

# BOOK REVIEW

## THE LAWYER AS LEGAL SCHOLAR

*Michael J. Madison\**

EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, AND SEMINAR PAPERS* (Foundation Press, 2003), 196 pp., \$ 18.95.

### I.

Law professors love to talk about themselves. Rarely is this more evident than when they have a student audience. It is surprising, therefore, that only now has a full-time legal scholar, dedicated primarily to matters other than the topic of writing itself, produced an entire book of advice for the student scholar. In *Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers*, Eugene Volokh, who teaches the law of the First Amendment, copyright law, and firearms regulation policy at the UCLA School of Law, has delivered an engaging, witty, and extremely useful book for the aspiring student note and article writer that is based, it clearly appears, on the model of scholarship that Volokh himself has so successfully pursued.

As teachers of legal writing know, the marketplace already features an engaging, witty, and entirely useful book for student scholars, *Scholarly Writing for Law Students: Seminar Papers, Law Review Notes and Law Review Competition Papers*, by Elizabeth Fajans and Mary Falk.<sup>1</sup> This short

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\* Assistant Professor, University of Pittsburgh School of Law. Email: madison@law.pitt.edu. Thanks to Ben Bratman, Ann Sinsheimer and Eugene Volokh for comments on an earlier version of this Review.

1. ELIZABETH FAJANS & MARY R. FALK, *SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR*

Review first takes up the differences between Volokh's volume and that of Fajans and Falk, and between Volokh and the other sources of instruction for the student scholar. Those differences, including a brief critique of Volokh's book itself, take up Parts II, III, and IV below.

The key distinction, it seems to me, is that Volokh approaches the topic as a question of producing competent—even strong—scholarship, whereas his predecessors in the field looked at it as a question of producing competent—even strong—critical writing as part of the overall legal educational enterprise. The difference is more than one of degree. Part V argues that helpful as the book is for students and scholars both—and it is extremely helpful—*Academic Legal Writing* makes an implicit, highly intriguing argument about the current character of legal education and, by extension, the legal profession. Law schools should focus more explicitly on student scholarship and thus do more to foster a genuinely scholarly culture among their students as well as their faculties, and ultimately among all members of the profession. *Academic Legal Writing* is therefore both useful (as a teaching tool), and sly (as a commentary on the profession). In teaching law students to be scholars, it is opening a discussion about the role of scholarship in the legal curriculum as a whole and, by implication, on the scholarly characteristics that all lawyers should be expected to possess and display. In an era when clinical and other “skills” training has become more and more the focus of legal education,<sup>2</sup> such a discussion may seem anachronistic. To the contrary: *Academic Legal Writing* rightly suggests that it is both important, and timely.

## II.

Those who teach and otherwise think about scholarship for law students work with a small canon. Until now, the only text in the field came from Professors Fajans and Falk, who both teach legal writing at Brooklyn Law School. In addition, two nationally-known scholars who work primarily outside the field of legal writing, Richard Delgado and Pamela Samuelson,

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PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS (2d ed. 2000).

2. During the last decade, much of the emphasis on clinical and other practical lawyering skills training can be traced to a report produced by the American Bar Association. See TASK FORCE ON LAW SCHOOLS AND THE PROFESSION: NARROWING THE GAP, STATEMENT OF FUNDAMENTAL LAWYERING SKILLS AND PROFESSIONAL VALUES (American Bar Association, Section of Legal Education and Admissions to the Bar, 1992) (commonly referred to as the “MacCrate Report” after the chair of the Task Force, Robert MacCrate).

have produced essays on scholarly writing that are widely cited by teachers of legal writing.<sup>3</sup> Understanding Volokh's contribution requires briefly summarizing this literature.

#### A. *Scholarly Writing for Law Students*

As teachers and practitioners of good legal writing, Fajans and Falk set their agenda on the table in their first few paragraphs: "Whether you are writing a competition paper, seminar paper, or law review article, this book can help you make the necessary transition from instrumental to critical writing."<sup>4</sup> Scholarly writing is an important theme of the book, but the authors are more concerned with instilling methods for the production of the work product—"strategies and techniques for each stage of the writing process, from inspiration to final proofreading"<sup>5</sup>—than with the quality of the substantive research and analysis that results. Not that the results do not count; they do. But the writing process is first and foremost an important element of each student's overall training as a lawyer:

You will find that the techniques and strategies of critical thinking, reading, and writing that this book describes—for finding inspiration, drafting, revising, editing, and polishing—are as useful for a complex estate plan, office memorandum, or appellate brief as they are essential to your paper. In fact, a recent study shows that former members value the law review experience at least as much for its enhancement of their writing skills as for its enhancement of their resumes.<sup>6</sup>

Fajans and Falk cite Aristotle's *Rhetoric* (following the steps of definition, comparison, causation, and substantiation) as a model for thinking about and organizing a topic and ultimately, a paper.<sup>7</sup> The book walks the student through what might be called an Aristotelian analytic and writing process: selecting a topic and choosing a thesis; researching the material; the mechanics of organizing, writing, and re-writing; footnoting and using authority wisely

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3. Richard Delgado, *How to Write a Law Review Article*, 20 U.S.F. L. REV. 445 (1986); Pamela Samuelson, *Good Legal Writing: Of Orwell and Window Panes*, 46 U. PITT. L. REV. 149 (1984).

