

TAKING NOTE OF NOTES:
STUDENT LEGAL SCHOLARSHIP IN THEORY AND PRACTICE

*by Andrew Yaphe**

ABSTRACT

In recent decades, an inconclusive (even by the standards of academia!) debate has intermittently flared up within the legal academy, as professors, judges, and practitioners have gone back and forth as to what legal scholarship ought to be. This article makes no contribution whatsoever to that debate. Instead, it looks at *student* legal scholarship, which has gone unnoticed while the larger debate about legal scholarship *simpliciter* simmered on. The article does two things, neither of which appears to have been attempted by anyone hitherto. First, it offers an extensive critique of the leading guidebooks for aspiring student authors (e.g. Eugene Volokh's *Academic Legal Writing*), which are taken to task for their narrow conceptions of student scholarship. Second, it provides an empirical analysis of recent student notes, enabling the reader to get an overview of the forms that student scholarship has actually taken over the past few years.

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I. INTRODUCTION

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.¹ Alternatively, one might canvas the attempts to answer that question which have been propounded, much- or little-debated, and largely ignored by a host

* J.D., Stanford Law School, 2010; M.A., University of Chicago, 1999; B.A., University of Virginia, 1998. I would be remiss were I not to extend my gratitude to Jordan Segall, whose contributions to this article were invaluable. I would also like to thank Peter Conti-Brown, Mark Kelman, and Ticien Sassoubre for their helpful suggestions. If anything in this article strikes the reader as being jejune, inane, or offensive, it should be assumed that one of the aforementioned individuals warned me about it, but that I willfully disregarded the sound advice that I was given.

¹ See FRANCIS BACON, ESSAYS 61 (John Pitcher ed., 1985).

of legal scholars.² A consideration of the legal scholarship on legal scholarship, however, reveals no consensus as to what it is or ought to be.³ In the absence of any agreement at the level of theory about the nature of legal scholarship, one might turn instead to practice and attempt to derive a definition inductively by looking at the contents of law reviews, the typical repositories of American legal scholarship.⁴

² The scholarship about legal scholarship is itself legion. Fortunately, the content of that scholarship is largely irrelevant to the project of this article. Those curious to behold what prominent legal scholars have to say about the nature of the enterprise could do worse than consult one of the symposia on the topic that have appeared in the last two decades. See, e.g. Symposium, *A Symposium on Legal Scholarship*, 63 U. COLO. L. REV. 521 (1992); Symposium, *Law, Knowledge, and the Academy*, 115 HARV. L. REV. 1277 (2002); Symposium, *The Future of Legal Scholarship*, 116 YALE L. J. POCKET PART 1 (2006); Symposium, *The New Legal Writing Scholarship*, 20 LEGAL STUD. F. 1 (1997).

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’s what law professors are best equipped to produce, or because that’s 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*, 1991 DET. C.L. REV. 229, 229-30 (arguing that academics would be well-advised to abandon their quest for the “abstract and the esoteric,” and instead concentrate on writing “more pedestrian” and “eminently more useful” articles on “topics that confront judges and practitioners of the law”); Roger C. Cramton, *Demystifying Legal Scholarship*, 75 GEO. L. J. 1, 14 (1986) (arguing that traditional doctrinal scholarship, for all its “deficiencies,” is something that law professors have a “comparative advantage” in producing, and pointing out that it is “highly useful to the practicing profession and the judiciary”). 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” and more “value as theory” than its detractors are willing to admit); Geoffrey R. Stone, *Controversial Scholarship and Faculty Appointments: A Dean’s View*, 77 IOWA L. REV. 73, 76-77 (1991) (arguing that law schools “should always be open to new ideas” and that scholarship “should never be dismissed as unworthy merely because it is unorthodox, controversial, or even deeply unsettling”).

These articles only begin to scratch the surface of the debate. Instead of providing yet more representative articles to constitute evidence, if any evidence is required, that there is a lack of consensus about what legal scholarship should be, I’ll 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). In the absence of any consensus, a number of scholars have abandoned the attempt to locate any essentialist definition of “real” legal scholarship. See, e.g., Philip C. Kissam, *The Evaluation of Legal Scholarship*, 63 WASH. L. REV. 221, 222 (1988) (asserting that “any writing about the law or legal process that is printed in a form generally recognized as ‘a legal publication’” should be considered “legal scholarship”); Stephen J. Werber, *On Defining Academic Scholarship*, 40 CLEV. ST. L. REV. 209, 215 (1992) (concluding that “any form of good legal writing” should be considered “true” legal scholarship).

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

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.⁵ The result: If you have institutional credibility,⁶ 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 get published somewhere.⁷

It isn't for me to say whether the prevailing uncertainty about the nature of legal scholarship is, on the whole, a good thing. Instead, I want to inquire into the

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, they would: after all, they're in the business of seeking out venues for legal scholarship. At the moment, that source—the ExpressO online delivery service—comprises more than 550 reviews. See ExpressO, *Express online deliveries to law reviews, available at* <http://law.bepress.com/expresso/> (proudly asserting that it offers a list of "550+ 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, Comment, *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* and the *Florida Journal of International Law* (to stay only in the "F"s) have only run to a few hundred pages. See, e.g., Christopher B. Carbot, *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); Johan David Michels, *Keeping Dealers off the Docket: The Perils of Prosecuting Serious Drug-Related Offences at the International Criminal Court*, 21 FLA. J. INT'L LAW 449, 460 (2009) (ditto).

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 have a desire 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").

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 distinctive⁸ is that law reviews publish works by students, who almost by definition are not yet experts in the field.⁹ For many of those student authors, the writing and publication of an note¹⁰ 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.¹¹ In addition to being a remarkably labor-intensive enterprise, the note often will have

⁸ “Baffling” is another word that comes to mind, if one is accustomed to other scholarly disciplines. Let’s just say that the *American Journal of Sociology* rarely publishes articles written by second- or third-year sociology graduate students.

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, well, insignificant. See, e.g., Bart Sloan, Note, *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). Still, student-written articles do sometimes have an effect. See, e.g., Sloan, *supra*, at 227-28 n.38 (recounting, as one “well-known example” of how courts have been impressed by student work, the story of a Fordham law student who developed a “market share liability” theory that was taken up by the California Supreme Court, among others).

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.” For further discussion of terminology, see *infra* notes 110-111 and accompanying text.

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 a 1986 article by Richard Delgado. See 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 from Delgado’s piece, he grabbed that number out of the air. And even if it was a more or less accurate estimate c. 1986, it’s 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.”

(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.¹²

Given how much work goes into writing a student note, and how consequential an endeavor it is for many students, the enterprise bears closer consideration than it seems to have received. Bear in mind that few students have written *any* kind of publishable scholarship prior to law school; almost none will have written publishable legal scholarship.¹³ 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

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 isn't exactly a conversation starter during a job interview. 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." Anecdotal evidence suggests that at least some students choose topics in order to make their resumes "stand out" for certain types of employer. A student who wants to work in IP, for instance, may seek to write an article on copyright law as a way of signalling his particular interest in the field.

¹³ There are, of course, exceptions. See, e.g., Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997); see also Eugene Volokh, *Words of Encouragement*, Volokh Conspiracy, Sept. 15, 2004, available at <http://volokh.com/2004/09/15/words-of-encouragement/> (trumpeting his brother's achievement in publishing the aforementioned article "before he even started law school").

snippets of appellate opinions.¹⁴ It would be possible to complete three years of coursework in most American law schools without ever 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 from end to end—would expose a student to a bewildering welter of approaches, but it would hardly provide authoritative guidance as to how legal scholarship ought to be written.¹⁵

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 are “publishable”?¹⁶ This article attempts to provide two kinds of answers to these

¹⁴ For a standard description of the “case method” approach to legal education that is ubiquitous in American law schools, see, e.g., LAWRENCE M. FRIEDMAN, *AMERICAN LAW IN THE 20TH CENTURY* 488-89 (2002). For a decidedly non-standard description of the “case method” approach, see, e.g., Andrew Yaphe, *“A Great Dread of Vulgarly”: A Novel Perspective on Christopher Columbus Langdell and the Origins of the Case Method in American Legal Education*, forthcoming (hopefully).

¹⁵ It would also take forever. Many law students complain, not without reason, that they already have enough work on their hands; it’s 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.

¹⁶ 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 aspiring author could gauge whether his work was 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’”); Florida State University Law Review, *Information for Prospective Members*, available at <http://www.law.fsu.edu/journals/lawreview/prospectivemembers.html> (stating that each member of the *Review* is required to “submit a paper of publishable quality” before graduating from law school, without offering guidance as to what “publishable” might mean); Vermont Law Review, *Vermont Law Review Basics*, available at

questions.¹⁷ 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 of law reviews) adopt the guidebooks’ implicit normative visions of what student scholarship should be.¹⁸ I looked at what appear to be the three most-recommended sources: a book on “Scholarly Writing for Law Students” by Elizabeth Fajans and Mary Falk,¹⁹ an article on finding scholarly

<http://lawreview.vermontlaw.edu/reference/v34/gbch1.pdf> (indicating that members of the *Review* are required to write a note that will “[s]atisfy publishable quality Note criteria,” without specifying any such “criteria”).

¹⁷ 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 haven’t 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 blithely ignore them.

¹⁸ 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* (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* (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. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* (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 one 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.

¹⁹ I looked at the most recent edition of this text: the third, from 2004. FAJANS & FALK, *supra* note 18.

topics by Heather Meeker;²⁰ and Eugene Volokh's book on "academic legal writing."²¹

Although, as we have seen, the question of what legal scholarship essentially ought to be is far from a settled one, 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 the fact that there is no agreement in the academy 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

²⁰ Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 UTAH L. REV. 917.

²¹ I looked at the third edition of this text, as it was the most recent available at the time I commenced this project. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING* (3rd ed. 2007) [hereinafter VOLOKH]. Although I didn't 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"); Columbia Law Review, *2010-2011 Publishable Notes Manual* 12, available at http://www.columbialawreview.org/assets/2010_Publishable_Notes_Manual.pdf (suggesting those three sources, along with a Richard Delgado article from 1986, for students who have gotten "stuck" trying to come up with a note topic); Drake University Law School, *Resources for Student Writing Notes*, available at <http://drakelaw.libguides.com/content.php?pid=78028&sid=583773> (suggesting those three as the first three "general sources" for students needing help with topic selection); George Mason University School of Law, *Law Library Research Guide: Scholarly Writing*, available at http://www.law.gmu.edu/library/guides/scholarly_writing (suggesting the Volokh and Fajans & Falk books in a section on "writing help," and listing the Meeker article in a section on "finding a topic"); Georgetown Law Library, *Research Strategies for Seminar Papers & Journal Notes*, available at http://www.ll.georgetown.edu/guides/seminar_papers.cfm (listing those three sources, and only those three, as "additional resources on scholarly papers"); Santa Clara Law, *Resources for Comment and Paper Topics*, available at <http://law.scu.edu/library/resources-for-comment-and-paper-topics.cfm> (listing those three sources, along with articles by Delgado and Volokh, as resources it "may be wise to begin with" when starting the writing process); Mary Whisner & Ann Hemmens, *Writing for & Publishing in Law Reviews: What Techniques Are Useful for Finding Interesting Topics?*, available at <http://lib.law.washington.edu/ref/lawrev.html> (suggesting those three sources, along with a book on writing "from the transnational perspective" and an article comparing the Fajans & Falk and Volokh books, in a section on "general advice" for finding "interesting topics").

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 truly acceptable.

