MICHIGAN LAW REVIEW

THE TEALBOOK

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I. Introduction

Dear Michigan Law School Community,

This manual, the Spring 2020 Edition of the *Tealbook*, is your guide to what the Notes Office publishes and what we are looking for in a piece. The footnotes, assorted hyperlinks, and the Appendix contain samples of every type of publishable piece.

The Michigan Law Review Notes Office receives submissions that touch on a wide variety of subjects. We appreciate creative topics and enjoy promoting new ideas. But we also believe that the formatting and structuring guidelines outlined in this manual provide the best vehicle for presenting those ideas. Following our formatting and structuring guidelines give you the best chance of publication.

Good luck! We're excited to read (and hopefully publish) your work. Please do not hesitate to reach out with any questions.

Sincerely,
The Notes Office

Kate Markey
Conor Bradley
Renee Griffin
Veronica Portillo-Heap
Brian Remlinger
Ingrid Yin

A. Volume 119 Notes Office

The Notes Office is a resource for any MLR member interested in publication. We are also a resource for the broader Michigan Law community. We are here to help any students who might be interested in learning more about publication or Noting-On, the process by which Michigan Law students can publish a piece and join our journal.

From left to right: Conor, Renee, Kate, Brian, Veronica, and Ingrid.

Conor Bradley

Hometown: Glen Rock, NJ
Undergrad: Hamilton College
1L Summer: The Honorable Patty Shwartz, U.S. Court of Appeals for the Third Circuit (NJ)
2L Summer: Simpson, Thacher & Bartlett (NY)
Notes Interest Areas: Civil Procedure, Admin Law, Environmental Law

Renee Griffin

Hometown: Lake Zurich, IL
Undergrad: University of Notre Dame
1L Summer: Eimer Stahl (IL)
2L Summer: Cleary Gottlieb Steen & Hamilton (DC)
Notes Interest Areas: Con Law, First Amendment, Civil Rights, Civil Procedure

Kate Markey

Hometown: Ann Arbor, MI
Undergrad: Kenyon College
1L Summer: Legal Services of South Central Michigan
2L Summer: Salvatore Prescott and Porter
Notes Interest Areas: Con Law, Child Welfare, Civil Rights, Environmental Law, Legal History

Veronica Portillo-Heap

Hometown: Los Angeles, CA
Undergrad: University of Chicago
1L Summer: Los Angeles County Public Defender
2L Summer: Alameda County Public Defender (Oakland, CA)
Notes Interest Areas: Immigration Law, Criminal Law & Procedure, Con Law, Asylum Law, Habeas Corpus

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Hometown: Stockton, CA
Undergrad: MIT
1L Summer: Campaign Legal Center
2L Summer: Public Counsel
Notes Interest Areas: Voting Rights/Election Law, Housing Law, Con Law, Local & State topics

Ingrid Yin

Hometown: South Barrington, IL
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1L Summer: Legal Council for Health Justice (Chicago)
2L Summer: Jones Day (Chicago)
Notes Interest Areas: Criminal Law & Procedure, Admin Law, Employment Law

II. The Writing Process

A. Topic Selection

1. Sources of Inspiration

Choosing a topic is, in some ways, 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 pick should be narrow, novel, complex, and interesting. If you're feeling stuck (or unsure of what a "Note" even *is*), pick up a recent issue of *MLR* for some great examples and inspiration! In recent issues, *MLR* has published Notes on the U.S. Soccer Federation, state civil procedure, project finance, indigent defense, for-profit schools, reproductive rights, corpus linguistics, and more!

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."

- Do some jurisdictions disagree about a legal interpretation or rule (e.g., federal circuit splits, state common law splits)?
- Is Policy X unconstitutional?
- Does some longstanding doctrine or policy still make sense in 2019–2020, given that facts and law, or society's moral/ethical/legal frameworks, have 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?
- Is there some line of cases or administrative decisions that is 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, healthcare, 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.

It's important to realize that everyone has their own research process. Some people will read broadly in an area of law they find interesting before settling on a question. Others

will identify an issue that seems neat, even if they know nothing about the surrounding law. And most of you will probably fall in the middle, picking something that's still bothering you from your classes or that came up during an assignment over the summer. Regardless of what you choose, the Notez office would like to emphasize that narrow issues tend to make the best note. The most disappointing part of reading a really cool piece of scholarship is realizing that the author has a dozen really cool ideas related to their topic, but hasn't had the chance to fully flesh-out any of them. In other words: make sure you can do justice to your topic in 30-40 pages of double-spaced text.