4. See FAJANS & FALK, *supra* note 1, at 2.

5. *Id.*

6. *Id.* at 5. In other work, the authors have explained at greater length how their approach to critical writing fits into broader pedagogical goals. See Elizabeth Fajans & Mary R. Falk, *Comments Worth Making: Supervising Scholarly Writing in Law School*, 46 J. LEGAL EDUC. 342, 344 (1996); Elizabeth Fajans & Mary R. Falk, *Against the Tyranny of Paraphrase: Talking Back to Texts*, 78 CORNELL L. REV. 163, 187 (1993).

7. See FAJANS & FALK, *supra* note 1, at 25-26.

(and ethically); and going through the editing process. In short, *Scholarly Writing for Law Students* is a detailed, soup-to-nuts manual for preparing a piece of critical writing. Publication and recognition are welcome rewards, but they follow rather than guide the process of research and writing. The concluding chapter on “Getting Mileage: Winning Awards and Publishing Your Work” begins: “Although a job well done is its own satisfaction, imagine how good it would feel to publish your paper or win a national writing competition prize.”<sup>8</sup>

### *B. How to Write a Law Review Article*

Richard Delgado’s 1986 essay, *How to Write a Law Review Article*,<sup>9</sup> is not addressed only to law students, but its clarity and brevity make it an ideal resource for student writers. Fajans and Falk cite to it.<sup>10</sup> Volokh includes it, along with Fajans and Falk and Pamela Samuelson’s essay, as one of three particularly useful resources for student scholars.<sup>11</sup>

Delgado’s most important discussions are his review of the types of law review articles, and a description of the process of identifying and selecting article topics. (He covers researching, writing, submission, and editing in briefer passages.) There are, he suggests, at least ten different types of articles: (i) the “case cruncher,” which analyzes a confused area of caselaw; (ii) the law reform article, which proposes to reform an unfair or inequitable rule or result; (iii) the legislative note, analyzing enacted or proposed legislation; (iv) the interdisciplinary article, applying insights to law from some other field; (v) the theory-fitting article, which identifies a new, emergent theory or principle in the law; (vi) a discussion of the forms and institutions of lawyers and the legal profession; (vii) a continuation of ongoing scholarly debates; (viii) pieces on legal history; (ix) the casenote; and (x) the empirical research article.<sup>12</sup> To find a topic within one of those paradigms, “find one new point, one new insight, one new way of looking at a piece of law, and organize your entire article around that. One insight from another discipline, one application of simple logic to a problem where it has never been made before is all you need.”<sup>13</sup> The

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8. *See id.* at 185.

9. *See* Delgado, *supra* note 3.

10. *See, e.g.*, FAJANS & FALK, *supra* note 1, at 7, 27.

11. EUGENE VOLOKH, *ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES AND SEMINAR PAPERS* 6 (2003).

12. *See* Delgado, *supra* note 3, at 446-48.

13. *Id.* at 448.

advice and analysis are right on target. Yet the very brevity of the essay limits its value as a system for producing scholarship.

Instead, as much as Fajans and Falk offer a manual for critical writing and thinking, Delgado offers a resource for conceptualizing scholarship. His essay takes up only nine pages in all, and his descriptions of article varieties and topic selection occupy four of those. Discussions of research and the use of authority take up a page and a half. The writing process itself takes up only a single paragraph.<sup>14</sup> What counts in this universe, then, is not the training in analytic skills that (legal) scholars endure and acquire. What counts is the production of what John Henry Newman, the intellectual ancestor of the “liberal education” that is the rhetorical cornerstone of American higher education, characterized as fundamental to the character of a university: scholarship as the advancement of knowledge.<sup>15</sup> Delgado differs from Fajans and Falk in focusing on the substantive end, rather than on the analytic means. For the latter, the hard work of scholarship lies in the analytic process, and often in that portion of the process that precedes writing itself. The mechanics of putting words on paper (or in bits) may be a secondary matter. For Delgado, there is no doubt that the battle may be won or lost in the analysis, but the battle means little if the product is unworthy, and the state of knowledge remains unchanged.

### C. *Good Legal Writing: Of Orwell and Window Panes*

Pamela Samuelson’s essay, *Good Legal Writing: Of Orwell and Window Panes*,<sup>16</sup> tries to bridge some of the gap between student-writing-as-extended-critical-thinking-skills, on the one hand, and scholarship-as-advancement-of-knowledge, on the other. Her essay is addressed primarily to law students. It offers neither a manual for successful critical writing (again, unlike Fajans and Falk), nor a conceptual framework for understanding what makes an effective scholarly article (unlike Delgado). Samuelson offers a collection of tips and recommendations, to be borrowed and mixed as the reader most prefers. There are the six “paramount” rules of good legal writing: (i) have a point; (ii) get to the point; (iii) adopt an effective structure; (iv) break the analysis into independently supported components; (v) proceed in a measured tone; (vi) and

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14. *Id.* at 452.

15. See JOHN HENRY NEWMAN, *THE IDEA OF A UNIVERSITY* 3 (Frank M. Turner ed., Yale Univ. Press 1996) (1852).

16. Samuelson, *supra* note 3.

be concrete.<sup>17</sup> These are conceptual enough to be both familiar and useful to non-student scholars, but sufficiently scripted to be comprehensible to students. There are supplemental rules, which range from mechanics of writing (write a strong introduction; use effective section titles; make case discussions brief and to the point)<sup>18</sup> to substantive analysis (present balanced perspectives; consider policy implications of the thesis).<sup>19</sup> Samuelson includes useful discussions of research strategies (learning how to do enough research),<sup>20</sup> and writing mechanics.<sup>21</sup> Her prescriptions are refreshingly down to earth. Like Delgado, she offers a scholar's perspective on what makes effective scholarship.

