Thank you to
Brian Howe, Daniel Cellucci, Daniel Osher, Jennifer Utrecht, Samuel Leifer, and Joel Pratt
for their commitment to the publication
of student scholarship.
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INTRODUCTION

Dear Associate Editors:

Welcome and congratulations! The Notes Office is excited to have you join the Michigan Law Review, and we are looking forward to working with you on your writing over the coming semester.

As an Associate Editor, one of your primary responsibilities is to write a publishable piece for the journal. This can take the form of a Note, a Comment, a Book Notice, or two First Impressions Essays. Whatever you choose, you will have the unique opportunity to explore a legal area of interest and make a creative contribution to the surrounding literature. You may even be able to obtain independent research credit for your endeavor.

Meeting the writing requirement is a collaborative effort. Every Associate Editor is assigned a Notes Editor who will actively participate in the entire writing process, providing editing suggestions and other guidance. You should expect to participate in a number of workshops and meetings with your Notes Editor and other Associate Editors in order to receive critiques on works in progress from a wide range of people. One of the goals here— in addition to substantive exploration of the issues you are writing about—is to give you training in the process of producing, critiquing, and editing legal scholarship.

Beyond guidance from and interaction with your Notes Editor and fellow Associate Editors, this manual should explain how to fulfill the writing requirement. And in the Appendix, we have provided links to exemplar references for every type of publishable piece you can write: (1) a Note, Dubious Delegation: Article III Limits on Mental Health Treatment Decisions, by Adam Teitelbaum; (2) a Comment, A Model for Fixing Identification Evidence After Perry v. New Hampshire, by Robert Couch; (3) a First Impressions Essay, Adoptive Couple v. Baby Girl: Two-and-a-Half Ways to Destroy Indian Law, by Marcia Zug; and (4) a Book Notice, “Never Again,” Again: A Functional Examination of the Financial Crisis Inquiry Commission, by Andrew W. Hartlage.

Good luck over the coming weeks, and please don’t hesitate to contact us with questions. We anticipate reaching out before orientation to go over your initial ideas regarding the scholarship you want to pursue, and we will also hold individualized meetings during orientation to follow up. We look forward to getting to know you!

Sincerely,
The Notes Office

Joel Pratt
Brian Howe
Daniel Cellucci
Daniel Osher
Jennifer Utrecht
Samuel Leifer
I. THE WRITING REQUIREMENT

Associate Editors can satisfy *MLR*'s writing requirement by completing one of four possible types of publications: (1) a Note, (2) a Comment, (3) a Book Notice, or (4) two *First Impressions* Essays.

This writing requirement is different from past volumes’ requirement. Associate Editors in prior volumes were only permitted to write Notes. We have instituted the new requirement to give Associate Editors more flexibility in pursuing the type of writing that most interests them and to increase the diversity of pieces published by the *MLR*.

Nevertheless, Associate Editors are strongly advised to consider writing a full-length Note, especially if they may decide to apply for clerkships. Many judges see student Notes as an important window into not only an applicant’s competence, but also his or her drive and dedication.

Please note that, regardless of what kind of piece you write to fulfill the writing requirement, the first section you will write in full will be Part II, followed by Part III, then followed by Part I. The past experience of the Notes Office is that an initial focus on the background information and material will make you very well-informed on a topic but may not help you develop a novel argument. Remember that legal scholarship should explore a subject in a novel way, and the best way to do that is to focus on your own contribution up front. You will still need to know your topic extremely well, but you should always be thinking about the best way to present and defend your unique contribution to the literature. Writing your piece argument first, instead of background first, will help you write a better piece.

While Associate Editors are not required to publish, whatever writing they submit to fulfill *MLR*'s writing requirement must be of publishable quality, as determined by the Notes Office. If an Associate Editor then decides to pursue publication once the Notes Office is satisfied that he or she has satisfied *MLR*'s writing requirement, he or she should submit his or her piece to the *MLR* office in charge of publishing the type of piece in question (i.e., the Notes Office for Notes and Comments, *First Impressions* Editors for *First Impressions* Essays, and Book Review Editors for Book Notices). That office will then determine whether the piece will be published. The details for publication of each type of piece are explained more thoroughly later in this manual.

Please note: Associate Editors may not use any paper they write to fulfill the *MLR* writing requirement as a class or seminar paper. Similarly, seminar or class papers previously written by students may not be submitted to fulfill the *MLR* writing requirement. Associate Editors may, however, earn independent research credit for their *MLR* writing with the approval of a supervising professor, as this manual discusses in more detail below. All members of *MLR* may, however, submit pieces written for seminars or classes for publication, provided those pieces meet the substantive qualifications required by the appropriate office.
II. Writing a Note

A. A “Note” Defined

A “Note” is a student-written paper that does the following:

1. Identifies an unresolved legal controversy or question,
2. Analyzes the possible means for addressing the controversy, elaborating the arguments on all sides of the debate, and
3. Argues for a unique solution that, if adopted, would eliminate the current legal dispute or uncertainty.

Practitioners and scholars turn to Notes for concise, comprehensible articulations of complex topics; for arguments to persuade judges, lawmakers, administrative bodies, and other scholars; and for succinct explications of existing authority.

Pursuing publication is entirely optional. In order to publish, a Note topic must be narrow enough to allow for careful, thorough analysis within twenty-five to forty-five double-spaced pages. Forty-five pages or fewer of clear, concise writing is sufficient to address even relatively complex topics. In compelling circumstances, however, we will accept Notes exceeding forty-five pages.

A link to a sample Note, Dubious Delegation: Article III Limits on Mental Health Treatment Decisions, by Adam Teitelbaum, can be found in the Appendix.

B. Developing a Note Topic

1. Note Types

Notes Addressing Controversies Among Jurisdictions

Jurisdictional splits are disagreements among federal district, bankruptcy, federal appellate, or state courts. Traditionally, splits among jurisdictions are a very fruitful source of Note topics. The following are types of jurisdictional splits:

- **Lower Court Splits:** Professor Whitman, a former Editor-in-Chief of MLR, suggests that Note-writers investigate current U.S. district court and U.S. bankruptcy court splits. Lower court judges (and their clerks) have little time to research the issues arising at their trials. When pressed to decide on a currently unresolved legal issue, these judges will likely search for Notes on the issue that can quickly inform them of conflicts in the case law and guide them toward a position. Dina McLeod’s Note, Section 2259 Restitution Claims and Child Pornography Possession, published in Volume 109, is a good example of this type of Note.
• **Circuit Splits:** These Notes provide an overview of and resolution to different legal approaches taken by federal circuit courts to a legal controversy. Ted Koehler’s Note, *Assessing Divisibility in the Armed Career Criminal Act*, published in Volume 110, is an example of this type of Note.

• **State Court Splits:** Conflicts among state courts are another type of unresolved legal controversy. For example, a Note could discuss differences in the ways that courts of different states have interpreted uniform laws, laws based on “model” codes, or the common law. This is different from discussing which of two differing state laws is superior. Additionally, while a survey of the law in all fifty states is unnecessary when writing a Note of this type, bear in mind that some comparison is necessary.

Once you find a split, the solution your Note proposes should be one that can be judicially implemented, but it may be appropriate to suggest a legislative remedy as well. It is important to realize, however, that a quality Note addressing one of these controversies cannot merely pick one court’s approach and analyze it; instead, a successful Note addressing a court split will take a novel approach to resolve a live legal controversy.

**Hybrid Notes: Mixing Law and . . .**

Another Note option involves exploring an interesting conjunction between law and another field (e.g., law and medicine, law and psychology, or law and literature).

The following are examples of Notes in this category:


• Rebecca Strauss, Note, *We Can Do This the Easy Way or the Hard Way: The Use of Deceit to Induce Consent Searches*, 100 Mich. L. Rev. 868 (2002).


**Empirical Notes**

These Notes examine whether certain social science data (economic, psychological, etc.) support or contradict the assumptions of a given doctrine or area of the law.
Historical Notes
These Notes analyze how a certain case, series of cases, or extralegal event explains the development of doctrine or the outcome of a specific case in a given area of law. Examples include the following:


Notes on Recent Court Decisions, Legislative Enactments, and Administrative Actions
Notes may address the implications of a recent development in the law, including:

- **Decisions.** This approach involves more than merely summarizing a court’s holding. A Note of this type analyzes how a recent court decision serves as the foundation of an unresolved legal controversy or a source of potential conflict.
- **Legislative Enactments.** This approach addresses the legal impact of recent legislative enactments. It may discuss possible constitutional challenges or explore different judicial interpretations of a statute. These Notes often involve research into legislative history.
- **Administrative Regulations.** This approach discusses the legal implications of recently implemented administrative regulations or decisions by administrative bodies. If you are interested in an area of law that is regulated by an administrative body—such as immigration, labor, environmental, health, communication, aviation, or securities law—you may want to consider this type of topic.

2. Sources for Note Topics
Finding a Note topic is the most critical stage in the publication process and is frequently the hardest part of writing a Note. Keep in mind that the best Note topics are focused ones. The following sources are good places to start your thinking and research:

- **Casebook notes, digests, treatises, and hornbooks.** Hypos in casebooks often signal unresolved issues and sometimes explicitly identify recent developments, unanswered questions, and conflicts among courts.
- **Talking to people.** Lawyers you worked with over the summer, professors, and your classmates can offer guidance on finding a good Note topic.
- **Legal blogs.** There are many blogs devoted entirely to narrow areas of the law, and reading these is a great way to keep on top of the most recent and interesting
developments in a given field. For a short list of some particularly useful blogs, see Section B.2.i below.

- **Westlaw/Lexis searches.** The Westlaw/Lexis representatives or your Notes Editor can help you develop search terms to identify potential Note topics that are tailored to your areas of interest. To get you started, we recommend the following string of search terms:

  ("split"/s ("of authority!" "circuit!" "court!") % "sentence") & ([INSERT TOPIC OF CHOICE])

You can either leave off everything after and including the ampersand or instead insert something like “labor union!” “collective bargaining” in place of the last parenthetical.

- **Legal sections of newspapers or other periodicals.** These sources can be especially useful in identifying decisions, statutes, or regulations with unknown legal implications.

- **Class discussions.** Professors often focus on unresolved and unclear areas of law in class. These discussions can be especially helpful in identifying uncertain implications of recent cases and statutes. Your casebooks may also identify these issues.

- **U.S. Law Week.** This publication discusses recent Supreme Court decisions, including grants and denials of certiorari, and major developments among the lower federal courts, including circuit splits. *MLR* has a subscription, as does the law library.