The following sources may be of help to you in selecting a topic and devising a question. No matter what topic you choose, your goal is to contribute an original piece of scholarship to the legal community. You will likely (and should) heavily rely on other sources, but in the end, your piece will say something new. Above all, find something that interests *you*!

- **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/
    - *Take Care Blog*: https://takecareblog.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 and that issues on which SCOTUS has granted cert are likely to be preempted)
    - *Sentencing Law & Policy, by Professor Douglas Berman*: http://sentencing.typepad.com/
    - *Sunday Circuit Splits*: http://sundaysplits.com/
    - *Volokh Conspiracy*: https://reason.com/volokh/
    - *Wall Street Journal Law Blog*: http://blogs.wsj.com/law/
- **Westlaw/Lexis searches.** For a Note on a circuit split, for example, 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**. If there's a topic you're passionate about, it'll be more fulfilling 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 specific 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 run "preemption checks" 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 **regular basis**:[1]

- **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.

[1] We know this part isn't fun, but it's even less fun to realize that your 30-page Note is preempted.

B. Types of Publishable Pieces

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:

- **Jurisdictional Conflict or "Circuit Split":** 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 two examples recently published in Volume 118: Jackson Erpenbach's Note, *A Post*-Spokeo *Taxonomy of Intangible Harms*, and Lauren Schusterman's Note, *A Suspended Death Sentence: Habeas Review of Expedited Removal Decisions*.
    - Once you find a split, the solution your Note proposes could be judicially implemented, but it may be appropriate to also suggest a legislative remedy.
    - 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. For recent examples of this type of Note, see Christopher I. Pryby's Note, *Forensic Border Searches After* Carpenter *Require Probable Cause and a Warrant*, and Gabriella M. D'Agostini's Note, *Treading on Sacred Land: First Amendment Implications of ICE's Targeting of Churches*, both from Volume 118, and Lisa Limb's Note from Volume 117, *Shots Fired: Digging the Uniformed Services Employment and Reemployment Rights Act Out of the Trenches of Arbitration*.
- **Interdisciplinary or 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.
- **Policy Notes**: This type of Note identifies a social problem that requires legal analysis and proposes a unique solution, such as extending an existing legal doctrine to a new sphere. For an example of this type of Note, see Hayato Watanabe's Note from Volume 118, *The Municipal Pardon Power*.

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

2. Note Structure

Organization is crucial to crafting a coherent Note. At the risk of sounding too formulaic, there is a uniform structure that consistently works for Notes. You can deviate from this structure as appropriate to your topic or argument,[2] but this structure works for most people and most Note topics. Within each part, you will likely want to split your analysis into multiple sections, though the number of sections within each part might vary significantly from Note to Note. You can also deviate from the suggested page ranges with good reason, but these suggestions should keep the pieces of your Note in balance.

Introduction and Roadmap (2–3 pages): This is your attention grabber ("hook") 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 the 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.

You should also include a roadmap paragraph at the beginning of each Part, outlining the structure and argument of that Part and its subsections.

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 general legal audience,

[2] Clear it with your Notes Editor!

not for experts in the field. In other words, you should write something that your classmates (and Notes editor!) can understand. Also, resist the temptation to be long-winded in this Part. This is not the innovative or interesting part—this is the nitty-gritty. 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… 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 solves (or doesn't completely solve) 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. Make sure at least some aspect of your solution is novel—avoid simply repeating solutions that have been proposed by others.

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

- 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's intent, and it should change its interpretation to match Congress's intent."[3]

[3] 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.

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. 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. Extreme caution is warranted when the problem you're writing about is predicated on a change in the law that's expected but has not yet come to pass. For example, if you write a Note that assumes a pending Supreme Court case will come out one way or another, you're likely going to find yourself scrapping most or all of it when the actual case turns out slightly differently than you or the legal community predicted
- 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.

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."

Doesn't Cite Relevant Literature

- It's incredibly important that you position your piece in the context of existing scholarly literature on the issue. If you're writing on an interesting issue, it's likely that other law students and lawyers have written about related issues. It's not impossible that you're the only person thinking about your topic – but then you're likely going to need a paragraph or two that explains why you're the only person thinking about it.
- Likewise, as you'll figure out soon enough, legal academia *strongly* prefers over-citing to under-citing. If in doubt, add a citation.