### III.

Into this field comes Volokh's *Academic Legal Writing*. Eugene Volokh is a precocious and prolific scholar of constitutional law and related subjects, not a teacher or scholar of legal writing. In a relatively short time (he has been a member of the UCLA faculty only since 1994) he has authored or co-authored more than thirty law review articles.<sup>22</sup> These embrace an impressive range of substantive topics.<sup>23</sup> Equally important for present purposes, he displays a command of clear, readable prose that is unusual in legal scholarship.<sup>24</sup> His advice on producing good scholarship, whether delivered to students or fellow academics, is well worth considering, even given the useful work described above.

Volokh's contribution, however, is more than merely that of an earnest scholar and good writer. *Academic Legal Writing* is notable both for what it does and for what it does not do. What it does is combine the "manual" approach of *Scholarly Writing for Law Students* (even going so far, in places, as to share some organizational similarities),<sup>25</sup> with the primary concern for the

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17. *Id.* at 151-57.

18. *Id.* at 157-59.

19. *Id.* at 163-64.

20. *Id.* at 164-66.

21. *Id.* at 159-63.

22. VOLOKH, *supra* note 11, at v.

23. Compare Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003), with Eugene Volokh, *Sovereign Immunity and Intellectual Property*, 73 S. CAL. L. REV. 1161 (2000).

24. In part, this is no surprise. Volokh's mentor is Judge Alex Kozinski of the Ninth Circuit Court of Appeals, no slouch himself when it comes to the written word.

25. The similarities may simply be due to the nature of the material, since both books essentially follow the scholar from beginning to end of the researching, writing and publishing processes.

scholarly content of the writer's output that characterizes Delgado's and Samuelson's essays. This is a neat trick, and it is made possible by Volokh's willingness in effect to use his book to describe how he conducts his own scholarship. *Academic Legal Writing* is not merely or mostly a guidebook for student scholars, or for legal scholars generally. It is a how-to book for writing and publishing as successfully as Volokh himself has done. What *Academic Legal Writing* does not do is equally important, and it derives entirely from Volokh's focus on the production of high quality scholarship as an end in itself. *Academic Legal Writing* is not a book about how to use legal scholarship to become a better lawyer, directed primarily to the occasional law review editor or other student who cares to take the time to produce real scholarship. It is a book that argues that all law students, and thus all lawyers, should become better scholars.

Such a book cannot appear to be about scholarship; in order to be marketable, it must appear to be about writing. The book thus borrows its overall organizational framework, wisely, from *Scholarly Writing for Law Students*. First are the basics of identifying a topic and converting that topic into a worthy article, note, or seminar paper.<sup>26</sup> Next is research,<sup>27</sup> then writing and editing.<sup>28</sup> The proper interpretation and use of authority follow.<sup>29</sup> Volokh, like Fajans and Falk, concludes with chapters on editing others' work,<sup>30</sup> and on publishing one's work.<sup>31</sup>

The organization and presentation may be familiar, but Volokh's tone and overall orientation could not be more different. His concept of useful scholarship is borrowed not from Aristotelian rhetoric, but from Stephen Carter's patent law metaphor,<sup>32</sup> which Carter himself invoked as an elaboration

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Characterizing *Scholarly Writing for Law Students* as a sort of "manual" is not intended to diminish that work itself as a principled implementation of composition theory. Cf. Philip C. Kissam, *Lurching Towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education*, 60 OHIO ST. L.J. 1965, 1988 (1999) (urging evaluation of law school writing according to principles of composition theory-writing as a process, and writing as a social act).

26. Compare VOLOKH, *supra* note 11, at 9-57, with FAJANS & FALK, *supra* note 1, at 1-49. Volokh follows this section with a brief, discrete section devoted to differences between scholarly works and seminar papers. See VOLOKH, *supra* note 11, at 59-67.

27. Compare VOLOKH, *supra* note 11, at 63-67, with FAJANS & FALK, *supra* note 1, at 51-62.

28. Compare VOLOKH, *supra* note 11, at 69-94, with FAJANS & FALK, *supra* note 1, at 63-104. Fajans and Falk discuss writing techniques in two sections, on outlining, drafting, and revising, see FAJANS & FALK, *supra* note 1, at 63-104, and separately on grammar, syntax, and punctuation. See *id.* at 121-61.

29. Compare VOLOKH *supra* note 11, at 95-131 (discussing the use of evidence), with FAJANS & FALK, *supra* note 1, at 105-120 (discussing the appropriate use of footnotes).