It may be argued that few if any student readers take these guides at face value, and that to offer the kind of extended critique of them that I will be presenting is to engage in the dubious practice of breaking butterflies upon a wheel. I do not think that is 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 very definite need. Again, there is no reason that law students should know the first thing about how to write a piece of serious legal scholarship. Nor is there any reason to think that law students who are elected to law review editorial boards will have any real idea of how they ought to evaluate the “publishability” of the notes submitted for their consideration. Given those conditions, it would be surprising if law students did *not* grasp at whatever straws happen to be offered to them. It seems inevitable that many law students will thus absorb the normative visions contained in these guides, accepting them as a true and complete description of what legal scholarship is and ought to be. One of the goals of this article, 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 at the present time. For this part of the project, I examined a set of 350 student-written articles published in a total of twelve 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.²² By surveying this representative 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 a scholarly article.

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.²³

²² For an explanation of these terms, see *infra* note 107.

²³ 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 don’t 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 content (“interesting” to whom? “Useful” for what purpose?) to those maddeningly nebulous adjectives.²⁴ In the spirit of those vague exhortations, I’ll conclude this introduction by suggesting that this article may prove interesting and/or useful to two groups of people: law students and law professors. Students may benefit from this article’s assessment of the advice on offer in the leading guidebooks; they may also be curious to know what their peers are actually doing.²⁵ 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 actually been doing over the last few years.

II. 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.²⁶ The critique I offer of these guides is, at times, severe. Before I launch

²⁴ See, e.g., *infra* notes 41-44 and accompanying text.

²⁵ 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.

²⁶ Hardly any serious scholarly attention has been paid to these resources. In fact, most of the “commentary” on them consists of substantially uncritical reviews. See, e.g., Richard Bales, *Recess*, 32 *STUDENT LAW.* 14 (2003) (reviewing Volokh in a non-judgmental manner); Bryan A. Garner, *Legal Writing*, 36 *STUDENT LAW.* 14, 15 (2008) (lauding Volokh’s as the “best book” on the subject of legal scholarship); Michael J. Madison, Book Review, *The Lawyer as Legal Scholar*, 65 *U. PITT. L. REV.* 63 (2003) (reviewing Volokh). 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).

into that critique, I want to make clear that my analysis is limited strictly to one aspect of these works: i.e., 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. My argument doesn’t touch on that aspect of these works at all. I am solely interested in outlining and critiquing the normative vision of student scholarship that is presented in each of the texts under consideration. But it would be a shame if students, on the basis of this critique, were to conclude that these guides should be avoided altogether. Instead, my goal in criticizing the normative claims made by these authors is to allow students to recognize that none of these texts should be taken as gospel for what student legal scholarship “really is.” Each of the authors considered in the upcoming pages has a contestable, idiosyncratic picture of student legal scholarship. My point, again, is to remind students that it is possible to gratefully accept these authors’ practical suggestions for how to go about the business of writing a note, without also embracing their normative view of what a note must look like.

A. The Note as Clerkship Writing Sample

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 extremely sympathetic to this line of critique.

The first guidebook for student writing that I will be looking at is also, 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 fawningly praised the candidate as a “Kozinski clone.”²⁷ The interview, Kozinski tells us, was going splendidly, until the candidate made a nearly fatal blunder. Upon being 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.”²⁸ Kozinski was impressed. He was impressed, that is, *until* he took a closer look at the note’s title page: “The Alienability and Devisability of Possibilities of Reverter and Rights of Entry.” Upon seeing that, his heart fell. Kozinski tells us that his first thought was that the note’s title had to be a “joke.”²⁹ Then, he wondered why anyone who was supposed to be “smart” would write “on such an arcane topic.”³⁰ Finally, he turned to the note itself. “It was well-written enough,” he grudgingly admits.³¹ Nonetheless, “the effort was pointless.”³² Why? Because, Kozinski writes, “the subject matter was of absolutely no interest to me.”³³ 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

²⁷ VOLOKH, *supra* note 21, at 1.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

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?”³⁴

Kozinski, we learn, never actually got around to reading “more than a few lines” of the “dreary” paper.³⁵ Despite his deep reservations, he decided to offer the possible “kook” a clerkship anyway, while making clear that he should “drop the paper in the nearest trash can and start from scratch.”³⁶ “I explained to him what was wrong with it,” Kozinski says; he then told the candidate “what a successful paper should look like.”³⁷ 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 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.³⁸ “His name,” Kozinski portentously concludes, “is Eugene Volokh.”³⁹

Before we get swept away by this triumphant story of a career crisis narrowly averted, it’s worth lingering to unpack this anecdote a bit further. What, exactly, was *wrong* with the note? Elsewhere in his introduction, Kozinski offers the reader general criteria for gauging competence in student scholarship: “Is the topic broad enough to be useful, yet narrow enough to be adequately covered? Is it

³⁴ *Id.* Kozinski doesn’t 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 of the other standard clerky chores.

³⁵ *Id.* at 2.

³⁶ *Id.*

³⁷ *Id.* at 2-3.

³⁸ *Id.* at 3.

³⁹ *Id.*

persuasive? Is it fun to read? . . . A well-written, well-researched, thoughtful paper can clinch that law firm job or clerkship.”⁴⁰ Did Volokh’s note fail in these ways? We’ll never know. For that matter, *Kozinski* couldn’t have known, inasmuch as he was unable to bring himself to look at “more than a few lines” of the thing.

What, then, was the matter? The note, Kozinski concedes, 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 didn’t immediately grab the attention of one Judge Kozinski. The unspoken moral of the story is clear: Thoroughness, elegance, and thoughtfulness are all very well, but if your note fails to impress 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 beat home the lesson learned by the young Volokh: namely, that impressing authority figures—in particular, judges who might want to hire one as a clerk—is the *raison d’être* of student legal scholarship. How does the book do this? By describing the task of, and the audience for, student scholarship in vague and confusing ways which are never precisely spelled out, but which on reflection can be seen to refer only to judges and their desiderata. Much of Volokh’s advice which seems questionable or false when considered as a description of scholarship per se turns out to make excellent sense, when seen for what it really is. At its base, Volokh’s book offers advice that is designed to minimize the likelihood that a judge

⁴⁰ *Id.* at 2.

will be offended by or irritated with one's work, in the way Kozinski was offended by and irritated with Volokh's original note.

The vagueness of Volokh's book is epitomized by its central commandment: that student articles must be "useful."⁴¹ No doubt this is true in some sense, 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."⁴² But this adds nothing to the definition, as "some readers" punts the issue of whom students should be writing for, while "professionally valuable" continues to be unhelpful in its lack of specificity.

Without precisely explaining what he means by "usefulness," Volokh ties the term to a call for *prescriptive* scholarship. The "most interesting claims," Volokh asserts, "are often ones that combine the descriptive and the prescriptive."⁴³ Though he grudgingly concedes that a student "can certainly write an article that's purely prescriptive or purely descriptive," he informs the aspiring author that "[c]ombining the prescriptive and the descriptive . . . tends to yield a more

⁴¹ *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 heterogenous beliefs, what does it mean to say generically that scholarship should be "sound"?). The only one of these terms that could possibly have any specific pertinence to the aspiring legal scholar is the concept of the "useful."

⁴² *Id.* at 17.

⁴³ *Id.* at 11.

interesting and impressive article.”⁴⁴ 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?’”⁴⁵

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 isn’t “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.”⁴⁶ 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 will turn to student scholarship for an encyclopedia-like treatment of some slice of the law, rather than looking to be edified or inspired by a student’s bold proposals for legal or social reform.⁴⁷ The same, I suspect, goes for law professors. While it is possible that some professors are eager to learn about, and build upon,

⁴⁴ *Id.*

⁴⁵ *Id.* at 19.

⁴⁶ *Id.* at 17.

⁴⁷ In my own experiences as a “practitioner”—i.e., when I worked as a summer clerk at several different law firms and government offices—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 some 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 assignments. It is, of course, possible that my use of student notes while in practice was aberrant, though my conversations with other practitioners suggest that my way of using such writings was not unusual.

the prescriptive proposals generated by their students, a more plausible professorial approach to student scholarship is described by Robert Weisberg, who 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.”⁴⁸ In fact, Weisberg comments on the number of student papers that he has found “enlightening and usefully exploitable,” even though they have been rejected for publication as notes because they were “merely descriptive.”⁴⁹

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, can’t rest with mere 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 *has* to do. As Volokh offhandedly, but tellingly, remarks, a purely descriptive piece won’t seem “good” to a reader who is “looking for a creative, original-thinking law clerk.”⁵⁰

Although Volokh claims 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 demands indicates that he really has just one kind of

⁴⁸ Weisberg, *supra* note 4, at 1151.

⁴⁹ *Id.*

⁵⁰ VOLOKH, *supra* note 21, at 36.

reader in mind: namely, the judge who is 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 the students who feel constrained to follow his advice. First, it does a disservice to students who don't want to do that kind of work, but who find themselves compelled to do so by law reviews that assume that Volokh's idiosyncratic view is an objective description of scholarship *per se*.⁵¹ Second, it does a disservice to scholarship itself, as it tends to devalue any student work that doesn't look like an appellate opinion, no matter how "interesting" or "useful" that work might be to readers who aren't judges.

In this light, it is instructive to consider a number of Volokh's assertions about "scholarship" which seem puzzling when considered on their face, but which make perfect sense once one sees that Volokh takes for granted that a good student note is, in essence, a clerkship writing sample. Consider, in this regard, Volokh's instruction that students "try to include some arguments or examples that broaden [the] article's political appeal."⁵² From a scholarly point of view, this advice is inexplicable. Much legal scholarship, after all, need not have any "political appeal" at all, and legal scholarship which *does* have a political valence rarely bothers to attempt a "broad" approach. (Imagine telling Richard Epstein that his latest article was OK, but that he really needs to make more of an effort to "broaden" the "appeal"

⁵¹ For an apparent example of this kind of thing, see the discussion of the *Santa Clara Law Review*, *infra* note 174.

⁵² VOLOKH, *supra* note 21, at 21.

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 maximize his chances on the clerkship market will, in fact, be well-advised to apply as broadly as possible to a wide ideological spectrum of judges.⁵³ As such, he will want to write a note that is unlikely to alienate any of his potential judicial employers with its political stance.

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."⁵⁴ Once again, the term "useful" here has to mean "attractive to judges," inasmuch as they 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."⁵⁵ Thus, Volokh exhorts students to steer clear of "law and economics, literary criticism, or feminist legal theory," unless they "really" are "require[d]" to invoke such approaches.⁵⁶ 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

⁵³ Or, at least, to as wide an ideological spectrum as exists among members of the American judiciary: it's thus a good idea to make oneself attractive to both conservative Republicans *and* moderate to right-wing Democrats.

⁵⁴ *Id.* at 20.

⁵⁵ *Id.*

⁵⁶ *Id.*

sense: theoretical approaches and interdisciplinary perspectives have become par for the course in legal scholarship.⁵⁷ But judges, notoriously, are less comfortable with such approaches.⁵⁸ Volokh's advice, essentially, is to keep one's eyes on the prize. Never mind what the law professors are doing; focus instead on pandering to what judges are supposed to want.

The most puzzling aspect of Volokh's book comes in 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," then generate a "claim" which will be the student's "proposed solution to that problem."⁵⁹ 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 mere fact that the split exists "shows that there's an important problem with no obviously right answer."⁶⁰ And any circuit split, by definition, has a "solution": the student can always argue that one or another of the views expressed by the "split" circuit courts ought to be adopted by all of them. Furthermore, they seem highly

⁵⁷ See, e.g., Richard 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").

