what student scholarship ought to look like. My further assumption is that these texts, as they become more and more popular, are helping to shape that mainstream opinion, as fresh generations of law students (in particular, law students who populate the editorial boards

13. It would also take forever. Many law students complain, not without reason, that they already have enough work on their hands. It is a bit much to suggest that “reading enough law review articles to get a broad perspective on legal scholarship” should be added to their already imposing roster of tasks.
14. Amusingly, many law reviews inform students that their articles must be of “publishable” quality to be published, but fail to provide any objective criteria by which an author could gauge whether his work is up to snuff. *See, e.g.,* Duke Law Journal, Membership, *available at* <http://www.law.duke.edu/journals/dlj/membership> (advising prospective student authors both that there is no “required format” for “substance or style,” and that “[n]o submission will be selected if it fails to meet the *Journal's* high [if unspecified] standard of ‘clearly publishable quality’”).
15. Any thorough approach to the subject, no doubt, ought to involve empirical survey work aimed at finding out how student writers and student law review editors answer such questions as “How shall I find a topic?” and “Is this student submission publishable?” (At the least, by doing so one would get a decent overview of the range of conscious rationalizations employed by law students when confronted with such issues.) I have not taken that kind of approach. Also, it seems more than likely that such unquantifiable factors as “informal faculty advice” and “sheer guesswork” play a huge role in the process. Without knowing how to reckon with those factors, I have chosen to ignore them.

of law reviews) adopt the guidebooks' implicit normative visions of what student scholarship should be.<sup>16</sup> I looked at what appear to be the three most-recommended sources: a book, *Scholarly Writing for Law Students*, by Elizabeth Fajans and Mary Falk;<sup>17</sup> an article on finding scholarly topics by Heather Meeker;<sup>18</sup> and Eugene Volokh's book on academic legal writing.<sup>19</sup>

Although there is no consensus in academia as to what legal scholarship essentially ought to be, the guidebooks tell their student readers a different story. Each of the guides has a specific notion of what legal scholarship should be. Each instructs its readers that they need to write a certain kind of note, and that they should avoid writing notes in certain proscribed ways. For the most part, it is unclear where the authors of these guides derive their notions of "proper" legal scholarship, given that there is no agreement in academia on that subject. Nonetheless, they present their views as if they were objective truths. While law professors feel free both to write about almost anything they please, so long as it is at least tangentially related to the law, and employ a wide variety of approaches, these guidebooks attempt to force student authors into a straightjacket. On the basis of the guides, one would assume that only a few kinds of legal scholarship are acceptable.

It may be argued that few if any student readers take these guides at face value, and that the extended critique of them that I will offer is akin to the dubious practice of breaking butterflies upon a wheel. I do not think that is

16. The earliest edition of any of the sources I will be examining appeared in 1995. See Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* (West Pub. Co., 1st ed. 1995). Since then, the book has gone through two additional editions, the most recent of which appeared in 2004. Elizabeth Fajans & Mary R. Falk, *Scholarly Writing for Law Students* (West, 3rd ed. 2004) [hereinafter Fajans & Falk]. The other major book in the area, Eugene Volokh's, first appeared in 2003, and has recently gone into its fourth edition. See Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (Foundation Press, 4th ed. 2010). It is unclear why such books have only appeared in recent years. Perhaps it simply never occurred to anybody that there was a market for them until the mid-'90s. It is also unclear what, at this point, would prompt a new contender to write a book in this field, meaning that the visions of student legal scholarship presented in these texts may become increasingly hegemonic in the years to come.
17. I looked at the most recent edition of this text: the third, from 2004. Fajans & Falk, *supra* note 16.
18. Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 *Utah L. Rev.* 917 (1996).
19. I looked at the third edition of this text, the most recent available at the time I began this project. Eugene Volokh, *Academic Legal Writing: Law Review Articles, Student Notes, Seminar Papers, and Getting on Law Review* (Foundation Press, 3d ed. 2007) [hereinafter Volokh]. Although I did not attempt any kind of thorough survey of the frequency with which these resources were recommended, they appear to be standard. See, e.g., Linda Berger, Thomas Jefferson Law Review, *Writing a Note*, available at <http://www.tjeffersonrev.org/Resources/writingnote.htm> (suggesting that the books by Volokh and Fajans & Falk are the "most complete guides" to writing a note, while the Meeker article is "also helpful"); see also Georgetown Law Library, *Research Strategies for Seminar Papers & Journal Notes*, available at [http://www.ll.georgetown.edu/guides/seminar\\_papers.cfm](http://www.ll.georgetown.edu/guides/seminar_papers.cfm) (listing those three sources, and only those three, as "additional resources on scholarly papers").

true. Clearly, there is a significant market for these guides: Volokh's book, for instance, has gone through four editions in its seven years of existence. That market, I would argue, has emerged in response to a definite need. Again, there is no reason that law students should know the first thing about how to write serious legal scholarship. Nor is there any reason to think that law students elected to law review editorial boards will have any real idea of how they ought to evaluate the notes submitted to them. Given those conditions, it would be surprising if law students did not grasp at whatever straws are offered to them. It seems inevitable that many law students thus will absorb the normative visions contained in these guides, accepting them as true and complete descriptions of what legal scholarship is and ought to be. One of my goals, then, is to persuade law students and law reviews that the normative visions of "the note" offered by these guides are arbitrary and incomplete.

In the second part of this article, I move from a critique of the prescriptive suggestions found in the guidebooks to an empirical analysis of the way students actually write notes. For this part of the project, I examined a set of 350 student-written articles published in a total of 12 law reviews between 2006 and 2009. Half of the law reviews were publications of "elite" law schools, while the other half were from "non-elite" schools.<sup>20</sup> By surveying this sample of student writings, I have been able to draw an overview of what recent law students have chosen to write about and how they have approached the task of writing scholarly articles.

The goal of this section was to learn more about what law students are actually doing (or, in some cases, to learn more about what they are *not* doing). I also wanted to see how closely the advice proffered by the major guides tracked with the actual practice of American law students. In some cases, as we will see, there is a rather close fit between what the guides counsel and what students actually do. In others, there is a gap between current practice and the advice found in the guides. This section demonstrates that, in some ways, the practice of student writing is richer than a reading of the guides would suggest. However, it also suggests that some of the guides' advice—in particular, I would argue, some of the most unfortunate aspects of their advice—is being heeded by law students.<sup>21</sup>

20. For an explanation of these terms, *see infra* note 101.

21. There is a certain amount of fudging here, as there will be throughout the article, because it is impossible to determine how much of a causal connection there is between what the guidebooks prescribe and what law students produce. As I have argued, I think that some influence is unquestionably exerted by the guides on the choices of law students. But it is also surely the case that some of the advice offered by the guides is nothing more than an accurate reflection of actual law student practice. I do not pretend to have a clear sense of where the guides are dictating law student behavior and where they are merely, as it were, "restating" it. Sometimes, I will use the gap between "the note in theory" and "the note in practice" to indicate that student work is more full of possibility than the guides would have their readers believe. At other times, I will use the closeness of fit between theory and practice to suggest that the guides are having an effect on what students elect to do. These are, of course, interpretive decisions. It would also be possible to argue, e.g., that the gap between theory and practice indicates that the guides are being ignored by students.

As we will see, the guides inform students that they need to produce articles that are “interesting” and “useful,” without supplying much definition (interesting to whom? useful for what?) to those maddeningly nebulous adjectives.<sup>22</sup> In the spirit of those vague exhortations, I will conclude this introduction by suggesting that this article may prove interesting or useful to two groups of people: law students and law professors. Students may benefit from this article’s assessment of the advice offered in the leading guidebooks. They may also be curious to know what their peers are actually doing.<sup>23</sup> Professors may benefit from this article’s critique of the principal guides, if only to the extent that they may learn how they ought to qualify their recommendations of those texts to anxious students. They may also be curious to know what it is that their students have been doing over the last few years.

### I. The Note in Theory: Three Conceptions of Student Legal Scholarship

In this section, I look at three of the most prominent guidebooks for student writers.<sup>24</sup> The critique I offer of these guides is, at times, severe. However, I want to make clear that my analysis is limited strictly to one aspect of these works: their tacit assumptions about what student legal scholarship “ought” to be. If one brackets those assumptions, each of these guides contains a great deal of sensible advice about how to write a note. For the most part, these texts focus on the mechanics of the writing process. Much of what they have to say about that process strikes me as extremely helpful, but my argument does not touch on that aspect of these works. I am solely interested in outlining and critiquing the normative vision of student scholarship presented in each of these texts. But it would be a shame if students—on the basis of this critique—were to conclude that these guides should be avoided altogether. My goal, instead, is to help students recognize that none of these texts should be taken as gospel for what student legal scholarship is. Each of the authors has a contestable, idiosyncratic picture of student legal scholarship. My point, again, is to remind students that they can accept these authors’ practical suggestions on how to write a note without also embracing their normative view of what a note must look like.

22. See, e.g., *infra* notes 39-42 and accompanying text.

23. At the least, those with aspirations to be either conventional or unconventional may benefit from a perusal of the empirical portion of this article. Conformists can mine the data to construct a perfectly typical student work. Nonconformists can look at the areas and methodologies that are largely ignored by other student authors and plan their projects accordingly.

24. Hardly any serious scholarly attention has been paid to these resources. To my knowledge, only Ruthann Robson has devoted significant critical attention to these texts. See Ruthann Robson, *Law Students as Legal Scholars: An Essay/Review of Scholarly Writing for Law Students and Academic Legal Writing*, 7 N.Y. City L. Rev. 195 (2004). Robson’s central issue with both Volokh’s and Fajans and Falk’s books is that they concentrate exclusively on the supposed utility of the note to the note’s supposed audience, while saying nothing about the student’s own passion for the subject. *Id.* at 198. As will become clear, I am sympathetic to this line of critique.

*A. The Note as a Clerkship Writing Sample*

The first guidebook for student writing that I will discuss is, perhaps, the most popular: Eugene Volokh's *Academic Legal Writing*. Volokh's book opens with a parable. In it, an illustrious jurist—Judge Alex Kozinski—reminisces about interviewing a clerkship candidate who had “record-breaking grades” from a “name-brand law school,” coupled with glowing recommendations that praised him as a “Kozinski clone.”<sup>25</sup> The interview, Kozinski relates, was going splendidly, until the candidate made a nearly fatal blunder. When asked if he had decided on a topic for his law review note, the excitable interviewee proudly announced “It’s done” and whipped out an “inch-thick document.”<sup>26</sup> Kozinski was impressed—until he looked at the title page: “The Alienability and Devisability of Possibilities of Reverter and Rights of Entry.” Kozinski tells us that his first thought was that the note’s title had to be a joke.<sup>27</sup> Then he wondered why anyone who was supposed to be “smart” would write “on such an arcane topic.”<sup>28</sup> Finally, he turned to the note itself. “It was well-written enough,” he concedes.<sup>29</sup> Nonetheless, “the effort was pointless”<sup>30</sup> because “the subject matter was of absolutely no interest to me.”<sup>31</sup> Instead of reading the note, Kozinski’s mind wandered off, as he mused darkly about what such an “arcane” choice of topics could signify about the note’s author: “Under that veneer of brilliance, was there a kook trying to get out? Could I really trust his judgment as to the countless sensitive issues he would have to confront during his clerkship?”<sup>32</sup>

Kozinski, we learn, never actually got around to reading “more than a few lines” of the “dreary” paper.<sup>33</sup> Despite his reservations, he decided to offer the possible “kook” a clerkship, while making clear that he should “drop the paper in the nearest trash can and start from scratch.”<sup>34</sup> “I explained to him what was wrong with it,” Kozinski relates, and told him “what a successful paper should look like.”<sup>35</sup> If, at this point, you find yourself worrying about how devastated that poor kid must have been, rest assured that things worked out for him. He “gratefully accepted” the advice, “chucked” his “inch-thick” note, and went

25. Volokh, *supra* note 19, at 1.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* Kozinski does not explain why choosing to write about estates in land should be taken as indicative of deep-seated “kookiness,” or why such a choice would indicate that a clerk would be incapable of reading briefs, researching precedents or any other standard chores.