### A Short List of Useful Legal Blogs

- **SCOTUSBlog:** [http://www.scotusblog.com/](http://www.scotusblog.com/) (keep in mind that issues on which SCOTUS has denied cert often make for good Note topics)
- **Law Professor Blogs:** [http://www.lawprofessorblogs.com/](http://www.lawprofessorblogs.com/) (this site contains links to professor-written blogs on a variety of legal subjects)
- **ABA Blawg Directory:** [http://www.abajournal.com/blawgs/by_topic/](http://www.abajournal.com/blawgs/by_topic/) (this site has compiled a list of blogs on 100+ different legal topics)
- **Split Circuits:** [http://splitcircuits.blogspot.com/](http://splitcircuits.blogspot.com/)
- **Circuit Splits:** [http://www.circuitsplits.com/](http://www.circuitsplits.com/)
- **How Appealing, by Howard Bashman:** [http://howappealing.law.com/](http://howappealing.law.com/)
- **Election Law, by Prof. Hasen:** [http://electionlawblog.org/](http://electionlawblog.org/)
- **Sentencing Law & Policy, by Prof. Berman:** [http://sentencing.typepad.com/](http://sentencing.typepad.com/)
- **Environmental Law Prof. Blog:** [http://lawprofessors.typepad.com/environmental_law/](http://lawprofessors.typepad.com/environmental_law/)
- **TaxProf Blog:** [http://taxprof.typepad.com/](http://taxprof.typepad.com/)
- **The Volokh Conspiracy:** [http://volokh.com/](http://volokh.com/)
- **Prof. Friedman’s Blog:** [http://confrontationright.blogspot.com/](http://confrontationright.blogspot.com/)
- **Full Court Press:** [http://afjjusticewatch.blogspot.com](http://afjjusticewatch.blogspot.com)
- **The Bankruptcy Litigation Blog:** [http://www.bankruptcylitigationblog.com/](http://www.bankruptcylitigationblog.com/)
3. Preemption Checks

Preemption Report: Situating Your Topic
Preemption occurs when the topic you are writing about has already been substantively covered by other scholarship or when the controversy you have identified has been resolved by a recent court decision or piece of legislation. If this happens and you are unable to tailor your writing so that it still says something novel and relevant, your topic will be a dead end and you will have to start the writing process afresh.

Consequently, you will be required to maintain a “preemption report” on your writing from day one until your piece is finally published (or you fulfill the writing requirement, whichever your end goal might be). This step is important: preemption of your topic can waste many hours of research and writing. More importantly, a preemption check actually strengthens the argument of your writing: the more hours you invest in reading journal articles, cases, and statutes, the more easily you can distinguish your piece within academic discourse. Be sure to look for the following in developing your preemption report:

a. Case Law

Check the case law to make sure that the Supreme Court has not already decided the issue and does not plan to do so in the near future (i.e., in the next year or so). Shepardize and Keycite any relevant cases that deal with your issue. For example, if your topic relies on certain cases, check all of the cases on all sides of the issue to ensure that they are still good law.

Do not panic if you find that a petition for certiorari has been filed with the Supreme Court. The Court declines to hear the vast majority of cases for which review is sought. You should reconsider your topic if the Court has actually granted cert, however. Additionally, make sure the Supreme Court will not decide a case dealing with a related issue that might render your piece moot.

b. Legislation

Legislative preemption is more complicated and unpredictable. Just because a member of Congress has introduced a bill that would repeal the Sentencing Guidelines does not mean that Congress will ever even vote on the issue. Determine where the potentially preemptive bill is in the legislative process, and make a judgment about how likely it is to become law. If in doubt, consult your Notes Editor.
c. Scholarly Writing

If another writer has already focused on your precise issue, your topic remains viable. But you must explain why you add new analysis to the debate. One good test is to make sure that no more than one of your main arguments overlaps with another piece of scholarship.

In order to check scholarly writing for preemption, search the legal periodical/journal databases on Lexis or Westlaw using a few keywords from your topic or the names of cases or statutes that deal with your issue. You should also search SSRN, academic databases in relevant social science fields (accessible through Merlin), and the Index of Legal Periodicals, a bound volume behind the reference desk in the law library. Familiarizing yourself with the work of other scholars will help you make a relevant and cite-worthy contribution to legal scholarship.

Lexis and Westlaw
Use both Lexis and Westlaw to conduct your preemption checks. Contact the representatives from Lexis and Westlaw or your Notes Editors for more information on how to conduct a thorough preemption check.

Conduct your preemption checks regularly—at least once a month. While you can set up alerts on Westlaw and Lexis that will automatically send you new material added to the database matching your keywords, this will not obviate the need for a full, formal check before turning in every Note segment.

4. Earning Independent Research Credit for Writing for MLR

We encourage MLR members to seek law school credit for writing for the journal. This is done by enrolling in one to three units of independent research, listed in the course schedule as “900 Research.” To do this, you must first consult with a professor and obtain his or her cooperation. Not all faculty members are willing to offer credit for such writing (and to our knowledge, no one has attempted to obtain credit for a non-Note, such as a Book Notice), although even those who are not may be willing to advise you on a more informal basis.

You can arrange meetings with professors to discuss your topic(s) whenever you find a convenient time. Law 900 credits can be added to your schedule throughout most of the semester, so do not feel that it is imperative to meet with a professor prior to the start of school.

Keep in mind that many professors will be reluctant to advise you unless you have a sense of the topic on which you wish to write. Walking into a professor’s office and saying, “I am interested in the area of law you teach. Can you give me a Note topic?” usually does not go over well. You would be wise to conduct some reasonably thorough initial research on your topic before asking to meet with a professor.

In addition, consult the faculty biographies (http://web.law.umich.edu/facultyBioPage/indexaz.asp) to determine who might be best able to advise you. Merely because a professor teaches criminal law does not mean the professor will know about the specific niche you wish to write on, although he or she may be able to refer you to someone who knows more about that specific area. Pay particular attention to the portion of a professor’s biography that lists his or her publications, as this is a clue to the professor’s area of
expertise. Your Notes Editor can also help you determine which faculty members to approach for guidance.

You can enroll in 900 Research during either semester of your 2L year, but be sure that the professor you are working with approves of your timeline. Professors also have their own views of how many pages are required for each unit of credit you receive, so be sure to consult with your professor on this question as well. Professors vary in how they like to work with students for independent study credit. Many professors take a hands-on approach with students regarding their writing and research; others are willing to sponsor you for credit but would prefer that you just turn in your writing at the end of the semester for a grade.

Once you have made arrangements with a professor—including how many credits you will receive (one to three)—send an email to LawCurriculumCoordinator@umich.edu with “900 Research” in the subject line. The body of the email must contain the following information:

- Your FULL name (no nicknames)
- Your 8-digit UMID #
- Your PROGRAM (J.D.)
- Professor’s FULL name (first and last)
- Number of Credit(s)
- Term in which you want to be enrolled

You should send this email as soon as your plans are finalized, but keep in mind that the Registrar does not process these emails until after the Drop/Add period has ended. This is good news, as it means you can typically still enroll for research credits later in the semester (check with Dean Baum to see if there is a final deadline for enrollment). Once your request is processed, you will then be enrolled in the section of 900 Research that corresponds to your professor. Keep in mind that students may not use more than a total of six independent research credits to satisfy the J.D. degree requirements.
**C. Structuring and Writing Your Note**

A Note is similar to other forms of legal and academic writing in that it marshals evidence, draws conclusions from that evidence, and presents a solution to some problem that will inform scholars or practitioners.

Notes employ an argumentative framework wherein every conclusion is stated first, and the evidence for that conclusion follows. Each sentence of a Note must state one of the following: a conclusion, evidence for a stated conclusion, or background information necessary to understand the importance of a stated conclusion. Remember CREAC from Legal Practice? Here it is again!

Every completed Note follows the same overall structure:

1. Introduction,  
2. Two or more Parts (the argument), and  
3. Conclusion.

### 1. The Introduction

The seeds of your entire Note are contained in the Introduction—the first three to five double-spaced pages of your Note. The Introduction should do the following:

1. Grab the reader’s attention (e.g., with an anecdote from a case or news article).  
2. Briefly give the background information needed to understand your issue.  
3. Narrow the general topic down to your specific issue.  
4. Set up the different perspectives on the issue.  
5. Explain why your Note is important and novel.  
6. Summarize, using a roadmap paragraph, all of the major arguments your Note will explore.

**Attention-Grabber**

The Introduction gives readers their first impressions of your Note. It convinces them your Note is worth reading, so it must capture the reader’s attention. One way to do so is to offer an illustrative anecdote from one of the more compelling cases or news articles related to your topic. Another method is to emphasize the sheer overall breadth or weight of your topic’s impact. (How would your argument change the balance of federalism? How might corporate America be permanently altered by the most seemingly insignificant change in the mail fraud laws?)

**Brief Background**

After the attention-grabber, move to a brief background of the issue. *MLR* is a general-interest legal journal. With solid and concise background information, make your argument accessible to a legal professional who is not a specialist in your area of law. For instance, if you are writing about securitization, you may want to provide basic definitions of terms, as well as examples so a
reader unfamiliar with finance will be able to understand your argument.

**Identification of the Specific Controversy**
After background, clarify the specific controversy or question your Note addresses.

**Extant Positions**
Once you have identified the controversy or question, describe the answers courts and commentators have put forth thus far. If you are writing on a circuit split, for instance, you would briefly summarize the different positions taken by the circuits.

**Relevance of the Note**
Particularly if there is extensive scholarship on your topic, you would be wise to identify how your piece will fill a gap in the current literature.

**The Roadmap Paragraph**
Next, state the position your Note advocates in a roadmap paragraph. The roadmap, which comes at the end of the Introduction, is the most important paragraph in your whole Note. It informs the reader of the Note’s thesis, how each Part supports your thesis, and the overall structure of the argument.

*Example:* “This Note argues that the courts should reach $X$ result. Part I contends that the language and intent of the statute strongly suggest $X$ interpretation. Part II argues that analysis of the policies animating the statute reinforces this conclusion. Part III maintains that $Y$ objection, although plausible, does not justify rejecting $X$ because . . . .”

The roadmap paragraph also serves as a red flag for an author during the writing process. Difficulty writing a roadmap signals fundamental problems with your conception of your Note. When you are fully satisfied with your research and your outline and confident that no hidden arguments might interfere with your conclusion, the roadmap paragraph is easy to write.

**Pointers:**

- Avoid roadmaps that state unsupported conclusions. For example, it is not enough to state, “Part I concludes that the Child Pornography Prevention Act is unconstitutional.” Rather, it should read, “Part I concludes that the Child Pornography Prevention Act is unconstitutional because computer-generated child pornography falls under the Supreme Court’s definition of protected speech.”

- Beyond Part I, every Part of your Note must make an argument and reach a conclusion, and your roadmap should reflect that. Your roadmap should not include statements such as “Part II describes/examines/summarizes the legislative history…” unless they are followed by clauses like “and concludes that Congress intended to codify the Supreme Court’s *Ferber* doctrine.”
• Avoid putting footnotes in your roadmap. Cite important sources in the preceding background information and then clarify and support your arguments in the body of the Note.

