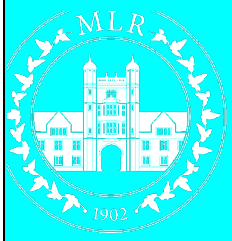


MICHIGAN LAW REVIEW



MICHIGAN LAW REVIEW

THE TEALBOOK

VOLUME 116
2017–2018

Table of Contents

I. Introduction 5

A. The Writing Requirement 6

B. Volume 116 Notes Office 7

C. General Timeline & Due Dates 8

II. The Writing Process (How to Satisfy the *MLR* Writing Requirement) 9

A. Topic Selection 9

1. Sources of Inspiration 9

2. Preemption Checks 11

B. Types of Publishable Pieces 12

C. Notes 12

1. What's a Note? 12

2. Note Structure 13

3. Common Pitfalls 14

4. Timeline and Deadlines for Notes 16

5. Grading Rubric for Notes 17

D. Comments 22

1. What's a Comment? 22

2. Comment Structure 23

2. Timeline & Deadlines for Comments 24

3. Grading Rubric for Comments 26

E. Book Notices 30

1. What's a Book Notice? 30

2. Book Notice Structure 31

3. Timeline & Deadlines for Book Notices 33

4. Grading Rubric for Book Notices 34

F. Online Essays 40

1. What's an Online Essay? 40

2. Online Essay Structure 41

3. Timeline and Deadlines for Online Essays 41

4. Grading Rubric for Online Essays 43
III. The Publication Process (Optional) 48
A. Who Can Publish? 48
B. Why Publish? 48
C. Publication Process for *MLR* (Notes & Comments) 49
D. Publication Process Flowchart for *MLR* Book Notices 49
E. Publication Process Flowchart for *MLR* Online 50
IV. Appendix 51
A. Sample Preliminary Topic Proposals 51
Sample Preliminary Topic Proposal #2 (Note—Circuit Split) 53
Sample Preliminary Topic Proposal #3 (Online Essay) 55
B. Sample Outline 56
Online Essay Sample Outline 61
C. Sample Roadmap Paragraph 62
Sample Roadmap Paragraphs 62
D. Sample Note 64
E. Sample Comment 65
F. Sample Book Notice 65
G. Sample Online Essay 65

I. Introduction

Dear Associate Editors,

Congratulations! The Notes Office is thrilled to welcome you to the *Michigan Law Review* and is looking forward to working with you to create awesome legal scholarship this semester.

As an Associate Editor, you have the opportunity[1] to write a publishable piece of student scholarship during the fall semester. You may write a Note, a Comment, an Online Essay or a Book Notice -- we'll help you sort through the differences and choose the one that is the best fit for you. No matter which format you choose, though, you will have the opportunity to explore a legal area in which you are interested and make a creative contribution to the surrounding literature. You might even end up cited in a Supreme Court opinion some day![2]

At the beginning of the semester, every Associate Editor is paired with a Notes Editor. We will be here to help you at every step of the process and to make your piece the absolute best it can be. This is a collaborative process: expect to participate in frequent workshops and meetings with your Notes Editor and other Associate Editors throughout the semester. Producing great scholarship is not a solo enterprise.

This manual, the *Tealbook*, explains exactly how to fulfill the *MLR* writing requirement and provides resources to help you do so. The Appendix contains samples of every type of publishable piece.

Good luck! We're excited to read (and hopefully publish) your work. Please do not hesitate to reach out with any questions; we look forward to getting to know you throughout the semester!

Sincerely,
The Notes Office
Mel Cassel
Laura Beth Cohen
Sally Gu
Paul Hoversten
Samantha Jaffe
Charlie Stewart

[1] A mandatory opportunity, but an opportunity nonetheless.
[2] This happens not that often. But it does, in fact, happen.

A. The Writing Requirement

One of the best parts about being on *MLR* is the opportunity to write original legal scholarship. It also happens to be required. Associate Editors can satisfy *MLR*'s writing requirement by completing one of four possible options:

1. Note (p. 12)
2. Comment (p. 22)
3. Online Essay (p. 30)
4. Book Notice (p. 40)

Each option will be more thoroughly explained throughout the *Tealbook*. The type of scholarship you choose to write is completely your own choice. After reading more about each type, you should choose the option that you feel is best for you and your topic.

Once the Notes Office has determined that you have fulfilled *MLR*'s writing requirement, you may decide to pursue publication. See page 26 for more information on *MLR*'s publication processes.

A few things to keep in mind:

1. Associate Editors may not use the piece they write to fulfil the *MLR* writing requirement as a paper for a class.
2. Similarly, Associate Editors may not use class papers they have previously written to fulfil the *MLR* writing requirement.[3]
3. Associate Editors may earn independent research credit for their *MLR* pieces with the approval of a supervising professor. Associate Editors cannot, however, use pieces that they co-author with a professor to fulfil the *MLR* writing requirement.

[3] But after you have fulfilled the writing requirement you can adapt a class paper, if you are so inclined, in an attempt to publish.

B. Volume 116 Notes Office

As you make your way through the *MLR* writing requirement during the fall semester, you will be assigned a particular Notes Editor to help you through the process. You should feel free to reach out to your Notes Editor at any time (metaphorically); we want to help you as best we can!

Mel Cassel



Hometown: Calabasas, CA
Undergrad: University of California, Berkeley
MLaw: WLSA, FYI leader, Senior Judge
1L Summer: US Attorney's Office, Los Angeles
2L Summer: O'Melveny & Myers, San Francisco

Laura Beth Cohen



Hometown: Bloomfield Hills, MI
Undergrad: University of Michigan
MLaw: RRJ, Outlaws, Dems
1L Summer: National Advocates for Pregnant Women
2L Summer: Covington & Burling, Washington, D.C.

Sally Gu



Hometown: San Diego, CA
Undergrad: University of Chicago
MLaw: Food Law & Policy, Health Law
1L Summer: Hogan Lovells, Washington, D.C.
2L Summer: Skadden, New York, NY

Paul Hoversten



Hometown: Lafayette, CO
Undergrad: Martin Luther College
MLaw: Street Law, Child Welfare Appellate Clinic, Senior Judge, TJ Hooper
1L Summer: Dep't of Education, Civil Rights, Denver
2L Summer: Dep't of Justice, Immigration Litigation, D.C.

Samantha Jaffe



Hometown: Venice, CA
Undergrad: Tufts University
MLaw: SRP, MDefenders, Unemployment Insurance Clinic, Child Advocacy Law Clinic
1L Summer: Alameda County Public Defender
2L Summer: Neighborhood Defender Service of Harlem, NAACP LDF

Charlie Stewart



Hometown: Columbus, OH
Undergrad: The Ohio State University
MLaw: Health Law
1L Summer: Judicial Intern, Southern District of Ohio
2L Summer: Jones Day, Columbus, OH

C. General Timeline & Due Dates

The *MLR* writing process begins in August with topic selection and ends in mid-January, right before the Editorial Board transition. In order to move efficiently and effectively, we have mandatory deadlines for each step of the process. If, upon looking at these deadlines, you immediately see a conflict with your personal schedule, you must notify your Notes Editor by Wednesday, September 6 to work out an alternative deadline.

To provide greater flexibility and account for any unforeseen circumstances, each Associate Editor is also given four (4) "flex days," or deadline extensions, that can be used at any point in the process. If you plan to use a "flex day," you must tell your Notes Editor at least 24 hours before the deadline.

MLR and the Notes Office takes deadlines, for you and for ourselves, very seriously. All deadlines for written work product are **11:59 pm** on the date listed. Failure to comply with any deadlines may result in disciplinary action and jeopardize your candidacy for an Editorial Board position. Plus, it will make your Notes Editor upset. No one wants that.

