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**LAW STUDENTS AS LEGAL SCHOLARS:
AN ESSAY/REVIEW OF *SCHOLARLY WRITING FOR
LAW STUDENTS*¹ AND *ACADEMIC LEGAL WRITING*²**

*Ruthann Robson**

I. INTRODUCTION

Legal education trains students to be professionals rather than scholars. Legal writing connotes professional writing: objective memos, appellate advocacy briefs, transactional documents such as wills and contracts, and client letters.³ Although there has been some recent change,⁴ law student “scholarship” has traditionally been relegated to a tiny fraction of students, often considered to be “the elite” who have “made” law review. Although upper division seminars in law schools may require papers, experiences differ widely because in those courses the focus is substantive coverage, not writing.⁵

Law students uninterested in scholarship are mystified by their colleagues who willingly engage in such a burdensome endeavor. “You’d have to be crazy,” I’ve heard more than one student re-

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¹ ELIZABETH FAJANS & MARY FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS* (2d ed. 2000).

² EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS* (2003).

³ The ABA Standards for Legal Education, Standard 302, entitled “Curriculum,” provides that “All students in a J.D. program shall receive (1) instruction in the substantive law, values and skills (including legal analysis and reasoning, legal research, problem solving and oral and written communication) generally regarded as necessary to effective and responsible participation in the legal profession.” ABA, *Standards for Legal Education*, available at <http://www.abanet.org/legaled/standards/standards.html>.

⁴ The ABA recently amended Standard 302 in 2003 to include “at least one additional rigorous writing experience after the first year,” in addition to “substantial legal writing instruction, including at least one rigorous writing experience in the first year.” *Id.* at Standard 302(a)(2).

⁵ See Lissa Griffin, *Teaching Upperclass Writing: Everything You Always Wanted to Know But Were Afraid to Ask*, 34 GONZ. L. REV. 45 (1998/99), for a discussion about structuring a rigorous upper-division writing course.

mark. Although there may be some tangible rewards—a published law review note or comment can open the door to a judicial clerkship—legal scholarship requires a great deal of work that can be both overwhelming and tedious.

Yet for students attracted to scholarship, the experience is often the highlight of their legal education. It provides an opportunity for expression that is unparalleled in the law school curriculum. For those students whose interests do not precisely track their classroom endeavors, the chance to devote their energies to their particular interest can be rewarding beyond measure. Other students crave the opportunity to explore an issue to a depth that the curriculum cannot offer. For students alienated by their legal education, by certain theoretical perspectives, or by specific doctrines, engaging in legal scholarship can provide a chance to argue their points of view. And for a few students who come from writing backgrounds, the scholarship experience allows them to have the joy of tangible evidence of their engagement with the law. There are students for whom nothing can compare to the heft of fifty manuscript pages with their name as author, and publication can be akin to nirvana.

Two books seek to assist law students with achieving, if not nirvana, then at least the production of solid works of student scholarship. *Scholarly Writing for Law Students*, its second edition published in 2000, is authored by Elizabeth Fajans and Mary Falk, associate professors of legal writing at Brooklyn Law School.⁶ The newer entry into this small field is *Academic Legal Writing*, published in 2003, and authored by UCLA Professor of Law Eugene Volokh.⁷ Both books are valuable resources for law students—and law faculty directing law students—engaged in legal scholarship.⁸

This essay/review of *Scholarly Writing for Law Students* and *Academic Legal Writing* seeks to compare these two books in light of my own experiences, both as a law student scholar many years ago⁹ and as a faculty advisor to many student scholarship projects in the

⁶ FAJANS & FALK, *supra* note 1. See David S. Romantz, *A Review of the Second Edition of Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers*, 30 STETSON L. REV. 611 (2000), for a previous review of this edition.

⁷ VOLOKH, *supra* note 2.

⁸ For other sources on legal scholarship, see Mary Beth Beazley & Linda Edwards, *The Process and the Product: A Bibliography of Scholarship About Legal Scholarship*, 49 MERCER L. REV. 741 (1998).

⁹ See *The Fourth Amendment Behind Bars: Search and Seizure in Prisons*, 5 NAT'L J. OF CRIM. DEF. 259 (1979); Comment, *Shark Infested Waters: Extraterritorial Application of Federal Controlled Substance Laws*, 9 STETSON L. REV. 145 (1979); Note, *Criminal Law: Federal Escape Statute—Jury's Discretion or Judge's Law?*, 8 STETSON L. REV. 428 (1979).

context of upper-division seminars,¹⁰ directed independent studies, and to our law review at CUNY School of Law.¹¹

This review/essay begins by considering the first steps of choosing and developing a topic for the piece of legal scholarship. The next section considers issues of structure and initial drafting. The final section analyzes the revision process that results in a final draft and submission. Throughout these sections, the issues of research, analysis, and writing process are discussed.