2. The Argument

The Note’s Overall Structure
Different topics demand different structures. You should discuss the overall structure of your Note with your Notes Editor at an early date, but you should also continue to think about reworking the structure as new arguments or sources surface.

Keep these three helpful guidelines in mind when developing your structure:

• Carefully develop your outline to ensure that it establishes a logical and easily assimilated framework for your Note.

• Remember that every part of your Note must make an argument, not merely describe, explain, or comment on something. Background information and descriptive discussions of the law usually belong in the Introduction, if brief, or in Part I if your issue is complicated. You do not need to avoid background information completely, but you do need to ensure that it serves merely as the foundation for your argument and does not replace the argument itself. Moreover, keep your discussions issue-centered, not case-centered.

  **Recommended:** “The majority of courts that have confronted the issue have held plaintiffs to a strict standard of causation, imposing liability on defendants only where factor A or B is present. In *Smith v. Jones*, for example, the First Circuit held defendants liable, emphasizing A, while in *Williams v. Brown*, the Third Circuit’s finding of liability focused on B.”

  **NOT Recommended:** “In *Smith v. Jones*, the First Circuit also addressed this issue. In that case, the court based its liability finding on A. In *Williams v. Brown*, the Third Circuit cited B in finding defendants liable. Therefore, factors A and B are important in determining whether liability is appropriate.”

• Don’t wait until the conclusion to state the significance of your Note. Make sure the point of your argument is clear from your opening paragraphs.
The Note’s Internal Structure
Each Part of your Note must begin with a brief introductory paragraph explaining what is to come. If the Part contains subportions (e.g., Sections like I.A, I.B, and I.C or subsections like I.A.1, I.A.2, and I.A.3), it may need a mini-roadmap describing the argument of each subportion.

**Example:** “This Part asserts that both the plain language and structure of the statute suggest that Congress intended $X$ interpretation. Section I.A argues that the statute’s plain meaning is $X$. Section I.B reviews the statute’s structure and concludes that the intent of Congress in enacting the statute was $X$.”

[Note: Major divisions of a Note are called Parts (e.g., Part I, Part II, Part III). Divisions within a Part are called Sections, (e.g., Section I.A, Section I.A.1). See the Maizebook for more details on correct terminology (look under “Subdivisions”).]

Paragraphs should begin with strong topic sentences stating narrow claims. The rest of the paragraph should support the claim.

Keep the following points in mind:

- Any sentence starting “Therefore, we see that . . .” should be moved to the very beginning of a paragraph and reformulated as a topic sentence. To check yourself, **read the first sentences of each paragraph in sequence—these sentences should construct the outline of your argument.**

- Each paragraph should only make one point.

- Use your strongest argument first. Thus, you should follow the normal hierarchy of legal argument: constitutional, statutory, judicially elaborated, policy-based.

- Never start a Part or Section with counterarguments or caveats. Make affirmative arguments first and then address the other side.

- **Address counterarguments!** Your argument will be stronger if you acknowledge and distinguish unfavorable precedent. Treat counterarguments fairly: do not set them up as if they are implausible just so you can knock them down more easily. Rather, be selective in choosing arguments and counterarguments. You do not need to cover every conceivable argument, just those that a reasonable reader can be expected to consider.

- If you are proposing a model or framework for analyzing an issue, make sure it is (1) not so complex or cumbersome that no one would want to use it and (2) not so vague as to be self-evident or easily manipulated by practitioners seeking different results.
Supporting Your Argument

The strongest arguments are those stated affirmatively as your own, while referencing authority for support:

**Recommended:** “The ADA does not require employers to transfer disabled employees. Under section 2(a) of the statute, employees should only be accommodated in their original position.¹ Transfer may be considered a form of unwarranted affirmative action because disabled employees receive priority in transfer.”

**NOT Recommended:** “The ADA does not require employers to transfer disabled employees.² According to the Sixth Circuit, employers do not need to transfer disabled employees because those employees must be able to accomplish the tasks of their original position, with accommodation.³ As the Fourth Circuit notes, transfer is a form of unwarranted affirmative action.”⁴

The text of your Note should contain only the quotes and background information that are central to your argument. Footnotes are generally the best location for the majority of supporting quotations, examples, and background information.

**Recommended:** “Health legislation has been addressed by Congress in several different forms in the past decade, all of which ended in deadlock.⁶ Many representatives despaired of passing adequate legislation.”

**NOT Recommended:** “Health legislation has been addressed by Congress from several different angles in the last several years. In 1982, members of Congress introduced a bill to resolve questions of insurance costs, which died in committee.⁸ In 1985, the Senate took up debate on another aspect of health insurance regulation. Senator Kennedy made several floor statements castigating Congress: ‘I am utterly discouraged . . . .’”⁹

You must support all assertions that are not common knowledge by citing legal and other reliable authorities in footnotes. Footnotes should be relatively short and clear. Include parentheticals explaining the significance of each citation to your argument, unless it is apparent from the text or surrounding footnotes.

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¹ ADA, § 2(a); see also 6th Circuit Case X.
² See 4th Circuit Case Y.
³ ADA, § 2(a).
⁴ See 6th Circuit Case X.
⁵ See 4th Circuit Case Y.
⁷ See Congressional Record, statement of Senator Kennedy (“I am utterly discouraged by Congress’s inability to produce viable health care legislation”).
⁸ See Act XXX, 1982.
⁹ See Congressional Record, etc.
As you put together a full draft of your Note, make sure to use all the types of resources relevant to your topic. If appropriate, you should investigate looseleaf services, nonlegal periodicals and books, legislative history materials, and state cases. In some circumstances, you may consider requesting legal briefs from a central case, or seeking feedback from a professor or other professional with expertise in the field. While consultation with a professor is not required, we have heard—almost without exception—that such consultations are valuable.

3. The Conclusion

Because the argumentation of the Note is so front-loaded, the Conclusion is the shortest and least important part, but it is a great opportunity to make a lasting impression on the reader. It is not the place to raise new arguments. Instead, it should provide a brief synopsis of your Note, reminding the reader in general terms what your ultimate conclusions were. Strong Conclusions tie back into themes raised in the Introduction, bringing the Note full circle.

4. Style

Your writing should conform to general rules of grammar. Two resources to consult on style matters are The Chicago Manual of Style and Strunk & White’s The Elements of Style. In addition, MLR Notes have their own unique style, which is detailed in the Maizebook.

Here is a list of suggestions to combat the most common stylistic errors:

- Avoid overusing the passive voice.
- Avoid meaningless lead-in phrases (e.g., “It should be noted that . . . ”).
- Always refer to Supreme Court Justices as “Justice X,” professors as “Professor Y,” and judges as “Judge Z,” unless a higher honorific applies.
- Designate and define terms for key concepts when they are first mentioned in your Note. Use recurring terms consistently.
- When referring to a court’s opinion, say that the court “held,” “reasoned,” or “stated,” and NOT “argued,” “believed,” or “felt.” Remember that courts make factual “findings” and legal “holdings.”
- Avoid too much nominalization—that is, making a verb, adjective, or adverb into a noun. For example, “illustration” is a nominalization of “illustrate.” Thus, the sentence “Smith v. Jones illustrates X” is stronger than “Smith v. Jones is an illustration of X.”

This article explains the concept in more detail: http://opinionator.blogs.nytimes.com/2012/07/23/zombie-nouns/. You can also test whether you are using too many nominalizations by entering some of your prose here: http://www.writersdiet.com/WT.php.
- Pay attention to Bluebook rules on capitalization and the use of numerals.
5. Format

All submissions to your Notes Editor should conform to the following format:

- 12-point, double-spaced Times New Roman font for text.
- 12-point single-spaced Times New Roman font for footnotes.
- Text and footnotes should be in edit form—that is, underline text that would normally be italicized, and **bold** text that would normally be in large and small caps.
- All pages should be numbered continuously.
- Use footnotes, not endnotes, and take care to *Bluebook* properly—this will save you time later. If you are still looking for a source, note that in the footnote.
- Include a Table of Contents containing your Note title, your name, and headings for all Parts and Sections.
- Notes are divided into Parts, and Parts are divided into Sections (e.g., Part I, Section I.A, and Section I.A.1). Introduction and Conclusion are not numbered.
- Learn how to “code” your references to previous footnotes so that they update automatically when footnote numbers change. A brief guide on coding references is included as an Appendix to the *Redbook*. 
III. WRITING A COMMENT

A Comment is written in the manner and style of a Note, but with a more limited scope and length. This does not mean that a Comment is an “easier” way to fulfill the Writing Requirement; writing a high-quality piece of such limited scope can be substantially more difficult than writing a longer one. There are two types of Comments.

“Case Comments” provide concise and cogent analyses of recent opinions from state supreme or appellate courts, federal courts of appeals and federal district courts, bankruptcy courts, or international courts. Generally, the Notes Office does not accept Comments covering recent Supreme Court decisions due to the amount and immediacy of analysis on these opinions. Such Comments will be considered, however, if the author demonstrates that his or her work will add value to the legal scholarship surrounding the case. Typically, a piece covering a recent or pending Supreme Court case is more suited as a First Impressions Essay, given the speed of online publication.

In addition to Case Comments, we publish “Recent Statute Comments,” with a preference for Comments on state statutes or narrow aspects of federal laws. Any Comments on high-profile laws like the Bankruptcy Reform Bill or No Child Left Behind must be narrowly focused on a specific provision of the law and must be strongly justified in light of other scholarship on the topic.

The structure and style of a Comment mirrors that of a Note. Consequently, please refer to Section II of the Redbook for more guidance on these issues. Also like Notes, Comments must continually undergo preemption checks. Please refer to Section II.B.3 of the Redbook for more information. Section II.B.2, which lists sources useful in helping to generate a Note topic, also applies equally well to Comments.

To satisfy the writing requirement, a Comment must be at least twenty pages of double-spaced text, although the Comment may need to be truncated after the writing requirement is satisfied if the author wishes to pursue publication. A Case Comment should devote roughly two to four pages to explaining the court’s reasoning, while the rest of the Comment should consist of criticism and/or arguments about the decision’s implications. For Recent Statute Comments, we expect similar proportions dedicated to explaining the new regime or provisions and then analysis and/or criticism of the likely effects and implications.

A link to a sample Comment, A Model for Fixing Identification Evidence After Perry v. New Hampshire, by Robert Couch, can be found in the Appendix to the Redbook.
IV. **WRITING FIRST IMPRESSIONS ESSAYS**

*First Impressions* is the online companion to the *Michigan Law Review* and publishes op-ed length articles in an online symposium format. Typically, a *First Impressions* Essay is an editorial on a timely and important judicial decision, legislative development, or legal policy issue. The only true subject-matter restriction is that the piece be legally relevant; otherwise, *First Impressions* prefers highly novel and experimental topics.