33. *Id.*

34. *Id.*

35. *Id.* at 2-3.



on to reap the rewards of his acquiescence to Kozinski's authority: a Supreme Court clerkship, high status in his profession as an "often quoted legal academic," and, we presume, happiness.<sup>36</sup> "His name," Kozinski portentously concludes, "is Eugene Volokh."<sup>37</sup>

Before we get swept away by this story of a career crisis narrowly averted, it is worth asking exactly what was wrong with the note. Elsewhere in his introduction, Kozinski offers criteria for gauging competence in student scholarship: "Is the topic broad enough to be useful, yet narrow enough to be adequately covered? Is it persuasive? Is it fun to read? . . . A well-written, well-researched, thoughtful paper can clinch that law firm job or clerkship."<sup>38</sup> Did Volokh's note fail in these ways? We'll never know. For that matter, Kozinski couldn't have known, since he was unable to bring himself to look at more than a few lines of it.

What, then, was the problem? The note, Kozinski conceded, was well-written; at an inch-thick, it was probably well-researched. It may even have been thoughtful. But all that effort was pointless, because the topic did not immediately grab the attention of Judge Kozinski. The unspoken moral of the story is clear: thoroughness, elegance and thoughtfulness are all very well, but if your note fails to capture the attention of a member of the judiciary, writing it was a complete waste of time.

As *Academic Legal Writing* makes clear, that lesson was thoroughly internalized by Kozinski's eager pupil. Indeed, the book reads as if it were designed to inculcate and drive home what the young Volokh had learned: namely, that impressing authority figures—in particular, a judge seeking clerks—is the *raison d'être* of student legal scholarship. The book describes the task of student scholarship and its audience in vague and confusing ways which are never precisely spelled out. But, on reflection, it seems clear that Volokh is referring only to judges and their desiderata. Much of his advice—though it seems questionable or false when considered as a description of scholarship per se—makes excellent sense, when seen for what it really is. At its base, Volokh's book offers advice designed to help avoid the likelihood that a judge will be offended or irritated by a student's work, in the way Kozinski was by the young Volokh's original note.

The vagueness of Volokh's book is epitomized by its central commandment: that student articles must be useful.<sup>39</sup> No doubt this is true in some sense,

36. *Id.* at 3.

37. *Id.*

38. *Id.* at 2.

39. *Id.* at 17. To be precise, Volokh offers a definition of "good" legal scholarship in which "usefulness" is just one factor. In full, he asserts that legal scholarship should "make (1) a claim that is (2) novel, (3) nonobvious, (4) useful, (5) sound, and (6) seen by the reader to be novel, nonobvious, useful, and sound." *Id.* at 9. But most of this definition is either true of all scholarship (in what field would "obvious" scholarship be considered "good"?) or hopelessly indeterminate (in a society like ours, in which people hold deeply heterogeneous beliefs, what does it mean to say that scholarship should be "sound"?). The only one of these

but what exactly does it mean? Without specifying to whom student writing should be useful and for what purposes it will be used, the advice is worthless. Volokh explains that a useful article is one that “at least some readers can come away from . . . with something that they’ll find professionally valuable.”<sup>40</sup> But this adds nothing to the definition, since saying “some readers” punts the issue of for whom students should be writing, while “professionally valuable” lacks specificity and continues to be unhelpful.

Without precisely explaining what he means by “usefulness,” Volokh ties the term to a call for prescriptive scholarship. The most interesting notes, Volokh asserts, “are often ones that combine the descriptive and the prescriptive.”<sup>41</sup> Though he concedes that a student “can certainly write an article that’s purely prescriptive or purely descriptive,” he says that “[c]ombining the prescriptive and the descriptive . . . tends to yield a more interesting and impressive article.”<sup>42</sup> To round out this string of unsupported assertions, Volokh emphasizes the necessity of being prescriptive by asserting that “[p]ractical-minded people who read a purely descriptive piece will often ask: ‘So what?’”<sup>43</sup>

Setting aside the vatic character of these pronouncements, they can be boiled down to the claim that student scholarship should be addressed to “practical-minded” readers, and that such readers generally (or, at least, often) find that scholarship is not interesting or useful unless it is prescriptive. But if we pause to reflect on these assertions, they seem dubious. Who, after all, are these practical-minded readers? Volokh suggests, no doubt correctly, that the audience for legal scholarship of any kind consists of lawyers, judges and scholars.<sup>44</sup> Which of these groups, however, is likely to find student scholarship wanting if it is merely descriptive? Consider the uses that a practicing lawyer is likely to make of a student note, assuming a practitioner has any use for it at all. It seems likely that busy lawyers might turn to student scholarship for an encyclopedia-like treatment of some slice of the law, rather than finding edification or inspiration in a student’s bold proposals for legal or social reform.<sup>45</sup> The same, I suspect, goes for law professors. While it is possible that some professors are eager to learn about and build on prescriptive proposals of

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terms that could possibly have any specific pertinence to the aspiring legal scholar is the concept of “useful.”

40. *Id.* at 17.

41. *Id.* at 11.

42. *Id.*

43. *Id.* at 19.

44. *Id.* at 17.

45. In my own experiences as a practitioner, I never used student notes for anything but their descriptive analyses of an area of law. Notes, I found, were sometimes a convenient means of getting an overview of a body of doctrine. I invariably ignored any proposals for social or legal change that a note might include, as such proposals were invariably irrelevant to my work. It is, of course, possible that my use of student notes was aberrant, though my conversations with other practitioners suggest otherwise.

their students, a more plausible professorial approach to student scholarship is described by Robert Weisberg. He writes that the most useful student work for academics is that which “generat[es] information and material, and . . . synthesiz[es] this material in a way that the professor can use in a course or in supporting the more speculative ideas in her own scholarship.”<sup>46</sup> In fact, Weisberg comments on the number of student papers that he has found “enlightening and usefully exploitable,” even though they had been rejected for publication because they were “merely descriptive.”<sup>47</sup>

All that remains are judges; and it is with them that we can finally see what Volokh is getting at. The blend of descriptive and prescriptive work upon which Volokh insists resembles nothing so much as an appellate judicial opinion. An appellate judge, after all, cannot be content merely with description of the facts found by the district court or the relevant lines of precedent: he must also prescribe a result. Volokh, in effect, is telling students to write scholarship as if they were apprentice appellate judges, mixing the descriptive and prescriptive as an appellate judge must do. As Volokh offhandedly, but tellingly, remarks, a purely descriptive piece will not seem good to a reader who is “looking for a creative, original-thinking law clerk.”<sup>48</sup> Although Volokh says that the audience for student scholarship consists of a broad group of “practical-minded” readers in the legal profession, a closer examination of his normative standards indicates that he really has just one reader in mind: the judge vetting candidates for clerkships. But why should all student notes be tailored to the requirements of that very narrow audience? Volokh’s unquestioned assumption that the criteria for competence in student scholarship should be “whatever is most calculated to appeal to judges as a writing sample” does considerable harm to students who follow his advice. First, it does a disservice to those who do not want to do that kind of work, but who find themselves compelled to do so by law reviews that assume Volokh’s view is an objective description of scholarship.<sup>49</sup> Second, it does a disservice to scholarship itself, because it tends to devalue any student work that does not look like an appellate opinion, no matter how interesting or useful that work might be to readers who are not judges.

In this light, it is instructive to consider a number of Volokh’s assertions about scholarship which seem puzzling at first, but which make perfect sense once one realizes that Volokh believes a good student note is, in essence, a clerkship writing sample. Consider Volokh’s instruction that students “try to include some arguments or examples that broaden [the] article’s political appeal.”<sup>50</sup> From a scholarly point of view, this advice is inexplicable. Much

46. Weisberg, *supra* note 4, at 1151.

47. *Id.*

48. Volokh, *supra* note 19, at 36.

49. For an apparent example of this kind of thing, see the discussion of the Santa Clara Law Review, *infra* note 140.

50. Volokh, *supra* note 19, at 21.

legal scholarship, after all, need not have any political appeal at all, and legal scholarship which does have political valence rarely bothers to attempt a broad approach. (Imagine telling Richard Epstein that his latest article is OK, but that he needs to make more of an effort to broaden the appeal of his work to readers who don't share his political presuppositions.) As advice to an ambitious clerkship applicant, on the other hand, this makes complete sense. A student who wants to enhance his chances on the clerkship market will be well-advised to apply as broadly as possible to a wide ideological spectrum of judges.<sup>51</sup> As such, he will want to write a note that is unlikely to alienate any of his potential judicial employers.

Similarly, Volokh attempts to dissuade students from making radical arguments. He informs the potentially radical student author that if he “really want[s] to make [a] radical claim, [he should] go ahead—[he] might start a valuable academic debate, and perhaps might even eventually prevail. But, on balance, claims that call for modest changes to current doctrine tend to be more useful than radical claims, especially in articles by students.”<sup>52</sup> Once again, the term “useful” has to mean attractive to judges, who tend to be dubious of anything that smacks of the “radical.” The same cautionary note is struck in Volokh’s strong suggestion that students “avoid using jargon” that will label their work as “belonging to some controversial school of analysis.”<sup>53</sup> Thus, Volokh exhorts students to steer clear of “law and economics, literary criticism or feminist legal theory,” unless they are “require[d]” to invoke such approaches.<sup>54</sup> For practical purposes, of course, this is tantamount to saying “don’t employ theoretical perspectives.” Again, from a purely scholarly point of view, this advice makes little sense: theoretical approaches and interdisciplinary perspectives have become par for the course in legal scholarship.<sup>55</sup> But judges, notoriously, are less comfortable with such approaches.<sup>56</sup> Volokh’s advice, essentially, is to keep one’s eyes on the prize. Never mind what the law professors are doing; focus instead on what judges are supposed to want.

51. Or, at least, to as wide an ideological spectrum as exists among members of the American judiciary: it is thus a good idea to make oneself attractive to both conservative Republicans and moderate to right-wing Democrats.

52. *Id.* at 20.

53. *Id.*

54. *Id.*

55. See, e.g., Richard A. Posner, *Legal Scholarship Today*, 115 *Harv. L. Rev.* 1314, 1317 (2002) (observing that although doctrinal scholarship continues to be a huge part of legal scholarship, “interdisciplinary scholarship looms very large,” and suggesting that such interdisciplinary work may “come eventually to dominate academic law”).

56. For the *locus classicus* of judicial dissatisfaction with non-traditional scholarship, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 *Mich. L. Rev.* 34, 34-35 (1992) (complaining that many law schools have “abandoned their proper place” by “emphasizing abstract theory at the expense of practical scholarship and pedagogy,” and asserting that judges have “little use” for much of the “abstract scholarship” that is “now produced by members of the academy”).