Deadlines Schedule

Date	**Assignment**
August 15, 2017	**Notes, Comments, Book Notices, and Online Essays:** Email five preliminary topic proposals to the Executive Notes Editor (*MLR*.ene@umich.edu)
August 16–20, 2017	**Notes, Comments, Book Notices, and Online Essays:** You will be assigned a Notes Editor who will provide feedback and help you narrow your topic ideas
August 24, 2017	**Notes, Comments, Book Notices, and Online Essays:** Email two final topic proposals to your Notes Editor
August 25–26, 2017	**Notes, Comments, Book Notices, and Online Essays:** Discuss top two topic proposals at *MLR* orientation with Notes Editor group
September 14, 2017	**Notes, Comments, Book Notices and Online Essays:** Roadmap and outline due
October 5, 2017	**Notes, Comments, and Book Notices:** Part II (or approved alternative) due **Online Essays:** First draft due
November 2, 2017	**Notes, Comments, and Book Notices:** Part I (or approved alternative) due

	Online Essays: Second draft due
December 11, 2017	**Notes, Comments, and Book Notices:** Part III (or approved alternative) + introduction due **Online Essays:** Third draft due
January 4, 2018	**Notes, Comments, and Book Notices:** Final draft (everything + conclusion) due **Online Essays:** Final draft due

II. The Writing Process (How to Satisfy the *MLR* Writing Requirement)

A. Topic Selection

1. Sources of Inspiration

Choosing a topic is likely the most challenging part of the writing process. But, all *MLR* editors who came before you did it. And all the ones who come after you will do it. So you can do it, too!

You should think in terms of crafting a "question presented," rather than just coming up with a broad "topic." The question that you decide to write about should be narrow, novel, complex, and interesting.

Start by tentatively choosing a broad, general topic (e.g., administrative law, corporate law, immigration). Once you have a broad topic in mind, ask yourself some of the questions listed below. This should guide you toward a narrow "question presented."

- Is Policy *X* unconstitutional (e.g., the writing competition prompt)?
- Does some longstanding doctrine or policy still make sense in 2017–2018, given that facts and law have changed?

- Does some longstanding doctrine or policy still make sense in 2017–2018, given that society's moral/ethical/legal framework has changed?
- Does some legal doctrine or policy actually accomplish the goal it's supposed to accomplish, given the facts on the ground? In other words, is there empirical support for the doctrine or policy?
- Do some jurisdictions disagree about a legal interpretation or rule (e.g., federal circuit splits, state common law splits)?
- Is there some line of cases or administrative decisions that's incoherent or irreconcilable?
- Does some administrative agency's policy exceed or deviate from its statutory authority?
- Do other states or countries treat some area of the law differently than we do? Why?

Some questions are laser-focused on a particular content area (e.g., immigration, medicine, environment) and others focus on methods or procedures (e.g., rules of evidence, standing, statutory interpretation). Both types of questions can be compelling, and we don't have a preference for one over the other.

When selecting a topic and devising a question, the Notes Office suggests that you look to the following sources for help. Remember that no matter what topic or form of writing you choose, your goal is to contribute to the legal community by producing a piece of scholarship that is original and unique. You will likely (and should) heavily rely on other sources, but in the end, your piece should say something new. So, fundamentally, it should be about something you find interesting!

- **Casebook notes, digests, treatises, and hornbooks.** Casebook hypos often include unresolved legal issues and conflicts among courts.
- **Class discussions and course syllabi.** Think back to the discussions your professors led regarding open legal questions.
- **Legal blogs.** The following is a list of particularly useful blogs:
    - *ABA Blawg Directory*: http://www.abajournal.com/blawgs/by_topic/ (this site has compiled a list of blogs on 100+ different legal topics)
    - *Antitrust Review*: http://www.antitrustreview.com/
    - *Balkinization*: http://balkin.blogspot.com (constitutional law/civil liberties)
    - *Bankruptcy Litigation Blog*: http://www.bankruptcylitigationblog.com/
    - *Election Law, by Professor Richard Hasen*: http://electionlawblog.org/
    - *Environmental Law Professor Blog*: http://lawprofessors.typepad.com/environmental_law/
    - *Federal Civil Practice Bulletin*: http://federalcivilpracticebulletin.blogspot.com
    - *Full Court Press*: http://afjjusticewatch.blogspot.com
    - *How Appealing, by Howard Bashman*: http://howappealing.law.com/

    - *Law Professor Blogs*: http://www.lawprofessorblogs.com/ (this site contains links to professor-written blogs on a variety of legal subjects)
    - *Lawfare*: http://www.lawfareblog.com (national security)
    - *Opinio Juris*: http://opiniojuris.org (international law)
    - *Patently O*: http://patentlaw.typepad.com/
    - *Professor Friedman's Blog*: http://confrontationright.blogspot.com/
    - *TaxProf Blog*: http://taxprof.typepad.com/
    - *SCOTUSBlog*: http://www.scotusblog.com/ (keep in mind that issues on which SCOTUS has denied cert often make for good Note topics)
    - *Sentencing Law & Policy, by Professor Douglas Berman*: http://sentencing.typepad.com/
    - *Volokh Conspiracy*: https://www.washingtonpost.com/news/volokh-conspiracy/
    - *Wall Street Journal Law Blog*: http://blogs.wsj.com/law/
- **Westlaw/Lexis searches.** For a Note on a circuit split, for examples, we recommend the following string of search terms: ("split" /s ("of authority!" "circuit!" "court!") % "sentence") & ([INSERT TOPIC OF CHOICE]).
- **Newspapers or other periodicals.** These sources can be especially useful in identifying decisions, statutes, or regulations with unknown legal implications.
- **U.S. Law Week.** This publication discusses recent Supreme Court decisions, including grants and denials of certiorari and major developments in the lower courts. *MLR* has a subscription, as does the Law Library.
- **Your brain**. Sounds corny, but if there's a topic you love, it'll be a lot less painful to spend a semester writing about it. Play to your interests and your strengths.

2. Preemption Checks

Before writing your piece, it is important to make sure that your topic has not been preempted. Preemption can occur in two ways: (1) the topic you are writing about has already been substantively covered by other scholarship reaching the same conclusion or (2) the controversy you have identified has been resolved by a recent court decision or piece of legislation.

To ensure that your topic hasn't been preempted, you will be required to maintain a "preemption report" on your writing from the day you start until the day you fulfil the *MLR* writing requirement or publish.

To conduct a preemption check, you should check the following sources on a weekly basis:[4]

[4] We know. This sucks. But what sucks more is realizing your 30-page Note is preempted in December.

- **Case law:** Make sure that the Supreme Court has not already decided the issue or does not plan to do so in the next year or so. Shepardize and keycite any relevant cases that deal with your issue. Make sure that the cases you plan to rely upon are still good law.
- **Legislation:** Make judgments about potentially preemptive bills. How likely are they to become law and make your issue moot?
- **Scholarly Writing:** If another writer has already focused on your precise issue, make sure that your piece either includes substantially different arguments or modes of analysis, or ultimately reaches a different conclusion. In order to check scholarly writing for preemption, search the legal periodical/journal databases on Lexis or Westlaw by using a few keywords from your topics or the names of cases or statutes pertinent to your issue.

B. Types of Publishable Pieces

As stated earlier in the *Tealbook*, there are four main types of publishable pieces: (1) Notes, (2) Comments, (3) Online Essays, and (4) Book Notices. Sections II.C–II.F will discuss each type of piece in detail.

C. Notes

1. What's a Note?

A Note is the classic law review work product. A Note does the following:

1. identifies an unresolved legal controversy or question;
2. analyzes the possible means for addressing the controversy by exploring the arguments on all sides of the debate; and
3. argues for a unique solution that would resolve the current legal dispute or uncertainty.

Most Notes fit into one of the following types:

- **Controversy Among Jurisdictions:** Jurisdictional splits are disagreements among different courts about how to handle or solve a particular legal issue. Jurisdictional controversies can include federal lower court splits, federal circuit splits, and state court splits. For examples of these types of Notes, see Dina McLeod's Note, *Section 2259 Restitution Claims and Child Pornography Possession*, published in Volume 109, and

Ted Koehler's Note, *Assessing Divisibility in the Armed Career Criminal Act*, published in Volume 110.

  - 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.
  - A Note should not merely say that one court's approach is better; a successful Note addressing a court split should take an innovative approach to resolve the disagreement.

- **Implications of Recent Court Decision, Statute or Administrative Action:** You may find that a recent development in the law changes or provides a solution to an otherwise unresolved legal controversy. Conversely, you may find that a recent development creates a new legal issue. Your Note may argue that a recent development in the law has the potential to solve an unresolved issue, or that it creates a new one. If you do the latter, you must provide a solution for the unresolved issue.
- **Hybrid Notes:** This type of Note uses another discipline (such as psychology, literature, public policy, medicine, etc.) to explore a legal issue and provide a solution. For examples of these types of Notes, see W. Robert Thomas, Note, *On Strict Liability Crimes: Preserving a Moral Framework for Criminal Intent in an Intent-Free Moral World*, 110 MICH. L. REV. 647 (2012), and 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).
  - This type of Note may also examine whether empirical data supports or contradicts the assumptions of a given doctrine or area of law.