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 scholarly 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.

Two sample Comments: Charlie Stewart's *The Rhetorical Canons of Construction: New Textualism's Rhetoric Problem*, and Robert Couch's *A Model for Fixing Identification Evidence After* Perry v. New Hampshire.

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 in more detail. 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 writing 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 . . . you have to prove it!

Alternatively, if your Comment does not identify a conflict in the law but instead opines on a recent 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.

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 scholarly conversation.

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,[4] and publication would likely take place in the next volume's issue.

A sample Book Notice: Andrew W. Hartlage's *"Never Again," Again: A Functional Examination of the Financial Crisis Inquiry Commission* in Volume 111.

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

[4] Mariel Radek and Ben Lempert, who are both marvelous!

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
4. Comparing and contrasting the author's approach with that of 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 section of the *Tealbook* above.

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.[5] Online Essays are posted on a regular basis on *MLR*'s website.

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.

[5] Traditionally, Online Essays are also less formal and academic in their tone. They often break down legal issues into normal, conversational English.

H. Sample Rubric

This rubric catalogs (some of) the features that make for successful legal scholarship. While Notes Editors may use the rubric to assist with providing you feedback, it is primarily provided for your own benefit in evaluating your progress. Formal scores will not be recorded based on these categories.

Outline Checklist
Thesis • Is there a clear thesis? • Is the thesis appropriately specific? • Is the thesis more than a mere statement of fact?
Structure & 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?
Research: • Has the subject been thoroughly researched? Have a sufficient number of sources been cited?
Final Note Checklist
Overall Substance
• Is the author's perspective a novel one in legal scholarship? • Does the author present a creative, workable solution to the issue presented?
Overall Style & Citation
• 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 any stylistic issues regarding tone, grammar, or wording? • Are there ATL Bluebook errors?
Overall Paragraphing & Flow
• Does each paragraph have a strong topic sentence? • Does each sentence in the paragraph support the topic sentence? • 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 roadmap paragraphs for each Part?
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?
Roadmaps & Thesis: • Is there a roadmap paragraph in the introduction that explains the structure of the Note? • Is there a clear thesis statement summarizing the Note's argument?
Part I
Structure & 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?
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?
Structure & Organization: • 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?
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?
Structure & Organization: • 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?

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 your piece to the Notes Office during one (or more) of our seven Calls throughout the year, an Online Essay by submitting to the Online Office, or a Book Notice by submitting to the Book Review Office.

That said, be aware that Notes and Comments are the most frequently published form of student scholarship. (Our friends in the Online and Book Review Offices have slightly less room to publish student scholarship—though it is possible!). You should talk to your Notes Editor early and often about the ins-and-outs of the *MLR* publication process if you are interested.

A few specific submission policies:

1. *MLR* alumni may submit Notes and Comments to the Notes Office up to a year after graduation. After that year, alumni may no longer submit Notes or Comments (but may submit to the Articles Office). Non-*MLR* 2Ls and 3Ls at Michigan may also submit Notes and Comments to the Notes Office during their time at Michigan; alumni cannot.
2. All current Michigan Law students and alumni may submit Online Essays and Book Notices to the respective offices; there is no temporal cutoff point.
3. Beginning in Volume 119, current Notes Editors may not submit Notes for publication. However, they may submit to Calls before and/or after their tenure.[6]
4. Authors that have previously published a Note or Comment are eligible to be published a second time, but the Selection Committee will prioritize pieces by authors that have not previously had the opportunity to publish.

B. Why Publish?

Why *not* publish? Future employers will think you're awesome, you can have your very own clickable citation on Westlaw, and your mom will love you even more than she already does.

More earnestly: making an original contribution to the wider scholarly discourse (however small) is a powerful thing. Multiple *MLR* Notes have been cited in litigation documents and court opinions in the last year alone.[7] Your idea will have posterity in the corpus of legal scholarship and could be useful to future generations of academics and practitioners alike.

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[6] If you are interested in publishing before joining the Editorial Board, please consult Appendix G.

[7] In addition to the Notes already cited above, see, for example, A.T.O. Golden Constr. Corp. v. Allied World Ins. Co., 2018 WL 308933, at *3 (S.D. Fla. May 21, 2018) (citing Stephen Mayer, Note, *An Implausible Standard for Affirmative Defenses*, 112 MICH. L. REV. 275 (2013)).

