

SCHOLARSHIP I: FINDING A TOPIC, SETTING AN AGENDA

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*“To live is to battle with trolls
in the vaults of the heart and mind.
To write: That is to sit in judgment on one’s self.”*
–Ibsen

I. Why Write? To Whom Are you Writing?

Scholarly writing is different than the advocacy writing that most new law professors have done as law clerks or associates before entering academia. It requires that you choose your own topic rather than advance a client’s, examine and critique your own deeply held beliefs through the writing process, and subject your work to evaluation in a public process that will determine your future as an academic. Don’t underestimate its significance to a successful academic career, the personal challenges it presents, or the time it will take to get the hang of it. On the other hand, don’t underestimate its rewards—they are many, both personal and professional.

A. Short-Term Goals: Getting Tenure, Ascending the Academic Ladder

If getting tenure or moving to a better school are the only reasons that you are writing, you will find writing relatively unrewarding; even if you succeed in obtaining your short term goals, you may not be happy with the view from the mountaintop when you arrive. Success lies in the journey, not the destination. On the other hand, the need to write to obtain tenure is an excellent reason to **start** writing, and certainly achieving tenure is an important goal whose attainment will afford you the freedom to write for a living. There is thus no point in mincing words: obtaining tenure is the short-term goal of most budding scholars, and I won’t minimize its significance here.

1. *Find out what your school requires in terms of scholarly productivity for tenure:* how many pieces, of what type, and by when (exactly when—will the promotion and tenure committee need your work by October or not until January of the academic year when tenure decisions are made?). Does your school only count law review articles? What about book reviews, essays, bar journal pieces, university press books, and textbooks? Must the scholarship be published or will an “in press” piece count? Has nontraditional scholarship met with success at your school? You don’t have to don the “tenure straitjacket” or suppress your preferred scholarly voice to get tenure at most schools, but you owe it to yourself to be aware of the risks you are taking and the choices you are making.

2. *Start early.* At most schools, faculty look for a pattern of scholarly activity; the pieces you publish will be viewed as evidence of future productivity, not simply assessed on their own merits. Your colleagues are searching for someone who is committed to the scholarly life, who can manage her own scholarly agenda, who is likely to be an active participant in the intellectual dialogues that take place in law schools, and who will bring glory and fame to the school through

his/her publications over the long haul. Last minute scholarly productivity raises the specter of someone who writes only under the great pressure that the tenure process creates, and will never be heard from again once tenure is conferred.

3. *Seek out mentors.* Get to know others on the faculty working in your area, and forge relationships with them. Ask for help in talking through your ideas, connecting them to other work, identifying relevant bodies of work. If you are the only one in your field on your faculty, find the most prolific or respected scholars and forge relationships with them.

4. *Write clearly and simply about first principles in your field.* Someone working outside your field (i.e., a law review editor or a faculty colleague on the promotion and tenure committee) should be able to easily grasp the nature and the significance of the issue you've chosen to focus on. At the same time, the issue should have sufficient depth and complexity that a reviewer in your field will appreciate its contribution.

B. Long-Term Goals: To Become a Scholar, To Live the Scholarly Life

Writing for yourself, for the joy of the craft, for the contribution you can make to knowledge—your own, that of others working in the field, that of decisionmakers applying the doctrine—these are the enduring reasons why most scholars write.

1. *Scholarly freedom confers both autonomy and obligation.* Scholars have the luxury of thinking about, researching and writing about topics of our own choice, free from the tyrannies of billable hours and client agendas. Choice of topic matters because it represents an allocation of scarce resources to a particular agenda. Consider the topic you have chosen, and whether it is worthy. This is a political choice; make it with full awareness.

2. *Scholarly writing is intensely personal, a voyage of self-discovery.* Testing your commitment to your beliefs through the writing process is an incredible growth opportunity, you will learn a lot about yourself and get paid to do so at the same time. It is also, at some points, a very painful process.

3. *Scholarship will enhance your teaching.* You will read more cases and have opportunities to study doctrinal areas in more depth than class coverage permits, you will read more law review articles, and you will become acquainted with the reform proposals of others in your field. More significantly, the questions you ask in class will change, and the passion you inspire in students will grow as you think more deeply and critically about the field.

4. *You will become part of a scholarly community in your field.* As peers in your field read your work, you may forge relationships with them, leading to friendships, larger collaborative projects, and support systems that transcend the petty politics that many law schools periodically suffer.

C. To Influence the Law, To Change the World

1. *Your work as a scholar has greater impact than that of a single practitioner.* As a scholar, you have the opportunity to think more broadly than a practitioner might, to look at the big picture and to inquire about how one doctrinal area affects another, how one subject affects another, how other disciplines affect the law. Accordingly, your work should be qualitatively different than that which you might have produced as a practitioner. Don't shy away from weaknesses in your arguments, but instead acknowledge them, engage them, and assess them from every angle.