A successful Note should be narrow enough to allow for careful, thorough analysis within **twenty-five to thirty-five double-spaced** pages.

A link to a sample Note, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After* Clapper v. Amnesty International USA, by Thomas Martecchini, is in the Appendix.

2. Note Structure

At the risk of sounding too formulaic, there is a uniform structure that consistently works for Notes. You can deviate from this structure if you have a compelling reason to do so,[5] but this structure works for most people and most Note topics. You can also deviate from the suggested page ranges with good reason, but these suggestions should keep the pieces of your argument in balance.

[5] Clear it with your Notes Editor!

Introduction and Roadmap (2–3 pages): This is your attention grabber and your roadmap. You should use the Introduction to tell a story or explain a news article and very quickly state the controversy.

At the end of your Introduction, you should write a roadmap paragraph explicitly outlining the order of your Note. A generic example:

> This Note argues that courts should reach *X* result. Part I provides a legal and factual background of the issue and places the question in context. Part II analyzes several sources and concludes that courts' current interpretation of the statute does not match Congress's original intent. Part III proposes that courts reinterpret the statute to mean *Y*, thus respecting both Congress's original intent and reliance interests that have developed over time.

Part One (5–7 pages): Provide the legal and factual background that the reader needs in order to understand Parts II and III. Remember, you're writing for a generalist audience, not for experts in the field. Also, resist the temptation to be long-winded in this Part. This is not the innovative or interesting part—this is the nitty-gritty, and realistically, many readers will skim this Part anyway. Be concise.

Part Two (8–12 pages): Identify the "problem" and explain why it's a bad thing. This usually involves collecting and analyzing a variety of sources (cases, statutes, legal and nonlegal articles, etc.) and pointing out something inconsistent, incoherent, or distasteful about the state of the law. You need to address counterarguments, especially if you are the first to identify the problem. Not everyone will immediately agree that your "problem" is really a problem at all, so you have to prove it.

Part Three (8–12 pages): Propose a "solution" to the "problem" you presented in Part II and explain why it completely (or doesn't completely) eliminates the conflict you identified. You may want to propose more than one possible solution. Explain why your proposed solution is better than all other would-be solutions, and rebut meritorious counterarguments, including logistical ones.

Conclusion (1–2 paragraphs): This is a very short recap of the whole Note, including some final remarks and maybe a quippy thought. Nothing substantive goes here.

3. Common Pitfalls

Preemption

- There will be a training on preemption.
- In general, ask yourself whether you're adding anything new to the literature in your framing of the "problem" or the "solution." If, for instance, you could supplant any significant portion of your Note with a one-line reference to another article, case, or statute, then you are preempted. Or, if the problem is likely to be solved by a legislature, a court, or another author prior to publication, then you will be preempted.

Too policy oriented

- For a Note, it's generally not enough to simply argue that the law as it stands makes for bad policy and that it should be changed legislatively. A Note should identify a *legal* contradiction or controversy, not just bad policy.
    - For instance, it's not enough to argue "Title IX doesn't go far enough and Congress should strengthen it," but it might be sufficient to argue "The Court's current interpretation of Title IX doesn't match Congress' intent, and it should change its interpretation to match Congress' intent."[6]

Not a workable solution

- It's okay to frame your solution a little bit idealistically, but if your proposed solution is too complex or it's judicially, bureaucratically, or politically impossible, then your question probably lends itself better to a Comment than a Note. In a Comment, you're free to simply point out a problem and defer devising a solution.

Too timely

- Be careful when writing about questions that are very new and newsworthy or the political crisis of the week (e.g., Russian involvement in the 2016 election or the Puerto Rican debt crisis). It's difficult to craft a coherent legal theory when the facts on the ground are still fresh and undeveloped. Moreover, you're likely to be preempted by the time your Note finally gets published.
- New and newsworthy topics are excellent for Online Essays, which are shorter and are published much more quickly.
- That said, newspaper and magazine articles are often good signals of existing controversies and are a good place to start looking for ideas.

[6] Think practical and narrow, rather than big picture and broad. Even if your Note is proposing a sea-change in the way we do things, it should sound like it's solving a narrow and defined problem.

Fails to address counterarguments

- Your argument is only as strong as your response to counterarguments. Skeptics will dispute your framing of both the "problem" and the "solution."

4. Timeline and Deadlines for Notes

1. Preliminary Topic Proposals: August 15

The first important deadline in the Note writing process will be to send five preliminary topic proposals to the Notes Office. These do not need to be more fleshed out than the proposals that you submitted as part of your *MLR* application, but you should confirm, via legal research, that your proposals have truly identified an open legal question. If you are struggling to find topics, reach out to the Notes Office and ask for some advice on where to look next. You do not need to submit five ideas for Notes, but can submit a mixture of Note, Comment, Online Essay, and Book Notice ideas. Please note which topics you like most and are most likely to choose.
After you have submitted your topic ideas, the Notes Office will assign you a Notes Editor (NE) based on your subject matter interests. Your NE will respond with some feedback. This will be an opportunity for your NE to steer you away from subjects which appear to be poor candidates for potential publication. This will also be a chance for your NE to point out some avenues of research that you should look down as you further investigate your topics in preparation for *MLR* orientation.

2. Topic Elimination: August 24

Using the feedback from your NE and after further research into your topics, choose your two favorite options. E-mail your NE with which two topics you plan to move forward with. The proposals should be more fleshed out at this point[7] and should present at least some idea of what your central thesis will be.

3. *MLR* Orientation: August 25–27

During Orientation, you will meet with your NE one-on-one as well as with the other AEs who will be working with your NE. Each of these meetings will provide you with an opportunity to present and discuss your two topic options with other law students, as well as receive feedback.

[7] A couple leading cases, for instance, or an on topic law journal article or two

4. Roadmap and Outline: September 14

By this time, you will have narrowed your topic options down to a single subject. You will then thoroughly research this topic and establish a detailed outline of how your Note will be written. You should outline each separate part of your Note, including the introduction and conclusion.

There are several reasons why we require you to turn in an outline. First, the outline should give your NE a solid idea of how your argument actually works. He or she should be able to use this outline to give you feedback on the structure of your argument and to point out counterarguments that need to be addressed. Second, the outline should help you in writing your piece. Third, the outline should be a method by which you can organize your research and sources in a useful way. As long as your outline is able to accomplish these goals, it may be in whatever format makes sense to both you and your NE.

5. Parts I–III: Oct 5, November 2, and December 11

Traditionally, AEs write Part II, Part I, and then Part III. If you believe that your particular topic would be better served by writing in a different order, you make seek approval from your Notes Editor to do so. Once an order is established, you should not deviate from it without first obtaining permission from your NE. If you have more or fewer than three Parts, you will work with your NE to establish an alternative timeline on which you will turn in your writing. Three Parts is the suggested structure for your Note, but the Notes Office welcomes creativity and is willing to alter the schedule to accommodate an innovative Note.

After each of these deadlines, your NE will give you feedback on both the style and substance of your writing. Please discuss this feedback with your NE, especially in the case of a difference of opinion. When you turn in each new section of your Note, you will also be required to incorporate all of the edits from the previous section(s).

6. Final Draft: January 4

Over Winter Break and at the beginning of the second semester, you will add the introduction and conclusion to your Note and submit a final draft to your NE.

After you have turned in this final draft, you will receive a final round of edits from your NE. These edits will be geared toward making your piece publishable and will include an overall grade.

5. Grading Rubric for Notes

After you submit each portion of your Note, your Notes Editor will provide feedback and a numerical score. The grade does not affect your completion of the writing requirement. Rather, it indicates whether your Note is likely in good shape for publication. Ideally, everyone will be in this boat.