30. Compare VOLOKH, *supra* note 11, at 133-35, with FAJANS & FALK, *supra* note 1, at 163-84.

31. Compare VOLOKH, *supra* note 11, at 137-54, with FAJANS & FALK, *supra* note 1, at 185-88.

32. See VOLOKH, *supra* note 11, at 9 (acknowledging debt to Stephen L. Carter, *Academic Tenure*

of the scholarship-as-advancement-of-knowledge premise.<sup>33</sup> It is the result, not the process, that counts.<sup>34</sup> Like a valid patent, a worthwhile piece of legal scholarship, regardless of the professional status of its author, should make (i) a claim,<sup>35</sup> that is (ii) novel,<sup>36</sup> (iii) nonobvious,<sup>37</sup> (iv) useful,<sup>38</sup> and (v) sound.<sup>39</sup>

In separate sections, Volokh elaborates on each point. *Claim*: The piece should have a thesis, which might be descriptive, prescriptive, or some combination of both, and in any case should be reducible to a single sentence.<sup>40</sup> But the thesis is not merely an excuse for hanging the scholar's hat. "Remember that your goal is to find whatever problem will yield the best article."<sup>41</sup> *Novelty*: No one must have come up with this claim before. "It's not enough for your ideas to be original to you, in the sense that you came up with them on your own—the article must add something to the state of expert knowledge about the field."<sup>42</sup> *Nonobvious*: Not anyone could have come up with the claim. "Keep in mind that your article will generally be read by smart and often slightly arrogant readers (your professor, the law review editors, other people working in the field) who will be tempted to say, 'well, I could have thought of that if I'd only taken fifteen minutes'—even when that's not quite true."<sup>43</sup> *Useful*: This is a criterion that may be honored by the scholarly

and "White Male" Standards: *Some Lessons from the Patent Law*, 100 YALE L.J. 2065, 2082-84 (1991)).

33. See Carter, *supra* note 32, at 2084.

34. In theme Volokh thus resists the dominant trend in the reformation of legal writing curricula of recent years, away from a "product approach" and toward a "process approach." See Jo Anne Durako et al., *From Product to Process: Evolution of a Legal Writing Program*, 58 U. PITT. L. REV. 719 (1997).

35. See 35 U.S.C. § 112 (2000) (stating that "[t]he [patent] specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention").

36. See *id.* § 102 (defining novelty for patentability purposes).

37. See *id.* § 103 (defining non-obviousness as measured from the perspective of "a person having ordinary skill in the art").

38. See *id.* § 101 ("Whoever invents or discovers any new or useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.").

39. "Soundness" is the scholarly equivalent of the patent statute's requirement that the invention be properly "enabled" in the patent application, that is, that the application demonstrate that the inventor has in fact invented the thing that is claimed. See *id.* § 112.

40. See VOLOKH, *supra* note 11, at 9-13.

41. *Id.* at 12.

42. *Id.* at 13. Non-obviousness may be demonstrated by nuance. See *id.* at 14. In patent law, the inventor need not demonstrate a "flash of genius." "Patentability shall not be negated by the manner in which the invention was made." 35 U.S.C. § 103.

43. VOLOKH, *supra* note 11, at 14-15.



community more in the breach than in the observance.<sup>44</sup> Nonetheless, a valid piece of scholarship must, at least formally, advance the state of the art. “[C]laims that call for modest changes to current doctrine tend to be more useful than radical claims, especially in articles by students or by junior practitioners.”<sup>45</sup> *Sound*: Volokh suggests that authors use “test suites,” a concept borrowed from computer software design, running an article’s proposals against a variety of hypothetical scenarios to determine whether they produce sound results. If the results are unsound or unexpected in any of a number of ways (Volokh catalogs the most common problems), the article can be revised accordingly.<sup>46</sup> What the author claims to have “invented” must in fact work as promised. If it doesn’t (typically, because the article is so broad as to be impracticable in practice, or so narrow as to be useless to all but a handful of readers), the article doesn’t deserve the reward of scholarly recognition and should be re-worked until it does.

The balance of the book elaborates this core structure. The scholarly article should be organized in order to frame the problem that it analyzes clearly and quickly, and to review the background of the problem succinctly. “Your claim and your proof are what you’re adding to the field of knowledge; your achievement will be measured largely by this value added. You can’t prove your claim without explaining the background facts and doctrine, but do this as tersely as possible.”<sup>47</sup> The bulk of the article should be dedicated to proving the claim itself. “Too many student articles spend eighty percent of their time summarizing the law and twenty percent explaining and proving their claims.”<sup>48</sup>

In this portion of *Academic Legal Writing*, Volokh makes perhaps his most important contribution to the literature on critical legal writing itself. He dedicates several sections to both conceptual and practical approaches to conducting the hard work of legal analysis. This is a step that Delgado and Fajans and Falk mostly omit, possibly because the task of explaining it is at

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44. Compare Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992) (illustrating judicial lament regarding production of “impractical” legal scholarship), with Richard A. Posner, *The Deprofessionalization of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1928 (1993) (defending the academy and characterizing legal scholarship, and interdisciplinary scholarship in particular, as a high-risk, low return activity).

45. VOLOKH, *supra* note 11, at 17; cf. Judge Alex Kozinski, *Who Gives a Hoot About Legal Scholarship?*, 37 HOUS. L. REV. 295 (2000) (encouraging stronger ties between legal academics and judges).

46. See VOLOKH, *supra* note 11, at 19-28.

47. *Id.* at 34.

48. *Id.*

least as difficult as actually engaging in it. Samuelson refers to it briefly.<sup>49</sup> It is a step, however, that many students find almost mystical in its complexity. By way of showing how the author should prove the claim, Professor Volokh walks through a lengthy series of hurdles to confront and overcome: proving the claim doctrinally and as a matter of policy; doing so concretely and with examples; and explaining and extending the claim through additional layers of debate and other areas of law and policy.<sup>50</sup>

All of this is accomplished with both enough explanation to guide a novice and enough sophistication to serve a published scholar. Volokh's fleshing out of the patent metaphor, supported by the additional "test suite" metaphor for proving the internal validity of the author's analysis, is calculated to produce thoughtful but robust scholarship, provocative where appropriate but supported by clear analysis. Volokh never comes right out and says that this is the model that he follows himself, but that point is implicit. His "test suite" metaphor is explicitly based on his own experience as a computer programmer, for example.<sup>51</sup> From beginning to end, this is a model that deserves the attention of all legal scholars, not merely the attention of their students.