2. *Ask new questions.* Directly impacting court doctrine, legislative enactments and policy pronouncements is not the only impact scholarship has in law. The most powerful inroads have been made by those who have thought outside the box, persuaded us to view familiar concepts in

new ways, and suggested new questions, influencing the direction of future scholarship and ultimately of the law.

3. *What you write matters*. Don't believe the myth that no one reads legal scholarship. A novel idea or approach will be picked up by other faculty in your field who will communicate the ideas to their students and their colleagues, include it in their coursepacks, refer students doing research to it, and generally disseminate it. Legislative aides may read it and call you to give testimony before congressional committees. Courts may cite you. Other scholars will cite you, criticize you, applaud you. Colleagues will call you to join symposia.

Inspirational Books: RICK PITINO, *SUCCESS IS A CHOICE* (1997)(on coping with fear of failure, fear of success); KAREN E. PETERSON, *THE TOMORROW TRAP* (1996)(on dealing with procrastination); A. CLAY SCHOENFELD & ROBERT MAGNAN, *MENTOR IN A MANUAL: CLIMBING THE ACADEMIC LADDER TO TENURE* (2D ED. 1994)(detailed pragmatic guide on scholarship issues as they pertain to the tenure process).

II. About What? Choosing Topics

In choosing a topic for the first law review article you will write, consider what you are sufficiently interested in to continue researching and writing about for the next 50 years. Concentrating one's efforts in one field (at least pre-tenure), will maximize knowledge of resources in the field, yield competence more quickly, and allow you to build with each article on what you learned from the previous one(s). In this way your scholarship is likely to deepen and increase in complexity and intellectual challenge over time.

A. Write About Your Passion

Write about what you want to write about, not what you think would be trendy, timely or a good subject for publication. Writing and researching in an area that you care deeply about will sustain you through the difficult times and will help to subdue the procrastination demons.

B. Relation to Teaching

It is vastly more efficient to write about the subject matter in which you teach. Not only will your efforts to learn the area and to keep current in the field produce a dual benefit, but you will stumble across ideas for writing in the course of preparing for class and dealing with student questions and confusion. Textbook notes which pose provocative questions and areas of student confusion are prime candidates for scholarly analysis. If students are confused or resist the doctrine in an area as unjust, perhaps it is ripe for questioning at a first principles level.

C. You Are What You Read

1. *Law Review Articles*: Read work that is most similar to what you aspire to produce. If you aspire to write a top ten law review article, read articles in top ten journals, in your field or out of it. Try to find writers whose style and voice you admire, and emulate them. You need to develop your own voice as a scholar, but it often helps to try on a style for size while you learn what works for you and what does not.

2. *Non Law Scholarship Related to your Discipline*: Read scholarly journals, join reading groups, go to conferences and forge connections with academics in disciplines related to your subject matter. Find out what they are thinking and writing about. Often you will notice links to law. At the very least this research will stimulate you to think in new ways about familiar legal principles.

3. *Current Newsworthy Cases*: Keep current on the new developments in your field. In

addition to keep-up reading in legal periodicals, reach out to see what is of interest to the lay press. Read a couple of top newspapers regularly—the New York Times, the Wall Street Journal, the Washington Post. Look for exposes or in-depth stories on matters of legal significance in your field. The press are often the first to pick up on these; academics are the last.

D. Keep a File of Ideas, Do A Preemption Check, Stay Connected

1. *Keep a file of ideas for scholarship labeled according to the topic that caught your attention.* Copy and place in the file articles of interest with notes regarding the relevance of any particular piece.

2. *Have a research assistant perform a “preemption check”, searching for other law review articles touching on the same topic.* Skim them and file them with the idea, and if your eventual conclusion is that the idea is not preempted, you will have a ready-made file of what has been written recently on the subject as background against which to situate your article.

3. *Go to conferences that are outside your field but sound intriguing.* You may see connections to your own work, or glean new ideas for research. If nothing else you will find out what other people are working on and minimize the sense of isolation that tends to accompany the scholarly life.

E. The Risks and Benefits of Nontraditional Scholarship

Traditional law scholarship identifies a doctrinal area of law that is incoherent, produces injustice or is at odds with larger societal goals; explains the law and its underlying policy agenda; critiques it from all angles; applies a new framework or adds a new set of insights (perhaps from another discipline); and recommends a resolution. It starts narrow, gets big in the middle, and then narrows down again in its prescription for reform. Nontraditional scholarship may begin either from the facts (empirical work—starts narrow; risk of never broadening out) or from a particular politicized perspective (critical theory, such as feminist theory, critical race theory, queer theory, or critical legal studies—starts broad, risk of being too abstract, not sufficiently anchored). Nontraditional scholarship is undeniably more risky for untenured scholars. Know the pitfalls.