*First Impressions* Essays are organized similarly to Notes or Comments, but each Part should be shorter than that of a Note or Comment, and Parts should rarely be subdivided into Sections. An Essay typically progresses by introducing the topic; briefly reviewing the relevant case or legislative history; making a novel proposal, argument, analysis, or critique; and concluding briefly. The Part(s) of the Essay that contain a novel proposal, argument, analysis, or critique should constitute the bulk of the Essay, while any background information should be limited to what is necessary to understand or support the Essay’s argument. *First Impressions* also prefers limited reliance on secondary sources and prefers reliance on primary sources coupled with strong, concise analysis.

Like Notes, *First Impressions* Essays must continually undergo preemption checks. Please refer to Section II.B.3 of the *Redbook* for more information. Section II.B.2, which lists sources useful in helping generate a Note topic, also applies equally well to *First Impressions* Essays.

To satisfy the writing requirement, a student must write two *First Impressions* Essays of 2,800–3,200 words each, and both pieces must be of publishable quality. Though this may account for fewer pages than the other options, be aware that completing two full pieces, along with the requisite topic generation, preemption checks, and editing, may be substantially more work than completing a Note.

A link to a sample *First Impressions* Essay, Adoptive Couple v. Baby Girl: *Two-and-a-Half Ways to Destroy Indian Law*, by Marcia Zug, can be found in the Appendix to the *Redbook*. Note that this Essay was written by a professor, not a student.
V.  WRITING A BOOK NOTICE

A. A “Book Notice” Defined

A “Book Notice” is a student-written book review. Book Notices are published in Issue 6, the Book Review Issue. Although Notices must focus on and discuss legal issues, that does not mean the books themselves must be “law” books. Indeed, applying a legal lens to a nonlegal book can often provide a very interesting review. In addition to being legally relevant, Notices must also add some original discourse, and most books that Notices review should have been published within the last three years.

To satisfy the writing requirement, a Book Notice must be at least twenty pages of double-spaced text of publishable quality. If the author chooses to pursue publication, the Book Review Office may require that the Notice be expanded or truncated, depending on the composition of the rest of the Book Review Issue.

B. Structuring and Writing Your Notice

Notices most commonly adopt the following structure: Part I summarizes the book; Part II criticizes and/or praises the book; and Part III expands on the book in some way, making an original contribution to the academic literature. Keep in mind, however, that this layout is merely illustrative, and successful reviews have been structured in many different ways. Regardless of the structure you adopt, it must be clear and well-roadmapped, and it must make a novel argument. The best way to learn how to write one of these is to read one, so please review Issue 6 of one of the past few volumes if you are interested. In addition, if you decide you want to write a Book Notice, please talk to your Notes Editor about working with the Book Review Office as you write the Book Notice.

1. Part I: Summary of the Book

Readers expect that a Book Notice will give them a clear and concise summary of the book that it reviews. Effective summaries typically highlight a book’s strengths and comment on its weaknesses, laying out critiques that will be explored further in later sections. As mentioned above, however, effective Book Notices vary in format, and you need not lead with a summary. Regardless of where you place it (or weave it in throughout), make sure that your Notice thoroughly and accurately describes the main points of the book you are reviewing.

2. Part II: Criticism and Praise

Following the summary, most Notices proceed with a detailed analysis of the book’s strengths and weaknesses. Although these critiques are often first mentioned in Part I, they are typically first developed in Part II. Effective criticism can take many forms, including the following:

(1) Criticizing the assumptions underlying an author’s argument;
(2) Asserting that, although an argument is strong, it is incomplete;
(3) Arguing that an author’s approach is biased;
(4) Comparing and contrasting the author’s approach with arguments made by other writers.
Although the tone of critiques varies by Notice, most authors are respectful but assertive and confident in their criticisms. Taking a more forceful position is risky, as readers may discount your arguments if you appear strident and overly harsh. On the other hand, do not hesitate to criticize—even vigorously—those arguments and assertions deserving of criticism.

3. **Original Contribution to the Literature**

In addition to summarizing and criticizing the book being reviewed, most Notices contain (and to fulfill the MLR writing requirement, *must contain*) original legal scholarship. This scholarship can come in many forms, including building on the book’s analysis, analyzing the book’s topic in a new light, and discussing legal developments occurring after the book was published. This section of your Notice should read similarly to the argument sections of a Note. For guidance on how to effectively build a legal argument, consult the Note sections of this manual.

A sample Book Notice, “Never Again, Again: A Functional Examination of the Financial Crisis Inquiry Commission,” by Andrew W. Hartlage, can be found in the Appendix to the Redbook.
VI. DEADLINES AND REQUIRED SUBMISSIONS

A. Schedules for All Content Types

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 21, 2014</td>
<td>Email Two Preliminary Topic Proposals to Notes Editor</td>
</tr>
<tr>
<td>August 22–24, 2014</td>
<td><em>MLR</em> Orientation, Workshop with Notes Editor Group</td>
</tr>
<tr>
<td>September 12, 2014</td>
<td>Note Roadmap and Outline Due</td>
</tr>
<tr>
<td>October 10, 2014</td>
<td>Part II Due</td>
</tr>
<tr>
<td>November 2, 2014</td>
<td>Part III Due</td>
</tr>
<tr>
<td>December 5, 2014</td>
<td>Part I + Introduction Due</td>
</tr>
<tr>
<td>January 16, 2015</td>
<td>Note Final Draft Due</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Date</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>August 21, 2014</td>
<td>Email 3-4 Preliminary Topic Proposals to Notes Editor</td>
</tr>
<tr>
<td>August 22–24, 2013</td>
<td><em>MLR</em> Orientation, Workshop with Notes Editor Group</td>
</tr>
<tr>
<td>September 12, 2013</td>
<td>First Essay Outline Due</td>
</tr>
<tr>
<td>October 10, 2013</td>
<td>First Essay Full Draft Due</td>
</tr>
<tr>
<td>November 2, 2014</td>
<td>Second Essay Outline Due</td>
</tr>
<tr>
<td>December 5, 2014</td>
<td>Second Essay Full Draft Due</td>
</tr>
<tr>
<td>January 16, 2015</td>
<td>Edited Copies of Both Essays due</td>
</tr>
</tbody>
</table>

All deadlines for written work product are **11:59 pm on the date listed.**
Whenever you have submitted written work product in accordance with one of the schedules above, you should receive feedback from your Notes Editor within one week. If you do not receive feedback or a notification of a delay, please contact your Notes Editor and the Executive Notes Editor.

You also should not feel like these are the only times you can interact with your Notes Editor. We are your resources on the journal for developing your own scholarship, and we are happy to help both inside and outside of formal meetings.

If you plan to publish, you may want to move at a faster pace than the schedules above contemplate. If you plan to publish and are writing a Note, you also may want to plan when your full-length Note will be completed. In either instance, speak with your Notes Editor for more guidance.

Finally, the schedules above do not account for revisions that may be necessary to make your piece one of publishable quality. If your work product on the relevant due date is not up to the
Notes Office’s standards, you will need to turn in a revised version at a date determined by the Executive Notes Editor or face disciplinary action.

1. Deadline and Submission Flexibility

MLR takes deadlines seriously. Failure to comply with deadlines in good faith is cause for disciplinary action and may jeopardize your candidacy for an Editorial Board position and your continued position as an editor of the journal. The Managing Editor may make exceptions for extenuating circumstances; however, job interviews, moot court competitions, demanding course loads, etc. will not be considered extenuating. We do recognize that emergencies occur, and we can make accommodations when absolutely warranted, but please try to plan ahead with your workload and give us as much advanced notice as possible if you are concerned that a deadline may be a problem for you.

To account for anything that might arise, each AE has three (3) total days of deadline extensions. For example, if you are writing a Note, you can hand in your Roadmap and Outline two days after the deadline, your First Installment on time, your Second Installment on time, and your Final Installment one day after the deadline. You must tell your Notes Editor at least 24 hours before the deadline if you intend to use one or more of your extension days. These days are indivisible (i.e., you can’t hand in one segment eight hours after a deadline and keep the other sixteen hours of the day for later use).

Further, although we take deadlines seriously, we do not want AEs to continue to labor on topics that prove to be fruitless simply to meet incremental deadlines. If you find your topic preempted or otherwise seriously undermined, you may work with your Notes Editor and the Executive Notes Editor to create a new, personalized set of deadlines. Note, however, that discovering preemption problems and fundamental flaws in your argument should be among your foremost objectives.
B. Events and Submissions Common Across All Content Types

Whether you are writing a Note, a Comment, First Impressions Essays, or a Book Notice, some events and submissions are the same:

1. Email Two Preliminary Topic Proposals to Notes Editor

A Preliminary Topic Proposal is a short discussion of the topic you are considering writing on. You will need to submit two to your Notes Editor, and neither should be longer than two pages. You need not have very precise topics at this point, but you should have a good sense of the areas of law you are interested in writing about and the types of arguments and analysis you wish to employ.

If you are thinking about writing a Book Notice, it is not necessary to have read the book at this time, but you should know what book you would like to review and have some idea of what you will talk about.

A Preliminary Topic Proposal contains the following sections:

<table>
<thead>
<tr>
<th>Content type(s)</th>
<th>Are you thinking of writing a Note? A Comment? A First Impressions Essay? A Book Notice? Maybe you have something in mind that is consistent with multiple content types (e.g., a topic that could be either a Comment or Note, depending on how elaborate you make your arguments and/or broad you make your scope).</th>
</tr>
</thead>
<tbody>
<tr>
<td>Topic area(s)</td>
<td>What general areas of law are relevant to the potential topic? If you are thinking of writing a Book Notice, what is the genre of book and where does it intersect with the law? If it does not explicitly intersect with the law, how will you tie the book to the law?</td>
</tr>
<tr>
<td>Issue</td>
<td>Define the central issue as you would in an “issue presented” section of a legal memo or brief. You need not know how you intend to resolve the issue, but you should indicate what issues you will address. If you are thinking of writing a Comment, what case or statute do you want to focus on? For a Book Notice, what unique perspective will you provide on the book that will make your Notice valuable commentary?</td>
</tr>
<tr>
<td>Background</td>
<td>What are the doctrines, case law, or other background information that form the basis of the legal controversy? If a Book Notice, who is the author (is he or she renowned in a specific area, does he or she typically write in a specific area, does he or she espouse a certain school of thought?), and have other authors written about similar topics?</td>
</tr>
<tr>
<td>Nature of legal controversy</td>
<td>If there is a legal controversy, what options are courts, legislators, administrative bodies, and scholars weighing? What ambiguities remain unsolved? Book Notices do not need to provide this information if no legal controversy is directly implicated.</td>
</tr>
<tr>
<td><strong>State of the legal controversy or the book</strong></td>
<td>If there is a legal controversy, is there a majority/minority view? What is the procedural status of relevant cases or other sources? If a Book Notice, how has the book been received, when was it published, etc.?</td>
</tr>
<tr>
<td><strong>Preemption problems</strong></td>
<td>Is your potential piece preempted in any way? Discuss all possible preemptors (e.g., high court decisions, legislative intervention, and other scholarly works that address the same topic).</td>
</tr>
</tbody>
</table>

If you are having trouble with your topic, please meet with your Notes Editor before the two proposals are due to discuss how to get on track.