II. DEVELOPING THE TOPIC

A student's selection of the subject for her or his scholarship is the initial and most important stage in the process. As Fajans and Falk phrase it, "[f]inding something worth saying" is the "most difficult and most crucial part of writing your paper."¹² The subject should be one that "lends itself to authentic, original, and useful discussion."¹³ Volokh provides a formula: "Good 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."¹⁴ The stress on the readers' anticipated reaction is echoed, albeit more softly, in Fajans and Falk: "Ideally, your choice of subject will be informed equally by your audience's needs and concerns and by your own interests."¹⁵

The distribution of importance between the student writer and her or his audience is perhaps my most acute disagreement with both Fajans and Falk and Volokh. I do not believe that a stu-

¹⁰ The specific courses I have taught include Law and Sexuality, Feminist Legal Theory, First Amendment, and Women and Crime.

¹¹ For student works that have been published in other journals, see Nicole Bingham, *Nevada Sex Trade: A Gamble for the Workers*, 10 YALE J.L. & FEMINISM 69 (1998); Matthew Carmody, *Mandatory HIV Partner Notification: Efficacy, Legality, and Notions of Traditional Public Health*, 4 TEX. F. ON C.L. & C.R. 107 (1999); Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219 (1999); Kate Haas, *Who Will Make Room for the Intersexed?*, 30 AM. J.L. & MED. 41 (2004); Rachel Haynes, *Bisexual Jurisprudence: A Tripolar Approach to Law and Society*, 5 MICH. J. GENDER & L. 229 (1999); Margaret McIntyre, *Sex Panic or False Alarm? The Latest Round in the Feminist Debate Over Pornography*, 6 UCLA WOMEN'S L.J. 189 (1995); Dana Northcraft, *A Nation Scared: Children, Sex, and the Denial of Humanity (Book Review of Judith Levine's Harmful to Minors, the Perils of Protecting Children from Sex)* ___ AM. U.J. GENDER SOC. POL'Y & L. ___ (forthcoming); Mark S. Silver, *Rethinking Harm and Pornography: Conflicting Personal and Community Views*, 23 WOMEN'S RTS. L. RPTR. 171 (2002); Colleen A. Sullivan, *Kids, Courts and Queers: Lesbian and Gay Youth in the Juvenile Justice and Foster Care Systems*, 6 TUL. J.L. & SEXUALITY 31 (1996).

¹² FAJANS & FALK, *supra* note 1, at 19.

¹³ *Id.* at 20.

¹⁴ VOLOKH, *supra* note 2, at 9.

¹⁵ FAJANS & FALK, *supra* note 1, at 20.

dent writer's interest should be equal, or subordinated, to predictions of the product's utility. In my experience, the ultimate and weightiest factor in the selection of the topic is the student's interest—passion—for the subject. Without that passion, all else is futile.

Moreover, speculation about an article's reception is akin to divination. Volokh does provide some excellent suggestions for enhancing the utility of an article, including focusing on the issues that are "left open," applying one's argument to other jurisdictions (using the example of states interpreting their own state constitutions), incorporating prescriptive implications of descriptive findings, considering making the "more politically feasible proposal," and making sure the argument "doesn't necessarily alienate your audience."¹⁶ Yet such advice is better suited to refining a topic and structuring the discussion rather than to the initial selection of a topic.

Even with regard to topic refinement, I find the emphasis on audience to be overly conservative and pedagogically problematical. Over the years, students have suggested topics that seemed to me to be "useless," but whenever I have such a reaction I quell it as quickly as possible lest I become like the professors who were so discouraging to me as a student. When I first sought to write scholarship about lesbian issues, I was told that no one was interested in such an "arcane" topic. In a way my experience was not unlike Eugene Volokh's as related in the book's foreword by Circuit Judge Alex Kozinski, for whom Volokh clerked. Kozinski recounts that, when he interviewed Volokh, the candidate's completed law review note was entitled "The Alienability and Devisability of Possibilities of Reverter and Rights of Entry."¹⁷ The judge assessed the topic as "arcane" and "dreary," suggesting to Volokh that he "drop the paper in the nearest trash can and start from scratch."¹⁸ This anecdote has a happy ending in that Volokh then wrote a much cited student article arguing that anti-sexual harassment laws violate the First Amendment.¹⁹

I suspect that the ending would not have been so satisfying if the law student's passion truly had been reverter and rights of entry. Dissuaded from pursuing his passion, perhaps the law student

¹⁶ VOLOKH, *supra* note 2, at 15-18.

¹⁷ *Id.* at 1 (Foreword).

¹⁸ *Id.* at 1-2.

¹⁹ Comment, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

would not have found a different topic, or even if he did, he might not have had the energy to sustain the tedious work that legal scholarship can entail. While Virginia Woolf was certainly not referring to law review articles, her admonishment to “write what you wish to write” and not “sacrifice a hair of the head of your vision” to “some professor with a measuring rod up his sleeve,”²⁰ encourages an independence of spirit that seems to me worth preserving in student scholarship.

