

SCHOLARLY WRITING

SCHOLARLY WRITING

Ideas, Examples, and Execution

FOURTH EDITION

JESSICA LYNN WHERRY

ASSOCIATE PROFESSOR OF LAW
UNIVERSITY OF BALTIMORE SCHOOL OF LAW

KRISTEN E. MURRAY

PROFESSOR OF LAW
TEMPLE UNIVERSITY, BEASLEY SCHOOL OF LAW



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*To our parents, the best teachers we know,
and to the kids in our lives who share our love of learning.*

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Our family and friends offered unwavering support and enthusiastic cheerleading as we worked on all the editions of this book, and our mothers lent us their keen proofreading eyes so that we could follow our own advice about finishing.

Finally, we also owe a debt to the many legal writing students who have passed through our classrooms over our years of teaching. We thank you for inspiring us to write this book, and for all the lessons you taught us over the years.

FOREWORD

As an academic, few experiences are more gratifying than learning that a student's thesis, note, or paper has been accepted for publication. (If the student also won a large writing competition cash prize, so much the better.) At the opposite end of the spectrum, few tasks are more dispiriting than watching students toil for months only to produce unsatisfying work that, for all the right reasons, will never be published.

In our profession, strong writing skills prove tremendously helpful and, in many jobs, constitute the price of admission. As attorneys, the written word is the coin of our realm. Not surprisingly, the best student writers in our law schools enjoy a competitive advantage in the entry-level job market. In legal offices, strong writers quickly find themselves involved in the most challenging and important work. Quite simply, experience suggests that the best writers find that their skills offer them a fast track to professional opportunity and success.

The required first-year law school curriculum typically includes a highly structured and often formalistic introduction to the fundamentals of legal research and writing. To make matters worse, first-year students often fail to appreciate—at the time—the importance of these courses and the need to master these foundational skills. Conversely, most law students embark upon their initial, upper-level scholarly writing experience with minimal faculty guidance concerning the writing process and a focus almost exclusively on the subject matter of their research. Inadequate preparation for the enterprise leads many students to underestimate and, thus, under-invest in, their scholarly writing projects. It's frustrating to see students squander this opportunity, because writing articles or scholarly papers offers students the chance to spread their wings in terms of their research, analysis, and writing.

Nonetheless, a surprisingly small number of law students actually publish research papers. While the previous generation's proliferation of journals has expanded the number of student notes and comments published, students that publish remain the exception, not the rule. That's a shame.

Performing in-depth, open-ended research offers a glimpse into the level of effort commonly expended by practitioners, particularly on large and important matters. Indeed, almost every step in the creation and—more importantly, the effort to achieve—perfection of a research paper helps prepare a law student to counsel, advocate, and communicate effectively in practice. Moreover, publication enhances student authors' credentials by demonstrating a facility in critical skills (research, analysis, and writing), signaling an interest and a certain level of expertise in a subject-matter area, while adding eye-catching fodder to student resumes. In addition, publishable student papers may generate income (with steadily increasing sums on offer in numerous writing competitions) and, at times, provide students the opportunity to hone their advocacy and persuasion skills by presenting their research to knowledgeable audiences.

Still, the reality remains. Daunting impediments deter students from pursuing publication. Of course, writing publishable papers requires hard work. Huge amounts of time must be expended and, all too often, holiday breaks and weekends must be sacrificed. (The dominant law school trend to truncate the academic semester, from fifteen to fourteen, and, increasingly, thirteen weeks only exacerbates the challenge students face.) The structure and rhythm of law school work—ranging from syllabi and a convenient textbook to frequent class meetings and timed examinations—does not apply. The shared experience—with colleagues preparing, reviewing, and, frequently, bemoaning identical material—is lacking. As many academics realize, producing serious, worthwhile scholarship can prove a lonely experience.

Looking back, I remain immensely grateful to the mentors who guided me through the process of conceptualizing, researching, organizing, polishing, submitting, and publishing my student work. (To Glenn George, Charles Koch, Jules Rothlein, and David Shipley, *thanks again!*) Alas, few law students are lucky enough to find so many gifted teachers and role models available and willing to shepherd them through the process. As a result, most students embark upon their quest to produce scholarly work—an output with which they have limited familiarity—ill-equipped for their journey.

Supervising legions of LL.M. candidates as they struggle to complete a thesis, J.D. students attempting to fulfill the note requirement that dominates their 2L *Law Review* or *Journal* experience, and J.D. and LL.M. candidates writing seminar papers (often to fulfill a mandatory upper-level

writing requirement) or independent research and writing projects serves as a potent reminder that the *process* that leads to publishable legal research is not for the faint of heart. Faced with such a challenge, any type of helpful lifeline is a welcome sight.