The most puzzling aspect of Volokh's book is his consideration of one of the most classic of note topics: the circuit split. On the face of it, this would seem the perfect subject for a Volokhian note. For Volokh, after all, the student's mission when choosing a topic is to first identify a problem, and then generate a "claim" which will constitute the student's proposed solution to that problem.<sup>57</sup> And, as we have seen, Volokh thinks that the best kind of claim is one that will be of interest to a judge. Given those principles, a circuit split seems like the *beau ideal* of a student note topic. Circuit splits, after all, are self-evidently "problematic." As Volokh observes, the fact that the split exists "shows that there's an important problem with no obviously right answer."<sup>58</sup> The student, of course, can always argue that one or another of the views expressed by the circuit courts ought to be adopted by all of them. Furthermore, circuit splits seem highly likely to be of interest to judges, who will be curious to learn of a split of authority that may affect their decision-making.

Yet Volokh, surprisingly, dissuades student writers from tackling the circuit split. He writes that it is unfortunate that students commonly write about circuit splits, and suggests that they would do better to avoid such notes.<sup>59</sup> Volokh's stated rationale for this is, to say the least, perplexing. He cautions student authors to eschew writing about splits because of the likelihood that their work will be "preempted" when (or, more precisely, if) the Supreme Court resolves the split.<sup>60</sup> But why is that a problem? If a student starts to write about a circuit split in October and the Court issues an opinion resolving it in November, that would indeed be unfortunate. As Volokh says, the student in such a sorry predicament would either have to "radically rework" his article or "throw it out altogether."<sup>61</sup> But given the Court's paltry caseload, and considering the lengthy period over which many splits are allowed to percolate, this hardly seems a fatal concern. It may be that Volokh is concerned that the Court will resolve the split soon after the student has finished writing his note, making it seem irrelevant. However, that seems an odd concern, given that timelessness is not one of his criteria for a good student note. Nor could it be, as the threat of getting preempted—i.e., the danger that a change in the law or society will render one's work irrelevant—is hardly unique to circuit splits. *Any* sociolegal problem that is identifiable by a student is liable to fall by the wayside, or to get fixed by a legislature or court in a way that renders the student's work on that problem uninteresting to future readers.<sup>62</sup>

57. Volokh, *supra* note 19, at 12.

58. *Id.* at 37.

59. *Id.* at 36-37.

60. *Id.* at 37.

61. *Id.* at 36-37.

62. For an amusing example of prescriptive, "problem-solving" notes that were effectively "preempted by real life," consider the spate of law review notes published in 1999 about the wildly overhyped "Y2K problem." See, e.g., David M. Kono, One Trillion Dollars? An Analysis of Y2K Employment Implications for Attorneys, 1999 BYU L. Rev. 1529 (1999).

The question remains: Why should Volokh be so dismissive of the circuit split as a topic? The answer I propose is, admittedly, a counterintuitive one. For Volokh, I would argue, circuit splits are too perfect a topic. By the logic of Volokh's argument, circuit splits are what all law students should be writing about. Paradoxically, though, their very perfection as a Volokhian topic threatens to expose the barrenness of Volokh's vision of scholarship. For Volokh, all student scholarship arguably aspires to the condition of "notes analyzing circuit splits." But, confronted with that prospect, Volokh recoils, as if he realizes that there must be something wrong with a scholarly world in which almost all student writers are churning out doctrinal analyses of circuit splits coupled with facile, readymade prescriptive "solutions" to them. Instead of embracing the logical consequences of his position, Volokh balks. He concocts a spurious explanation of why circuit splits are a bad thing for students to write about, while failing to see that they are in fact the culmination of everything he advises students to do.

Volokh's primer for student writers is, as I said, perhaps the most popular guidebook. It is also, arguably, the most pernicious, as it insistently (if implicitly) directs students to write notes that will be suitable for clerkship writing samples, while discouraging students from writing anything that might rock the boat intellectually or politically. Volokh advises students to be interesting and useful, but upon closer inspection, those terms have very idiosyncratic meanings. "Interesting," it turns out, means "interesting to judges." By the same token, the word "useful" in Volokh's book actually means "useful for the purpose of establishing one's bona fides as a judicial clerk." Meanwhile, any kind of scholarship that would not make for a plausible clerkship writing sample is implicitly denigrated or explicitly cautioned against.

### *B. The Note as Solution to a Doctrinal/Policy Problem*

The next guide to be considered is a 1996 law review article by Heather Meeker that offers advice on how to select topics.<sup>63</sup> Meeker's article is perhaps the most down-to-earth of the three texts under consideration. She does not entice the reader with visions of the rich rewards that may accrue to the author of a successful note.<sup>64</sup> Instead, she conceives the task of writing a note as a necessary chore, one of the hoops that law students have to jump through to complete their legal education.<sup>65</sup> This approach, at least, has the virtue of forthrightness. For Meeker, writing a note is just one more thing a law student is compelled to do. Even more than other aspects of law school, however,

63. Meeker, *supra* note 18.

64. Compare Volokh, *supra* note 19, at 5 (touting the plums that may fall into the lap of an author of a "good student article," including "jobs, clerkships, and . . . teaching positions," not to mention the possibility of having a "huge impact" on the legal profession), with Fajans & Falk, *supra* note 16, at 4 (explaining to the student author that the "techniques and strategies" developed while working on a note will be "relevant" to the development of the skills needed to be a successful lawyer).

65. Meeker, *supra* note 18, at 917.

the project of writing a note is bewildering. As she puts it, the student who is “commanded to find a research topic” is “faced with a daunting chicken-and-egg problem,” because he “must do a great deal of research to assess a topic on which to do research.”<sup>66</sup> Again, this is refreshingly honest.

Having stated the challenge faced by law students in such unsentimental terms, Meeker’s article offers students helpful guidance on how to locate note topics. As she does this, Meeker propounds a normative vision (both explicitly and implicitly) of what student legal scholarship ought to be. This vision is at least partly derived from a survey of student-edited law reviews she conducted in the 1990s.<sup>67</sup> It is not apparent whether the article’s assumptions about “proper” student scholarship are Meeker’s own, or reflect her research into the opinions of contemporary law review editors. Regardless of their origins, the article’s assumptions are worth considering, since they embody a typical understanding of the nature of student legal scholarship.

“Law review articles essentially do one of two things,”<sup>68</sup> Meeker says. First, they “resolve jurisdictional conflicts of law applied to an existing factual situation.”<sup>69</sup> Second, they “apply existing law to new or newly defined factual situations or apply new laws to existing factual situations.”<sup>70</sup> And that, in “essence,” is that. To paraphrase Dorothy Parker, this view of legal scholarship suggests that law review notes may run the gamut of topics from A to B. A student can do doctrinal work (resolving jurisdictional conflicts) or policy work (applying law to factual situations). Other approaches, though conceded to be within the realm of possibility, are marginalized.

Having set forth this narrow understanding of legal scholarship, Meeker offers a series of suggestions for how students can find topics within one of those two categories. The first of Meeker’s suggestions is the circuit split. Unlike Volokh, Meeker embraces circuit splits as a note topic. She principally advises that students should seek to resolve “jurisdictional conflict,” since topics in this area are “the most amenable” to inexperienced legal researchers.<sup>71</sup> And, as she observes, the “most obvious breeding ground” of such conflicts is U.S.

66. *Id.*

67. *Id.* at 919. I say “at least partly” because it is not clear from the article how many of Meeker’s suggestions are derived from her empirical research into attitudes among law review editors, and how many are her own ideas. Meeker tells us that the core of her empirical project was a survey of approximately 200 student-edited law reviews, in which she asked editors “questions about how they approached operations and management, topic selection, and preemption review.” *Id.* at 918-19. However, the survey itself seems in fact to have dealt only with preemption review, suggesting that the article’s assumptions about which topics are appropriate for student scholarship are largely Meeker’s own. *Id.* at 973-75.

68. *Id.* at 921.

69. *Id.*

70. *Id.*

71. *Id.*

courts of appeal.<sup>72</sup> Circuit splits, in Meeker's view, have several advantages. First, they have the advantage of "relevance."<sup>73</sup> Students, as novices to every field of law, may find it difficult to know whether potential research topics are worthwhile. Writing about a circuit split, Meeker suggests, means not having to fret about whether one's work is significant, because circuit splits by definition are topical. Second, they have the advantage of being relatively simple to identify.

Meeker then offers a section devoted to what I am calling policy analysis. She does not define this area as well as one might like, but basically it entails identifying new "factual backdrops" or "coming trends" and examining how old or new laws apply to them.<sup>74</sup> The advantage of writing on a topic of this kind, Meeker indicates, is that "new facts" are constantly being churned out, meaning that a wide variety of potential topics are always being generated. However, while articles in this domain, by definition, will be timely, their relevance is not as assured as is that of circuit splits. And to find a viable topic, it is not enough to peruse treatises or monitor recent circuit court decisions. The student must be slightly more creative.

The core of Meeker's article is thus its assertion that law review articles essentially do doctrinal or policy work, coupled with specific suggestions about how a student can generate topics in those areas. Although the article does concede that other kinds of topics are possible, it has no useful advice to offer about them. Moreover, the terms in which non-standard topics are discussed seem likely to deter law students from pursuing ideas outside doctrinal/policy subjects. For instance, while Meeker acknowledges that "there are other kinds of traditional topics available,"<sup>75</sup> she warns readers that articles on such subjects are "more akin to the papers that graduate students in other fields write."<sup>76</sup> She then devalues such work by stating that these topics may be better suited for a "student who is uncomfortable with traditional legal analysis."<sup>77</sup> The implication seems clear: if you cannot do real legal scholarship (the kind that law review articles "essentially" do), then maybe you can squeak by with a piece on an outlier topic. Having thus cautioned students against pursuing work in one of these areas, Meeker offers a rather arbitrary selection of three categories of "other" topics: "historical law," "legal philosophy and jurisprudence," and "case notes."<sup>78</sup> At no point does Meeker explain why she chose those three as representative categories, nor does she explain them.

72. *Id.*

73. *Id.*

74. *Id.* at 927.

75. *Id.* at 929.

76. *Id.*

77. *Id.*

78. *Id.* at 929-30.



Instead, she simply provides the titles of four randomly selected examples of each type of note.<sup>79</sup>

After that arbitrary and unhelpful discussion of “other traditional” topics, Meeker turns to what she calls “nontraditional” topics.<sup>80</sup> Again, Meeker warns students about committing to work in these vaguely defined areas. She cautions that nontraditional notes “have the disadvantage of requiring time-consuming research going beyond the usual sources.”<sup>81</sup> Having thus implied that they are more work than they are worth, Meeker offers an odd typology of the nontraditional that consists, in its entirety, of the following topics: “original research” and “municipal law.”<sup>82</sup>

While Meeker’s article is somewhat haphazardly assembled, and while it is certainly dated, it usefully serves up a typical vision of what student legal scholarship ought to be. The vision is fuzzy and a bit hedged, but basically comes down to this: students should be doing doctrinal/policy research of the most garden-variety type, resolving circuit splits and examining statutes. You *can* do other kinds of work, the article concedes; but the student is always reminded that such work is time-consuming and marginal. By offering pages of specific suggestions about how to do research in the “essential” categories, while having nothing to say about the problems of pursuing topics in other areas—indeed, while explicitly indicating that other areas are more trouble than they are worth—Meeker reinforces the view that law students should devote themselves to conventional topics.

### C. *The Note as Prescriptive Doctrinal/Policy Work (More or Less)*

The final guidebook to be considered is *Scholarly Writing for Law Students*, a text written by Elizabeth Fajans and Mary Falk, two professors of legal writing at Brooklyn Law School.<sup>83</sup> Upon initial inspection, Fajans and Falk offer the most attractive—or, at any rate, the least constrained—vision of legal scholarship of any of the three guides considered here. They begin by insisting that legal scholarship “is increasingly pluralistic and lively, opening up to new voices, new concerns, new disciplines.”<sup>84</sup> Instead of starting from the premise that student legal scholarship must be essentially doctrinal and policy-oriented, they indicate that a variety of alternative approaches are available, including “Law and Economics, Critical Legal Studies, Legal Storytelling, [and]

79. Eight of those twelve examples are from 1992 and 1993 issues of the Yale Law Journal, Columbia Law Review, and Emory Law Journal, suggesting that the list was gathered in a somewhat casual fashion. *Id.* at 929-30.