Between the submission of your proposals and orientation, your Notes Editor will contact you to discuss your ideas and help you flesh them out further. They will also indicate what progress they would like to see you make before orientation.

Two sample Preliminary Topic Proposals are included in the Appendix to the *Redbook*.

**2. MLR Orientation and the First Workshop with Your Notes Editor Group**

At orientation, you will have your first workshop with your Notes Editor Group (i.e., your Notes Editor and all of the other AEs assigned to that Notes Editor). At least one day before this meeting, you must have emailed everyone in the group any of your preliminary topic proposals that are still viable.

At the meeting, you must be prepared to briefly summarize your current game plan for satisfying the writing requirement and any progress you have made since completing your preliminary topic proposals. You must also help others develop their ideas by helping provide commentary and constructive criticism—the idea is to create an informal, collaborative working group where everyone is comfortable bouncing ideas off each other.

Your Notes Editor will have contacted you before orientation and gone over the progress he or she expects by this point. Make sure you are on track with these expectations so that you can take full advantage of the input from your fellow *MLR* editors.

**3. Second Workshop with Your Notes Editor Group**

The exact date of your second workshop is to be decided by your Notes Editor after consulting everyone on their schedules. But sometime in late September, you will meet again with your Notes Editor Group and workshop the written work product you have generated by the date of the meeting (this written work product should be emailed out to everyone in the group at least one day before the meeting).

This workshop will come after you have already produced an outline, and hopefully you will also have made progress in writing your actual piece. As always, your Notes Editor will have provided individualized expectations beforehand, so you will know how far along you should be by this point.
C. Events and Submissions Unique to Certain Content Types

1. Notes, Comments, and Book Notices

Roadmap and Outline
A Note or Comment outline is a full, detailed outline of your piece. It typically should run five to seven pages, but you should not add content simply to fill space. The purpose of this assignment is for you to begin formulating your arguments, documenting their support in your sources, and identifying trouble spots and areas that need further research. Your focus should not be on writing or citation style but instead should be on organization and structure. The more detailed and developed your outline, the more useful it will be during the writing process. Your outline will also include your roadmap paragraph describing your thesis and how you plan to argue it in each Part. Sample roadmap paragraphs and a sample outline are included in the Appendix to the Redbook.

Segments and Full Draft
Draft submissions occur in four stages (Part II, Part III, Part I, and Full Draft). This does not necessarily mean, however, that you will submit exactly one-third of the total pages at each stage or that your Note or Comment will easily divide into thirds. In essence, each deadline reflects a reasonable, good faith amount of progress on the submission (as opposed to a required number of words or pages). You should focus on making complete arguments rather than turning in a specific number of pages, although your Full Draft should amount to a total of at least twenty double-spaced pages.

Part II
First, you must expand the outline of the legal and factual background of your piece. Your updated and expanded outline should be more detailed for the purpose of providing your Notes Editor with a sufficient basis for understanding your subsequent arguments. The Notes Office also requires that you complete a draft of the first argument Part of your piece. For example, a typical Note is usually composed of three distinct Parts. Part I usually consists of background information, providing the framework for the Note’s arguments. Parts II and III constitute the argument portions of a Note. Based on this model, you must submit your detailed outline along with Part II by this deadline. If you find it necessary to draft Part I, the background section of your Note, prior to drafting Parts II and III, you should feel free to do so and to submit it along with Parts II and III. Bear in mind that this will not affect any of the other due dates. The core argument portions of your piece must still be drafted in accordance with the required due dates.

Part III
Your second deadline requires a written draft if both substantive argumentative portions of your Note. Your Part III submission will include a revised outline of the background Part of your piece, making sure that your outline provides your Notes Editor with sufficient information to understand the basis for your arguments. Using the model provided for the previous deadline, a Note composed of three Parts will include a detailed outline of Part I and a written draft of Parts II and III by this due date.
Part I
After putting together the argumentative pieces, you will have the best idea of what background information your reader will need to understand and agree with your argument. For this deadline, you will want to incorporate all feedback you’ve received from your Notes Editor and fellow AEs so far. You will then want to draft your full introduction and Part I, keeping in mind your target audience and the structure and substance of your argument.

Full Draft
After submitting Part I, along with your edits to Parts II & III, your Notes Editor will review your work and provide you with comments with the aim of ensuring that your written work is of publishable quality. Provided that you have shown a good faith effort in the writing and revising stages of your Note, the writing requirement will be satisfied after you have turned in a final draft of your Note of at least twenty double-spaced pages—which will consist of refining the work that you turned in previously and incorporating your Notes Editor’s comments and suggestions.

Associate Editors should be mindful that the Notes Office is conducting its first Call on Sunday, December 28, 2014. This date falls before completed Notes are due. Consequently, Associate Editors wishing to submit to the December 28 call must turn in an entire Note including a written background Part in addition to all argument Parts. For AEs interested in submitting to this Call, it is worth working with your Notes Editor as soon as possible to put you on a truncated timeline in order for your piece to be ready in time.

Last, while these guidelines may appear to describe a rigid outline for both your Note and your writing process, that is not the intention. Parts II and III should generally be understood to mean the first and second halves of the substantive argument of your Note. Do not feel as though your piece must be organized into three neat and compartmentalized Parts. Our goal with this policy is to push Associate Editors to do the hard thinking about the core argument of their Notes earlier in the semester. This will help Associate Editors craft pieces that are both original and meaningful. Your Notes Editor is committed to helping you achieve this goal and you should feel free to consult him or her at any time.

Turning in a Note or Comment of publishable quality does not mean that it will be published. If you choose to pursue publication, your piece will likely go through significant additional revisions before it is approved for publication. Indeed, the road to publication is often a long one, and the length of time needed to make your piece ready for publication varies from person to person. Refer to the Section VII of the Redbook for more details.
2. *First Impressions* Essays

**Essay Outlines**
The outline for a *First Impressions* Essay is similar to that of a Note. It typically should run two to three pages, but you should not add content simply to fill space. As with Notes and Comments, the purpose of this assignment is for you to begin formulating your arguments, documenting their support in your sources, and identifying trouble spots and areas that need further research. Your focus should not be on writing or citation style but organization and structure. The more detailed and developed your outline, the more useful it will be during the writing process. A sample Essay outline is included in the Appendix to the *Redbook*.

**Full Drafts**
Unlike Notes and Comments, *First Impressions* Essays are not turned in by segments, but wholesale. This is because Essays are shorter and tend to be more self-contained.

You will have fulfilled your writing requirement once you have turned in two Full Drafts of publishable quality, with each Draft running 2,800–3,200 words. The word range is a hard-and-fast rule, inclusive of footnotes. Strong Essays include approximately thirty footnotes. If the Full Draft you turn in for either of your two Essays is not of publishable quality, you will be required to revise and resubmit until it meets the expectations of the Notes Office. If this occurs, the Executive Notes Editor will apprise you of any new deadlines and bad faith may result in disciplinary action.

Turning in an Essay of publishable quality does not mean that your Essay will be published. Refer to the Section VII of the *Redbook* for more details.
VII. THE PUBLICATION PROCESS

A. Notes and Comments

1. The Call System

Notes and Comments are solicited for publication through a “Call for Submissions” (“Call”) format. Periodically, the Notes Office will have a Call deadline, listed below for Volume 114, at which time the Notes Office will review and select pieces submitted for publication.

**Call Deadlines for Volume 114**
- Sunday, December 28, 2014
- Sunday, February 15, 2015
- Sunday, March 29, 2015
- Sunday, July 5, 2015
- Sunday, August 30, 2015

Notes must be submitted to the Executive Notes Editor via email (mlr.ene@umich.edu) by 11:59 pm on the date of the Call deadline.

Although there is no pre-set number of Notes or Comments we accept for publication, typically fourteen Notes are published in each Volume (two Comments are roughly equivalent to a Note for publication quota purposes)—two Notes per issue, with the exception of Issue 6, our annual Book Review Issue, which does not contain any Articles, Notes, or Comments.

2. Who Can Submit to Calls?

- Category 1: Current *MLR* editors (i.e., Editorial Board members, Contributing Editors, and Associate Editors). *MLR* editors who are summer starters may also submit to Calls during the winter semester after they graduate.
- Category 2: Any 2L or 3L currently enrolled at the Law School submitting a Note as a Write-On candidate. Summer starters may also submit to Calls during the winter semester after they graduate.
- Category 3: *MLR* alumni whose pieces qualify as Notes and not Articles. Preference may be given to those alumni graduating most recently.

Candidates in Category 1 and Category 2 receive equal weight in the evaluation process. Category 1 and Category 2 candidates receive preference over Category 3 candidates.

3. Call Evaluation and Slating

All six Notes Editors and the Managing Editor (collectively the “Committee”) read all submissions received through a Call and independently rank them according to their readiness for publication. Notes and Comments considered “ready for publication” will comply with the guidelines set forth in the *Redbook*, with particular emphasis on the Readiness for Publication Checklist (included as an Appendix to the *Redbook*). Notes and Comments are tentatively slated for publication based on the Committee’s rankings as well as a discussion among the Committee.
If your Note or Comment is not slated for publication through a particular Call, you may submit it to subsequent Calls without penalty (i.e., it is to your advantage to submit to as many Calls as possible). The Notes Office encourages you to work with your Notes Editor in advance of Call deadlines to improve your readiness for publication.

4. Full Read

The Committee conducts a Full Read on each Note and Comment slated for publication. In a Full Read, the Committee members will meet to scrutinize it page by page to ensure that it is ready to begin the publication process. Full Reads focus on two aspects of Notes and Comments: first, whether the argumentation is sensible, complete, well-supported, and persuasive; and second, whether the structure appropriately conveys the arguments.

Each Committee member comes to the Full Read with written comments. The Committee members discuss potential edits to your Note or Comment and vote on whether particular changes are recommended or required. Your Notes Editor serves as a historian and advocate for you (for example, informing the Committee whether a particular suggestion has already been tried and did not work). Additionally, your Notes Editor is responsible for taking notes and drafting a “Full Read Memo.”

After a Full Read, you will receive a Full Read Memo from your Notes Editor containing a list of mandatory and recommended changes to your Note or Comment. You will also receive a marked-up copy containing all of the comments from the Committee. For your Note or Comment to be approved for publication, you must make any mandatory changes identified in the Full Read Memo. All other suggested edits, including those contained in the Committee members’ emailed drafts, are discretionary.