⁵⁸ 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").

⁵⁹ VOLOKH, *supra* note 21, at 12.

⁶⁰ *Id.* at 37.

likely to be of interest to judges, who will naturally be curious to learn of a split of authority that may affect their decisionmaking.

On its face, then, the circuit split would seem to be a superb note topic. Yet Volokh, surprisingly, *dissuades* students from tackling them. He writes that it is “unfortunate[]” that students commonly write about circuit splits, and suggests that students would do better to avoid such notes.⁶¹ But Volokh’s stated rationale for being wary of circuit splits 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 gets around to resolving the split.⁶² But why is *that* a problem? If one 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.”⁶³ 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 argued that Volokh’s worry is that the Court will resolve the split soon after the student has finished writing his note, making it seem irrelevant to future readers. But that’s an odd concern, given that *timelessness* was not one of Volokh’s criteria for a good student note. Nor could it be, as the threat of getting “preempted”—i.e., the threat 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

⁶¹ *Id.* at 36-37.

⁶² *Id.* at 37.

⁶³ *Id.* at 36-37.

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.⁶⁴

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 such 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

⁶⁴ 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., Gavin Clarkson, Column, *Y2K Tsunami: Directors & Officers Should Prepare to Be Deluged*, 5 B.U. J. SCI. & TECH. L. 53 (1999); David M. Kono, Comment, *One Trillion Dollars: An Analysis of Y2K Employment Implications for Attorneys*, 1999 BYU L. REV. 1529 (1999).

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 turn out to 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 competent judicial clerk.” Meanwhile, any kind of scholarship that wouldn’t 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.⁶⁵ Meeker’s article is perhaps the most down-to-earth of the three texts under consideration. She doesn’t entice the reader with visions of the rich rewards that may accrue to the author of a successful note.⁶⁶ Instead, she conceives the task of writing a note as a necessary chore, one of the endless hoops that law students have to jump through “to complete their legal education.”⁶⁷ 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

⁶⁵ Meeker, *supra* note 20.

⁶⁶ Compare VOLOKH, *supra* note 21, 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) and FAJANS & FALK, *supra* note 18, at 4 (explaining to the impliedly recalcitrant 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).

⁶⁷ Meeker, *supra* note 20, at 917.

than other aspects of law school, however, 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,” as he “must do a great deal of research to assess a topic on which to do research.”⁶⁸ Again, this is refreshingly honest.

Having stated the challenge faced by law students in such unsentimental terms, Meeker’s article proceeds straightforwardly to offer students helpful guidance on how to locate note topics. However, in the course of doing so, 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 conducted by Meeker in the 1990s.⁶⁹ It is not apparent from the article whether its 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, as they embody a typical understanding of the nature of student legal scholarship.

On the vision of legal scholarship presented by Meeker, “law review articles essentially do one of two things.”⁷⁰ First, they “resolve jurisdictional conflicts of law

⁶⁸ *Id.*

⁶⁹ *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 them “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.

⁷⁰ *Id.* at 921.

applied to an existing factual situation.”⁷¹ Second, they “apply existing law to new or newly defined factual situations or apply new laws to existing factual situations.”⁷² 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”); a student can also do 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 goes on to offer a series of suggestions for how students can find topics within one of those two “central” categories. The first and foremost of Meeker’s suggestions is the circuit split. Unlike Volokh, who (as we saw) is curiously wary of circuit splits as a note topic,⁷³ Meeker positively embraces them. She principally advises that students should seek to resolve a “jurisdictional conflict,” as topics in this area are “the most amenable” to inexperienced legal researchers.⁷⁴ And, as she observes, the “most obvious breeding ground” of such conflicts is “the United States courts of appeals.”⁷⁵ Circuit splits, on Meeker’s view, have several huge advantages for students. First, they have the “advantage of relevance.”⁷⁶ Students, as novices to every field of law, may find it very 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, as circuit splits are by

⁷¹ *Id.*

⁷² *Id.*

⁷³ See *supra* notes 59-64 and accompanying text.

⁷⁴ Meeker, *supra* note 20, at 921.

⁷⁵ *Id.*

⁷⁶ *Id.*

definition “topical.” Second, they have the advantage of being relatively simple to identify. They are documented in sources that are already familiar to students, from textbooks (“[m]any casebook notes identify a split”) to computer databases.⁷⁷ In all, Meeker devotes five pages of her article to very specific ideas about how students can come across circuit splits to write about.

Meeker then offers a section devoted to what I’m calling “policy” analysis. This area is not as well-defined, in Meeker’s article, as one might like, but it basically entails identifying new “factual backdrops” or “coming trends” and examining how old (or new) laws apply to them.⁷⁸ The advantage of writing on a topic of this kind, as Meeker indicates, is that “new facts” are constantly being churned out, meaning that a wide variety of potential topics are being generated all the time. However, while articles in this domain will, by definition, be timely, their relevance is not as assured as is that of circuit splits. And to find a viable topic, it isn’t enough to peruse treatises or monitor recent circuit court decisions; one has to be slightly more creative.⁷⁹

The core of Meeker’s article is thus its assertion that law review articles “essentially” do doctrinal or policy work, coupled with a number of specific suggestions about how the student can generate topics in those areas. Although the article does concede that other kinds of topic are possible, it has no useful advice to offer about them. Moreover, the terms in which non-standard topics are discussed

⁷⁷ *Id.* at 923-25. Admittedly, some of this advice is now rather dated. For instance, Meeker provides detailed suggestions about which keywords to type into the Westlaw and Lexis databases (as those databases were constituted in 1996) if one wants to discover a circuit split. *Id.* at 925.

⁷⁸ *Id.* at 927.

⁷⁹ Meeker does offer two pages of more or less helpful tips, suggesting, e.g., that “[s]pecialty newspapers or magazines are a good source.” *Id.* at 927-28.

are such as to deter law students from pursuing ideas outside the narrow domain of doctrinal/policy work. For instance, after completing her survey of doctrinal and policy topics, Meeker acknowledges that “there are other kinds of traditional topics available.”⁸⁰ However, she warns readers that these articles are “more akin to the papers that graduate students in other fields write.”⁸¹ She then subtly devalues such work by stating that these topics may be better suited for a “student who is uncomfortable with traditional legal analysis.”⁸² The implication seems clear: If you can’t 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.”⁸³ At no point does Meeker explain why she chose those three as representative “categories,” rather than, say, “law and economics” or “law and literature.”⁸⁴ Nor does she say anything *about* any of them.

⁸⁰ *Id.* at 929.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 929-30.

⁸⁴ On the evidence of Meeker’s own article, such topics were not unknown to student writers of the time. Her article includes a lengthy appendix of “representative note topics” that simply lists the titles of hundreds of notes published in then-recent law reviews. *Id.* at 942-72. Merely perusing some of these titles indicates a richer range of possibilities than Meeker’s advice would indicate. For examples of law and economics student scholarship of the period appearing in Meeker’s own appendix, see such titles as “An Economic Analysis of Implied Warranties of Fitness in Commercial Leases”; “Settling for Less: Applying Law and Economics to Poor People”; “Taking Back Takings: A Coasean Approach to Regulation.” *Id.* at 944-51. For examples of law and literature scholarship, see such titles as “He Thought He Was Right (But Wasn’t): Property Law in Anthony Trollope’s *The Eustace Diamonds*,” “The Rushdie Incident as Law-and-Literature Parable,” “The Persistence of Dread in Law and Literature.” *Id.* at 953-55.

Instead, she simply provides the titles of four randomly selected examples of each type of note before quickly moving on.⁸⁵

Following that arbitrary and unhelpful discussion of “other traditional” topics, Meeker turns to what she terms “nontraditional” topics.⁸⁶ Again, Meeker is quick to warn students from 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.”⁸⁷ 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.”⁸⁸

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’re worth—Meeker

⁸⁵ 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.

⁸⁶ *Id.* at 930.

⁸⁷ *Id.*

⁸⁸ *Id.*

reinforces the view that law students should devote themselves to the most conventional of 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 two professors of legal writing at Brooklyn Law School, Elizabeth Fajans and Mary Falk.⁸⁹ On an 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.”⁹⁰ Instead of starting from the premise that student legal scholarship must be essentially doctrinal and policy oriented, they indicate from the beginning that a variety of alternative approaches are available, including “Law and Economics, Critical Legal Studies, Legal Storytelling, Feminist Jurisprudence.”⁹¹ 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.”⁹² 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

⁸⁹ FAJANS & FALK, *supra* note 18.

⁹⁰ *Id.* at 2.

⁹¹ *Id.*

⁹² *Id.*

“[l]egal scholarship allows that free play of intellect and imagination out of which the future of a discipline emerges.”⁹³

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).”⁹⁴ 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.⁹⁵ 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.”⁹⁶ These, they write, are the “case cruncher” (i.e., doctrinal analysis of case law); the “law reform” article, arguing for change to a legal rule or institution; and the “legislative note,” analyzing proposed or recently enacted legislation.⁹⁷ The student is told that these

⁹³ *Id.* at 3.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at 6.

⁹⁷ *Id.* They derive these categories from Delgado, *supra* note 11, at 446-47.

“are the traditional modes of scholarship, and work in them is the most appreciated by judges and practicing attorneys.”⁹⁸ 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 that it is not the kind of thing that is “most appreciated” by “judges and practicing attorneys,” who are, after all, the people to whom students will be looking for jobs in the immediate future.⁹⁹ 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 “rarely be successful.”¹⁰⁰ Oddly, they neglect to explain how the student is to square this advice with the praise of interdisciplinary scholarship with which their book opened.

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.¹⁰¹ 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

⁹⁸ FAJANS & FALK, *supra* note 18, at 6.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 4.

¹⁰¹ *Id.* at 17.

judges read articles seeking perspective on the cases before them.”¹⁰² 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 which 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.”¹⁰³ 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.”¹⁰⁴ And, as with Meeker, the most obvious example of such an “original” topic that presents itself is that of “a ‘split’ among the United States Circuit Courts of Appeals.”¹⁰⁵

The best one can say of the book is that it is less in thrall to a narrow and constraining set of presuppositions than are the previous two texts we examined. Fajans and Falk expound the view that legal scholarship “characteristically” takes a normative/prescriptive, doctrinal/policy orientation, but they don’t go out of their

¹⁰² *Id.*

¹⁰³ *Id.* at 15.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

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 kind of approach—arguing that prescriptive articles on doctrinal/policy topics are at the “core” of student scholarship, but without actively belittling alternatives or discouraging students from trying something unusual—is, at least, the most unfettered vision of student scholarship on offer.

III. THE NOTE IN PRACTICE: STUDENT SCHOLARSHIP, 2006-2009

Having made our survey of 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 been approaching the task of writing a scholarly article.

A. Description of the Methodology

Choice of Reviews. In order to get a broad picture of student work, I decided to look at student writing from both “elite” and “non-elite” institutions. For my

arbiter of “eliteness,” I turned to the perhaps inevitable *U.S. News and World Report* rankings of law schools.¹⁰⁶ Flagship law reviews from schools ranked in the top fourteen were deemed “elite”; flagship law reviews from schools ranked between 60 and 100 were deemed “non-elite.”¹⁰⁷ Six law reviews from each group were selected at random.¹⁰⁸

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).¹⁰⁹

¹⁰⁶ The rankings employed were the 2010 edition. See U.S. News and 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 shuffled somewhat over the last five years, but they didn’t change *that* much. Yale, for instance, was the very “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).