Outline (out of 15)		
	First Score:	Revised Score:
Thesis: Is there a clear thesis? Is the thesis appropriately specific? Is the thesis more than a mere statement of fact?	/5	/5
Structure and Organization: Does Part I provide <u>specific</u> background information that helps explain/set up the problem? Does Part II present the problem in a cogent and logical way? Does Part III present a solution that solves the problem presented in Part II?	/5	/5
Research: Has the subject been thoroughly researched? Have a sufficient number of sources been cited?	/5	/5

Introduction and Part I (out of 25)		
	First Score:	Revised Score:

Introduction—General: Is there a hook that draws the reader in and/or illustrates the importance of the legal issue at hand? Does the introduction provide a summary of the issue and how the Note attempts to solve that issue?	/5	/5
Introduction—Roadmap and Thesis: Is there a roadmap paragraph that explains the structure of the Note? Is there a clear thesis statement summarizing the Note's argument?	/5	/5
Part I—Structure and Organization: Does Part I present information in a way that is easy to follow? Does each paragraph of Part I add to the point the author is trying to make? Are there roadmap paragraphs for each section?	/5	/5
Part I—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part I—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part II (out of 25)		
	First Score:	Revised Score:

Part II—Substantive Argument: Is the argument clear and well-reasoned? Is the argument presented well-supported by case law, etc.? Is the discussion *issue*-centered and not *case*-centered? Did the author address possible counterarguments?	/10	/10
Part II—Structure and Organization: Are there roadmap paragraphs in each section? Does Part II present the problem in a way that is easy to follow? Does each paragraph of Part II add to the point the author is trying to make?	/5	/5
Part II—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part II—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part III (out of 25)		
	First Score:	Revised Score:

Part III—Substantive Solution: Is the solution novel and not a mere rehash of what other scholars/students have suggested? Is the solution reasonable? If the solution is legislative/administrative, did the author explain why a judicial remedy would not be an adequate solution to the legal issue? Did the author address possible counterarguments?	/10	/10
Part III—Structure and Organization: Are there roadmap paragraphs in each section? Does Part III present the solution in a way that is easy to follow? Does each paragraph of Part III add to the point the author is trying to make?	/5	/5
Part III—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part III—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Final Product (out of 10)

	First Score:	Revised Score:
Style and Flow: Does the Note overall flow in a way that is easy to follow and makes logical sense? Does each Part lead naturally into the next Part (i.e. does Part I set up the specific legal context needed to understand Part II, etc.)? Are there any stylistic issues regarding tone, grammar, or wording?	/5	/5
Substance: Is the author's perspective a novel one in legal scholarship? Does the author present a creative, workable solution to the issue presented?	/5	/5

D. Comments

1. What's a Comment?

A Comment does the following:

1. identifies an unresolved legal controversy or question, or alternatively, identifies a recent legal development; and
2. explores the controversy by looking at all relevant arguments, or alternatively, analyzes the recent legal development in a unique and cogent manner.

Unlike a Note, a Comment does not provide a solution to an unresolved legal controversy. It does, however, analyze and present an original argument that contributes to the surrounding legal conversation. Most Comments respond to recent developments in the law (such as judicial decisions, legislation, or administrative rulings) but this is not a requirement.

A successful Comment should be narrow enough to allow for careful, thorough analysis within **twenty to thirty-five double-spaced** pages. A Comment should spend the first two to four pages

discussing the court or legislature's decision and reasoning, while the rest of it should consist of your own analysis, arguments or criticism regarding the likely effects and implications of the legal development.

A link to a sample Comment, *A Model for Fixing Identification Evidence After* Perry v. New Hampshire, by Robert Couch, is in the Appendix.

2. Comment Structure

Comments can be less formulaic than Notes, but in general, a Comment should accomplish the same thing as the first two Parts of a Note, but more deeply. In other words, you should provide a legal and factual background of the issue and explore the implications of the problem you identify.

Introduction and Roadmap (2–3 pages): This is your attention grabber and your roadmap. You should use the Introduction to tell a story or explain a news article and very quickly state the controversy. At the end of your Introduction, you should write a roadmap paragraph explicitly outlining the order of your Comment. A generic example:

> This Comment argues that *X* court decision created an open question in *Y* jurisprudence. Part I provides a legal and factual background of the issue and places the *X* decision in context. Part II explores prior decisions and other sources and concludes that *X* decision created more questions than it answered. Part III explores the implications of that contradiction.

Part One: Provide the legal and factual background that the reader needs in order to understand your argument and its implications. For instance, if you're doing a case Comment, this is where you explain the state of the law prior to the case and describe the decision the court reached.

Part Two: Identify the "problem" and explain why it's a bad thing. This usually involves collecting and analyzing a variety of sources (cases, statutes, legal and non-legal articles, etc.) and pointing out something inconsistent, incoherent, or distasteful about the state of the law. You need to address counterarguments, especially if you are the first to identify the problem. Not everyone will immediately agree that your "problem" is really a problem at all, so you have to prove it.

Alternatively, if your Comment does not identify a conflict in the law but instead opines on a recent or current development in the law, then this Part should explore the trajectory of that development and explain why it's a brave new world out there.

Part Three: You don't necessarily need a Part III. But this is a chance to briefly speculate about the legal or policy implications of the problem you identified.

Conclusion (1–2 paragraphs): This is a very short recap of the whole Comment, including some final remarks and maybe a quippy thought. Nothing substantive goes here.

2. Timeline & Deadlines for Comments

1. Preliminary Topic Proposals: August 15

The first important deadline in the Comment writing process will be to send five preliminary topic proposals to your Notes Editor (NE). These do not need to be more fleshed out than the proposals that you submitted as part of your *MLR* application, and the five may (but need not) include the topics that you submitted as part of your *MLR* application. If you are struggling to find topics, reach out to your NE and ask for some advice on where to look next. You do not need to submit five ideas for Comments, but can submit a mixture of Note, Comment, Online Essay, and Book Notice ideas.

After you have submitted your topic ideas, your NE will respond with some feedback. This will be an opportunity for your NE to steer you away from subjects which appear to be poor candidates for potential publication. This will also be a chance for your NE to point out some avenues of research that you should look down as you further investigate your topics in preparation or *MLR* orientation.

2. Topic Elimination: August 24

Using the feedback from your NE and after further research into your topics, choose your two favorite options. Email your NE with which two topics you plan to move forward. The proposals should be more fleshed out at this point and should present at least some idea of what your central thesis will be.

3. *MLR* Orientation: August 25–27

During Orientation, you will meet with your NE one-on-one as well as with the other AEs who will be working with your NE. Each of these meetings will provide you with an opportunity to present and discuss your two topic options with other law students, as well as receive feedback.

4. Roadmap and Outline: September 14

By this time, you will have narrowed your topic options down to a single subject. You will then thoroughly research this topic and establish a detailed outline of how your Comment will be written. Each of the separate parts of your Comment will be outlined, as well as the Introduction and Conclusion.

There are several reasons why we require you to turn in an outline. First, the outline should give your NE a solid idea of how your argument actually works. They should be able to use this outline to give you feedback on the structure of your argument and to point out counterarguments that need to be addressed. Second, the outline should help you in writing your piece. Third, the outline should be a method by which you can organize your research and sources in a useful way. As long as your outline is able to accomplish these goals, it may be in whatever format makes sense to both you and your NE.

5. Parts I–III: October 5, November 2, December 11

Traditionally, AEs write Part II, Part I, and then Part III. If you believe that your particular topic would be better served by writing in a different order, you make seek approval from your Notes Editor to do so. Once an order is established, you should not deviate from it without first obtaining permission from your NE. If you have more or fewer than three Parts, you will work with your NE to establish an alternative timeline on which you will turn in your writing. Three Parts is the suggested structure for your Comment, but the Notes Office welcomes creativity and is willing to alter the schedule to accommodate an innovative Comment.

After each of these deadlines, your NE will give you feedback on both the style and substance of your writing. Please discuss this feedback with your NE, especially in the case of a difference of opinion. When you turn in each new section of your Note, you will also be required to incorporate all of the edits from the previous section(s).

6. Final Draft: January 4

Over Winter Break and at the beginning of the second semester, you will add the introduction and conclusion to your Comment and submit a final draft to your NE. This draft will incorporate the feedback that you have received from your NE along the way.

After you have turned in this final draft, you will receive a final round of edits from your NE. These edits will be geared toward making your piece publishable and will include an overall grade.

3. Grading Rubric for Comments

After you submit each portion of your Comment, your Notes Editor will provide feedback and a numerical score. The grade does not affect your completion of the writing requirement. Rather, it indicates whether your Comment is likely in good shape for publication. Ideally, everyone will be in this boat.