#### IV.

That said, the "writer's manual for scholars" approach of *Academic Legal Writing* has some drawbacks. They are minor, given the overall strength of the book, but they are worth brief comment.

First, Volokh's comprehensive approach to the material all but requires that he devote large sections of the book to explanations and recommendations regarding grammar, syntax, writing style,<sup>52</sup> and ethical issues in research and writing.<sup>53</sup> Fajans and Falk do likewise,<sup>54</sup> though Volokh's emphases differ here and there, particularly in his lengthy explanation of the importance of understanding statistical and empirical data, and its ethical use.<sup>55</sup> The need to package this material in a single volume is understandable, given the reluctance of law school faculty to demand that their students read more than

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49. See Samuelson, *supra* note 3, at 152-55 (recommending that students connect doctrinal analysis to policy analysis, that students avoid abstraction, and that students engage in balanced analysis).

50. VOLOKH, *supra* note 11, at 35-43.

51. See *id.* at 20.

52. *Id.* at 79-92.

53. *Id.* at 155-61.

54. See FAJANS & FALK, *supra* note 1, at 121-61.

55. VOLOKH, *supra* note 11, at 111-28, 160-61.

one book on writing well. But there are many other good, even better books out there on how to compose high quality non-fiction, both in the context of legal writing<sup>56</sup> and otherwise.<sup>57</sup>

Second, aside from an important, detailed discussion of the role of empirical evidence, Volokh devotes an insufficient amount of space to possibilities for interdisciplinary and other nontraditional forms of legal scholarship. The emergence of high quality interdisciplinary work by legal scholars is one of the most remarkable and valuable developments in law schools over the last twenty years,<sup>58</sup> and there is every reason to think that law students can appreciate its strengths and weaknesses and produce such scholarship of their own. *Academic Legal Writing* talks explicitly (and to its credit, at length) about the source of one type of interdisciplinary scholarship, work based on statistical and other empirical evidence.<sup>59</sup> It contains little advice, however, for the student or other scholar who wants to explore different sorts of interdisciplinary work.

Third, and most important (though again dictated, perhaps, by considerations of the market for such books—most students produce at most a single scholarly paper over the course of their law school careers), *Academic Legal Writing* omits much consideration of perhaps the most important non-analytic dimension of the tasks of scholarship: engaging with and even participating in a community of scholars and of scholarship. Volokh covers

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56. See, e.g., LINDA HOLDEMAN EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* (3d ed. 2002); BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (2d ed. 2002); RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* (4th ed. 2001); LAUREL CURRIE OATES ET AL., *THE LEGAL WRITING HANDBOOK: ANALYSIS, RESEARCH, AND WRITING* (3d ed. 2002); HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* (4th ed. 1999); RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* (4th ed. 2001).

57. There is the indispensable WILLIAM STRUNK, JR. & E.B. WHITE, *THE ELEMENTS OF STYLE* (4th ed. 2000), and my personal favorite, WILLIAM ZINSSER, *ON WRITING WELL: THE CLASSICAL GUIDE TO WRITING NONFICTION* (6th ed. 1998).

58. Critical theory of one kind or another has flourished as a source of scholarship notwithstanding the demise of the Critical Legal Studies Movement. See, e.g., Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego, and Other Reformist Theories of Equal Protection*, 89 GEO. L.J. 2279 (2001) (evaluating Charles Lawrence's contribution to Critical Race Theory); A. Michael Froomkin, *Habermas@discourse.net: Toward a Critical Theory of Cyberspace*, 116 HARV. L. REV. 749 (2003) (testing Habermasian discourse theory against communities regulating technical dimensions of the Internet). The economics literature has had a profound influence on law and legal scholarship. See Richard A. Epstein, *Let "The Fundamental Things Apply": Necessary and Contingent Truths in Legal Scholarship*, 115 HARV. L. REV. 1288, 1304-10 (2002) (describing key insights from economic theory that have become relevant to legal scholars). The normative influence of these disciplines is controversial. See, e.g., John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 907-11 (2002) (decrying reliance on excessively formalist and relativist theories and advocating return to practicing legal reasoning).

59. VOLOKH, *supra* note 11, at 98-99, 104-05, 109-20.

the necessary dynamics of preparing drafts and responding to feedback from professors.<sup>60</sup> He also includes some valuable advice for the soon-to-be published author on placing articles for publication, working with editors, and on promoting articles within the scholarly community.<sup>61</sup> (Again, as with much of the book, faculty as well as students should take heed.) His case that student scholarship should focus on authentic scholarly output would be made stronger still by elaborating on scholarly discourse itself. Teachers of non-scholarly legal writing have begun to incorporate thinking about discourse communities into their work.<sup>62</sup> Scholars in both law and other fields understand intuitively that effective scholarship can be produced only by understanding the scholarly community itself—the established norms and conventions of existing scholarship, the history and expectations of the field, its population of scholars, and so forth. The “advancement of knowledge” that marks scholarship necessarily takes place against this background. Volokh covers some of this in sections on identifying a worthy scholarly project, that is, is the topic novel, useful, and sound? The importance of the scholarly community continues even when the writing is complete, as non-student scholars learn quickly. There are drafts to acquire and drafts to circulate, contacts to cultivate, presentations to hear and to give, and perspectives to be shared. A scholarly work responds to and is a contribution to a dialogue with other scholars. *Academic Legal Writing* would benefit from more emphasis on the importance of becoming part of that dialogue and on techniques for doing so.<sup>63</sup>

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60. *Id.* at 72-73.