Or, if your publication is more radical or obscure (i.e., *not* the type to end up being much practical use to "real" lawyers), all the better: you can wedge open the Overton window and bend conventional standards.[8] Present your paper at a lunch talk; submit it to writing competitions (cash prizes!); travel to academic conferences. Pursuing publication will take you to unexpected places.

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

1. **Call for publication:** Seven times a year, the Notes Office solicits 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.[9] 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 Notes 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.

[8] A variety of interesting *MLR* Notes have been cited by other scholars. *See, e.g.*, Steven A. Ramirezd & Neil G. Williams, *On the Permanence of Racial Injustice and the Possibility of Deracialization*, 69 CASE W. RES. L. REV. 299, 304 n.20 (2018) (citing Kathryn Ladewski, Note, *Preserving a Racial Hierarchy: A Legal Analysis of the Disparate Racial Impact of Legacy Preferences in University Admissions*, 108 MICH. L. REV. 577 (2010)); Matthew Schaefer, *The Need for Federal Preemption and International Negotiations Regarding Liability Caps and Waivers of Liability in the U.S. Commercial Space Industry*, 33 BERKELEY J. INT'L L. 223, 248 n.110 (2015) (citing Justin Silver, Note, *Houston, We Have a (Liability) Problem*, 112 MICH. L. REV. 833 (2014)); Cari Carson, Note, *Rethinking Special Education's "Least Restrictive Environment" Requirement*, 113 MICH. L. REV. 1397 (2015).

[9] After submission, pieces are first run through anti-plagiarism software. Pieces with portions of plagiarized text will not be referred to the Notes Office for consideration.

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. Publication Checklist

Are you close to publication? Planning to submit to the next Call? If so, please look over the following steps.

First, check the date of the Notes Office's next Call for Submissions on the *MLR* website.

Second, please ensure that your submission is **substantively and stylistically ready for publication**. The Notes Office's publication deadlines limit the extent to which a piece can be substantively edited after selection. With that in mind, please take the time to bring your submission into conformity with the following list of formatting and stylistic features of a good Note. None of these features are *required* for a piece to be selected, but they help the Selection Committee review the large volume of submissions that it receives.

All pieces that are selected *will* be required to comply with the following **checklist**:

- Your piece should be in Times New Roman font, size 12, double spaced above the line. Your footnotes should be Times New Roman font, size 12, single spaced;
- An abstract;
- A table of contents;
- Complete introduction and conclusion sections;
- Page numbers;
- Format citations in "journal font" (i.e., underline in place of *italics* and **bold** in place of using SMALL CAPS);
- Finally, ensure that each assertion that needs support is cited, and that all citations comply with the 20th Edition of the Bluebook. Additionally, please ensure that you are using the best sources available to support your assertions.[10]
    - *Please note*: For online sources, *MLR* uses permalinks (via perma.cc), rather than "last visited" parentheticals. However, permalinks will be added to the piece after it has been selected for publication. There is no need to generate permalinks beforehand.
    - *Also note*: This is not a license to include gratuitous citations. Thoughtful legal scholarship provides sufficient support to prove a proposition, but does not include needlessly repetitious sources. For example, do not cite *seven* cases to support a proposition where one or two on-point cases achieves the same effect.

Third, email your submission as a **word document** to the Executive Notes Editor (mlr.ene@umich.edu) **by 11:59PM on the date of the Call**. The ENE will confirm your submission and you will later receive the Selection Committee's final decision. An author may submit to as many Calls as they are eligible for; but an author may only submit *one* piece to any given Call.

If a piece is not selected for a particular Call, the Notes Office will attempt to provide the author with constructive feedback for future submissions. However, an author's Notes Editor should continue to be the primary source of comments on a piece. Additionally, the Notes Office discourages submission of the same piece to **more than three successive Calls**.

[10] For example, if you state that "courts have differed" on a certain issue, cite to two differing court opinions rather than a law review article stating that point.

V. Appendix

A. 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.

B. 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).

C. 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.

D. Sample Outline (Note)

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 element

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

E. Sample Outline (Online Essay)

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

F. Sample Roadmap Paragraph (Note)

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.

For more samples, look at some of the Notes we have published! Sample Notes, Comments, and Book Notices are also scattered throughout this document.