Writing what one wishes to write also serves the pedagogical purposes of student legal scholarship which seem to me to be undervalued in the textbooks by Volokh and by Fajans and Falk. Although I agree that one goal of student scholarship is publication, the larger goal is the student’s development and achievement. The pedagogical value of student scholarship should not be underestimated. Of course, both volumes are dedicated to promoting student development. They both focus on the student-reader, addressing her/him in the second person. Yet, messages about selecting topics based upon the interests of others subvert the student-centeredness of these manuals.

Thus, it seems to me that a student’s passion for the topic should be primary and non-negotiable. However, this does not mean that the student’s topic cannot be refined and developed in light of audience reaction. To this end, there is no substitute for consultation and research.²¹

Volokh suggests that a student who has tentatively chosen a problem, should “run it by your faculty advisor,” who “will probably know better than you do whether there’s already too much written on the subject, or whether there’s less substance to the problem than you might think.”²² This seems a good first step,²³ but students should not be surprised when the faculty member discusses research strategies for such queries instead of providing definitive answers. The need for research at this stage is vital, but both volumes separate research into its own chapter rather than integrating it into the chronology of writing. Volokh provides an especially abbreviated discussion of research, a mere five pages, which

²⁰ VIRGINIA WOOLF, *A ROOM OF ONE’S OWN* 106 (Harcourt Brace & Company 1989) (1929).

²¹ See Heather Meeker, *Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers*, 1996 UTAH L. REV. 917 (1996), for a helpful discussion of research methodologies for initial topic identification and topic evaluation.

²² VOLOKH, *supra* note 2, at 12.

²³ The previously mentioned caveat that what some faculty advisors or others may find unsuitable may be based on their own biases must be remembered.

is rather rudimentary.²⁴ Fajans and Falk's section is more substantial, and acknowledges the artificiality of cabining research into its own chapter.²⁵ Referring to the link between topic development and research, the authors state: "At the heart of the research process there is a seemingly insoluble chicken-and-egg problem: you need a thesis to focus your research, but you cannot focus your thesis without doing research."²⁶ They purport to solve this conundrum by reminding student scholars that "inspiration, research, and writing" are not "neatly separable stages of the critical writing process" which is more "like an upward spiral than a straight line."²⁷

In the case of students unfamiliar with this "upward spiral," who may instead experience it as a "downward spiral," such advice may not be sufficient. The following sections devoted to "gathering information" provide more concrete advice, including the standard for knowing when enough is enough.²⁸ The advice to start with secondary sources and a discussion of which secondary sources might be best is also valuable.²⁹ Likewise, Volokh suggests using secondary sources, astutely directing students to read one of the texts aimed at students (such as those in the Nutshell or Understanding Law series) to gain an overview of the chosen field, and subsequently doing a law review search.³⁰ Students' increasing reliance on Internet research is discussed in both books.³¹

Conventional research strategies are most successful when the

²⁴ See VOLOKH, *supra* note 2, at 63-67.

²⁵ FAJANS & FALK, *supra* note 1, at 51 (research and writing "do not follow in orderly sequence like the chapters in this book").

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* at 53 (stating that "when you find the same materials no matter where you look, you can be fairly certain the circle is closing").

²⁹ *Id.* at 55-57.

³⁰ VOLOKH, *supra* note 2, at 64, 66.

³¹ *Id.* at 103-104; FAJANS & FALK, *supra* note 1, at 57-59. The importance of keeping printouts of accessed material given the ephemeral nature of the Internet is sound advice. Fajans and Falk warn that Bluebook Rule 17.3.3 "discourages citation to internet sources 'unless the materials in printed form are difficult to find.'" *Id.* at 59. However, the subsequently published Seventeenth Edition of the Bluebook, Rule 18, expands and refines this guideline, allowing citation to nonprint sources when "[t]he traditional source is obscure or hard to find and when citation to an electronic source will substantially improve access to the same information contained in the traditional source." THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION, R. 18, at 129 (Columbia Law Review Ass'n et. al eds., 17th ed. 2000). Volokh stresses that, like printed matter, material on the Internet "is no more reliable than its author." VOLOKH, *supra* note 2, at 103. For evaluating Internet sources, see John Hopkins University Library, *Evaluating Information Found on the Internet*, at <http://www.library.jhu.edu/elp/useit/evaluate/> (last visited Feb. 10, 2004) (on file with the New York City Law Review).

chosen topic fits into a niche of the extant legal authorities, but I have often had the privilege of working with students with a passion for a topic that has little if any legal development. For example, at the time Colleen Sullivan was a student interested in writing about sexual minority youth, primary or secondary legal sources were few.³² Similarly, Laura Gans' interest in sexual conversion therapy was absent from legal literature.³³ These students were pioneers, effectively using nonlegal sources to construct legal arguments and uncover novel issues.³⁴

Research can also serve to define an amorphous topic with a single case, resulting in a casenote, sometimes called a case comment. While pieces focusing on one particular case are the traditional first piece for students on law review,³⁵ Volokh suggests eschewing them because any critique is "likely to be fairly obvious" and the structure will not "show off your skills at research."³⁶ Yet, as Fajans and Falk note, "the casenote has begun to incorporate a broader range of perspectives and interdisciplinary approaches."³⁷ Thus, when students have interests that are more theoretical or interdisciplinary, the focus on a single case can serve to anchor the less doctrinal concerns of the student scholar.