61. *Id.* at 150-53.

62. See Susan L. DeJarnatt, *Law Talk: Speaking, Writing, and Entering the Discourse of Law*, 40 DUQ. L. REV. 489, 506-21 (2002); J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 56-61 (1994); cf. John B. Mitchell, *Current Theories on Expert and Novice Thinking: A Full Faculty Considers the Implications for Legal Education*, 39 J. LEGAL EDUC. 75 (1989) (recommending strategies for aiding acculturation process); Joseph M. Williams, *On the Maturing of Legal Writers: Two Models of Growth and Development*, 1 J. LEGAL WRITING INST. 1 (1991) (discussing socialization of legal novices).

63. Volokh's book could do so from the perspective of the scholar. It seems to me that a counterpart argument, for the extension of the scholarly community to include students, could be made from the perspective of the law school and its faculty. For example, law students could sponsor colloquia for student scholarship, and/or law schools could include students in faculty colloquia or workshops. If Volokh is implicitly suggesting that law schools and their faculty do more to enable students (and lawyers) to become good scholars, then it would seem appropriate for schools to provide fora for that scholarship to be heard. At the least, the possibility of their doing so suggests that the philosophical arguments of Part V can be redeemed by changes to academic practice. Cf. James Lindgren, *Fifty Ways to Promote Scholarship*, 49 J. LEGAL EDUC. 126 (1999) (offering a list of structural changes that law school faculties might make to enhance their own scholarly productivity).

## V.

The broader question here is whether a book such as this (or, for that matter, the competing volume by Fajans and Falk) is necessary at all. Clearly, Volokh thinks so, and I tend to agree. The reasons are worth exploring, however, because they bear on what it is that law schools should be teaching their students. By extension, the reasons bear on what lawyers should be learning and doing, and ultimately on what it is that should define the legal profession today.

Why write? More specifically, why do law students write, and why should they write? Law students are required to write, according to accreditation standards for law schools. The American Bar Association (“ABA”) requires that “[a]ll students in a J.D. program shall receive: (2) substantial legal writing instruction, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year.”<sup>64</sup> The Bylaws of the American Association of Law Schools (“AALS”) include the requirement that “[a] member school shall . . . assure that every student receives significant instruction in legal writing and research.”<sup>65</sup> The standards do not define “rigorous” and the Bylaws do not define “significant,” leaving substantial discretion in the hands of individual faculties and faculty members.<sup>66</sup> But virtually all American law schools provide some basic training in legal research and writing during the first year (often focusing on preparation of office memoranda and appellate briefs), and most require that each graduating student complete at least one significant writing project. Writing and drafting, after all, is at the core of almost all types of law practice, so it is fitting that the lawyer’s professional training include some practice with this essential skill. But it is hardly a given that law students will be exposed to, let alone be required to prepare, significant scholarly work.

Legal scholarship by students, as such, occupies an awkward position in this matrix. Few law schools or law professors consider scholarly writing a

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64. American Bar Association Standards for Approval of Law Schools, Standard 302(a)(2), *available at* <http://www.abanet.org/legaled/standards/standards.html> (last visited Oct. 11, 2003).

65. By-Laws of the Association of American Law Schools, Article 6, Section 6-9(d), *available at* <http://www.aals.org/bylaws.html> (last visited Oct 11, 2003).

66. The recent trend in this area is defined by the MacCrate Report, *supra* note 2, and its emphasis on practical lawyering skills. *See id.* at 5 (noting that many practitioners believe that legal scholarship is of little practical value).

necessary part of the “rigorous” or “significant” instruction in writing that the ABA and AALS expect; few expect scholarship from students other than those who undertake to write for law reviews; few work with students on the joint production of scholarship. None of this is surprising. There are few professional rewards for the law professor who demands that his or her students produce true scholarship rather than mere seminar papers. There are few reasons for students to demand to learn scholarly skills. Few lawyers have any professional need to produce law review articles. Outside of a handful of elite law schools, few law students intend to become legal professors and therefore need or want to learn the craft of scholarship.<sup>67</sup>

It is possible, then, that Volokh is addressing *Academic Legal Writing* to the relatively small constituency of law students who aspire to the professoriate, or who otherwise value the abstract, intellectual life of the law for its own sake and want to pursue that interest in written form. My reading of this book, however, is that Volokh has not framed so narrow an argument. I suspect that he has a different answer for those who ask, why should law students write? That answer, and it is a provocative one, is that it is part of the lawyer’s job, part of the professional role, to acquire and display critical, analytic skills in service both to the law and to society, and not just to the individual client. Scholarship is too important, in other words, to leave it to scholars themselves.

Nowhere does Volokh make this claim directly. It may be a little speculative for me to infer the claim from his text. But why else focus so strongly on the classic characteristics of scholarship as such, rather than only on the analytic training that extended research supplies? And why else devote so much space to publication and promotion, when, as Fajans and Falk argue, those tasks are effectively secondary to most students, if they consider publication at all?<sup>68</sup>

Whether the claim is present explicitly or not, the claim is part of an argument well worth making, and worth exploring at some greater length. It extends to its logical conclusion a debate—what does legal scholarship consist of, and what is the proper role of scholarship within the legal

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67. Members of student-edited law journals are expected to produce notes as a condition of membership, but even journal membership (again, outside a handful of elite schools) is typically regarded professionally more as part of broader preparation for entry into law practice than as a form of apprentice scholarship.