80. *Id.* at 930.

81. *Id.*

82. *Id.*

83. Fajans & Falk, *supra* note 16.

84. *Id.* at 2.

Feminist Jurisprudence.”<sup>85</sup> While they acknowledge that student notes have “traditionally tended to be less ambitious and theoretical” than articles by law professors, they assert that “this seems to be changing.”<sup>86</sup> Indeed, they appear to advocate for a freedom of approach that would be entirely out of place in the work of Volokh or Meeker, writing that “[l]egal scholarship allows that free play of intellect and imagination out of which the future of a discipline emerges.”<sup>87</sup>

Alas, this assertion that students, like professors, have the right to engage in the “free play of intellect and imagination” is soon tempered. Fajans and Falk almost immediately backpedal from their liberatory opening, as they inform students that it is essential for them to understand that “almost all legal scholarship is implicitly directed to the decision-makers in our society” and is thus “characteristically normative (informed by a social goal) and prescriptive (recommending or disapproving a means to that goal).”<sup>88</sup> A mere page after extolling the way legal scholarship is opening to “increasingly pluralistic and lively” perspectives, they announce that “legal scholarship’s . . . core” consists of “normative/prescriptive” work.<sup>89</sup> This, finally, is the message of the book, which offers a more sophisticated version of Meeker’s view that legal scholarship is essentially doctrinal/policy work, combined with a less strident version of Volokh’s view that student scholarship needs to be prescriptive.

Fajans and Falk instruct students that the “majority of legal scholarship and almost all student scholarly work” fits into one of three categories.<sup>90</sup> These, they write, are the “case cruncher” (i.e., doctrinal analysis of case law), the “law reform” article that argues for changing a legal rule or institution, and the “legislative note” that analyzes proposed or recent legislation.<sup>91</sup> The student is told that these “are the traditional modes of scholarship, and work in them is the most appreciated by judges and practicing attorneys.”<sup>92</sup> As an afterthought, Fajans and Falk acknowledge that interdisciplinary or empirical studies “might be appropriate” for some students, but they make clear that such work is avoided by “almost all” students and is not “most appreciated” by judges and practicing attorneys, who are, after all, the people to whom students will be looking for jobs.<sup>93</sup> While recognizing that scholarship in other disciplines is not “characteristically normative and prescriptive,” they state flatly that, in the law, a “purely descriptive or interpretive approach” will

85. *Id.*

86. *Id.*

87. *Id.* at 3.

88. *Id.*

89. *Id.*

90. *Id.* at 6.

91. *Id.* They derive these categories from Delgado, *supra* note 11, at 446-47.

92. Fajans & Falk, *supra* note 16, at 6.

93. *Id.*

“rarely be successful.”<sup>94</sup> Oddly, they neglect to explain how the student is to square this advice with the praise of interdisciplinary scholarship with which their book opens.

In general, the book vacillates between the authors’ sense that there is more to legal scholarship than prescriptive doctrinal/policy work and their sense that it would be irresponsible to encourage students to be too daring in exploring alternatives to such work. For example, they counsel students not to be “too timid in your choice of subject, especially if you have a theoretical bent,” suggesting that there may be a surprisingly broad audience eager to get fresh perspectives on various issues.<sup>95</sup> But in the same breath, they discourage students from attempting such notes, stating that “[c]ourts and practitioners are especially grateful for practical articles: practitioners read articles looking for litigation strategies, and judges read articles seeking perspective on the cases before them.”<sup>96</sup> The latter advice, one suspects, serves to cancel out the former. The moral seems to be: you shouldn’t be too timid, but you must always remember that it pays to be conventional.

For the rest, the book offers advice that will seem familiar after our examinations of Volokh and Meeker. Fajans and Falk advise students to select their topics with a view to “writing a paper that expresses original, useful, and timely ideas about an important subject.”<sup>97</sup> As generic advice, this is as vague and unhelpful as the comparable injunctions we saw in the other guidebooks. After all, if students knew enough about the law and legal scholarship to know what an original or useful scholarly idea might be, they would hardly need the guidance of one of these texts. And when Fajans and Falk get down to particulars, their advice is, again, familiar. The student is told, for example, that a topic “might be original if it identifies for the first time a new issue, a true problem in the law that needs fixing.”<sup>98</sup> And, as with Meeker, the most obvious example of such an original topic is “a ‘split’ among the United States Circuit Courts of Appeals.”<sup>99</sup>

The best one can say of the book is that it is less in thrall to a narrow and constraining set of presuppositions than the other two texts. Fajans and Falk expound the view that legal scholarship “characteristically” takes a normative/prescriptive, doctrinal/policy orientation, but they do not go out of their way to insist that students obey that imperative. Nor do they imply that judges will want nothing to do with you if you disappoint them by writing on an unconventional subject in a non-traditional manner. This approach—arguing that prescriptive articles on doctrinal/policy topics are at the core of student

94. *Id.* at 4.

95. *Id.* at 17.

96. *Id.*

97. *Id.* at 15.

98. *Id.*

99. *Id.*

scholarship, without actively belittling alternatives or discouraging students from trying something unusual—is, at least, the most unfettered vision of student scholarship on offer.

## II. The Note in Practice: Student Scholarship, 2006-2009

Having surveyed what student writers are being exhorted to do, we can proceed to consider what they are actually doing. This, to my knowledge, is uncharted territory: I know of no previous attempt at an empirical analysis of student scholarship. To begin to fill that gap, I looked at a representative sample of 350 student notes: every note published between 2006 and 2009 in twelve randomly chosen law reviews. By examining this sample of notes, we can get a sense of what recent law students have chosen to write about, and discover how students have actually approached the task of writing a scholarly article.

### *A. Description of the Methodology*

*Choice of Reviews.* To get a broad picture of student work, I decided to look at student writing from both “elite” and “non-elite” institutions. As my arbiter of “eliteness,” I turned to the perhaps inevitable *U.S. News & World Report* rankings of law schools.<sup>100</sup> Flagship law reviews from schools ranked in the top 14 were deemed elite; flagship law reviews from schools ranked between 60 and 100 were deemed non-elite.<sup>101</sup> Six law reviews from each group were selected at random.<sup>102</sup>

100. The rankings employed were the 2010 edition. See U.S. News & World Report, Rankings—Best Law Schools, available at <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/rankings> [hereinafter USNWR rankings]. The rankings have shuffled somewhat over the last five years, but they did not change much. Yale, for instance, was the “best” law school in the country that entire time (as it will be in *saecula saeculorum*, presumably). Use of the USNWR rankings as a crude proxy for status should not be taken, of course, as an endorsement of the oft- and aptly criticized rankings. Critiques of the rankings abound. For one thorough assessment of the harms caused by the rankings, see Jeffrey Evans Stake, *The Interplay Between Law School Rankings, Reputations, and Resource Allocation: Ways Rankings Mislead*, 81 Ind. L. J. 229 (2006).
101. By relentlessly deploying scare quotes around any form of the word “elite,” I intend to signal a certain skepticism of the concept. I make no assertions about the difference in quality between any of the law schools, law reviews, student writings or student authors considered in this article. The term is meant to serve as shorthand for one of the realities of life in the legal profession, a reality that can perhaps be summed up by observing that a move from a school ranked around No. 80 in the USNWR rankings to one ranked around No. 7—whether for a transfer student, an upwardly mobile professor changing jobs, or a scholar seeking to parlay the acceptance of an article into a placement at a more prominent journal—would be widely regarded as a coup. Having, I hope, sufficiently indicated my skepticism of the concept, I will stop enfolding the word in quotation marks every time I use it.
102. The pool at the non-elite end is larger because some flagship law reviews in that range do not publish student scholarship in appreciable quantities. A law review had to publish at least 12 notes within the three-year period to qualify for the study; otherwise, I skipped it and moved on to another randomly chosen review. For instance, the Chapman Law Review was originally to have been considered, but it only published ten full-length student comments

The elite schools selected were Yale (1), Stanford (3), Columbia (4), Michigan (9), Virginia (10), and Northwestern (tied for 11). The non-elite schools were Miami (tied for 60), Oklahoma (tied for 72), Chicago-Kent (tied for 80), Hofstra (tied for 86), Santa Clara (tied for 93), and West Virginia (tied for 93).<sup>103</sup>

*Choice of Student Writing.* A number of different kinds of student writing appear in law reviews. Some student-written pieces are full-fledged works of scholarship, essentially equivalent to articles written by law professors. These are labeled “notes” by some law reviews, while other reviews refer to them as “comments.”<sup>104</sup> Other student-written pieces are intended as commentaries on a single case. Confusingly, these are also referred to as either notes or comments. The bulk of student-produced scholarship falls into one of these two categories, though there are occasional exceptions—a few law reviews still occasionally publish student-written book reviews, for instance.

For purposes of this study, I focused solely on what I am calling “notes.” I wanted to see what students produced when they were emulating their professors and attempting to write full-length scholarly articles on topics of their own choosing.<sup>105</sup> Thus, I eliminated anything that was clearly intended to be a “casenote” or “case comment.”<sup>106</sup> I also eliminated anything in which the choice of topic appeared to be dictated by the requirements of the law review itself—e.g., student pieces that were on a pre-selected symposium topic.<sup>107</sup>

*Description of the Sample.* For each law review selected, I looked at all of the student notes published in three consecutive volumes between the 2006-2007

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in the relevant volumes.

103. While the top schools tend to be scrupulously differentiated, ties abound as one goes further down the USNWR rankings: thus, seven different schools are ranked No. 86.
104. To minimize confusion, I will refer to full-blown student-written articles as “notes” throughout this section.
105. I am aware that this is an oversimplification: the percentage of students who select a topic of their own choosing is, to say the least, unclear. At least some law professors provide ready-made topics for students. I have not done any empirical research to determine how common it is for students to accept a topic handed to them by a professor (or to determine whether such behavior is more common at elite or non-elite law schools), though at least one well-regarded source of advice for student writers takes the phenomenon for granted. *See* Meeker, *supra* note 18, at 931 (observing that “some professors produce lists of topic ideas for their classes,” and suggesting that students in search of a topic may request to see such a list).
106. Or, at least, I eliminated anything that a law review itself labeled as such. Some law reviews simply bunch all the student scholarship together in a single section: the West Virginia Law Review, for instance, employs the basic division of “Articles” (by law professors, practitioners and judges) and “Student Works.”
107. For instance, the April 2007 issue of the University of Miami Law Review was devoted to a symposium on the Terri Schiavo case. It includes three student notes inspired by the case. Similarly, each volume of the Santa Clara Law Review includes a student-written note reviewing developments in legal ethics over the previous year. None of these were considered as part of this study.

and 2008-2009 academic years.<sup>108</sup> The sample included a total of 350 notes. Of those notes, 201 appeared in elite law reviews, while 149 appeared in non-elite law reviews.<sup>109</sup>

### *B. What Are Students Writing About?*

In this section, I examine the areas of substantive law on which students have chosen to write, comparing the choices made by students at elite and non-elite schools. I also look at several particular subjects for student writing: circuit splits, Supreme Court case law and local issues.