Another focal point for theoretical, interdisciplinary, or amor-

³² See Sullivan, *supra* note 11.

³³ See Gans, *supra* note 11.

³⁴ For subsequent legal scholarship on sexual minority youth, see Elvia R. Arriola, *The Penalties For Puppy Love: Institutionalized Violence Against Lesbian, Gay, Bisexual and Transgendered Youth*, 1 J. GENDER RACE & JUST. 429 (1998) (discussing the psycho-social framework that marginalizes sexual minority youth); *Client-centered Advocacy on Behalf of At-Risk LGBT Youth*, 26 N.Y.U. REV. L. & SOC. CHANGE 221 (2001) (Symposium Proceedings) (various participants detail personal experiences working with queer youth and the issues that confront them); Ruthann Robson, *Our Children: Kids of Queer Parents & Kids Who Are Queer: Looking at Sexual Minority Rights From a Different Perspective*, 64 ALB. L. REV. 915 (2001) (Section III provides an overview of legal issues affecting sexual minority youth); Teemu Ruskola, *Minor Disregard: The Legal Construction of the Fantasy That Gay and Lesbian Youth Do Not Exist*, 8 YALE J. L. FEMINISM 269 (1996) (analyzing the legal problems of sexual minority youth in a culture that assumes all minors are heterosexual). See also David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1340-45 (1999) (discussing sexual conversion therapies published contemporaneously with Gans, *supra* note 11).

³⁵ This practice is in many ways a sound one since it provides an acknowledged structure, or as Fajans and Falk state, a "virtually unvarying four-part pattern: introduction, background, analysis, conclusion." FAJANS & FALK, *supra* note 1, at 12.

³⁶ VOLOKH, *supra* note 2, at 28.

³⁷ FAJANS & FALK, *supra* note 1, at 12. As an example, the authors state that "one casenote effectively used Legal Storytelling, employing a personal narrative to help explain why a federal court wrongly refused to prohibit state display of the Confederate flag." *Id.* (citing James Forman, Jr., *Driving Dixie Down: Removing the Confederate Flag from Southern State Capitols*, 101 Yale L. J. 505 (1991)).

phous topics can be a book review, a genre that is not addressed by either Volokh or Fajans and Falk.³⁸ A book review—or even a dual book review—can be a way for a student scholar to weigh in on a theoretical controversy, as Margaret McIntyre did when she joined the longstanding and often virulent debate within feminism about pornography by focussing her article on two books with relevant opposing viewpoints.³⁹ Or the book review can serve as a foil for the student's own theoretical concerns, as Rachel Haynes did in using Ruth Colker's *Bisexual Jurisprudence* to discuss the possibilities of a pan-sexual jurisprudence.⁴⁰ While books by legal scholars are the obvious choices for book review/essays intended as legal scholarship, other books certainly offer possibilities if they involve legal issues. For example, Dana Northcraft's appreciative review of the controversial *A Nation Scared: Children, Sex, and the Denial of Humanity*, provides more specific legal theorizing than the journalist author chose to include, thereby making a substantive contribution to this contentious field.⁴¹

An additional strategy for narrowing a topic is to focus on a particular statute, ordinance, or legislative proposal. Obviously, a complex or lengthy statute will require further narrowing, but a legislative act can be a springboard, not only for broad policy discussions (often embedded in the legislative history that the student has uncovered through arduous research), but also for the deployment of lawyering skills in the articulation of possible challenges to the act. Writing on a legislative proposal certainly runs the risk that one's scholarship will be "quickly preempted," as Volokh warns,⁴² but it can also be a satisfying intervention as well as an advocacy piece. For example, Matthew Carmody wrote about mandatory HIV-status partner notification at a time when legislative proposals were gathering strength.⁴³ Although the energy behind these particular proposals has dissipated, the theoretical and policy discussions in the article remain pertinent to discussions of HIV and public health.

The casenote, book review, and legislative piece all allow the

³⁸ Although Volokh does advise avoiding "responses to other people's works," he specifically mentions articles and not books. VOLOKH, *supra* note 2, at 29.

³⁹ McIntyre, *supra* note 11 (a review essay on CATHARINE MACKINNON, *ONLY WORDS* (1993) and NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS* (1995)).

⁴⁰ Haynes, *supra* note 11.

⁴¹ Northcraft, *supra* note 11.

⁴² VOLOKH, *supra* note 2, at 30.