After making any necessary revisions from the Full Read Memo, you will resubmit your final draft to your Notes Editor and the Executive Notes Editor. Together, they will verify that you have incorporated all of the changes and determine whether your Note or Comment is ready for publication. Your Notes Editor has the authority to require as many drafts as he or she believes the Note or Comment needs before formally approving it for publication. In addition, the Committee may reconvene to discuss your Note or Comment a second time if it requires large structural changes or other significant edits. The Committee may also decide to send out comments in anticipation of a Full Read in order to address larger argumentative or structural issues.

When your Notes Editor and the Executive Notes Editor feel that your Note or Comment is ready for publication, the Committee will conduct a final preemption check on your piece. If there are no preemption problems, your Note or Comment will be officially approved for publication, and the source-gathering and citechecking process begins.

5. Citechecking, Incorporation, Pageproofing, and Final Review

MLR staff citechecks and pageproofs Notes and Comments in the same manner as Articles. Upon completion of citechecking, an “incorper” will incorporate any changes recommended by the
citecheckers. You will then receive a marked-up copy of your Note or Comment containing the incorper’s edits in track changes. You may be asked to find additional sources or clarify footnotes at this point, but you can also reject changes proposed by the incorper.

Next, your Note or Comment is sent to the Executive Editors of Pageproofing and the Editor-in-Chief, who make further suggestions in track changes. Again, you may reject any edits proposed at this stage, but we encourage you to take suggestions from MLR seriously, as they have been given to you in an attempt to help you publish the best possible piece.

Lastly, your Note or Comment will undergo a Final Review prior to publication to ensure that there are no grammatical or objective errors.

6. Post-Publication

When you publish your Note or Comment in MLR, you are entitled to twenty-five free copies in its published form to hang on the refrigerators of all your friends, relatives, and prospective employers. You may also order additional copies at any time, for a fee.
B. First Impressions Essays

1. Ongoing Collection System

First Impressions accepts submissions on an ongoing basis and makes decisions based on the merit of the submission and the volume and quality of other submissions, including outside submissions. Anyone can write and submit Essays. If your Essay is not selected for publication, you are welcome to resubmit it at a later time. We encourage you to work with your Notes Editor to revise your Essay before resubmitting. The publishing goal for student Essays is four to eight in any given volume. The production timeline for such pieces is roughly six to eight weeks.

Essays must be submitted to the Executive Editors of First Impressions via email (mlr.fi@umich.edu).

2. Evaluation and Slating

Both Executive Editors of First Impressions will read all submissions and select Essays for publication in largely the same manner as the Notes Office does for Notes and Comments.

3. The Editing Process

Once a student piece is accepted for publication, First Impressions Editors will work closely with the student and his or her Notes Editor to edit and publish the Essay. First Impressions Editors will citecheck the piece and make substantive edits. They will return the piece to the student to consider and incorporate those edits. The process of making substantive edits will continue until First Impressions determines that the Essay is ready for publication. First Impressions Essays then undergo the same Pageproof and Final Review editing stages as Notes and Comments, and the pieces are then formatted and finalized for publication.

4. Publication

Once First Impressions is ready to publish the Essay, the author will review it once more and approve it for publication. The Essay will then be uploaded to the website (http://www.michiganlawreview.org). Essays published in First Impressions are published on the website but not in the print edition of the Law Review.
C. Book Notices

1. Rolling Publication System

The Book Review Office operates on a rolling publication system: Book Notices can be submitted at any time and will be considered for publication in the order in which they are received. MLR only publishes Book Notices in Issue 6, and AEs should tentatively expect that there will be two or three slots open for Book Notices in that Issue in Volume 114 (Issue 6 for Volume 113 has already been filled). The bulk of the selection process occurs from February to early April, so AEs are advised to submit their pieces by then!

Book Notices must be submitted to the Book Review Editors via email (michlrev.ed.br@umich.edu).

2. Book Notice Selection

When considering whether to publish a Book Notice, both Book Review Editors read the submission and independently research the underlying book. The submissions are then discussed and evaluated by the Book Review Editors. Often, the Book Review Editors will meet more than once (and conduct follow up research between meetings) on a given piece. The Book Review Editors then select the pieces chosen for publication.

The Book Review Office does not have a formal evaluation rubric for deciding whether to publish a Book Notice, but both Book Review Editors will select what pieces are published by holistically considering a number of different bases, including (1) the importance of the book; (2) the importance of the author’s contribution to the literature; (3) the analytical depth of the Notice; (4) the Notice’s style; (5) the Notice’s completeness; (6) the accessibility and interest to the Book Review Issue’s audience; (7) the degree of preemption; and (8) the appropriateness of the Notice in the context of the other pieces being published in the Issue. The Book Review Office prefers reviews of books published in the past two years or whose publication is imminently forthcoming.

3. The Editing Process

Once a Book Notice is selected for publication, the Book Review Office conducts a version of the Notes Office’s Full Read process. It will then return the manuscript to the author. Two or more rounds of substantive edits will then ensue based on interaction between an assigned-Book Review Editor and the author. The piece is then funneled into the normal production process of Citechecking, Incorporation, Pageproofing, and Final Review, as with Notes and Comments.

4. Publication

When you publish your Book Notice in MLR, you are entitled to twenty-five free copies in its published form to hang on the refrigerators of all your friends, relatives, and prospective employers. You may also order additional copies at any time, for a fee.
VIII. THE ROLE OF YOUR NOTES EDITOR

The Notes Editor you are assigned before orientation will be your closest contact on MLR while you are an AE. He or she will provide feedback on all written work product you turn in as you progress on the writing requirement, as well as any drafts you submit after fulfilling the requirement. He or she will also run your Notes Editor Group workshops and generally serve as your writing mentor on the journal. Given the frequent interaction you will have with your Notes Editor, his or her opinion of your work and effort will carry weight when and if you decide to apply for an Editorial Board position yourself.

Feel free to discuss any challenges or new ideas with your Notes Editor—that’s the whole point of a Notes Editor. In addition, please remember to keep your Notes Editor up to date on developments in your writing’s subject matter. This includes keeping your Notes Editor apprised of the results of your routine preemption checks.

Keep in mind that once the new Editorial Board is elected (i.e., when you and other members of your volume take the reins of MLR), which usually occurs at the end of January or thereabouts, you will be assigned a new Notes Editor—someone from your own volume. That person might see your writing through to the final stages of publication, although your original Notes Editor may continue to have input in the process. Remember that we are here to help you, so please use us as a resource!
APPENDICES

1. Sample Preliminary Topic Proposals
2. Sample Roadmap Paragraphs
3. Sample Mini-Roadmaps
4. Sample Note Outline & Roadmap
5. Sample *First Impressions* Essay Outline
6. Coding *Supra* and *Infra* Note References
7. Sample Note
8. Sample Comment
9. Sample *First Impressions* Essay
10. Sample Book Notice
Sample Preliminary Topic Proposals

Sample Preliminary Topic Proposal #1 (Note - State Court Split)

CONTENT TYPE
Note – State Court Split

TOPIC AREAS
Civil lawsuits, punitive damages, survival of claim

ISSUE
Should punitive damages be assessed against a deceased tortfeasor’s estate?

BACKGROUND
Currently, six states (Alabama, Illinois, Montana, Pennsylvania, Texas, and West Virginia) allow plaintiffs to collect punitive damages from the estates of deceased tortfeasors. Meanwhile, about thirty jurisdictions disallow it. Fourteen states have clear statutory bars disallowing such damages and five states (Louisiana, Michigan, Nebraska, New Hampshire, and Washington) do not allow punitive damages in any civil cases.

NATURE OF THE LEGAL CONTROVERSY
One of the determinative questions appears to be the purpose of a state’s punitive damages tradition or law and how the court finds it relates to the dead-tortfeasor scenario.

For example, where a state only recognizes specific punishment of the wrongdoer as the purpose of punitive damages, it may be likely to disallow the claim once the wrongdoer is dead. Opinions and Notes supporting this view have said that one may not punish the dead, or rather that the punishment at that point becomes punishment of innocent heirs of the deceased. However, it has been suggested that a person may indeed be effectively punished once dead by diminishing their estate and that this also serves as a general deterrent. Alternatively, it has been suggested that a state’s purpose in allowing punitive damages is to compensate a victim for otherwise uncompensable harm. If the state takes this view, it may be more likely to allow punitive damages against dead tortfeasors.

STATE OF THE LEGAL CONTROVERSY
Most states have dealt with this issue in either their courts or legislatures. Although I have yet to double-check each jurisdiction, it appears that 13 states—Arkansas, Connecticut, Delaware, Hawaii, Indiana, Kentucky, Maryland, New Jersey, North Dakota, Ohio, South Carolina, South Dakota, and Utah—have not considered this issue as yet.

PREEMPTION PROBLEMS
The literature has generally been explanatory, e.g., casenotes or surveys reviewing the status of the rule in varying states, sometimes noting approval of the court’s decision. See, e.g., Scott A. Hennis, Casenote, Exemplary Damages—Survival Statute—Recovery of Exemplary Damages from the Estate of a Tortfeasor is Permitted Under the Texas Survival Statute: Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984), 16 St. Mary’s L. J. 731(1985) (explaining and approving
the Texas Supreme Court’s decision to allow such damages). The advocacy pieces that are on-point are state-oriented and argue for disallowing such damages: Paul Minnich, Comment, *Punitive Damages and the Deceased Tortfeasor: Should Pennsylvania Courts Allow Punitive Damages to be Recovered From a Decedent’s Estate?*, 98 Dick. L. Rev. 329 (1994); Charles William Burton, Comment, *Punishing the Dead: Whether the Estates of Dead Tortfeasors Should be Responsible for Punitive Damages*, 12 U. Ark. Little Rock L. J. 283 (1989/1990)(focusing on Arkansas); Diana Wagner Carr, Note, *Torts—Punitive Damages—The Florida Supreme Court is Asked to Decide Whether Punitive Damages may be Awarded Against a Deceased Tortfeasor’s Estate—Byrd v. Lohr, 488 So. 2d 138 (Fla. 5th DCA 1986)*, 15 Fla. St. U. L. Rev. 375 (1987). There is room for a Note to discuss and advocate the merits of allowing such a scheme.

There is one brief article (Osborne M. Reynolds, Jr., *Punitive Damages After Death – Can Tort Law Create Heaven and Hell?*, 26 Okla. L. Rev. 63 (1973)), that spends a couple of pages exploring the question and suggesting that punitive damages should be collected from the estates of dead tortfeasors. Most of the ten-page article deals with deceased plaintiffs. The article is more professorial musing than an advocacy piece; it does not seem to be offering a final word, rather it throws out some ideas without developing them fully. I hope to raise the point (to be derived from estates law) that control over one’s estate is sufficiently important to the living that the estate’s posthumous diminution would indeed be a specific punishment and general deterrent. This was raised in two sentences in the above mentioned article.
Sample Preliminary Topic Proposal #2 (Note - Circuit Split)

CONTENT TYPE
Note – Circuit Split

TOPIC AREAS
Criminal law, entrapment

ISSUE
Does the government’s burden in disproving an entrapment defense include proving a positional (“readiness”) factor?