68. It is possible that *Academic Legal Writing* is merely a manual for would-be law professors. There are, however, very few openings for full-time law faculty each year, and tens of thousands of new law graduates. Given those statistics, the length and detail of the book would hardly justify its mission.

profession?—that remains unresolved even among law professors, addressing the norms of their own part of the profession.<sup>69</sup> If I am correct that Volokh's book is based on this premise, then he deserves credit for the sheer cleverness of presenting it in the guise of a textbook. If I am reading more into the text than Volokh intends, then the argument ought to be made nonetheless. The argument, to be clear, is this. Law students, and therefore lawyers, not only can be scholars, but should be scholars. *Academic Legal Writing* is a book not for the niche law student, but for all law students, and ultimately, for all lawyers.

For both financial and broader cultural reasons, law schools today live under a pair of pressures: the demands of a bar that expect that ever more pre-professional training take place before students graduate,<sup>70</sup> and the demands of a student constituency that responds to an extraordinary degree to rankings of the "quality" of a given law school.<sup>71</sup> Neither of these demands is entirely new, of course. There has been tension for decades between the "professional" mission of legal education and the scholarly or academic mission of law schools.<sup>72</sup> Law schools were formally and informally ranked, in a variety of ways, long before 1990, when *US News & World Report* started publishing its quantified statistics on student:faculty ratios, financial resources, and reputation among the practicing bar.<sup>73</sup> Both pressures cut decidedly against efforts to extend the scholarly mission of the law school more broadly to its students. Implicit in both is the assumption that the practicing bar has little need to be reconciled to that mission, except to the extent that legal scholarship is "useful" in some immediate, instrumental sense, like persuading an appellate judge that a client's cause is deserving.<sup>74</sup>

Yet Volokh's indirect invocation of the "advancement of knowledge" criterion precisely evokes that scholarly mission, and couples it with the

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69. For an elegant recapitulation of the principal themes in the debate, see Deborah L. Rhode, *Legal Scholarship*, 115 HARV. L. REV. 1327 (2002).

70. The MacCrate Report was, after all, the culmination of a project undertaken by the American Bar Association.

71. See David C. Yamada, *Same Old, Same Old: Law School Rankings and the Affirmation of Hierarchy*, 31 SUFFOLK U. L. REV. 249 (1997).

72. "[T]he dichotomy between the teaching of law as a liberal and liberating study and the teaching of law as a technical and professional study" dates at least to the early 1800s. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* 5 (1983). See also *id.* at 264-79 (describing recent manifestations of this "intellectual schizophrenia").

73. *Id.* at 252-53.

74. See generally Robert W. Gordon, *Lawyers, Scholars, and the "Middle Ground,"* 91 MICH. L. REV. 2075 (1993) (contrasting practitioners' and judges' conventional view of "law" with range of utility for a variety of types of legal scholarship).

injunction familiar to all practicing lawyers—that scholarship should be useful. Volokh’s implicit marrying of the dual identities of the legal profession has deep historical roots. Cardinal Newman, cited above as the source of the classical definition of scholarship, went to some lengths to explain how professional education was consistent with his liberal, humane vision of a university.<sup>75</sup> Why, after all, are virtually all American law schools situated within universities? The historian Jaroslav Pelikan, in his recent reexamination of Newman, places law at the historic and contemporary core of the university,<sup>76</sup> and in so doing reminds us of the humanity that lies at the core of the profession:

[T]o qualify as a “profession,” an occupation of activity must involve some tradition of critical philosophical reflection, and probably the existence of a body of scholarly literature in which such reflection has been developed and debated. But the corollary of that thesis is probably a definition of the university as the only possible setting in which such reflection on a profession, and therefore the training informed by such reflection, can be carried on in its full intellectual context—and hence also a definition of the university that includes such training as a necessary element.<sup>77</sup>

Scholarship, in its classic sense, is inseparable from that core, and it is that core that Volokh, I suspect, is subtly trying to capture and assert as an obligation of student, faculty, institution—and profession. We should train student scholars, in other words, so that we might have lawyer-scholars. Those lawyer-scholars should analyze and critique on behalf of society rather than merely on behalf of their clients, in a profession whose mission it is to advance the knowledge that constitutes the law.

This claim raises a host of important questions, about the character of distinctively *legal* scholarship,<sup>78</sup> the overall character of the legal profession to which it relates,<sup>79</sup> and the character of legal education,<sup>80</sup> that are already the

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75. See NEWMAN, *supra* note 15, at 108-26.

76. See JAROSLAV PELIKAN, *THE IDEA OF THE UNIVERSITY: A REEXAMINATION* 105-06 (1992).

77. *Id.* at 108. Pelikan quotes approvingly and at length from talks given during the 1960s by the former president of the University of Chicago, and the former Dean of its Law School, Edward Levi. See Edward H. Levi, *The Choices for a University, A Talk on the Occasion of Eugene Swearingen’s Inauguration as President of the University of Tulsa* (Nov. 10, 1967), in *POINT OF VIEW: TALKS ON EDUCATION* 31 (1969) [hereinafter Levi, *Choices*]; Edward H. Levi, *The Law School Within the University, A Talk Given at the Annual Meeting of the Association of American Law Schools* (Dec. 29, 1964), in *POINT OF VIEW: TALKS ON EDUCATION* 109 (1969).