⁴³ Carmody, *supra* note 11.

student scholar to refine the chosen topic so that it becomes “doable.” Even more importantly, the writing is experienced by the student—the aspiring scholar—as “doable.” Whether the student chooses one of these apparently more limited genres or a more expansive one, the extremely important next step is developing a structure for the paper. Success in generating and implementing a structure depends in large part on topic development. In the process of structuring the piece, the student may continue to refine the topic, another example of what Fajans and Falk call the “upward spiral” involved in writing.⁴⁴

Nevertheless, no matter how “doable,” narrowed, focused, trenchant, important, useful, or innovative the student’s topic is, transforming it into a first draft requires nothing less than passion. It is passion that is the litmus test for a topic—all else is negotiable and subject to exceptions. The required passion may not be amenable to being conveyed in a writing text or essay/review by professors with measuring rods up our sleeves.⁴⁵ But students who do not begin by writing what they wish to write,⁴⁶ often do not confront the problems of structuring their first draft: they never get that far.

III. STRUCTURING AND WRITING A FIRST DRAFT

Plenty of passion, piles of research materials, and a finely honed argument may seem no match for the blank page or screen. “Getting it Down on Paper” is the subtitle of the extremely useful chapter in the Fajans and Falk text regarding the onerous process of producing a first draft.⁴⁷ Fajans and Falk recognize that writing is a process and offer several helpful suggestions including “dump drafts” or “zero drafts” (before the first draft), listing, and diagramming⁴⁸ in preparation for outlining. Fajans and Falk also recognize that writing can be intimidating, especially for first-time student scholars, and the purpose of such low-stakes writing is to acclimate the student scholar to this new pursuit of legal scholarship. The examples provided in the text are especially noteworthy, as they demonstrate a freewriting draft full of rhetorical questions, ellipses, dashes, abbreviations, and fragments, moving toward a more coherent list, and then toward a more traditionally structured outline.⁴⁹ The example of a “case chart” is also useful,⁵⁰ and

⁴⁴ FAJANS & FALK, *supra* note 1, at 51.

⁴⁵ See WOOLF, *supra* note 20.

⁴⁶ *Id.*

⁴⁷ FAJANS & FALK, *supra* note 1, at 63-79.

⁴⁸ *Id.* at 64-71.

⁴⁹ *Id.* at 66-67.

my experience supervising students who are working with a number of cases is that preparing grids can be constructive, not only as an organizational tool, but also as a handy reference guide when the actual writing begins. The device of issue trees is also handily illustrated.⁵¹ However, my experiences with such patterns have not been positive and this explanation did not make them any more attractive. Yet, as I think Fajans and Falk would agree, students should have a choice of techniques, and should probably try each at least once, especially if they are having trouble creating an outline.

Fajans and Falk provide additional guidance for developing the outline, supplying a traditional outline (for either a case note or topic comment) with a subsequent section on established organizational paradigms.⁵² The authors make it clear that the outlines and paradigms are merely guidelines and that the “issues raised by a particular case or topic should shape not only your analysis, but your structure.”⁵³ It would have been advantageous, I think, for the authors to again direct readers to a previous section on legal argument, especially to the serviceable checklist provided.⁵⁴ In that section, the checklist was used to assist in the close reading and analysis of legal texts, but many student writers could profit from a reminder that, in structuring their drafts, they, like other legal writers, are also structuring arguments.

Having led student scholars through the outlining process, the Fajans and Falk text presents two pages of advice on “writing the draft,”⁵⁵ the first lesson of which is to “begin anywhere.”⁵⁶ As they state, “Many people labor under the misconception that the right way to begin is to begin at the beginning, with the introduction, and to move sequentially through to the conclusion.”⁵⁷

Such a “misconception” might be encouraged by Volokh’s discussion on “Organizing the Article.”⁵⁸ Building on the initial section on “Choosing a Claim,” Volokh proceeds to “Organizing the Article,”⁵⁹ with the first section entitled, “Write the Introduc-

⁵⁰ *Id.* at 69.

⁵¹ *Id.* at 70.

⁵² *Id.* at 72-77.

⁵³ *Id.* at 73.

⁵⁴ *Id.* at 30-31.

⁵⁵ *Id.* at 78-79.

⁵⁶ *Id.* at 78.

⁵⁷ *Id.*

⁵⁸ VOLOKH, *supra* note 2, at 31.

⁵⁹ *Id.* at 9.

tion.”⁶⁰ Subsequent sections, such as “Explain Background Facts and Legal Doctrines,” “Prove the Claim,” and “Make Your Article Richer: Connect to Broader Issues, Parallel Issues, and Subsidiary Issues,”⁶¹ demonstrate the organization of a scholarly article and implicitly convey the notion that the writing process mirrors the reader’s progress in reading from beginning to end.⁶² One notable exception is Volokh’s advice to rewrite the introduction before writing the conclusion,⁶³ thus avoiding the pitfall of a weak introduction.⁶⁴ Additionally, Volokh includes a short subsection entitled “Finish the First Draft Quickly/Defeat Writer’s Block by Skipping Around.”⁶⁵ This subsection, however, includes advice to students that caused consternation in this faculty adviser:

Your producing a first draft quickly, and then quickly improving and completing it, will also give your faculty adviser more time to give you useful feedback, and maybe to read through more drafts; and it will make you look industrious and disciplined—which is how you want the person who’s grading your work to see you.⁶⁶

Perhaps this is naive, but I shudder to think that students should be primarily concerned with creating an impression about their diligence. Students work differently and quick multiple drafts may work for some, while a slow deliberative process with self-editing instead of feedback is more effective for others. Overall, Volokh seems less concerned with the writing process than Fajans and Falk do. Students who experience writing anxiety will be more comfortable with the Fajans and Falk book.