Over the years, I worked with colleagues to draft, expand, and improve a set of thesis guidelines and advice for students, but this merely scratched the surface. Two early works, one by Eugene Volokh, and the other by Elizabeth Fajans and Mary R. Falk, now both in their fifth edition, made students' lives easier. The publication of Murray and Wherry's *SCHOLARLY WRITING*, now in its fourth edition, offers students a wealth of choices. What I appreciate most about Murray and Wherry's *SCHOLARLY WRITING* is that it guides the student each step of the way. Moreover, Murray and Wherry do not simply try to *tell* the student how to overcome each hurdle, they *anticipate* challenges, offer alternative solutions, and *show* the student various examples of how to improve and what to aspire to.

Having said that, my purpose here is not to compare and contrast these three tools, but to leave no doubt in law students' minds that consulting (nay, embracing) one or more of them will dramatically enhance their likelihood of success, whatever their endeavor. After more than two decades of working with student journal editors (and, alas, serving as an academic dean), I find it remarkable how few law schools, *Law Reviews*, and *Journals* recommend, let alone require, that students consult one or more of these texts. While history, tradition, or faculty largess may explain the legal academy's unique phenomenon of student management of *Law Reviews* and *Journals* (as opposed to the more common and, arguably, credible peer review model), nothing justifies the all-too-common sink-or-swim pedagogy associated with student note and comment writing. Surely, the best students figure it out, and many produce excellent pieces. Meanwhile, far more fail, and most never again attempt to publish their work. Today, that's unnecessary.

I strongly recommend Murray and Wherry's *SCHOLARLY WRITING* to law students and the faculty who mentor them. I can say—without reservation—that this book, and, more specifically, the method it espouses, has changed my life for the better. For more than twenty years, I have supervised a large cadre of LL.M. thesis candidates, while simultaneously serving as the faculty advisor to the leading journal in my field. Since our students began a structured instructional program employing this book (and, again, its methodology), our students have:

- Consistently chosen better thesis, note, and paper topics;
- Written better theses, notes, and papers;
- Published more theses and articles in leading journals;
- Published more student notes in our school's journals;
- Won *a lot* more money in writing competitions; and (I would be remiss if I failed to mention)...
- Complained less about the thesis, note, and paper-writing process.

I could stop there. But I would be remiss if—in addressing my colleagues in the legal academy—I failed to mention how much more I enjoy reading and reviewing student theses, notes, and article drafts today. To my colleagues and friends, Kristen and Jessica, on behalf of myself, my colleagues, and my past, present, and future students: *Thank you!*

STEVEN L. SCHOONER

Nash & Cibinic Professor of Government Procurement Law
George Washington University
Washington, D.C.
2012

ABOUT THIS BOOK

We would like to start by congratulating you. Perhaps you were recently selected to your law school's law review or other legal journal. Maybe you are about to embark on an LL.M. program in a specialized area of law. Or your achievement could be that you finished your first (or even second) year of law school. Any of these reasons, and any other reason that has led you to this book, is congratulations-worthy!

If you are reading this book, you are about to begin the process of writing a scholarly legal research paper. Your scholarly writing project may take a variety of shapes and meet a variety of purposes. Perhaps your school requires an upper-level legal research paper to graduate with a J.D., a requirement that may be satisfied by writing a note or comment for your journal, writing a paper in a seminar class, or working on an independent writing project. Or maybe you are an LL.M. student tasked with writing a thesis to satisfy your LL.M. program requirements. Whatever your assignment is called, do not be confused by the various names. In this book, we generally use "scholarly writing project" and "scholarly paper," but if your professor talks about a legal research paper or other variation, we have you covered.

For many students, the scholarly paper is their biggest challenge in law school because the project is so large in scope and requires mostly independent work. We developed this book to provide guidance and support as you work on your scholarly writing project. Over several years of teaching scholarly writing, we have worked with hundreds of students writing papers on a wide variety of topics and surveyed law review and law journal student-editors to find out what criteria student-editors use in making publication decisions. Based on this experience and information, we have developed a process that works for all students writing on any topic. Put your fears aside; this book will take you through the process step by step!

A scholarly writing project is daunting, but it is also your opportunity to tell the world about your ideas and why your ideas are right, or at least worth considering. You might have a thoughtful idea you want to share

with the legal community or the world; you might have stumbled across something in your work in other classes or in reading the latest news and something does not sit right with you. You think there must be a solution, or a better way to deal with a problem. Your scholarly writing project gives you an outlet for developing and sharing these ideas. It is also an opportunity for you to develop expertise on a topic, which you can use to guide your academic or professional career.

We have incorporated real samples of student scholarly writing throughout the book to illustrate many of the concepts we discuss. In our experience, looking at well-executed student papers can help you in crafting your own scholarly paper. We use fourteen student scholarly papers as examples throughout the book: Chris Bruno's paper on parental rights,¹ Monica DiFonzo's paper on art theft,² Shaina Elias's paper on deportation of alien widows,³ Tori Finkle's paper on judges' compassionate release decisions during COVID-19,⁴ Nathaniel Guest's paper on historical property rights,⁵ Kelsey Henderson's paper on paid parental leave in the United States,⁶ Natalie Hrubos's paper on agreements to arbitrate employment discrimination claims,⁷ Emily Kimmelman's Comment on discharge of student loan debt,⁸ Dylan McDevitt's paper on the Sentencing Commis-

1. Christopher Bruno, Note, *A Right to Decide Not to Be a Legal Father: Gonzales v. Carhart and the Acceptance of Emotional Harm as a Constitutionally Protected Interest*, 77 GEO. WASH. L. REV. 141 (2008).