78. See Rhode, *supra* note 69, at 1327-33.

79. See Robert Post, *Legal Scholarship and the Practice of Law*, 63 U. COLO. L. REV. 615 (1992) (observing tensions between legal scholars’ tradition of situating themselves inside the profession and their desire to explore forms of scholarship that are external to the law itself).

80. See John J. Costonis, *The MacCrate Report: Of Loaves, Fishes, and the Future of American*



subjects of independent debates both inside and outside the academy. Adding students to the mix of questions about the scholarly obligations and aspirations of lawyers and law faculty adds layers of complexity to an already crowded field of demands on the profession and its professional schools.<sup>81</sup> Engaging law students more regularly in scholarly discourses is time-consuming and expensive. Some faculty may resist the inroads on traditional professional hierarchies implied by bringing students more regularly into scholarly discourses. Others may resist spending the time required to train students in scholarly techniques. Clinicians may perceive a threat to curricular innovations of recent years that have brought training in practical lawyering skills more clearly into the regular law school curriculum. Students may resist the introduction of curricular requirements not narrowly focused on training for practice, and in any case they may be poorly prepared for even introductory scholarship by college training that itself now often suffers from an excess of careerism. The practicing bar is apt to dislike any shift in emphasis that appears to make law graduates less suited for immediate immersion in practice.

One might respond, and defend a broader role for lawyer and student scholarship, beginning with characterizations of law as an agent of social change, or lawyers as necessarily grounded in the ethics and morality of their communities.<sup>82</sup> A relevant but weaker response would rely on the notion that scholarly legal writing is another species of legal writing, and provides yet more training in that essential professional skill.<sup>83</sup> Rather than make an appeal to these contemporary (and possibly contested) norms,<sup>84</sup> I offer, instead, the suggestion that we revisit again the place of the legal profession—and any profession—within the tradition of liberalism that has long characterized the

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*Legal Education*, 43 J. LEGAL EDUC. 57 (1993).

81. For legal educators, the Internet makes “online” legal education possible, threatening to destabilize the current hierarchy of landed law schools. See Michael Ariens, *Law School Branding and the Future of Legal Education*, 34 ST. MARY’S L.J. 301, 303-07 (2003); Wendy R. Leibowitz, *Law Professors Told to Expect Competition from Virtual Learning*, CHRON. HIGHER ED., Jan. 21, 2000, at A45. For some practitioners, the possibility of multi-disciplinary practice, that is, partnerships among lawyers and non-lawyers, threatens the distinctive norms and ethics of the *legal* profession.

82. See ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 165-68 (1993).

83. Weaker still is the possibility that by casting legal education in more research- and scholarship-oriented terms, law schools can resist forces tending to undermine the form of the traditional law school. See *supra* note 81.

84. Robert Post suggests that the contrast between internal and external roles for legal scholars is an intractable one, given the conventional role and structure of law schools in providing professional training for practitioners. See Post, *supra* note 79, at 624-25.

university, including its law faculty. Edward Levi, the former president of the University of Chicago and Dean of its Law School, wrote: “The professional school which sets its course by the current practice of the profession is, in an important sense, a failure.”<sup>85</sup> Instead, he argued,

[t]he professional school must be concerned in a basic way with the world of learning and the interaction between this world and the world of problems to be solved. . . . Viewed in terms of its larger responsibilities, the professional school inherits and exemplifies much of the disappearing tradition of the liberal arts college.<sup>86</sup>

This tradition, moreover, is neither exemplified nor transmitted to students primarily via teaching; in the university “research properly conceived is the highest form of education. Without new insights and a new vision, no one can recreate for himself or for others the great traditions of the past, understand the cultures of today, or work with theory as a living structure.”<sup>87</sup> Law, both inside the academy and beyond, is not exempt from this ideal, nor merely at its fringe. As Pelikan observes, it was the law faculty itself that originally defined the first university, at Bologna.<sup>88</sup>

Whether extending the premise (and promise) of legal scholarship more broadly across the profession is a needless burden to be resisted, or a tradition and culture to be restored, cannot be resolved here. The challenge is to identify a model in which the practices of practitioners and scholars serve as complements to one another, rather than affronts. It is a challenge and a debate that deserves an airing, along with fuller exploration of its implications. One might, for example, question my implicit conceptual linkage between the institutions of the law and those of higher education. As Lawrence Friedman notes, the Langdellian law school emerged from the effort to both situate law schools within the university but segregate the law from other academic disciplines.<sup>89</sup> Yet the contemporary version of that law school, with specialty programs, clinics, and scholars writing in a profusion of new and traditional modes, sounds strikingly like both the larger eclectic university of which it is usually a part, and the extraordinary diverse profession in general.<sup>90</sup> Eugene Volokh’s *Academic Legal Writing* should certainly help teach law students to write better papers; it may set some lawyers (and law professors) on the path

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85. Levi, *Choices*, *supra* note 77, at 38.

86. *Id.* at 38-39.

87. *Id.* at 40.

88. See PELIKAN, *supra* note 76, at 105.

89. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 618 (2d ed. 1985).

90. See Costonis, *supra* note 80, at 167.

to becoming more thoughtful professionals. May it also contribute to ongoing dialogues about the character of legal education, and of the legal profession.