The absence of attention to structure, either in the form of an outline or some other skeletal apparatus, may also make the Volokh text less useful for many inexperienced legal scholars. A student suffering from feelings of confusion or of being overwhelmed will not find concrete suggestions for ameliorating these emotions. Additionally, the absence of any acknowledgment of the struggles involved in producing a first draft may needlessly dishearten some students. Like Fajans and Falk, readers can turn to

⁶⁰ *Id.* at 31.

⁶¹ *Id.* at 38.

⁶² The sample plan and time-chart that Volokh provides, *id.* at 48-49, also conveys this impression.

⁶³ *Id.* at 43.

⁶⁴ FAJANS & FALK, *supra* note 1, at 78 (“the habit of writing a draft straight through, without rewriting the introduction, may explain why the theses of many articles are more clearly stated in the conclusion than in the introduction”).

⁶⁵ VOLOKH, *supra* note 2, at 72.

⁶⁶ *Id.*

previous sections about structuring arguments, but again, Volokh's text may prove less helpful to some than it could be. In a section entitled "Test Suites," Volokh discusses testing one's argument, but unlike the section in Fajans and Falk which lists various types of legal arguments,⁶⁷ Volokh appeals to the language of computer programming.⁶⁸ Certainly, this reference to computer language will resonate for some students, but when I think of specific students I've supervised who had earned previous degrees in the humanities, I imagine less receptive reactions.

The strength of the Volokh text resides in its discussion of logical argument rather than in writing processes. Apart from the computer-programming example, there is much here that student scholars will find useful for framing and analyzing arguments. The section on using interdisciplinary materials like surveys, is excellent in identifying the problem of a simple reliance upon survey evidence.⁶⁹ Subsequent subsections treating the extrapolation and drawing of comparative conclusions from surveys and other data, including cases, are equally astute.⁷⁰ Student scholars who master these principles will become more critical readers, although in many cases I suspect they might become loath to use sociological or similar materials because of the serious problems that Volokh identifies.

Turning an idea into a workable draft is at the core of all types of writing. Footnotes are a uniquely problematical feature in legal writing. In my experience, the questions most often asked by students and new scholars revolve around the substantive problems posed by the predominance of footnotes in legal scholarship. While correct Bluebook citation and plagiarism prevention are

⁶⁷ See FAJANS & FALK, *supra* note 1, at 19.

⁶⁸ A test suite is a set of cases that programmers enter into their programs to see whether the results look right. A test suite for a calculator program might contain the following test cases, among many others:

1. Check that $2 + 2$ yields 4.
2. Check that $3 - 1$ yields 2.
3. Check that $1 - 3$ yields -2 (because the program might work differently with positive numbers than with negative ones).
4. Check that $1/0$ yields an error message.

If all the tests yield the correct result, then the programmer can have some confidence that the program works. If one test yields the wrong result, then the programmer sees the need to fix the program—not throw it out, but improve it. Such test suites are a fundamental part of sound software design.

VOLOKH, *supra* note 2, at 19-20.

⁶⁹ *Id.* at 111-120.

⁷⁰ *Id.* at 121-128.

comparative details best left to the editing process, even when they involve larger questions of ethics,⁷¹ questions about the proper scope of footnotes can plague the writing of a first draft.

Fajans and Falk's skillful treatment of footnotes is found in a well-designed chapter that includes footnotes as examples of the points discussed.⁷² The distinction made between "authority" footnotes and "attribution" footnotes will resonate with students making a transition from writing legal memoranda and briefs to writing legal scholarship. Yet, as most legal scholars know, these footnotes are relatively easy to master compared with what I once heard a student call "that whole other article in small print at the bottom of the pages." As Fajans and Falk explain, in the most succinctly accurate explanation I have ever encountered, "textual footnotes provide discursive commentary supplementing the text."⁷³ The authors then include a critique of textual footnotes and advise writers to develop their individual footnote style, and decide whether they fall into the "minimalist, centrist, or expansionist camp."⁷⁴ The authors provide a diagnostic tool for evaluating textual footnote material: "your decision whether to footnote or not to footnote should depend upon whether a textual footnote would be helpful to your reader."⁷⁵ Applying such a test during the writing of a first draft, however, can occasion great consternation for even experienced writers. As Fajans and Falk wisely advise, all footnotes "should be sketched in as much detail as possible in your first draft."⁷⁶ The rule I share with students is, "[w]hen in doubt, write it out."