Outline (out of 15)		
	First Score:	Revised Score:
Thesis: Is there a clear thesis? Is the thesis appropriately specific? Is the thesis more than a mere statement of fact?	/5	/5
Structure and Organization: Does Part I provide <u>specific</u> background information that helps explain/set up the problem? Does Part II present an unresolved legal controversy or question and also explore the controversy by looking at all of the relevant arguments? OR Does Part II identify a recent legal development and does it analyzes that recent legal developments in a unique and cogent manner? (Optional) Does Part III briefly speculate about the legal or policy implications of the problem identified?	/5	/5
Research: Has the subject been thoroughly researched? Have a sufficient number of sources been cited?	/5	/5

Introduction and Part I (out of 30) (25 if Part III is present)		
	First Score:	Revised Score:
Introduction—General: Is there a hook that draws the reader in and/or illustrates the importance of the legal issue at hand? Does the introduction provide a summary of the problem and how the Comment attempts to solve that issue?	/5	/5
Introduction—Roadmap and Thesis: Is there a roadmap paragraph that explains the structure of the Comment? Is there a clear thesis statement summarizing the Comment's purpose?	/5	/5
Part I—Structure and Organization: Does Part I present information in a way that is easy to follow? Does Part I provide the *specific* factual and factual background that allows the reader to understand the argument and its implications? (E.g., if the Comment is on a case, describe the state of the law prior to the case and describe the decision) Does each paragraph of Part I add to the point the author is trying to make? Are there roadmap paragraphs for each section?	/10 (5 if Part III exists)	/10 (5 is Part III exists)

Part I—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part I—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part II (out of 45) (40 if Part III exists)		
	First Score:	Revised Score:
Part II—Substantive Argument: Does Part II identify the "problem" and explain *why* it is a problem? Does it point out something inconsistent, incoherent, or distasteful about the state of the law? Does Part II explore the problem/controversy by looking at all relevant arguments? Alternatively, does Part II analyze and opine on recent/current developments in a unique and cogent manner? Does Part II explore the trajectory of this development and explain how the state of the law will be different? Does the Comment analyze and present an *original* argument that contributes to legal scholarship? Does the Part II address counterarguments about the problem actually being a problem?	/20 (15 if Part III exists)	/20 (15 if Part III exists)

Part II—Structure and Organization: Are there roadmap paragraphs in each section? Does Part II present the problem or legal development in a way that is easy to follow? Does each paragraph of Part II add to the point the author is trying to make?	/10	/10
Part II—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/10	/10
Part II—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part III (Optional) (out of 10, if present)		
	First Score:	Revised Score:
Part III—Substantive Solution: Is	/5	/5
Part III—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/3	/3

Part III—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/2	/2

Final Product (out of 10)		
	First Score:	Revised Score:
Style and Flow: Does the Comment overall flow in a way that is easy to follow and makes logical sense? Does each Part lead naturally into the next Part (i.e. does Part I set up the specific legal context needed to understand Part II, etc.)? Are there stylistic issues regarding tone, grammar, or wording?	/5	/5
Substance: Is the author's perspective a novel one in legal scholarship? Does the author present a creative, workable solution to the issue presented?	/5	/5

E. Book Notices

1. What's a Book Notice?

A Book Notice does the following:

1. summarizes the book;
2. criticizes and/or praises the author's analysis or arguments; and

3. contributes original legal scholarship, by building on the book's analysis, analyzing the book through a new lens, or discussing legal developments that have occurred since the book was published.

Although Notices must focus on and discuss legal issues within the book, the book itself does not have to be a "law" book. Instead, the Notice should analyze a recent book (published within the last three or so years) through a legal lens, thus contributing to the legal scholarship community.

A successful Notice should be narrow enough to allow for careful, thorough analysis within **twenty to thirty double-spaced** pages.

MLR publishes all Notices in Issue 6 of each volume. If you decide you would like to write a Notice, you will likely work with both a Notes Editor and a Book Review Editor,[8] and publication would likely take place in the next volume's issue.

A link to a sample Book Notice, *"Never Again," Again: A Functional Examination of the Financial Crisis Inquiry Commission*, by Andrew W. Hartlage, is in the Appendix.

2. Book Notice Structure

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. The best way to learn how to write one of these is to read one, so you should review Issue 6 of one of the past few volumes if you are interested. Not all Book Notices take this exact form. You can deviate from this proposed structure, but talk it over with your NE and Book Review Editor first.

Part One (summary of the book): Describe the main points of the book you're reviewing. An effective summary typically highlights a book's strengths and comment on its weaknesses, laying out critiques that will be explored further in later sections.

Part Two (criticism and praise): Describe and expand on the strengths and weaknesses of the book. 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; or

[8] Amanda and Katie, who are both excellent!

4. comparing and contrasting the author's approach with arguments made by other writers.

You should be respectful but assertive and confident in your criticisms. By the same token, you should be effusive but realistic in your praise. Don't shy away from nuance; you can both criticize and praise the same book.

Part Three (original contribution to the literature): Here you should build on your analysis of the book, analyzing its topic in a new light and perhaps discussing legal developments that have occurred since the book was published. This Part of your Notice should read similarly to the argument portions of a Note; it should present a legal problem and a solution. For guidance on how to build a legal argument, consult the Note sections of the *Tealbook* above.

3. Timeline & Deadlines for Book Notices

1. Preliminary Topic Proposals: August 15

The first important deadline in the Book Notice writing process will be to send five preliminary topic proposals to the Notes Office. These do not need to be more fleshed out than the proposals that you submitted as part of your *MLR* application, and the five may (but need not) include the topics that you submitted as part of your *MLR* application. If you are struggling to find topics, reach out to your NE and ask for some advice on where to look next. You do not need to submit five ideas for Book Notices, but can submit a mixture of Note, Comment, Online Essay, and Book Notice ideas.

After you have submitted your topic ideas, your NE will respond with some feedback. This will be an opportunity for your NE to steer you away from subjects which appear to be poor candidates for potential publication. This will also be a chance for your NE to point out some avenues of research that you should look down as you further investigate your topics in preparation or *MLR* orientation.

2. Topic Elimination: August 24

Using the feedback from your NE and after further research into your topics, choose your two favorite options. E-mail your NE which two topics you plan to move forward with. The proposals should be more fleshed out at this point and should present at least some idea of what your central thesis will be.

3. *MLR* Orientation: August 25–27

During Orientation, you will meet with your NE one-on-one as well as with the other AEs who will be working with your NE. Each of these meetings will provide you with an opportunity to present and discuss your two topic options with other law students, as well as receive feedback.

4. Roadmap and Outline: September 14

By this time, you will have narrowed your topic options down to a single subject. You will then thoroughly research this topic and establish a detailed outline for your Book Notice. The outline must include each part of your Book Notice, including the Introduction and Conclusion.

There are several reasons why we require you to turn in an outline. First, the outline should give your NE a solid idea of how your analysis actually works. He or she should use this outline to give you feedback on the structure of your argument and to point out counterarguments that need

to be addressed. Second, the outline should help you in writing your piece. Third, the outline should be a method by which you can organize your research and sources in a useful way. As long as your outline is able to accomplish these goals, it may be in whatever format makes sense to both you and your NE.

You will also submit your outline to the Book Review Office who will work with you and your NE on the structure of your argument.

5. Parts I–III: October 5, November 2, December 11

Traditionally, AEs write Part II, Part I, and then Part III. If you believe that your particular topic would be better served by writing in a different order, you make seek approval from your Notes and Book Review Editors to do so. Once an order is established, you should not deviate from it without first obtaining permission from your editors. If you have more or fewer than three Parts, you will work with your NE to establish an alternative timeline on which you will turn in your writing. Three Parts is the suggested structure for your Book Notice, but the Notes Office welcomes creativity and is willing to alter the schedule to accommodate an innovative Book Notice.

After each of these deadlines, your NE and Book Review Editor will give you feedback on both the style and substance of your writing. Please discuss this feedback with your editors, especially in the case of a difference of opinion. When you turn in each new section of your Book Notice, you will also be required to incorporate all of the edits from the previous section(s).

6. Final Draft: January 4

Over Winter Break and at the beginning of the second semester, you will add the introduction and conclusion to your Book Notice and submit a final draft to your NE. This draft will incorporate the feedback that you have received from your NE along the way.