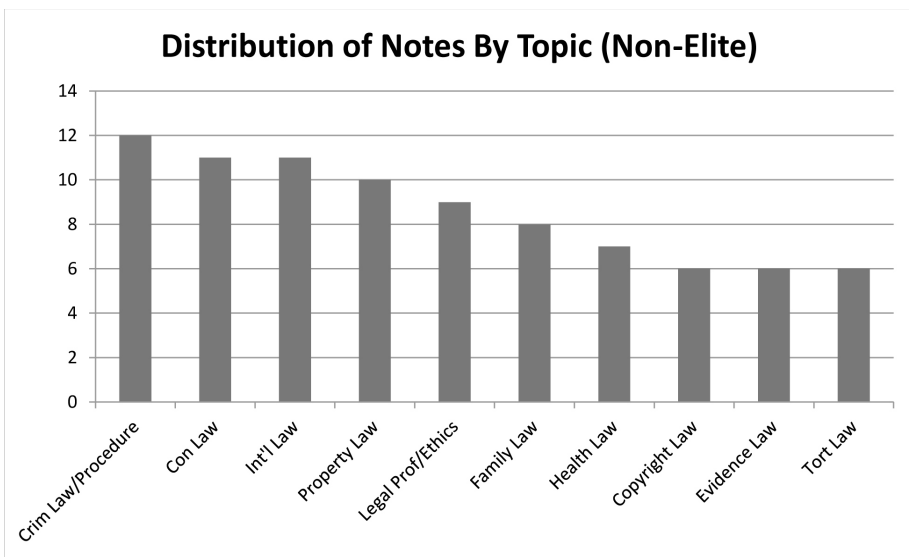
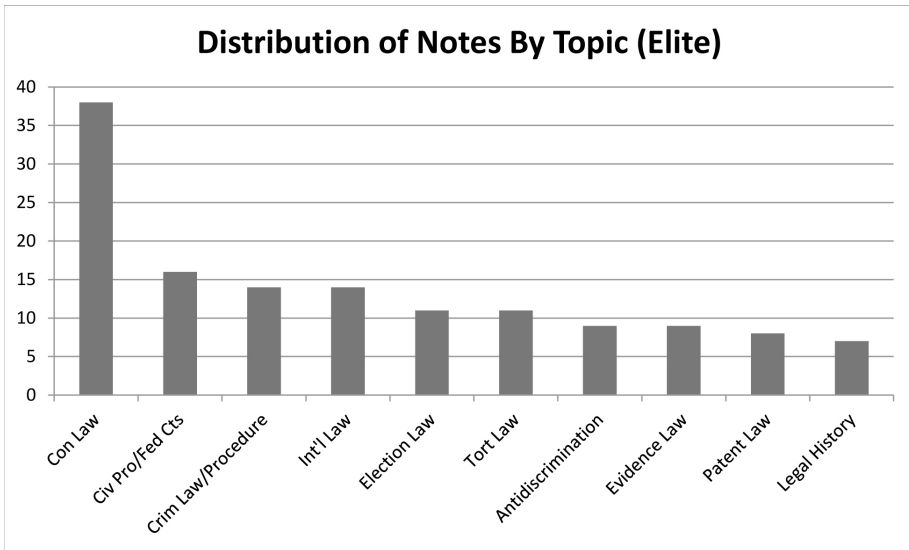
#### 1. Substantive Law

As we have seen, one of the difficulties for law student writers is choosing a topic, inasmuch as few students have significant experience in any area of law. Our overview of student writing begins, accordingly, with a look at the areas of substantive law students select as topics. I have categorized notes according to the major field or fields of substantive law addressed in the note. Where possible, I paired the note with a standard law school course into which its subject matter fit. To pick easy cases: a note proposing an amendment to a federal trademark law was categorized as “Trademark Law”; a note on the Confrontation Clause and how several Supreme Court cases would affect the admissibility into evidence of certain kinds of documents was categorized as “Evidence Law.” If a note seemed to straddle two different substantive areas, I placed it under two headings. For instance, a note analyzing the “conflicts that can arise between patent and antitrust law” in the context of reverse payment settlements in the pharmaceutical industry was categorized as both “Patent Law” and “Antitrust Law.” And, if a note seemed to address a completely *sui generis* topic that would be difficult to fit into a standard law school course, I allowed it to stand alone. Thus, a note on “outer space law” that aimed to “reveal some of the major legal obstacles currently constraining the space industry” was placed in an “Outer Space Law” category.<sup>110</sup>

108. Many law reviews publish issues to correspond with the academic year. Thus, the first issue of a given volume will appear in autumn, and its last issue will be published the following summer. In other cases, a given volume of a review is published entirely within a single year. In the case of the first kind of review, I looked at the 2006-2007, 2007-2008 and 2008-2009 volumes. In the case of the second kind of review, I looked at the 2006, 2007 and 2008 volumes. There was one exception: during the time-span under consideration, the Santa Clara Law Review switched formats. Thus, Volume 46 of the Santa Clara Law Review goes from 2005 to 2006, while Volume 47 appeared solely in 2007. I looked at its 2005-2006, 2007 and 2008 volumes.

109. For a fuller version of this section of the article, including additional tables and more data on the notes being considered, see Andrew Yaphe, Taking Note of Notes: Student Legal Scholarship in Theory and Practice, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1711533](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1711533).

110. See Gabriele Wohl, Outer Space, Inc.: Transmitting Business, Ethics, and Policy “Across the Universe,” 111 W. Va. L. Rev. 311 (2008). Outer space law, alas, is an underwritten field; no other note touched on this interesting area of the law.



*Commentary on the Overall Distribution of Subjects.* The most interesting discovery is that no one topic is overwhelmingly popular. Outside of constitutional law, no subject area attracted more than 8 percent of students from elite law schools, while no subject attracted more than 8 percent of students from non-elite schools.

*Favored by Elite Students, Shunned by Non-Elites.* The major disparity in subject area choice came in the area of civil procedure and federal courts. Civil procedure, of course, is a core course, one that is taken by all American law students. Federal courts is also a standard course, widely regarded as essential

for students who aspire to clerkships in the federal judiciary. It is unsurprising that this area attracted the second-most notes among elite students. However, it was almost completely ignored by non-elite students. There were zero notes in non-elite law reviews on topics in federal courts, while there was only a single note on a topic in civil procedure.<sup>111</sup>

The disparity in notes on federal courts (which was the subject of 11 elite notes, as against zero non-elite notes) may be accounted for by the fact that more elite than non-elite law students expect to secure federal judicial clerkships after graduation. However, while this may explain why non-elite student authors show little interest in the mechanics of the federal court system, it does not explain why so few of them appear to take an interest in civil procedure *per se*.

*Favored by Non-Elite Students, Shunned by Elites.* Perhaps the most notable subject area that is favored by non-elite students and largely ignored by elite students is property law. It was the fourth most-popular subject for non-elite notes, accounting for seven percent of the total.<sup>112</sup> By contrast, only four of the elite notes (two percent) were on property law. This disparity becomes more significant when the elite notes on property law are examined more closely. Three of those elite notes were empirical analyses of aspects of property law in local communities. These notes, in their methodological approach and conceptual stance, were all strongly influenced by the work of Robert Ellickson.<sup>113</sup> In other words: if it were not for property law notes written under the aegis of Ellickson, there would hardly be any elite property law notes at all. Non-elite notes, by contrast, tended to deal with such property topics as takings doctrine, the partition of real property and zoning law. Such topics were essentially unaddressed by elite law student authors in the sample.

The other major area that is popular among non-elite students but ignored by elite students is family law. This was one of the more popular subjects for

111. See Jill Holly, *The Circuit Split Over the Citizenship of National Banks for Diversity Jurisdiction Purposes Under 28 U.S.C. § 1348*, 46 *Santa Clara L. Rev.* 205 (2005).
112. Admittedly, five of the ten non-elite student notes on property law came from a single institution: the *West Virginia Law Review*.
113. Two of these notes were by Yale students who worked with Ellickson; one was by a Northwestern student who was evidently influenced by Ellickson's work. See Tad Heuer, *Living History: How Homeowners in a New Local Historic District Negotiate Their Legal Obligations*, 116 *Yale L. J.* 768, 768, 814 (2007) (thanking Robert Ellickson personally for "his extensive comments, assistance, and encouragement," and conducting empirical research whose "results are consistent with Ellickson's research on the interplay between law and social norms"); Valerie Jaffee, *Private Law or Social Norms? The Use of Restrictive Covenants in Beaver Hills*, 116 *Yale L. J.* 1302, 1302-06 (2007) (contributing to "debates over the interaction between public and private methods of land use coordination" in which Ellickson has been one of the major figures and thanking him personally for his "invaluable assistance"); Laura H. Nirider, *In Search of "Refinement Without Exclusiveness": Inclusionary Zoning in Highland Park, Illinois*, 102 *Nw. U. L. Rev.* 1919, 1919-20 (2008) (declaring its intention to contribute to a debate about inclusionary zoning that was started by Ellickson).



non-elite students—the sixth-most-popular topic, in fact—but was completely ignored by elite students.

The disparity of notes on property law may reflect the status of the course in American law schools. The course tends to be underemphasized at elite law schools (at Yale, for instance, students are not required to take it), while getting more attention at non-elite law schools (perhaps because it is one of the central subjects tested on the bar exam). Perceived status may also account for the disparity of notes on family law, as it seems likely that fewer elite than non-elite law students take a serious interest in the subject or anticipate practicing it.

*Largely Ignored Topics.* Perhaps the most surprising discovery of the survey was that there were virtually no notes on contract law. Contracts is a course that every law student in America takes in the first year of study. Most of the other core first-year classes were well-represented in the sample, but contract law was virtually unexplored. A total of three notes in the sample were on contract law: one in an elite law review, two in non-elites. It is not at all clear why students would avoid this topic. All law students are exposed to the area; many of them will work with contracts in their careers; and it is not obviously less attractive than many of the other topics students choose to write about.<sup>114</sup>

Another significant absence is notes on tax law. Tax, while not a required course in most law schools, is still a major subject that many law students take. However, only one note in the entire sample was on tax.<sup>115</sup> It may be argued that tax is a highly technical subject, and that scholarship on the topic is likely to seem arcane or parochial to law students who lack special training in the field. But the same could be said of other areas that are much better represented in the sample. Patent law, for instance, is also highly technical, but it was substantially better represented, with a total of 13 patent law notes: eight in elite reviews and five in non-elites.

Given the number of law students who pursue corporate law for a career, the relative paucity of notes in that area is perhaps surprising. Only five notes—three in non-elite reviews and two in elite reviews—dealt directly with the subject. However, if one includes other topics that fall within the broader penumbra of corporate law, the area appears better represented.

Another subject that is relatively underrepresented, given its importance, is administrative law. Only five notes dealt with that area. This appears surprising, inasmuch as it seems likely that many more law students will pursue careers that will require grappling with administrative law than, say, wills and trusts (a topic that attracted basically as many student writers as administrative law).

114. It is possible that contract law is more heavily “theoretical” than other core topics, and that students who lack a background in economics therefore avoid it. This hypothesis seems inadequate to account for the lack of work in the area, however, as law students are not incapable of doing work in the theoretical discipline most pertinent to contracts—namely, law and economics. Fifteen notes in the sample employed that methodology.

115. See Patricia B. Hsue, *Lessons from United States v. Stein: Is the Line Between Criminal and Civil Sanctions for Illegal Tax Shelters a Dot?*, 102 Nw. U. L. Rev. 903 (2008).