Management of footnote material in subsequent drafts has been greatly improved with the advent of word-processing, allowing the automatic renumbering of footnotes and the ease of moving text.⁷⁷ Instead of being intimidated by footnotes, I suggest

⁷¹ Compare *id.* at 155-157 with FAJANS & FALK, *supra* note 1, at 105-120. While the Fajans and Falk chapter includes a reference to "ethical use," the Volokh discussion confronts the issue of ethics much more specifically, and includes significant issues beyond plagiarism, such as recycling one's own work (either for class credit or publication) and fairness. *Id.*

⁷² FAJANS & FALK, *supra* note 1, at 105-120.

⁷³ *Id.* at 115.

⁷⁴ *Id.* at 117.

⁷⁵ *Id.*

⁷⁶ *Id.* at 109.

⁷⁷ Accord *id.* at 117. Those of us who began our forays into legal scholarship before this time—writing out the text on white legal paper and the footnotes on yellow legal paper and measuring in order to calculate the space necessary on the bottom of the typewritten page—often struggle to resist telling newer scholars how much easier it is now.

to students that they regard footnotes as a legal scholar's balm, especially when writing a first draft, serving as a repository not only for citations but for tangential material and even musings. As Fajans and Falk compellingly demonstrate, the eventual judgment about the inclusion of material in the text or in a footnote (or its total exclusion) remains a subjective, and often arguable, one.⁷⁸

Given the usefulness of this chapter on footnotes, its discussion of structures and examples of outlines, and its emphasis on writing as process, the Fajans and Falk text serves as a reliable and inspiring guide for students attempting to craft a first draft. Once a solid first draft has been accomplished, the enviable task of finalizing it and submitting it for publication lies ahead.

IV. FINALIZING A DRAFT AND SUBMISSION

Editing a draft encompasses many different aspects, which might be reductively denominated as analytic, organizational, and semantic.

The Volokh textbook excels in its treatment of methodologies of argument and can be profitably used in evaluating the arguments of a first draft. Although primarily contained in the section on "Organizing the Article," the Volokh volume includes a list of "Things to Look for: Logic," which would also assist a writer in self-editing the arguments.⁷⁹ The Fajans and Falk volume also contains a checklist for editing for content, although it is much less specific.⁸⁰ Self-editing for analytic rigor can be difficult and feedback can be immensely profitable at this point. As Fajans and Falk suggest at the end of their book, collaborative student groups can "contribute to important gains in critical thinking" and "revising."⁸¹ Ensuring that an argument exhibits logical clarity to a classmate can be an excellent exercise.

Organizational editing is closely connected to analytical editing. The identification of an analytical lapse may mean, not simply rewriting, but also reorganizing a section of the piece, or in some cases, the piece as a whole. Usually, a strong foundational struc-

⁷⁸ The example provided by Fajans and Falk for illustrating judgments about whether material belongs in the text or in a textual footnote is both witty and apt. See *id.* at 117 n.27.

⁷⁹ VOLOKH, *supra* note 2, at 75-79 (suggesting avoiding categorical assertions, the weak argument that laws should be perfect, false alternatives, "missing pieces" in a logical proof, overbroad criticisms, metaphors, undefined terms, and undefended or vague assertions).

⁸⁰ FAJANS & FALK, *supra* note 1, at 87-88.

⁸¹ *Id.* at 217.

ture obviates the need for wholesale restructuring. On occasion, a paper has evolved to such a great extent beyond the original outline that the paper has large-scale organizational problems. In those instances, I have had great success suggesting that students engage in “reverse outlining,” so that they essentially extract the skeletal outline and rearrange the bones before engaging in the surgery of “cut and paste” of the actual text. The examples provided by Fajans and Falk, using published articles and including headings and subheadings, should prove instructive for students in evaluating their own large-scale organization.⁸²

Smaller-scale organization, including topic sentences, transitions, and concluding sentences, often constitutes the bulk of the work of revising the organizational structure of a first draft. Indeed, this work seems less like organization than like writing, because what is actually occurring is the linguistic clarification of the organization scheme. Again, the Fajans and Falk text contains several useful examples.⁸³ Less concretely, Volokh advises against paragraphs that lack a common theme, long paragraphs, and inadequate connections between paragraphs.⁸⁴

Reworking the writing is perhaps the easiest task of revision. As Fajans and Falk point out, a book devoted to academic legal writing can only review a few principles and is not a substitute for a reference book on standard English.⁸⁵ Both Fajans and Falk and Volokh agree on many fundamentals of good legal writing, although both modify the once-absolute proscription against the passive voice.⁸⁶

The Volokh text stresses avoiding “legalese” and advises students to “write like normal people speak.”⁸⁷ Based upon my experiences working with students, I am not certain this is sound advice. Many students speak—and write—at a level of informality and incorporate slang to an extent that seems to me unacceptable in formal writing, including legal scholarship. Moreover, while Professor Volokh may practice informal syntax in his own scholarship,⁸⁸ it seems to me that his advice about adhering to Bluebook format is

⁸² *Id.* at 92-94.

⁸³ *Id.* at 96-99.

⁸⁴ VOLOKH, *supra* note 2, at 79-80.

⁸⁵ FAJANS & FALK, *supra* note 1, at 121.