After you have turned in this final draft, you will receive a final round of edits from your NE. These edits will be geared toward making your piece publishable and will include an overall grade.

4. Grading Rubric for Book Notices

After you submit each portion of your Notice, your Notes Editor and Book Review Editor will provide feedback and a numerical score. The grade does not affect your completion of the writing requirement. Rather, it indicates whether your Notice is likely in good shape for publication. Ideally, everyone will be in this boat.

Outline (out of 15)		
	First Score:	Revised Score:
Thesis: Is there a clear thesis? Is the thesis appropriately specific? Is the thesis more than a mere statement of fact?	/5	/5
Structure and Organization: Does Part I provide specific background information that helps explain/set up the problem? Does Part II present the problem in a cogent and logical way? Does Part III present a solution that solves the problem presented in Part II?	/5	/5
Research: Has the subject been thoroughly researched? Have a sufficient number of sources been cited?	/5	/5

Introduction and Part I (out of 25)		
	First Score:	Revised Score:

Introduction—General: Is there a hook that draws the reader in and/or illustrates the importance of the legal issue at hand? Does the introduction provide a brief summary of the book? Does the review highlight a book's strengths and comment on its weaknesses, introducing critiques that will be explored further in later sections?	/5	/5
Introduction—Roadmap and Thesis: Is there a roadmap paragraph that explains the structure of the Book Notice? Is there a clear thesis statement summarizing the book and the Book Notice's argument?	/5	/5
Part I—Structure and Organization: Does Part I present the book in a way that is easy to follow? Does each paragraph of Part I add to the point the author is trying to make? Are there roadmap paragraphs for each section?	/5	/5
Part I—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part I—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part II (out of 25)		
	First Score:	Revised Score:
Part II—Substantive Criticism/Praise: Does this part describe and expand on either/both the strengths and/or weaknesses of the book? Is the argument clear and well-reasoned? Is the argument presented well-supported by the book itself, case law, etc.? Is the discussion *issue*-centered and not *case*-centered? Did the author address possible counterarguments?	/10	/10
Part II—Structure and Organization: Are there roadmap paragraphs in each section? Does Part II present the problem in a way that is easy to follow? Does each paragraph of Part II add to the point the author is trying to make?	/5	/5
Part II—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5

Part II—Style: If Part II is critical of the book's arguments, did the author maintain a respectful but assertive/confident tone in their criticism? If Part II notes the book's strengths, did the author maintain an effusive but realistic tone in their praise? Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part III (out of 25)		
	First Score:	Revised Score:
Part III—Substantive Problem and Solution: Is the legal problem laid out in a clear way that is easy to follow? Is the solution novel and not a mere rehash of what other scholars/students have suggested? Is the solution reasonable? If the solution is legislative/administrative, did the author explain why a judicial remedy would not be an adequate solution to the legal issue? Did the author address possible counterarguments?	/10	/10

Part III—Structure and Organization: Are there roadmap paragraphs in each section? Does Part III present the solution in a way that is easy to follow? Does each paragraph of Part III add to the point the author is trying to make?	/5	/5
Part III—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part III—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Final Product (out of 10)		
	First Score:	Revised Score:
Style and Flow: Does the Book Noticeoverall flow in a way that is easy to follow and makes logical sense? Does each Part lead naturally into the next Part (i.e. does Part I set up the specific legal context needed to understand Part II, etc.)? Are there any stylistic issues regarding tone, grammar, or wording?	/5	/5

Substance: Is the author's perspective a novel one in legal scholarship? Does the author present a creative, workable solution to the issue presented?	/5	/5

F. Online Essays

1. What's an Online Essay?

An Online Essay does the following:

1. briefly introduces an important judicial decision, legislative development, or legal policy issue; and
2. contains a novel proposal, argument, analysis, or critique.

Online Essays should focus on timely issues; authors should use the news and recent judicial or legislative decisions as topics for online essays. Unlike Notes or Comments, Online Essays should not spend a significant period of time talking about the historical development of a particular issue; Essays should primarily contain novel, creative approaches to contemporary legal issues.

A successful Essay should be narrow enough to allow for careful, thorough analysis in about **twenty-five double-spaced pages** (6,000 words). A strong Essay should include about ninety footnotes.

A link to a sample Online Essay, *Judge Gorsuch and* Johnson *Resentencing (This Is Not a Joke)*, by Leah Litman, is in the Appendix to the *Tealbook*. Note that this Essay was written by a professor, not a student.[9]

[9] Traditionally, Online Essays are also less formal and academic sounding. They often break down legal issues into normal, conversational English.

2. Online Essay Structure

An Online Essay should mirror the structure of a Note or a Comment, but each Part should be shorter than it would be in a Note or a Comment. In particular, make sure the legal and factual background (Part I) is brief. It's unlikely that you need to subdivide Parts into Sections.

Refer to above sections of the *Tealbook* for detailed structure of Notes and Comments. That said, Online Essays are much more flexible than Notes—talk to your NE and/or the Online office to see if your proposed Essay structure is workable. Broadly speaking:

A Note-style Essay should look something like: Introduction, (1) Background, (2) Legal conflict, (3) Solution, Conclusion.

A Comment-style Essay should look like: Introduction, (1) Background, (2) Problem or legal development, (3) Implications of problem or development, Conclusion.

3. Timeline and Deadlines for Online Essays

1. Preliminary Topic Proposals: August 10

The first important deadline in the Online Essay writing process will be to send five preliminary topic proposals to your Notes Editor (NE). These do not need to be more fleshed out than the proposals that you submitted as part of your *MLR* application, and the five may (but need not) include the topics that you submitted as part of your *MLR* application. If you are struggling to find topics, reach out to your NE and ask for some advice on where to look next. You do not need to submit five ideas for Online Essays, but can submit a mixture of Note, Comment, Online Essay, and Book Notice ideas.

After you have submitted your topic ideas, your NE will respond with feedback. This will be an opportunity for your NE to steer you away from subjects which appear to be poor candidates for potential publication. This will also be a chance for your NE to point out some avenues of research that you should look down as you further investigate your topics in preparation or *MLR* orientation.

2. Topic Elimination: August 24

Using the feedback from your NE and after further research into your topics, choose your two favorite options. E-mail your NE which two topics you plan to move forward with. The proposals should be more fleshed out at this point and should present at least some idea of what your central thesis will be. They should also include some basic research including

3. *MLR* Orientation: August 25–27

During Orientation, you will meet with your NE one-on-one as well as with the other AEs who will be working with your NE. Each of these meetings will provide you with an opportunity to present and discuss your two topic options with other law students, as well as receive feedback.

4. Online Essay Outline: September 14

By this point you will have chosen the two topics on which you will write your Online Essay. In conjunction with your NE, you will choose which topic to write about and create a detailed outline for this essay. There are several reasons why we require you to turn in an outline. First, the outline should give your NE a solid idea of how your argument actually works. They should be able to use this outline to give you feedback on the structure of your argument and to point out counterarguments that need to be addressed. Second, the outline should help you in writing your piece. Third, the outline should be a method by which you can organize your research and sources in a useful way. As long as your outline is able to accomplish these goals, it may be in whatever format makes sense to both you and your NE.

5. Drafts 1–3: October 5, November 2, December 11

Generally speaking, AEs are required to submit the substantively legal portions of their online essays first. Thus, we recommend that your first draft includes all of your main legal arguments; an introduction and conclusion can be added in later drafts. Online Essays, however, are often more flexible than Notes or Comments. When you begin the writing process, you will work with your Notes Editor to establish a specific schedule for you and your topic.

After each of these deadlines, your NE will give you feedback on both the style and substance of your writing. Please discuss this feedback with your NE, especially in the case of a difference of opinion. When you turn in each new section of your Online Essay, you will also be required to incorporate all of the edits from the previous section(s).

You may also turn in these parts to the *MLR* Online Office for feedback.

6. Final Draft: January 4

Over Winter Break and at the beginning of the second semester, you will add the introduction and conclusion to your Online Essay and submit a final draft to your NE. This draft will incorporate the feedback that you have received from your NE along the way.

After you have turned in this final draft, you will receive a final round of edits from your NE. These edits will be geared toward making your piece publishable and will include an overall grade.

4. Grading Rubric for Online Essays

After you submit each portion of your Online Essay, your Notes Editor will provide feedback and a numerical score. The grade does not affect your completion of the writing requirement. Rather, it indicates whether your Online Essay is likely in good shape for publication. Ideally, everyone will be in this boat.