One conclusion that may be drawn from the relative absence of notes in these central areas is that student writers, in their selection of topics, are not strongly influenced by considerations of the work they intend to do in their legal careers. Consider that contract law, tax law, corporate law and administrative law combined were the subject of 14 notes. Compare that to the representation of international law, which was itself the subject of 25 notes. It is hard to imagine that many American law students will pursue careers that do not involve at least one of the former subjects in a significant way. By contrast, relatively few students will need to have expertise in any branch of international law in their careers.

This survey may also raise questions about the alleged utility of notes to the profession at large. Consider the popularity of constitutional law as a topic for note writers. While it may be unsurprising that so many student writers would be drawn to constitutional law for their topics, it is also the case that constitutional law is, to say the least, also a popular subject for law professors to write articles on. There are few areas in constitutional law that have not been the subject of extensive commentary by law professors. But when there are so many professor-penned articles to choose from on, for example, the constitutional right to an abortion, why would anyone turn to a student author's work on the same subject?<sup>116</sup>

## 2. Circuit Splits

As we saw, there is something of a split among the guidebooks for student writers when it comes to the topic of circuit splits. While Volokh strongly cautions students against writing on circuit splits, Mecker regards them as the most natural of subjects (and, not incidentally, one of the easiest topics to come across).<sup>117</sup> Fajans and Falk have less to say on the subject, noting only that a note on a circuit split is the "classic example" of a work addressing "disputes about law."<sup>118</sup> They encourage students to think creatively about splits—suggesting, for instance, that students also look to conflicts among state courts—but do not attempt to dissuade students from doing this kind of work.<sup>119</sup>

Having listened to the advisors, let's see what the students have actually been doing.

116. This is not to say that student authors may not have compelling reasons to choose a topic such as "the constitutional right to an abortion." Nor is it to say that student authors are incapable of writing work that is as good as, or even better than, professorial offerings. But if we are to accept the claim that practitioners and judges are using student work, we have to ask: are they really likely to use a student note on an area of constitutional law, when they could just as well consult an article written by a prominent constitutional law scholar?

117. See *supra* notes 71-73 and accompanying text.

118. Fajans & Falk, *supra* note 16, at 15.

119. *Id.*

**Table 1: Notes on Circuit Splits (Elite Notes)**

Law Review	No. of Notes
Columbia	4 (8.5%)
Michigan	7 (18%)
Northwestern	2 (7%)
Stanford	0 (0%)
Virginia	3 (9%)
Yale	0 (0%)

**Table 2: Notes on Circuit Splits (Non-Elite Notes)**

Law Review	No. of Notes
Chicago-Kent	3 (11.5%)
Hofstra	3 (11%)
Miami	0 (0%)
Oklahoma	3 (23%)
Santa Clara	4 (12%)
West Virginia	2 (6%)

Overall, 8 percent of elite notes, and 10 percent of non-elite notes, dealt with circuit splits.<sup>120</sup>

The most interesting aspect of this finding is how uniformly circuit splits appear as a topic in elite and non-elite law reviews. One might have thought that students at elite law schools would regard “tracking a circuit split” as a banal task. Alternatively, one might have thought that non-elite students would be less interested in generating original scholarly ideas, and thus would turn to circuit splits as a crutch more often.<sup>121</sup> In fact, however, elite and non-elite law students select circuit splits as a topic with nearly equal frequency.

Without a baseline for comparison of these figures, it is impossible to determine whether notes on circuit splits are a dying breed, or whether they have always been represented in roughly these proportions. The data may indicate that most law students have consciously decided that writing on circuit splits is a poor idea. Alternatively, law review editorial boards may have largely decided that notes on circuit splits are unpublishable. But without historical figures for comparison, it would be premature to interpret this as evidence that Volokh’s dismissive opinion of the value of the circuit split as a note topic has permeated the consciousness of American law students.

120. In total, 16 of 201 notes from elite law schools analyzed a circuit split, compared to 15 of 149 non-elite law schools. I performed a chi-square test of goodness-of-fit to test the null hypothesis that notes considering circuit splits were equally common in elite and non-elite law reviews. I do not reject the null hypothesis,  $\chi^2(1, N=350) = 0.47, p = .49$ .

121. To be clear: I do not hold such a clichéd view of law students at any level. These thoughts are strictly presented as what one might believe, if one were inclined to stereotype law students based on the status of their institution.

### 3. Supreme Court Jurisprudence

For a broader picture of what law students were writing about, I looked at whether notes included any extensive discussion of Supreme Court jurisprudence. It perhaps goes without saying that, for many law students, the Supreme Court holds endless fascination,<sup>122</sup> and thus may influence students' choices of topic. It may be that students assume that writing about Supreme Court opinions ensures that their work will be important. It may also be that this belief draws students away from areas where the Supreme Court has little to say (e.g., contract law) and toward areas where Supreme Court pontifications are more central (e.g., constitutional law).

In some areas, of course, paying heed to Supreme Court opinions is unavoidable. To choose an obvious example, it would be difficult to write a note on a recent Supreme Court opinion and its consequences without engaging in analysis of Supreme Court jurisprudence. There are also wide areas of the legal landscape which cannot adequately be treated without consideration of Supreme Court precedents. But there are also any number of legal topics for which no reference to the Supreme Court is necessary. Without leaving the core subjects that all first-year law students are exposed to, it is possible to deal with large swathes of tort, contract and property law without so much as glancing at a Supreme Court opinion.<sup>123</sup> The same goes for a host of other subjects, including wills and trusts, corporate law and international law. And, even in an area like constitutional law, it is in theory possible to write a note on state constitutional law that would not need to cite U.S. Supreme Court decisions.

For this portion of the analysis, I looked at whether notes included an overview of Supreme Court jurisprudence in any area. A note had to offer at least a page of in-depth analysis of one Supreme Court opinion, or at least two pages of analysis of a series of Supreme Court cases, to be included in this category.

**Table 3: Notes Considering Supreme Court Jurisprudence  
(Elite Notes)**

<b>Law Review</b>	<b>No. of Notes</b>
Columbia	35 (75.5%)
Michigan	24 (63%)
Northwestern	18 (62%)
Stanford	8 (44%)
Virginia	23 (72%)
Yale	25 (68%)

122. Of course, it is not just law students who hang on the Supreme Court's every pronouncement, no matter how confused or vatic. Law professors, for instance, are not immune to that state of mind. It might even be argued that the former phenomenon is a consequence of the latter. Federal judges, obviously, have professional motivations for paying close attention to what the Court does.

123. See, e.g., basically any casebook on these subjects.

**Table 4: Notes Considering Supreme Court Jurisprudence  
(Non-Elite Notes)**

<b>Law Review</b>	<b>No. of Notes</b>
Chicago-Kent	12 (46%)
Hofstra	12 (43%)
Miami	7 (47%)
Oklahoma	5 (38.5%)
Santa Clara	13 (39%)
West Virginia	13 (38%)

My analysis found that 66 percent of all elite notes included a close consideration of Supreme Court jurisprudence, while only 42 percent of non-elite notes did so. Again, without a baseline it is impossible to say how many notes making extended reference to Supreme Court opinions there “should” be.

The most interesting aspect of this finding is that there was a significantly greater proportion of notes examining Supreme Court cases in elite law reviews.<sup>124</sup> The significance of this is unclear. However, it may suggest that Volokh’s views about the true purpose of the note resonate with elite law students more than those at non-elite law schools.<sup>125</sup> After all, elite law students who want to use part of their note as a clerkship writing sample may think it prudent to have at least one section deal with Supreme Court cases, even if the analysis is not necessary, because they may think that federal judges will be disposed favorably to writing samples that analyze Supreme Court precedents.<sup>126</sup>

124. This difference is highly significant,  $\chi^2 = 20.92, p < .001$ .

125. By using the word “resonate,” I mean to tiptoe (yet again!) around questions of causation. I assume that the vision of the note as a clerkship writing sample is not original to Volokh. Rather, I take it that his book incarnates a set of assumptions about the purpose of student scholarship that, at the least, is not uncommon among ambitious elite law students. (On the other hand, I assume that Volokh’s views are, to some extent, the cause of student attitudes, inasmuch as at least some students presumably have no notions whatsoever of what the note is supposed to be and simply accept the guidance proffered by an “authoritative” source such as Volokh’s book.) To the extent that this finding is indicative of support for Volokh’s theory of the note, it may simply demonstrate the extent to which Volokh’s way of thinking about notes is prevalent among elite and non-elite law school students.

126. Since law review articles tend to be such baggy monsters, it is somewhat difficult to look at any given note and clearly identify a section that does not belong, but has been shoehorned in for instrumentalist reasons. For one possible example of this phenomenon, see Katherine Twomey, *The Right to Education in Juvenile Detention Under State Constitutions*, 94 Va. L. Rev. 765, 767, 779-84 (2008) (arguing that “children in juvenile detention have a right to an adequate education based on state constitutional guarantees of education,” but devoting an entire section to discussion of several Supreme Court cases and concluding that “it is not likely that juvenile delinquents will have a strong federal claim to challenge the inadequacy of education provided in juvenile detention centers under the Equal Protection Clause or the Due Process Clause”) (where “it is not likely” is a mild way of making an observation that could be phrased “there is not a snowball’s chance in Hell that such a claim would succeed, based on the unequivocal holdings in some very well-known Supreme Court decisions.”).

#### 4. Local Issues

The final category I considered was what I term “localism.” I wanted to learn whether law students took an interest in writing about the world that is immediately around them—i.e., legal issues at the city or state level—or whether they thought it essential to address a problem that is not “merely parochial.”<sup>127</sup> Volokh, for instance, explicitly discourages student authors from addressing local topics. He suggests that articles focusing on a single state’s law will generally be “useful only to people in that state,” and accordingly argues that students should not “limit” themselves by writing on such topics.<sup>128</sup> Instead, he encourages students to find states with similar laws and frame their work as a general discussion of “laws of [that] sort.”<sup>129</sup>

By “local,” I refer to a note that centers explicitly on an issue of state or local law. Such a note might examine a state statute, or compare aspects of one state’s law with that of another. Such a note might also examine a single county or city, though notes zeroing in on governmental entities at that level are rare.

One might hypothesize that such topics would prove less attractive to students at elite law schools—law schools that think of themselves as “national”—than they would be to students at non-elite law schools, which often are characterized as “regional.”<sup>130</sup> Such a hypothesis is strongly supported by the evidence. Only 1.5 percent of elite notes addressed local issues, while 25 percent of non-elite notes did so.<sup>131</sup> The disparity becomes even sharper when

127. At this point, I should confess to a certain bias (if the bias is not already obvious). I see no reason why law students should not be writing on issues of local concern. (No scholarly reason, anyway.) Areas such as municipal law and housing law, though little explored in the note sample, could be treated profitably by student authors. Inasmuch as students are deterred from working in these areas by assumptions that student notes should avoid being “parochial” or “limited in scope,” those assumptions strike me as unfortunate.

128. Volokh, *supra* note 19, at 35.

129. *Id.* This is yet another example of Volokh’s incoherent approach to “usefulness.” After all, an article that directly addresses a specific state law in, e.g., West Virginia is likely to be quite useful to a lawyer in West Virginia who has to deal with that law. In fact, such an article is likely to be more useful to such a lawyer than a general discussion of similar laws. Again, Volokh’s counsel against localism may be explained by reference to his constant presupposition that *any* note should resemble a good clerkship writing sample. (A note entirely addressing a West Virginia law might be of interest to a West Virginia state judge, on this view, but will be less likely to appeal to the broad spectrum of judges the clerkship applicant is supposed to have in mind.)

130. For an article that uses these terms in a standard sense, see William D. Henderson, *The LSAT, Law School Exams, and Meritocracy: The Surprising and Undertheorized Role of Test-taking Speed*, 82 *Tex. L. Rev.* 975, 1000-05 (2004).