¹⁰⁷ 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 #80 in the USNWR rankings to one ranked around #7 – whether for a transfer student, or 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 almost universally regarded as a coup.

Having, I hope, sufficiently indicated my skepticism of the concept, I’ll stop enfolding the word in quotation marks every time I use it.

¹⁰⁸ 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 twelve notes within the three-year period to qualify for the study; otherwise, I passed it over and moved on to another randomly chosen review from the sample. For instance, the *Chapman Law Review* was originally to have been considered, but it only published ten full-length student “comments” in the relevant volumes (two each in its volumes of 2006-2007 and 2007-2008, followed by six in its volume of 2008-2009).

¹⁰⁹ 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 #86.

Choice of Student Writing. A number of different kinds of student writing appears 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.”¹¹⁰ Other student-written pieces are intended as commentaries on a single case; confusingly, these are *also* referred to as either “notes” or “comments.”¹¹¹ 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 was looking to see what students produced when they were consciously emulating their professors and attempting to write full-length scholarly articles on topics of their own choosing.¹¹² Thus, I eliminated anything that was clearly intended to be a

¹¹⁰ Compare Stanford Law Review, *Submit a Note/Comment*, available at <http://www.stanfordlawreview.org/node/add/note-submission> (explaining that the *Stanford Law Review* uses the term “note” to refer to a “student-authored piece of academic writing which discusses and analyzes an original legal issue or problem in some depth”) with Northwestern University Law Review, *Prospective Members*, available at <http://www.law.northwestern.edu/lawreview/members.html> (explaining that the *Northwestern Law Review* publishes “student articles” which are labeled “comments”). To minimize confusion, I will refer to full-blown student-written articles as “notes” throughout this section.

¹¹¹ See, e.g., Stanford Law Review, *supra* note 110 (explaining that the word “Comment” is used for a “student-authored piece of academic writing that is centered around an analysis or critique of a recent case, piece of legislation, law journal article, or law-related book. Comments are also significantly shorter than Notes.”). As one guide to student writing observes: “Some law reviews call a student article analyzing just one case a ‘casenote,’ while others call it a ‘case comment,’ or just a ‘comment’ or ‘note.’ Further, some reviews call the analysis of a development or controversy and ‘comment,’ and others call it a ‘note.’” FAJANS & FALK, *supra* note 18, at 5.

¹¹² I’m 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 haven’t done any empirical research to determine how common it is for students to accept a topic handed to them on a platter (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 20, at 931 (observing that “some

“casenote” or “case comment.”¹¹³ 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.¹¹⁴

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 and 2008-2009 academic years.¹¹⁵ 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.

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” to get an idea).

¹¹³ 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” (written by law professors, practitioners, and judges) and “Student Works” (written by, well, students). See, e.g., *West Virginia Law Review*, *Table of Contents*, 110 W. VA. L. REV. [ix] (2008).

¹¹⁴ 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 that are, unsurprisingly, inspired by the case. See, e.g., Meghan K. Jacobson, Note, *Assault on the Judiciary: Judicial Response to Criticism Post-Schiavo*, 61 U. MIAMI L. REV. 931 (2007). Similarly, each volume of the *Santa Clara Law Review* includes a student-written “note” reviewing developments in legal ethics over the previous year. See, e.g., Marisa Huber, Note, *Ethics Year in Review*, 47 SANTA CLARA L. REV. 867 (2007). None of these were considered as part of this study.

¹¹⁵ 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. See, e.g., *The Yale Law Journal*, *About the Journal*, available at <http://www.yalelawjournal.org/about-us/> (noting that the *Journal* is published eight times a year, “monthly from October through June, excluding February”). In other cases, a given volume of a review is published entirely within a single year. See, e.g., *Virginia Law Review*, *About VLR*, available at <http://virginialawreview.org/page.php?s=general&p=about> (noting that the *Review* is “published eight times a year, in March, April, May, June, September, October, November, and December”). 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 timespan under consideration, the *Santa Clara Law Review* went from being a Yale-type law review to a Virginia-type law review. Thus, volume 46 of the *Santa Clara Law Review* goes from 2005 to 2006, while volume 47 appeared solely in 2007. Compare *Santa Clara Law Review*, *Title Page*, 46 SANTA CLARA L. REV. [i] (2005) with *Santa Clara Law Review*, *Contents*, 47 SANTA CLARA L. REV. [i] (2007) and *Santa Clara Law Review*, *Contents*, 47 SANTA CLARA L. REV. [xiii] (2007). I looked at its 2005-2006, 2007, and 2008 volumes.

Table 1: Sample Size by Institution (Elite Notes)

Law Review	No. of Notes
Columbia	47
Michigan	38
Northwestern	29
Stanford	18
Virginia	32
Yale	37
	201

Table 2: Sample Size by Institution (Non-Elite Notes)

Law Review	No. of Notes
Chicago-Kent	26
Hofstra	28
Miami	15
Oklahoma	13
Santa Clara	33
West Virginia	34
	149

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 elite and non-elite students. I also look at several particular subjects for student writing: circuit splits; Supreme Court case law; and local issues.

1. Substantive Law

As we saw, one of the central difficulties for law student writers is choosing a topic, inasmuch as few student writers have significant experience in any area of law. This article's overview of student writing begins, accordingly, with a look at the areas of substantive law that students have elected to write on. For this section, I categorized notes according to the major field (or fields) of substantive law addressed in the note. Wherever possible, I tried to pair 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";¹¹⁶ 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."¹¹⁷ If a note seemed to straddle two

¹¹⁶ See Matthew C. Oesterle, Note, *It's as Clear as Mud: A Call to Amend the Federal Trademark Dilution Act of 1995*, 81 CHI.-KENT L. REV. 235 (2006) (proposing exactly what the title suggests it will propose).

¹¹⁷ See Cyrus P. W. Rieck, Note, *How to Deal with Laboratory Reports Under Crawford v. Washington: A Question with No Good Answer*, 62 U. MIAMI L. REV. 839 (2008).

different substantive areas, and attempted to make contributions to both, I placed it under two headings. For instance, a note that analyzed 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.”¹¹⁸ And, if a note seemed to address a completely *sui generis* topic that would be difficult or impossible to imagine fitting 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 unto itself.¹¹⁹

Table 3: Top Ten Subject Areas (Elite Notes)

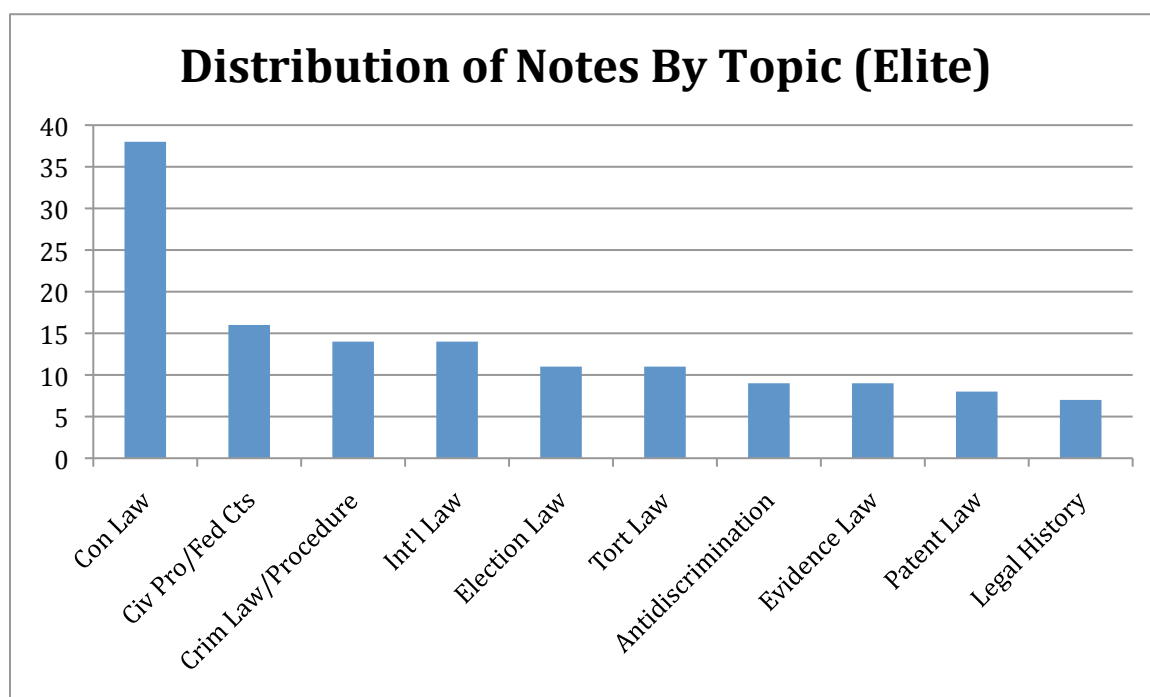
Substantive Area	No. of Notes	
Constitutional Law	38	19%
Civil Procedure/Federal Courts	16	8%
Criminal Law/Criminal Procedure	14	7%
International Law	14	7%
Election Law	11	5.5%
Tort Law	11	5.5%

¹¹⁸ See Scott A. Backus, Note, *Reversing Course on Reverse Payment Settlements in the Pharmaceutical Industry: Has Schering-Plough Created the Blueprint for Defensible Antitrust Violations?*, 60 OKLA. L. REV. 375, 375-79 (2007).

¹¹⁹ See Gabriele Wohl, Note, *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.

Antidiscrimination	9	4.5%
Evidence Law	9	4.5%
Patent Law ¹²⁰	8	4%
Legal History	7	3%
	137	68%

Note: N = 201

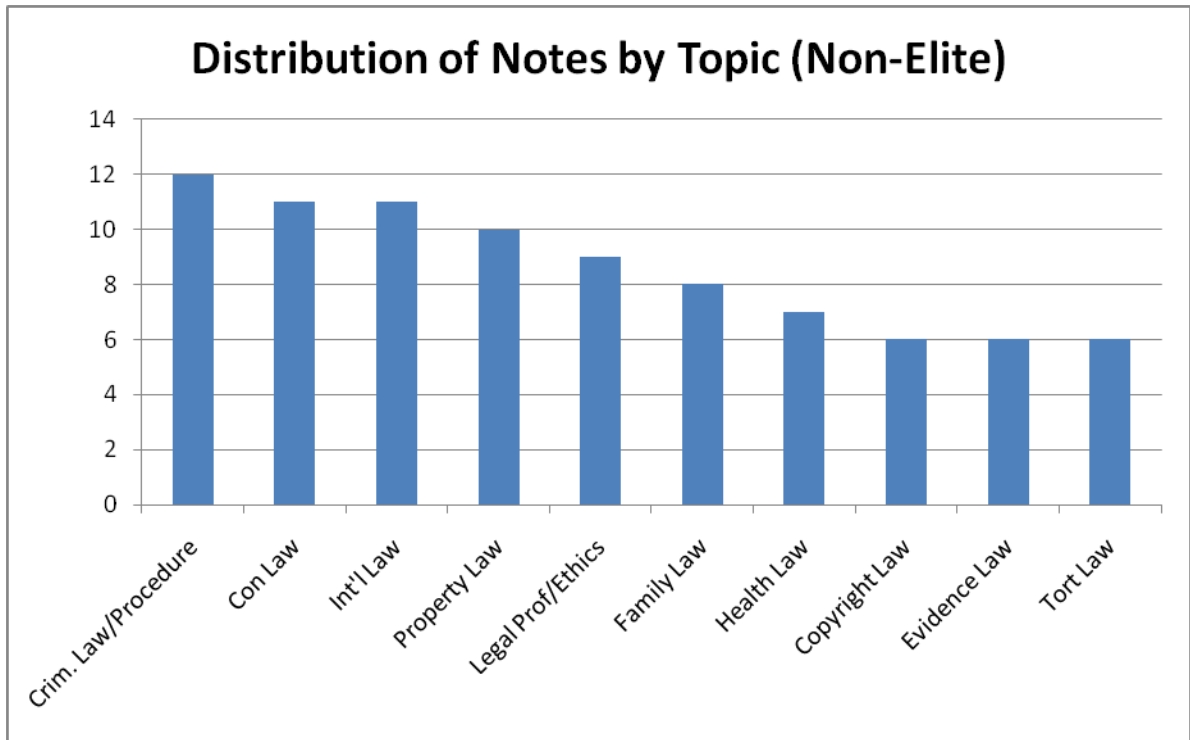


¹²⁰ Patent law, copyright law, and trademark law were each considered as a distinct subject area, rather than as constituents of an undifferentiated “intellectual property” category. This interpretative decision was driven by the fact that these subjects tend to be treated in distinct courses in law school; it was also driven by the notes themselves, which were almost all devoted exclusively to one of those three central areas of intellectual property law. If one instead were to consider all of the IP notes as a group, there would be 13 elite IP notes and 14 non-elite IP notes, rendering it the fifth-most-popular elite subject and the most popular non-elite subject.