Outline (out of 15)		
	First Score:	Revised Score:
Thesis: Is there a clear thesis? Is the thesis appropriately specific? Is the thesis more than a mere statement of fact?	/5	/5
Structure and Organization: Does Part I provide specific background information that helps explain/set up the problem? Does Part II present the problem in a cogent and logical way? Does Part III present a solution that solves the problem presented in Part II?	/5	/5
Research: Has the subject been thoroughly researched? Have a sufficient number of sources been cited?	/5	/5

Introduction and Part I (out of 25)		
	First Score:	Revised Score:
Introduction—General: Is there a hook that draws the reader in and/or illustrates the importance of the legal issue at hand? Does the introduction provide a summary of the issue and how the Note attempts to solve that issue?	/5	/5
Introduction—Roadmap and Thesis: Is there a roadmap paragraph that explains the structure of the Online Essay? Is there a clear thesis statement summarizing the Essay's argument?	/5	/5
Part I—Structure and Organization: Does Part I present information in a way that is easy to follow? Does each paragraph of Part I add to the point the author is trying to make? Are there roadmap paragraphs for each section?	/5	/5
Part I—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5

Part I—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part II (out of 25)		
	First Score:	Revised Score:
Part II—Substantive Argument: Is the argument clear and well-reasoned? Is the argument presented well-supported by case law, etc.? Is the discussion *issue*-centered and not *case*-centered? Did the author address possible counterarguments?	/10	/10
Part II—Structure and Organization: Are there roadmap paragraphs in each section? Does Part II present the problem in a way that is easy to follow? Does each paragraph of Part II add to the point the author is trying to make?	/5	/5
Part II—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5

Part II—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Part III (out of 25)		
	First Score:	Revised Score:
Part III—Substantive Solution: Is the solution novel and not a mere rehash of what other scholars/students have suggested? Is the solution reasonable? If the solution is legislative/administrative, did the author explain why a judicial remedy would not be an adequate solution to the legal issue? Did the author address possible counterarguments?	/10	/10
Part III—Structure and Organization: Are there roadmap paragraphs in each section? Does Part III present the solution in a way that is easy to follow? Does each paragraph of Part III add to the point the author is trying to make?	/5	/5

Part III—Paragraphs: Does each paragraph have a strong topic sentence? Does each sentence in the paragraph support the topic sentence?	/5	/5
Part III—Style: Did the author avoid using passive voice? Did the author use meaningless lead-in phrases ("it should be noted," etc.)? Are recurring terms referred to consistently? Are there ATL Bluebook errors?	/5	/5

Final Product (out of 10)		
	First Score:	Revised Score:
Style and Flow: Does the Online Essay overall flow in a way that is easy to follow and makes logical sense? Does each Part lead naturally into the next Part (i.e. does Part I set up the specific legal context needed to understand Part II, etc.)? Are there any stylistic issues regarding tone, grammar, or wording?	/4	/4
Substance: Is the author's perspective a novel one in legal scholarship? Does the author present a creative, workable solution to the issue presented?	/4	/4

Technical Details: Is the essay at least 6,000 words? Is there adequate support cited in the piece (~90 footnotes)?	/2	/2

III. The Publication Process (Optional)

A. Who Can Publish?

YOU can publish! All of you can get your name in print, for all the world to see. You can publish a Note or Comment by submitting to the Notes Office (i.e., your lovely Notes Editor and his or her best friends), an Online Essay by submitting to the Online Office, or a Book Notice by submitting to the Book Review Office.

Throughout the fall semester, your Notes Editor will provide numerical grades as you turn in each section of your piece. Scores above 80/100 indicate that a piece may be a strong candidate for publication. That said, this number is not a floor. It is simply a marker of what the Notes Office is likely to find ready for publication. Feel free to talk to your Notes Editor early and often about the ins-and-outs of the *MLR* publication process if you are interested.

MLR alumni may submit Notes and Comments to the Notes Office up to a year after graduation; after a year, alumni may no longer submit Notes or Comments (but can submit to the Articles Office). Non-*MLR* 2Ls and 3Ls may also submit Notes and Comments to the Notes Office during their time at Michigan; alumni cannot.

All current Michigan Law students and alumni may submit online essays and book notices to the respective offices; there is no temporal cutoff point.

B. Why Publish?

Why *not* publish? Future employers will think you're awesome, you can brag to all of your non-published friends about your accomplishment, and your mom will love you even more than she already does.

C. Publication Process for *MLR* (Notes & Comments)

1. **Call for publication:** Eight times a year, the Notes Office solicit Notes and Comments for publication through "calls." Call dates are listed on the *MLR* website.
2. **Notes Office selection meeting:** Following each call, the Notes Office conducts a selection meeting and slates pieces for publication. These meetings are blind, meaning the Notes Editors evaluate the submissions without knowing the identity of the authors.
3. **Notes Office Full Read:** Once an author is selected for and accepts a publication offer, the Notes Office conducts a "full read." This is the Notes Office's most substantive editing stage. Following the full read, the Notices Office and author typically go through two to three more rounds of edits.
4. **Associate and Contributing Editors sourcegathering and citechecking:** Associate and Contributing editors sourcegather and citecheck the piece, just as they do with articles.
5. **Executive Editors & Editor-in-Chief Edits:** The Executive Editors and EIC edit above-the-line content for grammar, spelling, and style and ensure that all citations conform with the *Bluebook*.
6. **Executive Editors & Editor-in-Chief Final Review:** The piece is typeset and formatted like it would appear in the print issue. The Executive Editors and EIC provide a final review of the piece for any remaining issues.
7. **Publication!** If published, you will receive 25 free copies of your piece in its published form.

D. Publication Process Flowchart for *MLR* Book Notices

1. **Book Review Ongoing Collection System:** The Book Review Office accepts submissions on an ongoing basis. To submit a Book Notice, email your submission to michlrev.ed.br@umich.edu.
2. **Book Review Office Selection:** The Book Review Editors review all submissions on an ongoing basis and make selections for the Book Review issue (issue 6).
3. **Book Review Office Editing:** Once selected for publication, the Book Review Editors provide substantive and technical feedback. The Book Review Editors and author typically go through two or three more rounds of edits.
4. **Executive Editors & Editor-in-Chief Edits:** The Executive Editors and EIC edit above-the-line content for grammar, spelling, and style and ensure that all citations conform with the *Bluebook*.
5. **Executive Editors & Editor-in-Chief Final Review:** The piece is typeset and formatted like it would appear in the print issue. The Executive Editors and EIC provide a final review of the piece for any remaining issues.

6. **Publication!** All Book Notices are published in Issue 6 of the *MLR*. If published, you will receive 25 free copies of your piece in its published form.

E. Publication Process Flowchart for *MLR* Online

1. **Online Office Ongoing Collection System:** *MLR* Online accepts submissions on an ongoing basis. To submit an online essay, email your submission to *MLR*.online@umich.edu.
2. **Online Office Selection:** The Online Editors review all submissions on an ongoing basis and continually slate essays for publication.
3. **Online Office Editing:** Once selected for publication, the Online Editors provide substantive and technical feedback. The Online Editors and author typically go through two or three more rounds of edits.
4. **Executive Editors & Editor-in-Chief Final Review:** The piece is typeset and formatted like it would appear in the print issue. The Executive Editors and EIC provide a final review of the piece for any remaining issues.
5. **Publication!** All Online Essays can be accessed through the *MLR* website and other legal databases, such as Westlaw.

IV. Appendix

A. 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 (Online Essay)

Content Type
Online 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.