131. A huge percentage of the non-elite school local notes—21 of 37—came from just one law review: West Virginia’s. Among other things, this suggests that the category of “non-elite school law review” is a crude one, which could be broken down into at least two subgroups: non-elite school law reviews that model themselves on elite school law reviews, and those that do not. The student authors published by the West Virginia Law Review, for instance, appear to regard the treatment of their state’s legal issues as one of their central missions:

one observes that we have already encountered the three elite notes on local issues: they are the Robert Ellickson-inspired studies of local communities and property law mentioned earlier. With the exception of that very specific subset of notes, no elite writers focused their attention on local concerns.<sup>132</sup>

This finding could be interpreted in a number of ways. It may be that there are no elite notes on local issues because elite students do not care about “parochial” problems.<sup>133</sup> Alternatively, it could be the case that elite students are deterred from writing on local issues because they have been told that student legal scholarship should address more “important” subjects. It could also be the case that elite students are, in fact, writing papers on local issues, although their law reviews decline to publish such work as notes, on the assumption that published notes must pertain to topics of “broader” interest.

### C. How Are Students Writing?

Having looked at what law students choose to write about, we now can turn to considering how they approach the task of writing a note. As we have seen, the leading guidebooks exhort students to produce doctrinal/policy scholarship with a strong prescriptive component. In this section, I look at whether law students are heeding this advice. In the first subpart, I look at students’ choices of methodology: whether they have elected to write doctrinal and/or policy scholarship of the type advocated by Volokh, et al., or whether they have branched off to do the kind of “nontraditional” work that is subtly (or explicitly) discouraged by those authors. In the second subpart, I take up the prescriptive question and see whether law students have chosen to adopt the normative tack that the guidebooks tell them is essential to a good note.

#### I. Methodology

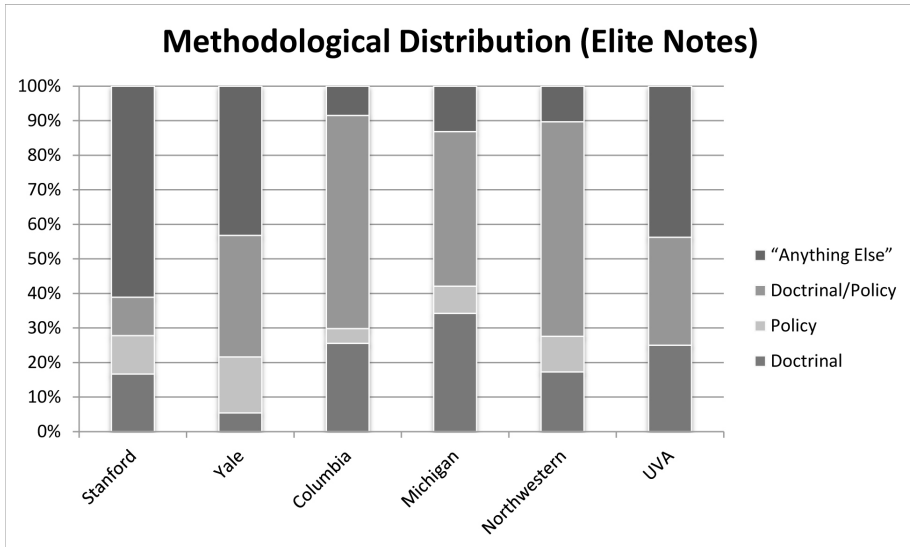
The notes in the sample were divided into four categories: doctrinal, policy, doctrinal/policy, and “anything else.” The doctrinal note is one that looks strictly at case law—what Richard Delgado has termed the “case cruncher.”<sup>134</sup> I use the term “policy” to designate a note that considers a piece of legislation, a social institution, or another non-doctrinal subject, without using any identifiable

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62 percent of West Virginia notes centered on local (almost invariably state-level) problems. Their notes suggest a close attention to matters of local concern, which is absent both from other non-elite law reviews (no Hofstra student, for instance, showed any special interest in New York law) and from elite law reviews published by state universities (no Michigan or Virginia students showed any special interest in their states’ particular legal problems).

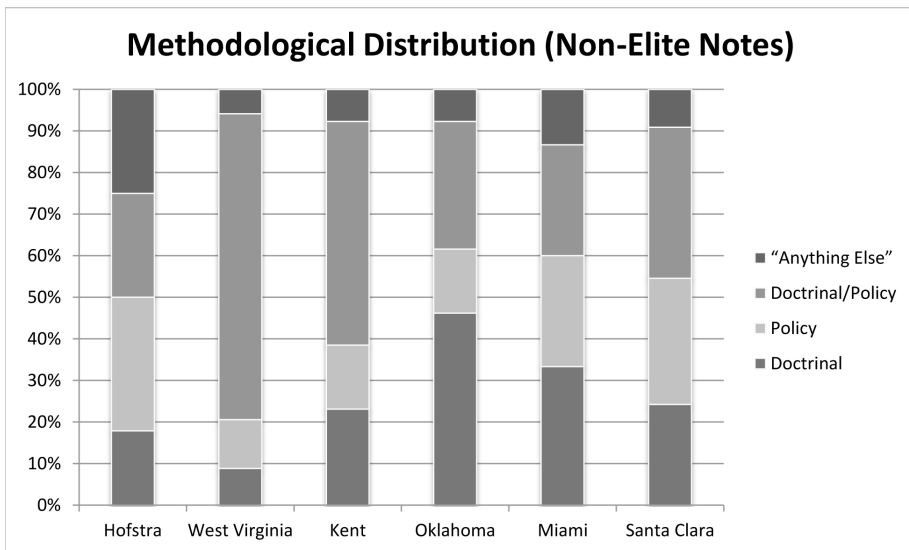
132. The difference in the distribution of notes examining local issues is highly statistically significant,  $\chi^2 = 46.05$ ,  $p < .001$ .
133. The evidence of the Ellickson elite school notes on local communities, at least, suggests that law students from elite schools can indeed take an interest in such matters, if properly inspired. Local government law is, after all, a course that is offered at elite law schools. Some students even find it interesting.
134. See Delgado, *supra* note 11, at 446.

methodological approach (such as law and economics).<sup>135</sup> “Doctrinal/policy” notes are exactly what they sound like: a blend of doctrinal analysis of case law with policy considerations. “Anything else” notes were, simply speaking, anything other than one of those three. It is a catch-all category that includes law and economics, history, empirical scholarship and other approaches.<sup>136</sup>



135. In some ways, this was a negative category. I used this term to designate notes that did not do substantive doctrinal analysis, and which did not employ any other significant methodological approach (e.g., law and economics, or empirical research, or history).
136. If a note included at least a single part that diverged from the standard doctrinal and/or policy conventions, I categorized it as “anything else.” *See, e.g.*, Mollie Lee, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 *Yale L. J.* 456 (2006) (featuring a part that offers standard-issue doctrinal discussion of cases interpreting the Commerce Clause, followed by a part that offers a theoretical “market failure approach” to describe environmental harm).





The dominant category for notes, at both the elite and non-elite schools, is the doctrinal/policy blend—a note that mixes consideration of case law with broad policy concerns. As the tables show, such notes were equally popular among elite and non-elite students, with just under half of each group electing to take that approach. The pure doctrinal note was also equally popular for students at elite and non-elite schools. About one in five students from each group elected that approach.

It is interesting, however, to observe that students at all levels are prepared to eschew the suggestions of the guidebooks and produce interdisciplinary scholarship, and that some law reviews are willing to publish them. Elite law reviews appear to be more hospitable to such work than non-elite law reviews. A quarter of elite school student notes ignored convention and adopted a non-standard methodological approach. Only 11 percent of non-elite school student notes did the same. And certain elite law reviews are clearly more comfortable with interdisciplinary work than others. The majority of students at Stanford, and a plurality of students at Virginia and Yale, attempted non-standard methodologies. This was not the case with the other elite law reviews, nor with any of the non-elite law reviews.

*Classification of Non-Standard Notes.* Only 17 of the non-elite school student notes fell into the catch-all “anything but doctrinal and/or policy” category. Of those, six employed a comparative law approach, three employed a law and economics approach and two were essays on legal history. None of the non-elite school student notes attempted any kind of original empirical research. The other six used a variety of unusual methodologies (unusual, that is, for student notes), including feminist theory, narrative and even music theory.

By contrast, 53 of the elite school student notes fell into the “anything else” category. Of those, history was the most popular methodology: 16 of the notes were classified as legal history. Law and economics was the second-most-popular methodology, constituting 12 of the elite school student notes. Comparative law accounted for four elite notes. Eleven of the notes included original empirical research. The other ten notes employed a variety of approaches, drawing on such disparate fields as game theory, “pain theory” and rhetorical analysis.

*Analysis.* Students from non-elite law schools appear to favor conventional methodologies more than those from elite schools. One possible explanation for this is that a higher percentage of students from elite schools receive graduate training in other disciplines before law school, and thus believe they are more capable of doing advanced interdisciplinary work.<sup>137</sup> Another possibility is that students from non-elite schools are less likely to have their own opinions about what legal scholarship can or should be, and are more willing to accept the prescriptions about doctrinal/policy work found in the leading guidebooks. Yet another possibility is that those students are writing more unconventional notes than is reflected in the sample, but non-elite law reviews (and their student-run note selection boards) are less willing than elite law reviews to countenance such work as publishable student scholarship.

## 2. Prescriptivism

As we have seen, the one consistent message beaten home by the guidebooks is that legal scholarship needs to be prescriptive. Volokh tells students that to be interesting their note needs to include a prescriptive element, and cautions them that readers will dismiss their work with a “So what?” if they write a merely descriptive note.<sup>138</sup> Fajans and Falk declare that “normative/prescriptive” work is the core of legal scholarship, and warn students that “purely descriptive or interpretive” notes will “rarely be successful.”<sup>139</sup> Do law students, in fact, adhere to these precepts?

To answer this question, I categorized notes according to whether they included a prescriptive component. If a note instructed anyone—courts in

137. I did not attempt a thorough analysis of this, as it is not always easy to tell whether a student author has an advanced degree other than a J.D. (Some law reviews conventionally offer an introductory paragraph in which the reader is given biographical information about the note’s author, including educational pedigree. Other law reviews do not.) I attempted a quick comparison of two of the law reviews that do provide biographical data about student authors. Eleven of the Yale student authors (30 percent) claimed to have graduate degrees other than a J.D. Five of those 11 attempted something other than doctrinal/policy work. By contrast, only two of the Chicago-Kent authors (8 percent) made such a claim. Both of those authors stuck to standard doctrinal/policy work, however. Chicago-Kent students, as a group, did not adhere to any fixed convention in their biographical entries. Many of them did not even name the school where they did undergraduate work, a lapse of which no Yale author was guilty.

138. See *supra* notes 41-43 and accompanying text.

139. See *supra* notes 88-89 and accompanying text.

general, one court in particular, Congress, an administrative agency, a foreign country—that they needed to do something, I counted it as a prescriptive note.