BACKGROUND
In its latest review of entrapment, Jacobson v. United States, 503 U.S. 540 (1992), the Court held that when the government’s search for a conviction leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, would not have violated the law, the courts should intervene and uphold an entrapment defense. The facts of this case included government agents inducing a Nebraska farmer through a campaign of phony mailings to violate the ban on child pornography. After 2.5 years, the farmer succumbed and ordered an illegal magazine. The Supreme Court held as a matter of law that the defendant had been entrapped.

NATURE OF THE LEGAL CONTROVERSY
In Jacobson, the Court did not specify whether the government’s showing of predisposition must include both “mental” and “positional” elements. A circuit split has developed over this issue.

STATE OF THE LEGAL CONTROVERSY
In United States v. Hollingsworth, the en banc Seventh Circuit interpreted Jacobson as establishing that a showing of predisposition includes both “mental” and “positional” elements, creating a difficult situation for government officials and an easy entrapment defense for defendants. The court advanced the criterion that to prove a defendant’s predisposition to commit a crime, the government must show that the defendant was not only willing but was also in a position and was likely to do so, without government assistance.

The Ninth Circuit decision in United States v. Thickstun created the circuit split. In Thickstun, the court disagreed with the Seventh Circuit’s finding that predisposition is not a purely mental state.” The Thickstun court read Jacobson “not as creating a requirement of positional readiness, but as applying settled entrapment law,” and not requiring proof of “positional” predisposition to avoid an entrapment defense. The court relied on the five factors set forth in United States v. McClelland (9th Cir.) for proving predisposition: (1) the defendant’s character and reputation, (2) whether the government initially suggested the criminal activity, (3) whether the defendant engaged in the activity for profit, (4) whether the defendant showed any reluctance, and (5) the nature of the government’s inducement.

The Fifth Circuit’s decision in United States v. Knox widened the circuit split. There, the Fifth Circuit agreed with the Seventh Circuit’s interpretation of Jacobson in Hollingsworth. The Fifth Circuit said that to show that a defendant was likely to engage in an offense in the absence of the
government’s inducement, prosecutors must show that the defendant had the necessary skills to commit the offense. In Knox, the prosecutors did not present any evidence that the defendant knew how to engage in money laundering prior to the undercover agents’ inducements; therefore, the court found that the defendant was entrapped as a matter of law.

In addition, in United States v. Brown, the Eleventh Circuit held that predisposition is necessarily a “fact-intensive inquiry into a defendants’ state of mind. Therefore, entrapment as a matter of law cannot be reduced to any list of factors for a reviewing court to examine.”

Preemption Problems
Cert was denied in McClelland. Cert was filed in Thickstun on July 1. Cert has not been filed in either Hollingsworth or Knox. On August 5, the Fifth Circuit granted en banc review to Knox.

This issue has been developing over a long period of time, and there are a multitude of articles discussing entrapment. Yet, since the split was caused by the Thickstun opinion that was released in April 1997, no law review Notes or Articles have been published directly discussing these cases and their interpretations of Jacobson. The most recent law review articles have only gone so far as dissecting and endorsing the 7th Circuit’s ruling in Hollingsworth. See Thomas G. Briody, The Government Made Me Do IT – The Changing Landscape on the Law of Entrapment, 45 R.I. B. J. 15 (Mar. 1997); John E. Nilsson, Of Outlaws and Offloads: A Case for Derivative Entrapment, 37 B.C. L. Rev. 743 (1996).
Sample Preliminary Topic Proposal #3 (First Impressions Essay)

CONTENT TYPE
First Impressions Essay

TOPIC AREAS
Indian Law, Family Law, Upcoming Supreme Court Cases

ISSUE
What are the possible outcomes of the upcoming Supreme Court case Adoptive Couple v. Baby Girl?

BACKGROUND
Well-established Indian law seems to answer the specific questions presented in Baby Girl. There is also wide agreement about the interpretation of the Indian Child Welfare Act more generally and the constitutionality of the ICWA and Indian law. Almost every jurisdiction agrees that the ICWA applies to children who have never been part of an Indian family. Well-established precedent supports Congress’s power to legislate about Indian affairs under the Indian Commerce Clause. Classifying people as “Indian” doesn’t raise the same concerns as classifying people by race because “Indian” is a political classification. All of this suggests something else is going on in this case and the outcome of the case could bring major changes in Indian law.

NATURE OF THE LEGAL CONTROVERSY
It’s clear the Court thinks something is wrong with the ICWA, but it’s not clear what that is. This Essay will predict some of the things the Court may be concerned about, focusing specifically on arguments regarding the constitutionality of the ICWA and Indian law generally.

STATE OF THE LEGAL CONTROVERSY
The precedent is well-established, but the fact that the Supreme Court granted cert on this case suggests it is about to be upended. The question is how.

PREEMPTION PROBLEMS
The major preemption worry is that the Supreme Court will decide the case before the piece is published.
Sample Roadmap Paragraphs

**Generic Sample**

This Note argues that the courts should reach X result. Part I contends that the language and intent of the statute strongly suggest X interpretation. Part II argues that analysis of the policies animating the statute reinforce this conclusion. Part III maintains that Y objection, although plausible, does not justify rejecting X.

**Samples from Notes We Have Published**

**Basic roadmaps**

This Note argues that the MBTA applies only to activities directed at wildlife. Part I contends that the language and legislative history of the statute show that Congress intended a narrow reading of the MBTA. Part II demonstrates that, if construed broadly, the MBTA would become a criminal law of disturbing breadth, and that the limiting principles that have been suggested—prosecutorial discretion, extra-hazardous materials, and permit schemes—all suffer from fatal flaws. Part III argues that sound environmental policy for migratory birds can be achieved without an expanded reading of the MBTA.


This Note argues that courts should adopt the Eighth Circuit’s approach in addressing the penalty procedures that follow food stamp trafficking violations. Part I argues that the Food Stamp Act’s review provision allows for judicial review of the agency’s rules, and that the ten-day response requirement is an arbitrary and capricious standard to which small store owners should not be held. Part II contends that Congress intended to allow stores to present evidence that their permanent disqualification would cause hardship to households—and that even absent that intent, the agency has no basis for excluding it. Part III asserts that courts that refuse to review the agency’s formula for punishing violations misapply Supreme Court doctrine, and that courts reviewing the formula will find it cannot be upheld. This Note concludes that courts should not allow the FCS to require stores to respond to charge letters within ten days, that they should force the FCS to hear stores’ evidence that their permanent disqualification would hurt the surrounding community, and that they should find the FCS’s penalty formula too harsh for small grocery stores.

This Note seeks to define precisely the tort injury in lost chance cases and to ascertain the proper method for measuring the damages associated with that injury. Part I defines the types of losses that constitute the tort injury in lost chance cases and argues that courts have, for the most part, failed to identify these losses properly. For this reason, they have failed to measure damages in a way that accurately compensates for these losses. Part II advocates a method of damages determination that relies on direct assessment of the tort injury by the factfinder, informed by a clear understanding of the distinct tort injury at issue and by the guidance traditionally offered by the judge’s instructions. In advancing such a formulation, Part II criticizes two alternative methods of damage valuation. This Note concludes that the loss of chance doctrine can achieve legitimacy as a valid extension—rather than an ill-fitting alteration—of traditional principles of tort law only by defining in precise terms the losses that constitute the tort injury in lost chance cases and by allowing juries the discretion to assess the value of those losses without undue constraints.


Sample Mini-Roadmaps

**Generic Example**

This Part asserts that both the language and structure of the statute strongly suggest \( X \) interpretation. Section I.A argues that the statute’s plain meaning is \( X \). Section I.B reviews the structure and concludes that the intent of Congress in enacting the statute was to do \( X \).

**Samples from Notes We Have Published**

**Diving right in**

This Part explicates the doctrine of accomplice liability as formulated in *Peoni* in order to inform the fashioning of an appropriate standard of aiding and abetting under section 924(c). Section I.A explains the derivative nature of complicity and suggests how this informs a critical distinction between the mens rea of accomplice and principal toward the principal’s crime, and the mental element required of the accomplice toward his own conduct in order to punish him on a level with the principal. This distinction has important implications for the rule of complicity under section 924(c): the accomplice must know that the principal uses or carries a gun during the predicate crime, but must also act intentionally to assist or influence him to do so. Section I.B explores the role of the intentional act requirement in triggering accomplice liability.


**Mini-roadmap at the end of an introductory paragraph**

Although nothing in the legislative history advocates recognizing purely reproductive disorders as disabilities, the legislative history does include explicit and universal recognition that all individuals infected with HIV qualify as disabled. One legislative committee expressed a belief that substantial limitations on the ability of HIV-infected individuals to reproduce provide the basis for universal coverage of HIV, thereby implying that reproduction is a major life activity. The courts that have recognized infertility as a disability have relied heavily on these comments about HIV as support for their conclusion that reproduction constitutes a major life activity. Section II.A asserts that it is improper to extrapolate from ADA coverage of HIV-positive individuals that the ADA also covers individuals with purely reproductive disorders. In fact, as Section II.B points out, legislators consciously excluded reproduction from their lists of sample major life activities, an omission that provides strong support for the inference that Congress did not intend reproduction to be considered a major life activity.

Mini-roadmaps for subsections

Section I.A argues that a court should consider whether the defendant’s condition severely impairs her in a predictable manner. Specifically, Section I.A.1 contends that congressional discussion of the Act’s goals and of the physical condition category supports the severity requirement. Section I.A.2 then maintains that Congress’s desire for fairness and rationality supports requiring a predictable condition.

Note Sample Outline & Roadmap

This Note argues that the omission of an offense element from a federal indictment is amenable to harmless error review. Part I explains how the Apprendi line of decisions increased the possibility for indictment error. Part II contrasts indictment error with the few structural errors identified by the Supreme Court, and concludes that indictment error is more similar to an analogous petit jury error, because grand jury proceedings may still be a reliable vehicle for assessing whether there is probable cause, and indictment errors do not have systemic implications for the criminal justice system. Part III contends that the theoretical and historical purposes of the grand jury make indictment error suitable for a case by case determination of whether the indictment error affected the grand jury proceedings.