Table 4: Top Ten Subject Areas (Non-Elite Notes)

Substantive Area	Number of Notes	
Criminal Law/Criminal Procedure	12	8%
Constitutional Law	11	7.5%
International Law	11	7.5%
Property Law	10	7%
Legal Profession/Legal Ethics	9	6%
Family Law	8	5.5%
Health Law	7	4.5%
Copyright Law	6	4%
Evidence Law	6	4%
Tort Law	6	4%
	86	58%

Note: N = 149



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% of elite students, while no subject whatsoever attracted more than 8% of the non-elite students.

That finding, of course, can be read directly off the tables provided above. In the following pages, I offer remarks on some of the more interesting (and less visible) findings of the survey, which involve areas that were largely ignored by elite students, non-elite students, or both groups.

Favored by Elite Students, Shunned by Non-Elites. The major disparity in subject area choice under this heading 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, which is widely

regarded as essential for students who aspire to clerkships in the federal judiciary. As such, it is perhaps unsurprising that this area attracted the second-most notes among elite students. However, it was almost completely ignored by non-elites. There were zero notes in non-elite law reviews on topics in federal courts, and only a single note on a topic in civil procedure.¹²¹

The disparity in notes on federal courts (which was the subject of eleven 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 doesn't 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-elites and ignored by elites is property law. It was the fourth most-popular subject for non-elite notes, accounting for 7% of the total.¹²² By contrast, only four of the elite notes (2%) were on property law. This disparity becomes more significant when one examines the elite notes on property law 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.¹²³ In other words: If it weren't for property law notes written under the

¹²¹ See Jill Holly, Comment, *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).

¹²² Admittedly, five of the ten non-elite student notes on property law came from a single institution: the *West Virginia Law Review*.

¹²³ 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, Note, *Living History: How*

aegis of Ellickson, there would hardly be any elite property law notes at all. Non-elite notes, by contrast, tended to deal with such central property topics as takings doctrine,¹²⁴ the partition of real property,¹²⁵ and zoning law.¹²⁶ 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 non-elite students—the sixth-most-popular topic, in fact—but was completely ignored by elite students, none of whom wrote on it.

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 during their careers.

Homeowners in a New Local Historic District Negotiate Their Legal Obligations, 116 YALE L. J. 768, 768, 814 (2007) (thanking Ellickson personally for “his extensive comments, assistance, and encouragement,” and conducting empirical research whose “results are consistent with Robert Ellickson’s research on the interplay between law and social norms”); Valerie Jaffee, Note, *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, Comment, *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).

¹²⁴ See, e.g., Jonathan Lahn, Note, *The Use of History in the Supreme Court’s Takings Clause Jurisprudence*, 81 CHI.-KENT L. REV. 1233 (2006); Eric L. Silkwood, Note, *The Downlow of Kelo: How an Expansive Interpretation of the Public Use Clause Has Opened the Floodgates for Eminent Domain Abuse*, 109 W. VA. L. REV. 493 (2006).

¹²⁵ See, e.g., John Mark Huff, Note, *Chop It Up or Sell It Off: An Examination of the Evolution of West Virginia’s Partition Statute*, 111 W. VA. L. REV. 169 (2008).

¹²⁶ See, e.g., Nathan Blackburn, Comment, *Planning Ahead: Consistency with a Comprehensive Land Use Plan Yields Consistent Results for Municipalities*, 60 OKLA. L. REV. 73 (2007).

Ignored by All. 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.¹²⁷ 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 isn’t obviously less attractive as a topic than many of the other things students choose to write about.¹²⁸

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.¹²⁹ 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.¹³⁰ But the

¹²⁷ See David R. Collins, Note, *Shrinkwrap, Clickwrap, and Other Software License Agreements: Litigating a Digital Pig in a Poke in West Virginia*, 111 W. VA. L. REV. 531 (2009); Marlyse McQuillen, Note, *The Development of a Federal CISG Common Law in U.S. Courts: Patterns of Interpretation and Citation*, 61 U. MIAMI L. REV. 509 (2007); Matthew Milikowsky, Note, *A Not Intractable Problem: Reasonable Certainty, Tractebel, And the Problem of Damages for Anticipatory Breach of a Long-Term Contract in a Thin Market*, 108 COLUM. L. REV. 452 (2008).

¹²⁸ 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. A total of fifteen notes in the sample employed that methodology. See *infra* pp. 63-64.

¹²⁹ See Patricia B. Hsue, Note, *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).

¹³⁰ Alternatively, it is possible that law students with an interest in tax choose to send their work to a specialist journal like the *Virginia Tax Review*, which accepts pieces written by students at other institutions. See *Virginia Tax Review, Submissions*, available at <http://www.student.virginia.edu/vtra/submissions/default.html>. However, a closer look at the contents of that journal lends support to the view that tax is simply not a popular area for student authors. For the three-year span that is the subject of this Article, the *Virginia Tax Review* only published a total of *four* student notes; three of them were written by non-Virginia students. See

same could be said of other areas that are much better represented in the sample. Patent law, for instance, is also highly technical, and yet it was substantially better represented. (There were thirteen 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.¹³¹ However, if one includes other topics that fall within the broader penumbra of corporate law, the area as a whole appears better represented.¹³²

Steven Chung, Note, *Real Taxation of Virtual Commerce*, 28 VA. TAX REV. 733, 733 (2008) (stating that the author was an LL.M. in Taxation Candidate at Loyola Law School); Philip Robin Cleary, Note, *Predicting the Taxation of Prediction Markets*, 27 VA. TAX REV. 953, 953 (2008) (stating that the author received a J.D. from Brooklyn Law School); Sarah Pendergraft, Note, *From Human Capital to Capital Gain: The Puzzle of Profits Interests*, 27 VA. TAX REV. 709, 709 (2007) (stating that the author was a Virginia Law School student); Darien Shanske, Note, *Public Tax Dollars for Private Suburban Development: A First Report on a National Phenomenon*, 26 VA. TAX REV. 709 (2006) (stating that the author received a J.D. from Stanford Law School).

It is also possible that some sort of “shunt” effect accounts for the small number of notes in the sample (six) on environmental law, as that discipline also features a number of specialist journals that are open to publishing student work. See, e.g., Stanford Environmental Law Journal, *Article Selection Process*, available at <http://elj.stanford.edu/for-authors/article-selection-process/> (explaining that the *Journal* publishes notes submitted at schools other than Stanford).

¹³¹ For the two elite notes on corporate law, see Benjamin Angelette, Note, *The Revolution that Never Came and the Revolution Coming—De Lasteyrie du Salliant, Marks & Spencer, Sevic Systems and the Changing Corporate Law in Europe*, 92 VA. L. REV. 1189, 1189-92 (2006) (looking at a trio of European Court of Justice decisions that “liberalized” the “real seat doctrine” of corporate law in Europe); J. Russel Denton, Note, *Stacked Deck: Go-Shops and Auction Theory*, 60 STAN. L. REV. 1529 (2008) (offering an “auction theory” treatment of “go-shop provisions”). For the three non-elite corporate law notes, see Heather Flanagan, Note, *The Difficulty of a Plaintiff’s Playground Being Truly “Open for Business”: An Overview of West Virginia’s Corporate Law Governing Derivative Lawsuits*, 110 W. VA. L. REV. 883 (2008); J. Jarrod Jordan, Note, *Piercing the Corporate Veil in West Virginia: The Extension of Laya to All Sophisticated Corporate Entities*, 109 W. VA. L. REV. 141 (2006); Gariel Nahoum, Note, *Small Cap Companies and the Diamond in the Rough Theory: Dispelling the IPO Myth and Following the Regulation A and Reverse Merger Examples*, 35 HOFSTRA L. REV. 1865 (2007).

¹³² For instance, there were four notes on securities law, which I counted as a distinct field from corporate law. See Michael G. Capeci, Note, *SEC Rule 10B5-2: A Call for Revitalizing the Commission’s Efforts in the War on Insider Trading*, 37 HOFSTRA L. REV. 805 (2009); Ariella Gasner, Note, *Your Death: The Royal Flush of Wall Street’s Gamble*, 37 HOFSTRA L. REV. 599 (2008); Joshua Hess, Note, *How Arbitrary Really Was the S.E.C.’s “Hedge Fund Rule”? The Future of Hedge Fund Regulation in Light of Goldstein, Amaranth Advisors, and Beyond*, 110 W. VA. L. REV. 913 (2008); Michael A. Rabkin,

Another subject that is relatively underrepresented, given its importance, is administrative law. Only five notes dealt with that area.¹³³ This may be considered surprising, inasmuch as it seems likely that many more law students will pursue careers that will force them to grapple with administrative law than, say, wills and trusts (to pick a topic that attracted basically as many student writers as administrative law).¹³⁴

One conclusion that may be drawn from the relative absence of notes in these central areas is that students, in their selection of a topic to write on, are not strongly influenced by considerations of the work they intend (or hope) to do in their future legal careers. Consider that contract law, tax law, corporate law, and administrative law *combined* were the subject of fourteen notes. Compare that to the representation of international law, which was itself the subject of *twenty-five* notes. It's hard to imagine that many American law students will pursue a career that doesn't involve at least one of the former subjects in a significant way. By

Comment, *When Consumer Fraud Crosses the International Line: The Basis for Extraterritorial Jurisdiction Under the FTC Act*, 101 NW. U. L. REV. 203 (2007).

¹³³ Four were in elite law reviews, and one in a non-elite law review. See Christopher Cumings, Comment, *Judicial Iron Triangles: The Roadless Rule to Nowhere—And What Can Be Done to Free the Forest Service's Rulemaking Process*, 61 OKLA. L. REV. 801 (2008); Jon Donenberg, Note, *Medicaid and Beneficiary Enforcement: Maintaining State Compliance with Federal Availability Requirements*, 117 YALE L. J. 1498 (2008); Matthew Einbinder, Note, *Information Markets: Using Market Predictions to Make Administrative Decisions*, 92 VA. L. REV. 149 (2006); Doug Geyser, Note, *Courts Still "Say What the Law Is": Explaining the Functions of the Judiciary and Agencies After Brand X*, 106 COLUM. L. REV. 2129 (2006); Daniel P. Rathbun, Note, *Irrelevant Oversight: "Presidential Administration" from the Standpoint of Arbitrary and Capricious Review*, 107 MICH. L. REV. 643 (2009).