1. *Empirical Research:* time-consuming, requires skills in drafting survey instruments and collating data that may be beyond those of the average law professor, unless she has a background in empirical research in another discipline. Empirical work can be groundbreaking, however, and is often the source of multiple article ideas.

2. *Outsider Perspectives:* intensely personal and psychologically draining. Particularly where combined with a polemical writing style, outsider-perspective work is vulnerable to criticism on the basis that it is not sufficiently even-handed or detached, or that it is not adequately anchored in doctrine. On the other hand, if this is what you care deeply about, consider the fact that if you don't dedicate your career to writing about it, you will obtain tenure but lose yourself in the process. You become what you write about.

III. Writing is a Science, As Well as An Art

Make writing a habit. Write whether you are inspired or not, don't wait for the Muse to arrive. Raw talent or a great idea are less likely to produce valuable scholarship than disciplined, steady work. Aim to be the tortoise, not the hare: slow by steady wins this race.

A. Use Time Effectively

1. *Make a daily and weekly writing schedule and stick to it.* Carve out blocks of time that are long enough to allow for start-up time but short enough so that your creativity and effort is

maximally rewarded and you end each session before diminishing returns set in, feeling a sense of accomplishment. Set a timer if necessary. Two to four uninterrupted hours a day several days per week is better than one or two full days, and less likely to yield procrastination and time-frittering.

2. *Prioritize writing.* If possible, schedule classes and other commitments around your most productive hours for writing. Fill in other related activity (meetings with your research assistant, organizing sources, obtaining research materials you have previously identified, doing keep-up reading and scanning for ideas) in your less productive time slots.

My favorite book on the writing process is EVIATAR ZERUBAVEL, *THE CLOCKWORK MUSE* (1999) Other good resources are ANNE LAMOTT, *BIRD BY BIRD: SOME INSTRUCTIONS ON WRITING AND LIFE* (1994), and RICHARD RHODES, *HOW TO WRITE: ADVICE AND REFLECTIONS* (1995).

B. Don't Be Afraid to Write Several Articles in One Manuscript, Simultaneously

It is not uncommon to finish a manuscript only to find that it is extremely lengthy and combines two or more ideas that while connected, are not inextricably intertwined. Separating them later is a tedious task, and it helps to recognize while you are still writing that you are going to produce twins rather than a singleton. If you can, sever one idea and set it aside, and then go on with the other. However, if you don't realize that you've spawned twins until birth of the first draft, realize that separating them and propping them up on their own is far less work than writing an entirely new article. An article is a series of logically linked segments that together form an analysis, and taken sequentially press the reader toward a conclusion. The segments may well be severable though they may need new segments written to connect them to the new article.

C. Think Big.

If you know what your conclusion will be at the outset of writing, the project is not ambitious enough. You should have some idea of the questions, but even those will change or refine as the piece evolves: formation of ideas, research and writing are intertwined for most scholars. Write the footnotes as you go, and expect that writing them will lead you off in tangential directions. Be prepared to call a halt to any tangent that is developing a life of its own and turning into a new article; put it in the idea file.

D. Write and Rewrite.

Expect to spend inordinate amounts of time polishing, reframing and reorganizing once the first draft is complete. The first draft will likely be embarrassing and comprehensible (in toto) only to you. The editing process yields the smooth, high-quality consistency and uniform authorial tone throughout an article that separates many good articles in the top journals from those less-polished pieces containing good ideas that end up in the second tier journals.

E. Circulate Your Draft.

Set deadlines for yourself and circulate your draft to readers sufficiently in advance of the law review submission season (late summer/early fall and late winter/early spring) to allow you to incorporate their comments into your draft before sending it out. Be sure to list them in the footnote acknowledging their contribution. Yes, sometimes name-dropping helps; at a minimum, it reassures nervous law student editors that someone in the know has read this article and did not counsel the author to burn it immediately.

Other Resources on Finding A Topic, Setting an Agenda:

Hiroshi Motomura, *Setting a "Scholarly Agenda,"* 10 St. Louis Pub. L. Rev. 175 (1991).

Richard Delgado, *How to Write A Law Review Article*, 20 U.S.F. L. Rev. 445 (1986).
Kevin Hopkins, *Cultivating our Emerging Voices: The Road to Scholarship*, 20 BC Third World L.J. 77 (2000).
Mary Kay Kane, *Some Thoughts on Scholarship for Beginning Teachers*, 37 J. Leg. Ed. 14 (1987).