I. Introduction
   a. Grand jury indictment is required to commence prosecutions (amend V)
   b. Errors are reviewed differently depending on if defendant objects
      i. F.R.C.P. 52(b), plain error review when defendant does not object
      ii. F.R.C.P. 52(a), when defendant does object
   c. When a defendant objects to a Constitutional error, either reviewed for harmless error, or considered structural error (reversible per se)
   d. Question: if offense element mistakenly omitted from indictment and defendant objected below, should court review for harmless error or does this merit per se reversal/dismissal of indictment
   e. Circuit Split
      ii. Per se Reversals: United States v. Du Bo, 186 F.3d 1177 (9th Cir. 1999) (weird in some cases – note); United States v. Spinner, 180 F.3d 514 (3d Cir. 1999)
f. NOT preempted: United States v. Resendiz-Ponce, 549 U.S. 102 (2007) SCOTUS did not have to reach Q because concluded indictment impliedly contained offense element

II. **Apprendi increased the possibility for indictment errors.**
      i. Anything that increases a defendant’s sentence is an offense element, must all be part of an indictment because every offense element must be charged in federal indictment **Almendarez-Torres**, 523 U.S. 224, 228 (1998).
   b. The **Apprendi** and **Booker** line of decisions increased the possibility of indictment error
      i. Distinctions between offense elements and sentencing factors can be unclear
      ii. Also difficult to distinguish statutory language from offense elements, or what can be inferred or implied in an indictment **United States v. Harms**, 442 F.3d 367, 373-74 (5 Cir. 2006) (because GJ could find omissions material, properly inferred element); United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001); **United States v. Resendiz-Ponce**, 549 U.S. 102 (2007) (overt acts sufficiently implied)
      iii. Also increases the potential for error because the heightened requirement on prosecutors increases the likelihood of random error or mistake
   c. Indictments may be of increasing importance and plea bargaining increases [get additional cite] Washburn, Kevin, *Restoring the Grand Jury* 76 Ford. L. Rev. 2333 (2008)

III. **Indictment error is more similar to petit jury errors which are reviewed for harmless error than it is to the few structural errors identified by the Supreme Court**
   a. The offense element in an indictment is a discrete, isolable issue whose likely impact on grand jury proceedings can be assessed, unlike the structural errors identified by the Supreme Court, whose effects are typically felt throughout the trial process and are not confined to discrete issues or segments of a criminal proceeding.
         1. Contrast with **United States v. Cotton**, 535 U.S. 625, 634 (2002), when on review for plain error the court concluded that it did not seriously affect fairness, integrity or public reputation of judicial proceedings to not allege drug quantity in indictment.
         2. That portion of plain error test (substantial rights) extrapolated to harmless error review in **Neder**, 527 U.S. at 9.
   1. United States v. Mechanik, 475 U.S. 66 (1986) witnesses appeared simultaneously before grand jury, violated F.R.C.P. 6(d) applied harmless error to grand jury proceedings for first time
   2. Mechanik’s logic is readily applicable to indictment error

b. Counter-argument: Every error will be harmless because defendants will be convicted at higher standard (reasonable doubt) rather than probable cause
   ii. Circuits that review for harmless error not experienced parade of horribles
   iii. Standard should be whether proceedings in grand jury affected, not just whether defendant was convicted. This prevents all errors from being harmless because the focus is on presentation to the grand jury not the end result of the proceeding
      1. Mojica Baez gets it wrong!
      2. HAMLING, 418 U.S. 87, 117 (req of indictment)

iv. Some errors reversed under harmless error United States v. Prentiss, 273 F.3d 1277 (10th Cir. 2001); United States v. Allen, 357 F.3d 745 (8th Cir. 2004)

c. Indictment error is most similar to omitting an offense element from petit jury instructions, which is reviewable for harmless error in Neder v. United States, 527 U.S. 1 (1999)
   i. An indictment error does not render the grand jury proceedings a fundamentally unfair/unreliable vehicle for probable cause Neder 527 U.S. at 9.
      1. Indictment error does not vitiate all of the grand jury’s findings Neder 527 U.S. at 11
   ii. Petit jury is a more fundamental right but is still subject to harmless error review when jury instructions omit an element of the offense
      1. Not incorporated Hurtado v. California, 110 U.S. 516, 538 (1884); prosecutor’s exculpatory obligations are much less, United States v. Williams, 504 U.S. 36 (1992); accused no right to present evidence, Untied States v. Calandra, 414 U.S. 338 (1974); grand jury in secret (F.R.C.P. 6(d) and (e))
   iii. Fact finding role of petit jury not usurped (compare dissents in Neder with unanimous Cotton) because grand jury just determines whether more likely than not defendant committed crime
      1. Similar to judicial standard in summary judgment motions (administrable, and not contrary to 6th Amendment)
      2. But there still remains the problem of giving more power to judges from the people
Practically and logically it does not make sense to have a higher standard of review for Fifth Amendment indictment errors than for Sixth Amendment errors, when the Fifth Amendment indictment error is often a precursor to the Sixth Amendment failure to submit an offense element to the jury. Fairfield, Joshua A.T., *To Err is Human: The Judicial Conundrum of Curing Apprendi Error*, 55 Baylor L. Rev. 889 (2003)

**IV. Indictment error can be harmless, because it is possible for a defective indictment to fulfill the purposes of an indictment so as to not affect later proceedings.**

a. An erroneous indictment could fulfill the purposes of the grand jury proceedings, and so error should be assessed on a case to case basis.


1. Whether there is probable cause is not an all or nothing determination but an inherently factual, case by case inquiry

2. This is similar to sufficiency of evidence claims that judges routinely do

ii. **Notice to the defendant of charges against him/her** Ex Parte Bain, 121 U.S. 1 (1886); Duncan v. Louisiana, 391 U.S. 145 (1968), Batchelor v. United States, 156 U.S. 426 (1895); Stirone v. United States, 361 U.S. 212 (1960)

1. The severity of omission, or whether an offense element could be naturally inferred, could or could not change a defendant’s trial strategy (not all should be reversible per se).

2. No notice type rights (6th Amendment) have been recognized as structural error, likely because whether a defendant was surprised at trial based on the indictment is a factual inquiry that depends on the actual and potential strategies available to the defendant


4. Resendiz-Ponce demonstrates how some indictment errors may be difficult to distinguish, or may be so technical that they could not prejudice the defendant

5. Circuit practice that distinguishes between constructive amendments and variances is analogous to a notice-based differentiation for indictment error US v. Vigil, 523 F.3d 1258 (10th Cir. 2008); United States v. Whirlwind Soldier, 499 F.3d 862 (8th Cir. 2007); US v. Budd 496 F.3d 517 (6th Cir. 2007);

iii. **Definition of offense to prevent second prosecution (double jeopardy)** United States v. Debrow, 346 U.S. 374 (1953)

1. Double jeopardy determinations made by a judge, and so it reasonable for a judge to look at the particular case to determine whether the offense is sufficiently set forth so as to prevent a second prosecution

   1. The check on government was to prevent unsubstantiated prosecutions, which the grand jury serves by assessing whether there is probable cause
      a. Judiciary acts as check on executive power outside of unsubstantiated prosecutions [cites]


   1. Responses
      a. Prosecution as executive; decision whether to prosecute = executive (art. I; Morrison v. Olson, 487 U.S. 654 (1988)
      b. No constitutional right to grand jury nullification; the check on government was to prevent unsubstantiated prosecutions, which the grand jury serves by assessing whether there is probable cause (and judge can assess similar to sufficiency of evidence claims + other judicial checks on executive)
         ii. Edwards, George J., *The Grand Jury: considered from an historical, political, and legal standpoint and the law and practice relating thereto*

   2. Explain why: Vasquez v. Hillary, 474 U.S. 254 (1986) does not imply all grand jury error as structural
      a. But this was for systemic justice concerns- did not want racial discrimination in judicial system.
      b. Compare Cotton discussion of reputation of judiciary for indictment error

V. **Conclusion**
First Impressions Essay Sample Outline

1. Introduction
   a. Factual and procedural background of the case (Adoptive Couple v. Baby Girl)
   b. The official questions presented in this case have already been answered, so it is likely the Court intends to address a different question

2. What might the real purpose of Baby Girl be?
   a. It is unlikely the real purpose of the case is to answer the question of whether the Indian Child Welfare Act (ICWA) applies to children who have never been part of an Indian family (the “existing Indian family exception”)
      i. The exception undermines the goal of the ICWA to remove Indian family decisions from state control
      ii. The question has basically been answered. Even states who used to embrace the exception have rejected it in recent years
   b. The question has basically been answered. Even states who used to embrace the exception have rejected it in recent years.
      i. Scalia calls Mississippi Band of Choctaw v. Holyfield, which held that the voluntary placement of Indian children by their parents into a non-Indian family violated the ICWA, the biggest regret of his career, thus the purpose of Baby Girl might be to overturn Holyfield
      ii. However, Holyfield and Baby Girl involve different provisions of the ICWA, so the easiest way to use Baby Girl to overturn Holyfield is to find the entire ICWA unconstitutional
      iii. Two propositions support the constitutionality of the ICWA, and if either falls, the ICWA and all of Indian law will fall
         1. The first proposition is that laws for Indians are not race-based
            a. Morton v. Mancari holds that “Indian” is a political categorization, not a racial categorization
            b. The Court may hold that “Indian” is a racial categorization
         2. The second proposition is that Congress is authorized to make special laws regarding Indians
            a. Congress has plenary power over Indian affairs under the Indian Commerce Clause
            b. Congress has plenary power over Indian affairs under the Indian Commerce Clause
      iv. The Court will likely not question the constitutionality of the ICWA and Indian law by directly questioning established precedent
         1. Doing so would require blatant disregard of precedent
         2. Doing so would appear to be motivated by political considerations that would undermine public confidence in the courts and the rule of law
   c. It may be to question the constitutionality of the ICWA on narrow 10th Amendment grounds by arguing that it is unconstitutional because it constitutes a significant infringement on state’s rights
      i. The DOJ questioned the 10th Amendment implications of the ICWA when it became law
      1. However, the House of Representatives argued that the ICWA did not
interfere with the state’s power over domestic relations because that power has never extended to Indian family relations

ii. If the Court does invalidate the ICWA on 10th Amendment grounds, it could be the first in a series of cases chipping away at Indian law on 10th Amendment grounds

3. Conclusion
Coding Supra and Infra Note References

Whenever you wish to refer to another footnote appearing earlier (supra) or later (infra) in your document, you should code these references. Coding ensures that the reference numbers will automatically update whenever you add or delete intervening footnotes.

Coding must be done immediately after inserting a number. Coding only takes a few extra steps. Fixing the mistakes that occur without coding could take hours.

Examples of references that should be coded
Supra note 3
See supra notes 15-22 (code BOTH the 15 and the 22)
Infra note 40
See Hagan, supra note 85, at 45 (code just the 85, NOT the 45)

Examples of references that should not be coded
Infra Section III.A

Here’s how to code

1. Highlight the number in the document.

2. From the INSERT tab, go to CROSS REFERENCE.

3. A small and apparently empty box will appear on your screen. To get the correct settings, go to the REFERENCE TYPE pull-down menu. (Reference Type pull-down menu is at the top of the Cross-Reference box, not at the top of the entire document.) Change the setting from “Numbered Item” to FOOTNOTE. Now your Cross-Reference box should be full with the first line of all your footnotes.

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