¹³⁴ To be precise, there were four notes on wills and trusts. See Sarabeth A. Rayho, Note, *Divorcees Turn About in Their Graves as Ex-Spouses Cash In: Codified Constructive Trusts Ensure an Equitable Result Regarding ERISA-Governed Employee Benefit Plans*, 106 MICH. L. REV. 373 (2007); Laurel Sevier, Comment, *Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California's Mentally Ill Slayes*, 47 SANTA CLARA L. REV. 379 (2007); Carissa R. Trast, Note, *You Can't Choose Your Parents: Why Children Raised by Same-Sex Couples Are Entitled to Inheritance Rights from Both Their Parents*, 35 HOFSTRA L. REV. 857 (2006); Benjamin C. Wolf, Note, *Resolving the Conflict Between Jewish and Secular Estate Law*, 37 HOFSTRA L. REV. 1171 (2009).

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 students 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, e.g., the constitutional right to an abortion, why would anyone turn to a student author's work on the same subject?¹³⁵

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, Meeker regards them as the most natural of subjects (and, not incidentally, one of the easiest topics to come across through the application of mechanical procedures).¹³⁶ Fajans and Falk have less to say on the subject, noting only that a note addressing “a ‘split’ among the United States

¹³⁵ This is not to say that student authors may not have compelling reasons to choose a topic like “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 on the same topic. 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 for any such area they could just as well consult an article written by a prominent constitutional law scholar?

¹³⁶ See *supra* notes 73-76 and accompanying text.

Circuit Courts of Appeals” is the “classic example” of a work addressing “disputes about law.”¹³⁷ They encourage students to “think creatively” about splits—suggesting, for instance, that students also look to “conflicts among state courts” when considering such a topic—but don’t attempt to dissuade students from doing this kind of work.¹³⁸

Having listened to the advisors, let’s see what the students have actually been doing:

Table 5: 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%)

¹³⁷ FAJANS & FALK, *supra* note 18, at 15.

¹³⁸ *Id.*

Table 6: 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% of elite notes, and 10% of non-elite notes, dealt with a circuit split.¹³⁹

The most interesting aspect of this finding is the *uniformity* between the representation of circuit splits as a topic in elite and non-elite law reviews. One might have thought that elite students would regard “tracking a circuit split” as a banal task. Alternatively, one might have thought that non-elite students would be less capable of generating their own scholarly ideas, and thus would be compelled to rely on circuit splits as a crutch more often.¹⁴⁰ In fact, however, elite and non-elite law students turn to circuit splits as a topic with near-equal frequency.

¹³⁹ In total, 16 out of 201 elite notes analyzed a circuit split, compared to 15 out of 149 non-elite notes. 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, $\chi^2(1, N=350) = 0.47, p = .49$.

¹⁴⁰ I, of course, would never hold such a cliched view of law students at any level; these thoughts are strictly presented as things “one” might have believed, if one were inclined to stereotype law students based on the status of their institution.

Without a baseline against which to compare 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.¹⁴¹ It is possible that the data indicate that most law students have consciously decided that writing on circuit splits is a poor idea (or that law review editorial boards have largely decided that notes on circuit splits are “unpublishable”), perhaps influenced by the cautionary advice offered by Volokh. 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.

3. Supreme Court Jurisprudence

In an attempt to get a broader picture of what law students were writing about, I looked at whether the notes included any extensive discussion of Supreme Court jurisprudence. It perhaps goes without saying that, for many law students, the Supreme Court is a locus of endless fascination.¹⁴² It is thus possible that the Supreme Court may exercise a magnetic influence on students’ choices of topic. It may be the case that students assume that writing about Supreme Court opinions is a means of ensuring that their work will be on an “important” subject. It may also

¹⁴¹ In a future project, I hope to compare the sample of notes examined in this article with samples of notes written in earlier decades.

¹⁴² Of course, it isn’t 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 powerful professional motivations for paying close attention to what the Court does.

be the case that this assumption draws students away from areas where the Supreme Court has little to say (e.g., contract law) and toward areas where the Supreme Court's pontifications are more central (e.g., constitutional law).

In some areas, of course, paying heed to Supreme Court opinions is unavoidable. To pick 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, well, Supreme Court jurisprudence.¹⁴³ There are also wide areas of the legal landscape which cannot adequately be treated without consideration of the Supreme Court precedents that shape the field.¹⁴⁴ 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.¹⁴⁵ 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 wouldn't need to delve into (U.S.) Supreme Court decisions.

For this portion of the analysis, then, I looked at whether notes included an overview of Supreme Court jurisprudence in any area. A note had to offer at least a

¹⁴³ Examples abound; see, e.g., Tyler Welti, Note, *Massachusetts v. EPA's Regulatory Interest Theory: A Victory for the Climate, Not Public Law Plaintiffs*, 94 VA. L. REV. 1751 (2008) (offering an extensive analysis of the Supreme Court's standing doctrine, centering on the Court's then-recent *Massachusetts* decision).

¹⁴⁴ Examples also abound; see, e.g., Scott C. Wilcox, Note, *Secondhand Smoke Signals from Prison*, 105 MICH. L. REV. 2081, 2087-89 (2007) (arguing that it is a violation of the Eighth Amendment for prisoners to be forced to breathe in secondhand smoke, and looking at a Supreme Court case that interprets the Eighth Amendment to prohibit the "deliberate indifference of prison officials to a serious risk of harm" posed by such smoke).

¹⁴⁵ See, e.g., basically any casebook on these subjects.

page of in-depth analysis of one Supreme Court opinion, or at least two pages of analysis of a line of Supreme Court cases, to be included in this category.

Table 7: Notes Considering Supreme Court Jurisprudence (Elite Notes)

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

Table 8: Notes Considering Supreme Court Jurisprudence (Non-Elite Notes)

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

66% of all elite notes included a close consideration of Supreme Court jurisprudence, while only 42% 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.¹⁴⁶

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.¹⁴⁷ It is unclear what significance, if any, this datum has. However, it may be taken to suggest that Volokh’s views about the true purpose of the note resonate with elite law students more than non-elite ones.¹⁴⁸ 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 entirely necessary for the note itself, on the not-improbable view that federal judges will gravitate to writing samples that analyze Supreme Court precedents.¹⁴⁹

¹⁴⁶ One interesting line of inquiry would be to compare the percentage of notes that focused on Supreme Court cases to the percentage of law review articles by professors that did the same over this period of time. I haven’t done that.

¹⁴⁷ This difference is highly significant, $\chi^2 = 20.92$, $p < .001$.

¹⁴⁸ 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 is not uncommon among ambitious elite law students, at the very least. (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 to them by an “authoritative” source such as Volokh’s book.) To the extent that this finding is indicative of support for a Volokhian “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 students.

¹⁴⁹ Since law review articles tend to be such baggy monsters, it’s somewhat difficult to look at any given note and clearly identify a section that “doesn’t belong,” but has been shoehorned in for instrumentalist reasons. For one possible example of this phenomenon, see Katherine Twomey, Note, *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 part to discussion of several notorious 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

4. Local Issues

The final category I considered was the question of “localism.” I was interested in learning 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 was essential to address a problem that wasn’t “merely parochial.”¹⁵⁰ Volokh, for instance, explicitly discourages student authors from addressing local topics: he writes that because articles “focusing on a single state’s law” will generally be “useful only to people in that state,” students should not “limit” themselves in that way.¹⁵¹ Instead, he instructs students to find states with “similar laws” and frame their work as a “general discussion” of “laws of [that] sort.”¹⁵²

detention centers under the Equal Protection Clause or the Due Process Clause”) (where “it is not likely” is a mild way indeed of making an observation that could instead 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”).

¹⁵⁰ At this point, I should confess to a certain bias (if the bias isn’t already obvious). I see no reason why law students should not be writing on issues of purely “local” concern. (No *scholarly* reason, anyway.) Areas such as municipal law and housing law, though little explored in the note sample, could be profitably treated by student authors. Inasmuch as students are deterred from working in these areas by prevailing assumptions that student notes should avoid being “parochial” or “limited in scope,” those assumptions strike me as unfortunate.

¹⁵¹ VOLOKH, *supra* note 21, at 35.

¹⁵² *Id.* This is yet another example of Volokh’s incoherent approach to “usefulness.” After all, it is presumably the case that an article that directly addresses a specific state law in, e.g., West Virginia will 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 laws that are of the same “sort” as the particular law he’s interested in. 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 much less likely to appeal to the “broad spectrum” of judges the clerkship applicant is meant to have in mind as a potential audience.)

By “local,” I refer to a note that centers explicitly on an issue of state or local law. Such notes might examine a state statute,¹⁵³ or compare aspects of one state’s law with that of another,¹⁵⁴ or examine a line of state court cases.¹⁵⁵ Such a note might also examine a single county or city, though notes zeroing in on governmental entities at that level are rare indeed.

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.”¹⁵⁶ Such a hypothesis is strongly supported by the evidence, as the following tables demonstrate:

Table 9: Notes Centering on Local Issues (Elite Notes)

Law Review	No. of Notes
Columbia	0
Michigan	0
Northwestern	1

¹⁵³ See, e.g., Laurel Sevier, Comment, *Kooky Collects: How the Conflict Between Law and Psychiatry Grants Inheritance Rights to California’s Mentally Ill Slayers*, 47 SANTA CLARA L. REV. 379 (2007).

¹⁵⁴ See, e.g., Christian B. Hennion, Note, *Home Sweet Home? What Massachusetts Can Tell Us About the Prospects for the Illinois Affordable Housing Planning and Appeal Act*, 81 CHI.-KENT L. REV. 679 (2006).

¹⁵⁵ See, e.g., Mary Claire Johnson, Note, *“I Will Not Divulge”: How to Resolve the “Mass of Legal Confusion” Surrounding the Physician-Patient Relationship in West Virginia*, 110 W. VA. L. REV. 1231 (2008).

¹⁵⁶ For an article that uses these terms in a standard sense, while also supplying data on the kinds of students who typically attend each type of institution, see, e.g., 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).

Stanford	0
Virginia	0
Yale	2

Table 10: Notes Centering on Local Issues (Non-Elite Notes)

Law Review	No. of Notes
Chicago-Kent	2
Hofstra	0
Miami	4
Oklahoma	6
Santa Clara	4
West Virginia	21

As these tables make clear, there is a glaring disparity between the willingness of elite and non-elite students to attend to local issues. Only 1.5% of elite notes addressed local issues, while 25% of non-elite notes did so.¹⁵⁷ The disparity becomes even sharper when one observes that we have already

¹⁵⁷ Obviously, a huge percentage of the non-elite “local” notes came from just one law review, West Virginia’s. Among other things, this suggests that the category of “non-elite law review” is a crude one, which could be broken down into (at least) two sub-groups: non-elite law reviews that model themselves on elite 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: 62% 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).

encountered the three elite notes on local issues: they are the Robert Ellickson-inspired studies of local communities and property law that were considered above in the discussion of substantive law choices.¹⁵⁸ With the exception of that very specific subset of notes, *no* elite writers deigned to focus their attention on merely local concerns.¹⁵⁹

This finding could be interpreted in a number of ways. It may be that there no elite notes on local issues because elite students don't care about "parochial" problems.¹⁶⁰ 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, but that their law reviews decline to publish such work as "notes," on the assumption that notes must pertain to topics of "broader" interest.