Overall, 77 percent of elite notes included a prescriptive proposal, while 80 percent of non-elite notes did so.<sup>140</sup> Of the 350 notes considered in this study, 274 instructed some group of decision-makers on what they should do.<sup>141</sup> The most popular addressee for these proposals was courts, generically—87 elite notes told courts what they ought to do, as did 23 non-elite notes.<sup>142</sup> The Supreme Court was singled out less often: only eight elite notes and nine non-elite notes had the temerity to instruct the highest court in the land on what it needed to do. Congress was exhorted to take action in 35 notes: 13 elite notes, 22 non-elite. Federal agencies received their fair share of advice as well: among the agencies given instruction on what to do were the Food and Drug Administration, the Federal Communication Commission and the Securities and Exchange Commission. Addressees who were, perhaps, even less likely to

140. One reason that the percentage of prescriptive non-elite school notes is so high is that every Santa Clara note included a prescriptive element. This seemed a bit surprising, until I noticed that each Santa Clara note in the sample adhered rigidly to the same five-part format: beginning with an “Introduction,” each moved on to sections providing “Background,” “Identification of the Problem,” “Analysis,” and a concluding “Proposal.” Given this uniformity, I presume that this rubric is mandatory for Santa Clara students who wish to publish a note. (I can only “presume,” as the editorial board at Santa Clara declined to respond to my query about their law review’s requirements for notes.) This procrustean approach can have inadvertently humorous consequences, as when a note about a circuit split—a case in which the problem is inherent in the title of the piece—still includes the seemingly mandatory part offering “identification of the problem.” See, e.g., Holly, *supra* note 111, at 218 (explaining, under “Identification of the Problem,” that the note’s titular circuit split “creates uncertainty”). The apparent necessity of including a prescriptive proposal in every note produces even more bizarre results. Perhaps the strangest note in the Santa Clara sample is one that offers an interesting descriptive overview of arbitration law in China, before taking an abrupt left turn into unfettered prescriptivism by insisting that the Chinese government must radically restructure its judiciary and institute a federal court system based on the American model, to “facilitate the enforcement of arbitral awards.” See David T. Wang, Judicial Reform in China: Improving Arbitration Award Enforcement by Establishing a Federal Court System, 48 Santa Clara L. Rev. 649, 667-78 (2008) (helpfully suggesting, *inter alia*, that China could make do with only ten Courts of Appeals, each of which would have jurisdiction over three provinces).
141. It is perhaps needless to say that these normative proposals, almost without exception, paint a rosy picture of how the world would be improved if only the pertinent decision-makers took action in the proposed manner. As Pierre Schlag has aptly remarked: “Indeed, when was the last time you saw a law review article end on the note, ‘Oh my god, there’s nothing we can do. We’re ruined.’?” Pierre Schlag, Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art), 97 Geo. L. J. 803, 823 (2009).
142. Non-elite school notes were more likely to address particular courts. For instance, six of the West Virginia notes contained prescriptive proposals that were specifically addressed to West Virginia state courts. See, e.g. Allison Minton, One Man v. The “800-Pound Gorilla”: An Argument for Truly Just Compensation in Condemnation Proceedings, 111 W. Va. L. Rev. 503, 528-29 (2009) (arguing that the West Virginia Supreme Court of Appeals should “seize” a “timely opportunity” to settle a discovery issue, and instructing it to “lay down new common law” for West Virginia).

take heed of proposals made by American law students included the European Union, Hamas, the Chinese government, the World Trade Organization and emerging democracies looking to design “constitution-drafting processes.”

In addition to considering prescriptivism, I categorized notes according to whether they sought to identify a problem that needed to be solved. Eighty-three percent of elite notes and 88 percent of non-elite notes took that “problem-based” approach.<sup>143</sup> For the most part, this datum overlapped with prescriptivism: if a note took a prescriptive slant, then it likely conceived of itself as identifying a problem to which its prescriptive suggestion was the solution. However, the overlap was not perfect. There were a number of notes that identified a problem (and thus fell into this category), though the author did not feel the need to propose a prescriptive solution of his own.<sup>144</sup> There were also notes that adopted a prescriptive approach, even though the author had not identified a problem that needed fixing.<sup>145</sup>

### III. Conclusion

At the end of an article that has had cutting things to say about the assumption that legal scholarship “must” be prescriptive, it might seem (to put it mildly) inconsistent of me to offer any prescriptions of my own. And, to tell the truth, a normative peroration in the grand style (“Listen to me, decision-makers who may or may not pay attention to law reviews, much less student notes! You must do the following”) does not much appeal to me. Instead, I will wrap up by offering a few theoretical observations.

It seems to me that there are at least three possible theories of the note. For ease of reference, I will call them the *utility* theory, the *instrumentalist* theory, and the *scholarly* theory. (I know I’m putting my thumb on the scale with that last bit of terminology, but so what? At this point, the reader presumably is not unaware of my own inclinations and biases.) We have seen the first of these over and over again: it is the ostensible view propounded by the guides, which constantly hammer home the claim that notes must be useful to some readership. We have also seen the second of these. It is, in my argument, the actual theory held by Volokh. It suggests that the true purpose of notes is to advance the author’s career. However, we have not really seen the third theory at all. I will attempt to explain what I mean by it, but first I want to offer a few last observations about the other two theories.

143. That is, 166 of the 201 elite school notes, and 131 of the 149 non-elite school notes.

144. *See, e.g.*, Andrew Carlon, Entrapment, Punishment, and the Sadistic State, 93 Va. L. Rev. 1081, 1086 (2007) (arguing darkly that the practice of entrapment in criminal law turns the state into a “totalitarian punishment machine”—which is, presumably, problematic—without offering any prescriptive proposals).

145. This is a rarer phenomenon, but examples do exist. *See, e.g.*, Timothy A. Johnson, Sentencing Organizations After Booker, 116 Yale L. J. 632, 665-66 (2006) (instructing “Congress, lower federal courts and the Sentencing Commission” *not* to take action to change the organizational guidelines for sentencing because the law does not need to be fixed, the Supreme Court having correctly provided courts with “pragmatic flexibility”).

On its face, the utility theory is highly appealing. For one thing, it has the merit of appearing not to require any justification. “Of course scholarship needs to be useful,” one might reasonably think. What else should it be? As we have seen, however, this theory relies for its plausibility on the repeated invocation of a few magic words, such as interesting and useful, whose content is never quite supplied. But in the absence of any evidence about who in the profession is reading notes and how they are using them, this theory, for all its superficial allure, must be regarded as vacuous.<sup>146</sup>

There is also something to be said for the instrumentalist theory. For instance, it has the great virtue of being practical. Given that the average law student is likely to devote hundreds of hours to the task of writing a note, this theory at least has the merit of explaining why it is worthwhile to do so. It does not rely on vague, unsubstantiated assertions about how the profession is relying on student scholarship. Indeed, under this theory, the profession could be entirely indifferent to student scholarship: the note would still have value, inasmuch as the student would still get something out of it. If we are being honest with ourselves, we have to admit that we have no idea how, or whether, the profession is employing the thousands of student notes published annually. But we do know that students are making use of their notes to further their own careers, by packaging them as writing samples and highlighting them on their resumes.

Both of these are consequentialist theories of the note. On these accounts, what matters is the real-world impact of the note on either the profession or the student’s prospects. But framing the issue in those terms helps to point up what is missing from both theories: namely, any sense that student legal scholarship could possibly be a mode of disinterested inquiry, whose object is to get at a hitherto undiscovered truth about some subject.<sup>147</sup> This is not a

146. This may be as good a place as any to say a word about citation counts. Volokh begins his book by arguing, solely on the basis of citation counts, that student notes can “have a huge impact,” a claim he supports by listing a double handful of notes that have been cited in a number of “academic works” and judicial opinions. Volokh, *supra* note 19, at 5-6. But to simply adduce a raw number of citations as evidence of “impact” is, to say the least, disingenuous. As any academic knows, the mere act of citing a text is in no way an indication that one has been impacted by it. To see what I mean, imagine that I had chosen to cite Professor X’s “An Article on Notes” in the course of writing this piece. I might have had any number of reasons for citing X’s work, only one of which would be “X’s enormous impact on my thinking.” Perhaps X dug up some helpful nugget of fact, and I decided that the most convenient way of alluding to that fact was by citing its appearance in his article. Or maybe it is the case that only a handful of other scholars have written on the topic of student notes, and I found it necessary to throw in a cite to X to demonstrate familiarity with the relevant literature. Or maybe I think that X is dead wrong about notes, and I decided to cite to him as a minatory example of what *not* to think about them. Those are all prominent motivations for citing anything, though observing as much tends to take the shine off the assertion that being “cited by over 90 academic works and over 25 cases” is a strong indicator of “impact.” *Id.* at 5.

147. I do not mean to sound starry-eyed about the purity of the academic enterprise, nor will I bother assembling a footnote full of shallow references to descriptions of the scholarly vocation in Western thought. Instead, I simply suggest that “notional usefulness to a

vision of scholarship that one sees much of in the student guides to academic writing. It is, however, a possible theory of the note—the theory that I am calling (prejudicially, and for lack of a better word) the scholarly theory. On this view, students might try to find an area of the law that genuinely interests them. Instead of scouring conventional sources to locate a topical subject, they might try to figure out what it is they think about whatever area of the law matters to them. Having done so, they might write up the results of their inquiry in whatever form seems most appropriate.

What, exactly, would be wrong with conceiving of the note in this way? I can think of at least two objections. First, and most cynically, it may be argued that many law students fail to find anything in the law to be passionate about. In a way, this is one of the more distressing tacit messages of the guides. They often seem to envision a student reader who is not excited about any aspect of the law, and who therefore requires extrinsic devices to expose him to a problem that he can “solve” in one of the expected ways. In defense of the guides, it might be said that they are not designed to help the passionate law student. Rather, they are aimed at the confused or indifferent law student who is compelled to write about *something*, regardless of personal investment. That may well be true, and it may be that the critique here should be addressed to the law schools and law reviews (which require students, even if they have no interest in scholarship, to write a “publishable note”) rather than to the guides, which are merely trying to help students make the best of a bad situation.

I think that there is something to be said for this line of argument. In response, I would say that if the guides explicitly confined themselves to that purpose, I would have few objections to them. But they don't. Instead, they purport to tell all students what “good legal scholarship” is, which—for reasons this article has been devoted to expounding—strikes me as deeply problematic.

Another, and perhaps more persuasive, objection is that what I am describing may be all very well in some settings, but is unimaginable as a general regime for producing acceptable student legal scholarship.<sup>148</sup> It may be said that students are indeed frequently passionate about one or more areas

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professional audience” and “actual usefulness in advancing an author's non-scholarly career pursuits” would not generally be thought to constitute an exhaustive definition of the value of scholarship.

148. I should perhaps observe that there is an obvious elitist version of this argument (here, I use the word “elitist” in the invidious sense). On this argument, it may be said that students at top schools can be allowed to go where their scholarly inclinations lead them, but students at lower-tier schools need to be guided with a heavier hand if they are to produce competent scholarly work. Having looked at hundreds of elite and non-elite school student notes in the last few months (here, I use the word “elite” in the neutral sense), I would suggest that this argument is belied by the reality of student scholarship. Many of the most interesting and inventive notes appeared in non-elite school law reviews. By contrast, many of the notes published in elite law reviews were formulaic or intellectually dubious. Of course, it is possible that some of those “interesting and inventive” non-elite notes were in fact heavily guided by the invisible hand of a faculty member. It is also possible that some of the authors of formulaic or dubious elite school notes would have produced even worse work if they had been left to their own devices.

of the law, but translating that passion into adequate scholarship is, by and large, beyond them. I am sympathetic to this position, having turned out my own share of sketchy student papers. But, once again, the problem here is that the objection assumes that we know what “adequate” scholarship is. If we actually had a concrete idea of which features of student scholarship are useful to the profession at large, then one might argue that the problem with letting students follow their own inclinations is that they would thereby tend to produce notes that fail to exhibit those useful features. But, as I have said, we simply do not know how the profession uses student scholarship, assuming that the profession does use it in a serious way. And, because we do not know that, we cannot know that embracing the scholarly theory of notes would lead to worse notes than we currently have.