B. Sample Outline

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

1. **F.R.C.P. 52(b),** plain error review when defendant does not object
2. **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)

1. Most Constitutional errors are harmless Chapman v. California, 386 U.S. 18 (1967), Gonzalez-Lopez, 126 S. Ct. 2564; Johnson v. United States, 520 U.S. 461 (1977)
2. The errors that are not subject to harmless error review are considered structural and are reversible per se Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in grand jury selection); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable doubt instruction to petit jury); Waller v. Georgia 467 U.S. 39 (1984) (denial of right to public trial); Tumey v. Ohio, 273 U.S. 510 (1927) (biased judge)**;** Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of assistance of counsel); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of right to self representation)

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

1. Harmless Error: United States v. Allen, 406 F.3d 940 (8th Cir. 2005); United States v. Higgs, 353 F.3d 281 (4th Cir. 2003)
2. 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 elemen**t**

II. Apprendi increased the possibility for indictment errors.

A. Apprendi v. New Jersey, 530 U.S. 466 (2000), (Sixth Amendment required jury to find every offense element beyond reasonable doubt) + Booker v. United States, 543 U.S. 220 (2005) (Guidelines advisory)
   1. 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.
   1. Distinctions between offense elements and sentencing factors can be unclear
      a. Almendarez-Torres; James v. United States, 127 S. Ct. 1586, 1600 n.8 (2007); Shephard v. United States, 290 U.S. 306 (2005) (felon status is element of crime)
   2. 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)
   3. 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. Representation affects an infinite number of tangible and intangible aspects of a trial. Gideon v. Wainwright, 372 U.S. 335 (1963); McKaskle v. Wiggins, 465 U.S. 168 (1984)
      a. 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.
      b. That portion of plain error test (substantial rights) extrapolated to harmless error review in Neder, 527 U.S. at 9.
   2. Just neutrality not readily isolable Tumey v. Ohio, 273 U.S. 510 (1927)
      a. Contrast with United States v. Cotton, 535 U.S. 625, 634 (2002)
   3. Supreme Court precedent on grand jury error shows how indictment error do not require reversals per se. Bank of Nova Scotia v. United States, 487 U.S. 250 (1988)

a. 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

b. 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

1. Difficult for defendants to show prejudice Weinberg, Robert L., After Mechanik: What's Left of Grand Jury Safeguards, 1-WTR Crim. Jst. 2 (1987); Aarfa, Christopher M., Mechanikal Applications of the Harmless Error Rule in Cases of Prosecutorial Grand Jury Misconduct, 1988 Duke L. J. 1242 (1988)
2. Circuits that review for harmless error not experienced parade of horribles
3. 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
   a. Mojica Baez gets it wrong!
   b. HAMLING, 418 U.S. 87, 117 (req of indictment)
4. 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)

1. An indictment error does not render the grand jury proceedings a fundamentally unfair/unreliable vehicle for probable cause Neder 527 U.S. at 9.
   a. Indictment error does not vitiate all of the grand jury's findings Neder 527 U.S. at 11
2. Petit jury is a more fundamental right but is still subject to harmless error review when jury instructions omit an element of the offense
   a. 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))
   b. Contrast Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable doubt instruction is structural error)
3. 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
   a. Similar to judicial standard in summary judgment motions (administrable, and not contrary to 6th Amendment)
   b. But there still remains the problem of giving more power to judges from the people

D. 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. **Probable Cause to indict defendant** United States v. Calandra, 414 U.S. 338 (1974)
   a. Whether there is probable cause is not an all or nothing determination but an inherently factual, case by case inquiry
   b. This is similar to sufficiency of evidence claims that judges routinely do
2. **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)
   a. 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).
   b. 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
   c. Ex. of assessing notice United States v. Mojica-baez, 229 F.3d 292 309-10 (1st Cir. 2000) United States v. Duarte, 246 F.3d 56 (1st Cir. 2001) (substantial rights not violated by omission in indictment)
   d. Resendiz-Ponce demonstrates how some indictment errors may be difficult to distinguish, or may be so technical that they could not prejudice the defendant
   e. 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);
3. **Definition of offense to prevent second prosecution (double jeopardy)** United States v. Debrow, 346 U.S. 374 (1953)
   a. 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
4. **SOP check on government (prosecution without cause)** Stirone v. United States, 361 U.S. 212 (1960), Vasquez v. Hillery, 474 U.S. 254 (1986); Costello, 350 U.S. at

362; Jon Van Dyke, *The Grand Jury: Representative or Elite*, 28 Hastings L.J. 37 (1976)**;** Garcia, Alfredo, *The Fifth Amendment: A Comprehensive and Historical Approach*, 29 U. Tol. L. Rev. 209 (1998); Kuckes, Niki, *The Democratic Prosecutor: Explaining the Constitutional Function of the Grand Jury*, 94 Geo. L.J. 1265 (2006)**.**

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

5. **Counter-argument: judge usurping role of grand jury, and harmless error review precludes grand jury nullification** Vasquez v. Hillary, 474 U.S. 254, 263 (1986); Fairfax, Roger A., *Grand Jury Discretion and Constitutional Design*, 93 Corn. L. Rev. 703 (2008)
   a. Responses
      i. Prosecution as executive; decision whether to prosecute = executive (art. I; Morrison v. Olson, 487 U.S. 654 (1988)
      ii. 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)
      iii. Younger, Richard D. The People's Panel: The Grand Jury in the United States, 1634-1941
      iv. Edwards, George J., The Grand Jury: considered from an historical, political, and legal standpoint and the law and practice relating thereto (
   b. Explain why: Vasquez v. Hillary, 474 U.S. 254 (1986) does not imply all grand jury error as structural
      i. But this was for systemic justice concerns- did not want racial discrimination in judicial system.
      ii. Compare Cotton discussion of reputation of judiciary for indictment error

V. Conclusion

Online Essay Sample Outline

I. 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

II. 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")
  1. The exception undermines the goal of the ICWA to remove Indian family decisions from state control
  2. 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.
  1. 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
  2. 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
  3. Two propositions support the constitutionality of the ICWA, and if either falls, the ICWA and all of Indian law will fall
     a. The first proposition is that laws for Indians are not race-based
        i. Morton v. Mancari holds that "Indian" is a political categorization, not a racial categorization
        ii. the Court may hold that "Indian" is a racial categorization
     b. The second proposition is that Congress is authorized to make special laws regarding Indians
        i. Congress has plenary power over Indian affairs under the Indian Commerce Clause
        ii. Congress has plenary power over Indian affairs under the Indian Commerce Clause
  4. The Court will likely not question the constitutionality of the ICWA and Indian law by directly questioning established precedent
     a. Doing so would require blatant disregard of precedent

b. 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
   1. The DOJ questioned the 10th Amendment implications of the ICWA when it became law

D. 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
   1. 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

III. Conclusion

C. Sample Roadmap Paragraph

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.

Benjamin Means, Note, Prohibiting Conduct, Not Consequences: The Limited Reach of the Migratory Bird Treaty Act, 97 MICH. L. REV. 823, 825-26 (1998).

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.

Elliot Regenstein, Note, Food Stamp Trafficking: Why Small Groceries Need Judicial Protection from the Department of Agriculture (And from Their Own Employees), 96 MICH. L. REV. 2156, 2159 (1998).

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.

Todd S. Aagaard, Note, *Identifying and Valuing the Injury in Lost Chance Cases,* 96 MICH. L. REV. 1335, 1338-39 (1998).

For an example of a long roadmap, see Tyler B. Robinson, Note, A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under 924(c), 96 MICH. L. REV. 783 (1997).

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.
Tyler B. Robinson, Note, A Question of Intent: Aiding and Abetting Law and the Rule of Accomplice Liability Under 924(c), 96 MICH. L. REV. 783, 789 (1997).

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.
Todd Lebowitz, Note, Evaluating Purely Reproductive Disorders Under the Americans with Disabilities Act, 96 MICH. L. REV. 724, 732-33 (1997).

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.
Jordan B. Hansell, Note, *Is HIV "Extraordinary"?,* 96 MICH. L. REV. 1095, 1099 (1998).

D. Sample Note

Thomas Martecchini, Note, *A Day in Court for Data Breach Plaintiffs: Preserving Standing Based on Increased Risk of Identity Theft After* Clapper v. Amnesty International USA, 114 MICH. L. REV. 1471 (2016).

E. Sample Comment

Robert Couch, Comment, *A Model for Fixing Identification Evidence After* Perry v. New Hampshire, 111 MICH. L. REV. 1535 (2013).

F. Sample Book Notice

Andrew W. Hartlage, Book Note, *Never Again, Again: A Functional Examination of the Financial Crisis Inquiry Commission*, 111 MICH. L. REV. 1183 (2013).

G. Sample Online Essay

Leah M. Litman, *Judge Gorsuch and* Johnson *Resentencing (This Is Not a Joke),* 114 MICH. L. REV. ONLINE 67 (2017), http://michiganlawreview.org/wp-content/uploads/2017/02/115MIchLRevOnline67_Litman.pdf.