C. How Are Students Writing?

Having looked at *what* law students choose to write about, we can now turn to a consideration of *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 fact, this is the most insistent message

¹⁵⁸ See *supra* note 123 and accompanying text.

¹⁵⁹ The difference in the distribution of notes examining local issues is highly statistically significant, $\chi^2 = 46.05, p < .001$.

¹⁶⁰ The evidence of the Ellicksonian elite notes on local communities, at least, suggests that elite law students *can* 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.

offered by the guides to student writing: each of the three guides strongly encourages students to produce scholarship of this type. 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 question of prescriptivism, and see whether law students have chosen to adopt the normative tack which the guidebooks tell them is essential to a "good" note.

1. Methodology

The notes in the sample were categorized as falling into one of four categories: doctrinal; policy; doctrinal/policy; and "anything else." The doctrinal note is one that strictly looks at case law: what Richard Delgado has termed the "case cruncher."¹⁶¹ 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 methodological approach (such as law and economics).¹⁶² "Doctrinal/policy" notes are exactly what they sound like: a blend of doctrinal

¹⁶¹ See Delgado, *supra* note 11, at 446.

¹⁶² In some ways, this was a negative category: I used this term to designate notes that didn't do any substantive doctrinal analysis, but which also didn't employ any other significant methodological approach (e.g. law and economics, or empirical research, or history). A less charitable way of characterizing this type of note is offered by Paul Campos, who speaks of how the "vision of law as 'policy science' remains little more than a series of hopeful guesses, a pseudo-science conducted with much bravado but little real data and no valid method of experimentation." PAUL CAMPOS, JURISMANIA: THE MADNESS OF AMERICAN LAW 95 (1998).

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 a number of other approaches.¹⁶³

Table 11: Distribution of Methodological Choices (Elite Notes)

	Doctrinal	Policy	Doctrinal/Policy	“Anything Else”
Stanford	3	2	2	11
Yale	2	6	13	16
Columbia	12	2	29	4
Michigan	13	3	17	5
Northwestern	5	3	18	3
UVA	8	0	10	14
	43 (22%)	16 (8%)	89 (44%)	53 (26%)

¹⁶³ 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.” For an example of this kind of note, see, e.g., Mollie Lee, Note, *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).

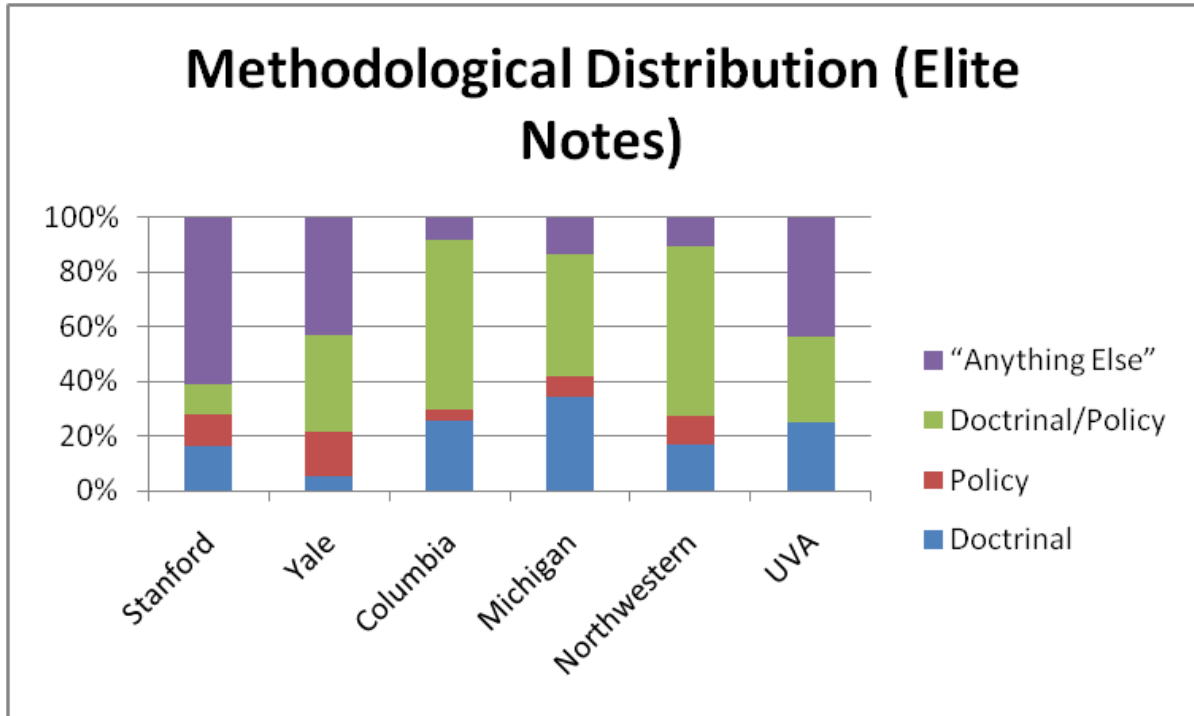
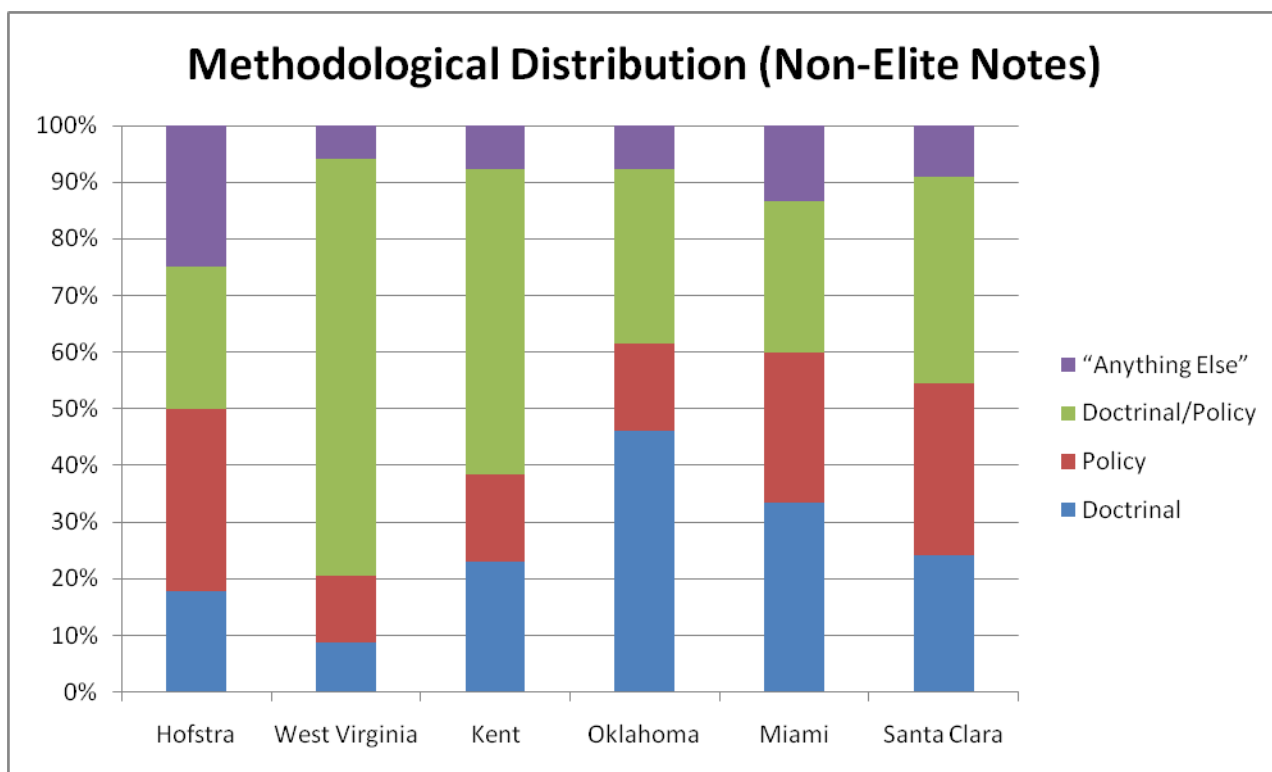


Table 12: Distribution of Methodological Choices (Non-Elite Notes)

	Doctrinal	Policy	Doctrinal/Policy	"Anything Else"
Hofstra	5	9	7	7
West Virginia	3	4	25	2
Kent	6	4	14	2
Oklahoma	6	2	4	1
Miami	5	4	4	2
Santa Clara	8	10	12	3
	33 (22%)	33 (22%)	66 (44%)	17 (11%)



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 numbers 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 elite and non-elite students; about one in five students from each group elected that approach.

It is interesting, however, to observe both 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 such notes. Elite law reviews appear to be more hospitable to such work than non-elite law reviews. A quarter of elite student notes turned their back on convention and

adopted a non-standard methodological approach; only 11% of non-elite 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, or with any of the non-elite law reviews.

Classification of Non-Standard Notes. Only seventeen of the non-elite 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 in legal history. None of the non-elite 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,¹⁶⁴ narrative,¹⁶⁵ and even music theory.¹⁶⁶

By contrast, fifty-three of the elite notes fell into the “anything else” category. Of those, history was the most popular methodology: sixteen of the notes were classified as legal history.¹⁶⁷ Law and economics was the second-most-popular methodology, constituting twelve of the elite notes. Comparative law only accounted for four elite notes. Eleven of the notes included original empirical

¹⁶⁴ See Amanda J. Albert, Note, *The Use of Mackinnon’s Dominance Feminism to Evaluate and Effectuate the Advancement of Women Lawyers as Leaders Within Large Law Firms*, 35 HOFSTRA L. REV. 291 (2006).

¹⁶⁵ See Luke A. Boso, Note, *The Unjust Exclusion of Gay Sperm Donors: Litigation Strategies to End Discrimination in the Gene Pool*, 110 W. VA. L. REV. 843, 849-53 (2008) (using “storytelling” to “frame” the note’s analytic concerns).

¹⁶⁶ See Jeffrey Cadwell, Comment, *Expert Testimony, Scènes À Faire, and Tonal Music: A (Not So) New Test for Infringement*, 46 SANTA CLARA L. REV. 137, 153-57 (2005) (offering a five-page “primer on tonal music theory” to undergird its approach to copyright infringement in musical works).

¹⁶⁷ This approach was highly favored by the *Virginia Law Review* in particular, which contributed seven legal history notes to the sample.

research. The other ten notes employed a variety of approaches, drawing on such disparate fields as game theory,¹⁶⁸ “pain theory,”¹⁶⁹ and rhetorical analysis.¹⁷⁰

Analysis. Non-elite law students appear to favor conventional methodologies more than elite law students do. One possible explanation for this is that a higher percentage of elite law students receive graduate training in other disciplines prior to law school, and thus feel themselves more capable of doing advanced interdisciplinary work.¹⁷¹ Another possibility is that non-elite law students are less likely to have their own opinions about what legal scholarship can (or should) be, and are thus more willing to accept the prescriptions about doctrinal/policy work found in the leading guidebooks. Yet another possibility is that non-elite law students are actually writing more unconventional notes than is reflected in the sample, but that non-elite law reviews (and their student-run note selection boards)

¹⁶⁸ See Matthew D. Fortney, Comment, *Devolving Control Over Mildly Contaminated Property: The Local Cleanup Program*, 100 NW. U. L. REV. 1863, 1882-85 (2006) (developing a game theoretic model to explain the necessity of a new kind of environmental cleanup program).