⁸⁶ *Id.* at 127; VOLOKH, *supra* note 2, at 86-87.

⁸⁷ VOLOKH, *supra* note 2, at 83.

⁸⁸ See, e.g., Eugene Volokh, *Why Buckley v. Valeo is Basically Right*, 34 ARIZ. ST. L.J. 1095 (2002) (“say that the Court got it pretty much right”); Eugene Volokh, *Freedom of Speech and the Right of Publicity*, 40 HOUS. L. REV. 903 (2003) (use of contractions).

equally valid for formal writing.⁸⁹

Deciding when a “draft” is a final draft, or at least a draft ready for submission to potential publishers, is not explicitly broached by either Volokh or Fajans and Falk. Perhaps this is because it is essentially unknowable. Volokh recommends that writers “go through as many drafts as you can,”⁹⁰ noting that he tries to do “10 complete edits” before submitting an article,⁹¹ and that “20 or 30 substantive edits” of an appellate court opinion was the norm in the judicial chambers in which he clerked.⁹² Of course, in some cases, a deadline decides when a “draft” is “final” even if it does not approach the author’s aspirations to perfection. In such cases, there is solace in the rigorous editing process to which the law review will subject the article. But when a student scholar is submitting an unsolicited piece to law reviews, there is the opportunity to edit endlessly—and the issue can become one of procrastination or lack of confidence.

The submission of student articles to law reviews outside the student’s own school is viewed pessimistically by Fajans and Falk, who say that, “[h]owever rarely, journals do publish some work by students at other schools each year,” adding that students “have a better chance at the journals of schools ranked somewhat lower,” and third-year students may consider waiting until after graduation to submit.⁹³ On the other hand, Volokh is much more optimistic,⁹⁴ counseling students that they “can” and they “should” publish outside their own law journals.⁹⁵

My own experience has been closer to Professor Volokh’s.⁹⁶ Thus, I do not agree with the conclusion by Fajans and Falk that “writing a publishable article is a long shot.”⁹⁷ Once a student

⁸⁹ “Rightly or wrongly, many journal editors see good Bluebooking as a sign of professionalism; accommodate their prejudices.” VOLOKH, *supra* note 2, at 139.

⁹⁰ *Id.* at 56.

⁹¹ *Id.* at 69.

⁹² *Id.* at 70.

⁹³ FAJANS & FALK, *supra* note 1, at 186-187.

⁹⁴ Commenting on an earlier treatment of student publishing by Professor Volokh, Fajans and Falk comment that “some of it seems more appropriate to professionals than to students.” FAJANS & FALK, *supra* note 1, at 186 n.1 (citing Eugene Volokh, *Writing a Student Article*, 48 J. LEGAL EDUC. 247 (1998)).

⁹⁵ VOLOKH, *supra* note 2, at 137. Additionally Volokh is unabashedly status conscious: “there’s a pecking order out there, and ignoring it is costly,” *id.* at 141, and thus provides instructions for students to “shop up” their pieces to a law review at a more prestigious school. *Id.* at 141-142.

⁹⁶ See note 11 for a list of student articles.

⁹⁷ FAJANS & FALK, *supra* note 1, at 187. This is especially true because I think “publishable” has become a term of art that means publishable quality and does not neces-

scholar has reached the point of submission, my experience has been that the work will be accepted for publication. Yet, as I think Volokh and Fajans and Falk would agree, reaching that point of submission—from initial idea to topic refinement through outlines and throughout the often anguishing composition of the first draft and then the seemingly interminable revisions—can be arduous. But, as I have stated elsewhere, the student scholar's persistence in this endeavor is the *sine qua non* of eventual accomplishment.⁹⁸ And it is passion that fuels this persistence.

A passionate and persistent law student seeking to become a (published) legal scholar would be well-advised to use Volokh's *Academic Legal Writing*, especially with regard to legal argument, and Fajans and Falk's *Scholarly Writing for Law Students*, especially with regard to legal writing and processes.

V. CONCLUSION

"[O]ne effective way to close a piece is with a provocative, wise, or humorous quotation. . . ."⁹⁹

"But keep it quick—the reader is looking forward to being done."¹⁰⁰

sarily mean it will be published. For example, no matter how carefully planned, an article could be preempted by another piece or mooted by subsequent legal developments. Moreover, other vagaries, such as fluctuations in law review editorships, affect acceptances.

⁹⁸ Referring to students who attempt law review articles, I have noted that what "fascinates me is the comparison between those who do succeed and those who do not. The successful ones are not necessarily the ones with the most overt initial enthusiasm, the best topics or initial papers, the highest grades or most developed writing skills, or the greatest external support system. They are simply the ones who persist . . ." Ruthann Robson, *The Politics of the Possible: Personal Reflections on a Decade at the City University of New York School of Law*, 3 N.Y. CITY L. REV. 245, 254 (2000).

⁹⁹ FAJANS & FALK, *supra* note 1, at 146.

¹⁰⁰ VOLOKH, *supra* note 2, at 43.