¹⁶⁹ See Martin V. Totaro, Note, *Modernizing the Critique of Per Diem Pain and Suffering Damages*, 92 VA. L. REV. 289, 291 (2006) (using “current pain theory” and the “teachings of medical science and psychology” to create a fresh perspective on tort law).

¹⁷⁰ See Rebecca E. Ivey, Note, *Destabilizing Discourses: Blocking and Exploiting a New Discourse at Work in Gonzales v. Carhart*, 94 VA. L. REV. 1451 (2008).

¹⁷¹ I didn’t attempt any thorough analysis of this, as it isn’t always easy to tell whether a student author has an advanced degree other than a J.D. (Some law reviews—e.g. Yale’s—conventionally offer an introductory paragraph in which the reader is given biographical information about the note’s author, including educational pedigree. Other law reviews—e.g. Oklahoma’s—do not.) I attempted a quick comparison of two of the law reviews that *do* provide biographical data about student authors in the note itself. Eleven of the Yale student authors (30%) claimed to have graduate degrees other than a J.D.; five of those eleven attempted something other than doctrinal/policy work. See Heuer, *supra* note 123; Jaffee, *supra* note 123; Rudy Kleysteuber, Note, *Tenant Screening Thirty Years Later: A Statutory Proposal to Protect Public Records*, 116 YALE L. J. 1344 (2007); Lee, *supra* note 163; Stratos Pahis, Note, *Corruption in Our Courts: What It Looks Like and Where It Is Hidden*, 118 YALE L. J. 1900 (2009). By contrast, only two of the Chicago-Kent authors (8%) made such a claim; both of those authors stuck to standard doctrinal/policy work, however. See John G. New, Note, *“Aren’t You Lucky You Have Two Mamas?”: Redefining Parenthood in Light of Evolving Reproductive Technologies and Social Change*, 81 CHI.-KENT L. REV. 773 (2006); Oesterle, *supra* note 116. However, the Chicago-Kent students, as a group, didn’t adhere to any fixed convention in their biographical entries; many of them didn’t even name the school where they did their undergraduate work, a lapse of which no Yale author was guilty.

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,” they need to include a prescriptive element in their work, and cautions them that readers will dismiss their work with the question “So what?” if they hew to the “merely” descriptive.¹⁷² Fajans and Falk announce that “normative/prescriptive” work is the “core” of legal scholarship, and warn students that “purely descriptive or interpretive” notes will “rarely be successful.”¹⁷³ 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 general; one court in particular; Congress; an administrative agency; a foreign country—that they needed to do anything, I counted it as a “prescriptive” note. As the following tables suggest, a substantial majority of law students—though by no means all of them—felt that it was necessary to be prescriptive:

¹⁷² See *supra* notes 43-45 and accompanying text.

¹⁷³ See *supra* notes 94-95 and accompanying text.

Table 13: Prescriptivism (Elite Notes)

Law Review	No. of Notes
Columbia	41 (87%)
Michigan	28 (74%)
Northwestern	26 (90%)
Stanford	11 (61%)
Virginia	19 (59%)
Yale	30 (81%)

Table 14: Prescriptivism (Non-Elite Notes)

Law Review	No. of Notes
Chicago-Kent	19 (73%)
Hofstra	22 (79%)
Miami	9 (60%)
Oklahoma	9 (69%)
Santa Clara	33 (100%)
West Virginia	27 (79%)

Overall, 77% of elite notes included a prescriptive proposal, while 80% of non-elite notes did so.¹⁷⁴ This is to say that of the 350 notes considered in this study, 274 instructed some group of decisionmakers on what they needed to do.¹⁷⁵ 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.¹⁷⁶ The Supreme Court was singled out less often: only 8 elite notes and 9 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 37 notes: 13 elite notes, 22 non-elite. Federal

¹⁷⁴ One reason that the percentage of prescriptive non-elite notes is so high is that *every single* 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.” See, e.g., Eric Lloyd, Comment, *Making Civil Rico “Suave”: Congress Must Act to Ensure Consistent Judicial Interpretations of the Racketeer Influenced and Corrupt Organizations Act*, 47 SANTA CLARA L. REV. 123 (2007). Given this uniformity, I presume that this rubric is mandatory for Santa Clara students who wish to publish a note. (I can only “presume” about this, 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 very title of the piece—still includes the seemingly mandatory part offering “identification of the problem.” See, e.g., Holly, *supra* note 121, 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 each and every note produces even more bizarre results. Perhaps the strangest note in the Santa Clara sample is one which 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, Comment, *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).

¹⁷⁵ 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 decisionmakers 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).

¹⁷⁶ Non-elite 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, Note, *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 about condemnation proceedings).

agencies received their fair share of advice as well: among the agencies given instruction on what to do were the Food and Drug Administration,¹⁷⁷ the Federal Communication Commission,¹⁷⁸ and the Securities and Exchange Commission.¹⁷⁹ Addressees who were, perhaps, even less likely to take heed of proposals made by American law students included the European Union,¹⁸⁰ Hamas,¹⁸¹ the Chinese government,¹⁸² the World Trade Organization,¹⁸³ and “emerging democracies” that are looking to design “constitution-drafting processes.”¹⁸⁴

In addition to considering prescriptivism, I categorized notes according to whether they sought to identify a “problem” that needed to be solved. 83% of elite notes, and 88% of non-elite notes, took that “problem-based” approach.¹⁸⁵ 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

¹⁷⁷ Three notes offered prescriptive advice to the FDA. *See, e.g.*, Karen Baswell, Note, *Time for a Change: Why the FDA Should Require Greater Disclosure of Differences of Opinion on the Safety and Efficacy of Approved Drugs*, 35 HOFSTRA L. REV. 1799 (2007).

¹⁷⁸ Three notes offered prescriptive advice to the FCC. *See, e.g.*, Peter DiCola, Note, *Choosing Between the Necessity and Public Interest Standards in FCC Review of Media Ownership Rules*, 106 MICH. L. REV. 101 (2007).

¹⁷⁹ Two notes offered prescriptive advice to the SEC. *See, e.g.*, Joshua Hess, Note, *How Arbitrary Really Was the S.E.C.’s “Hedge Fund Rule”? The Future of Hedge Fund Regulation in Light of Goldstein, Amaranth Advisors, and Beyond*, 110 W. VA. L. REV. 913 (2008).

¹⁸⁰ *See* Rebecca E. Boon, Note, *They Killed Her for Going Out with Boys: Honor Killings in Turkey in Light of Turkey’s Accession to the European Union and Lessons for Iraq*, 35 HOFSTRA L. REV. 815 (2007).

¹⁸¹ *See* Amy Chiang, Note, *An International and Islamic Perspective of Hamas*, 83 CHI.-KENT L. REV. 1021 (2008).

¹⁸² *See* Melissa S. Hung, Comment, *Obstacles to Self-Actualization in Chinese Legal Practice*, 48 SANTA CLARA L. REV. 213 (2008); Wang, *supra* note 174.

¹⁸³ *See* Suzanne Bermann, Note, *Ec-Hormones and the Case for an Express WTO Postretaliation Procedure*, 107 COLUM. L. REV. 131 (2007).

¹⁸⁴ *See* Alicia L. Bannon, Note, *Designing a Constitution-Drafting Process: Lessons from Kenya*, 116 YALE L. J. 1824 (2007).

¹⁸⁵ That is, 166 of the 201 elite notes, and 131 of the 149 non-elite notes.

category), though the author did not feel the need to propose a prescriptive solution of his own.¹⁸⁶ There were also notes that adopted a prescriptive approach, even though the author had not identified a current problem that needed fixing.¹⁸⁷

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 (“You must do the following, [group of decisionmakers who may or may not pay any attention to law reviews, much less student notes]!”) doesn’t hold much appeal for me. Instead, I’ll 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, let’s 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 is presumably not unaware of my own inclinations and biases.) We’ve seen the first of these over and over again: it is the ostensible view propounded by the guides, which constantly hammer home

¹⁸⁶ See, e.g., Andrew Carlon, Note, *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).

¹⁸⁷ This is a rarer phenomenon, but examples do exist. See, e.g., Timothy A. Johnson, *Sentencing Organizations After Booker*, Note, 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 didn’t need to be fixed, the Supreme Court having correctly provided courts with “pragmatic flexibility” on the relevant question).

the claim that notes must be “useful” to some readership. We’ve also seen the second of these. It is, on 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 haven’t really seen the third theory at all. I’ll attempt to explain what I mean by it, but before doing so I want to offer a few last observations about the other two theories.

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’ve seen, however, this theory relies for its plausibility on the repeated invocation of a few magic words (“interesting,” “useful”) whose content is never quite supplied. But in the absence of any evidence about *who* in the profession is actually reading notes and *what* they are being used for, this theory, for all its superficial allure, must be regarded as vacuous.¹⁸⁸

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

¹⁸⁸ 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 21, 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 very 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’s the case that only a handful of other scholars have written on the topic of student notes, and I felt it necessary to throw in a cite to X in order 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.

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 for him to do so. It doesn't rely on vague, unsubstantiated assertions about how the profession as a whole is "relying" on student scholarship. Indeed, on 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 that are 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.¹⁸⁹

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 as a whole or the individual student's future 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.¹⁹⁰ This is not a

¹⁸⁹ Of course, we don't exactly know *how* notes are serving their apparent instrumentalist ends. Even in the case of clerkship applications, for instance, it isn't clear that judges always read the writing samples that are an inevitable component of the application. From speaking to current and former students who have experienced both sides of the clerkship application process (i.e., students who have gone off to interviews prepared to discuss their writing sample at length, as well as those who, having become clerks, have found themselves on the other side of the desk, interviewing hopeful supplicants), my impression is that some judges don't care about writing samples at all; some only glance at the samples, but leave the reading of them (and the "quizzing applicants on them") to their clerks; and some actually plow through them, at least for a few favored candidates.

¹⁹⁰ I don't mean to sound starry-eyed about the purity of the academic enterprise, nor will I bother assembling a footnote full of shallow references to notable descriptions of the scholarly vocation in Western thought. Instead, I'll simply suggest that "notional usefulness to a professional audience"

vision of scholarship that one sees much of in the student guides to “academic writing.”¹⁹¹ It is, however, a possible theory of the note: the theory that I’m 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 that they themselves 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 seemed most appropriate to them.

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 don’t tend 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 particularly excited about any aspect of the law, and who therefore requires extrinsic devices to expose him to a “problem” that he can proceed to “solve” in one of the expected ways. In defense of the guides, it might be said that they aren’t 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

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.

¹⁹¹ The only place it really surfaces, in fact, is in Ruthann Robson’s brief critique of the guides. See *supra* note 26.

merely trying to help students make the best of a bad situation. I think there's 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'm describing may be all very well for *some* settings, but is unimaginable as a general regime for producing acceptable student legal scholarship.¹⁹² It may be said that students are indeed frequently passionate about one or more areas of the law, but that translating that passion into adequate scholarship is, by and large, beyond them. I'm 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 don't exhibit those useful features.

But, as I keep saying, we simply do not know how the profession uses student

¹⁹² 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 that 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 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 law reviews; many of the notes published in elite law reviews were formulaic or intellectually dubious. Of course, it's 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's also possible that some of the authors of "formulaic or dubious" elite notes would have produced even worse work if they had been left to their own devices.

scholarship, assuming that the profession does in fact use it in any serious way.

And, because we don't know that, we cannot know that embracing the scholarly theory of notes would lead to the production of worse notes than we currently have.