2. Monica R. DiFonzo, Note, "Think you can steal our Caravaggio and get away with it? Think again." *An Analysis of the Italian Cultural Property Model*, 44 GEO. WASH. INT'L L. REV. 539 (2012).

3. Shaina N. Elias, Note, *From Bereavement to Banishment: The Deportation of Surviving Alien Spouses Under the "Widow Penalty"*, 77 GEO. WASH. L. REV. 172 (2008).

4. Victoria Finkle, *How Compassionate?: Political Appointments & District Court Judge Responses to Compassionate Release During COVID-19*, 110 GEO. L.J. 1495 (2022).

5. Nathaniel Guest, Comment and Note, *Putting History on a Stone Foundation: Toward Legal Rights for Historic Property*, 18 TEMP. POL. & CIV. RTS. L. REV. 699 (2009).

6. Kelsey Henderson, "This is Work": The Argument for Expanding Paid Parental Leave Policies Across the United States (unpublished paper on file with authors).

7. Natalie Hrubos, Note, *Agreements to Arbitrate Employment Discrimination Claims: Pyett Illustrates Need to Re-forest the Legal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 281 (2008).

8. Emily Kimmelman, *Student Loans: Path to Success or Road to the Abyss? An Argument to Reform the Student Loan Discharge Exception*, 89 TEMP. L. REV. 155 (2016).

sion,⁹ Jessie Shields's paper on partial verdicts,¹⁰ and Collin Swan's paper on personal services contracts.¹¹ We encourage you to read the full-text versions of one (or more) of these papers if you are interested in the topic to help you get a sense of what a scholarly paper looks like.¹² We have also included three annotated full-text notes in the Appendix to give you a comprehensive illustration of the concepts we discuss throughout the book.¹³ The fourth edition uses three new papers (Tori's, Kelsey's, and Dylan's) exclusively in the outlining discussion in Chapter 4. All the student work engaged with the law as it existed at the time of writing and followed Bluebook rules according to the governing edition at the time of writing. The topics, law, and citation rules may no longer be accurate given the passage of time. In the fourth edition, we revised generally to use inclusive gender-neutral pronouns.

Scattered throughout the book are a series of sidebars called "Bright Ideas" and "Tech Talk." Bright Ideas are intended to give you practical tips for particular concepts or steps in the scholarly writing process. Tech Talk points out places where you might use a specific app or technology-based shortcut to help with the writing process. You can easily identify the Bright Ideas throughout the book because they are set off with a shining light bulb icon, while Tech Talk is identified by a screen with dialogue box icon.

9. Dylan McDevitt, Not-A-Delegation: The Future of *Mistretta* and the Continuing Constitutionality of the United States Sentencing Commission (unpublished paper on file with authors).

10. Jessie D. Shields, *On the Subject of Partial Verdicts: A Series of Practical Questions Answered for District Court Judges*, 88 TEMP. L. REV. 579 (2016).

11. Collin D. Swan, Note, *Dead Letter Prohibitions and Policy Failures: Applying Government Ethics Standards to Personal Services Contractors*, 80 GEO. WASH. L. REV. 668 (2012).

12. Throughout the book, we use examples from the students' draft papers (which are on file with the authors) as well as the published versions. We have omitted both citations to the papers and citations contained within the papers in favor of a clean presentation. If you are interested in the sources the students relied on in their papers, please consult the full-text published versions.

13. Katy (Yin Yee) Ho, *Defining the Contours of an Ethical Duty of Technological Competence*, 30 GEO. J. LEGAL ETHICS 853 (2017); Jordan Schwartz, *State Executive Emergency Powers and the Second Amendment: A Call for Judicial Courage During a State Emergency* (unpublished note on file with authors); Peter K. Smyth, *A Functionalist Recommendation for Business Methods Patents: A Note on *Bilski** (unpublished case note on file with authors).

We have also included self-assessment quizzes and checklists throughout the book. The quizzes are not designed to test whether you read the chapter, but to help you determine where you are in the writing process, what issues you may want to discuss with your professor or supervisor, and whether you are ready to move on to the next stage in the process. The checklists are intended to help you track your own progress and make sure you will meet the next deadline.

We hope this book helps you have a positive experience while working on your scholarly writing paper. We wrote this book to offer guidance and support to you, no matter the context—in a scholarly writing class using this book as a course text, in a seminar or other class using this book as a reference or course supplement, as a self-teaching guide throughout an independent writing process, or any other scenario. The book offers advice to students who are working alone, working with a supervisor, or working within a small peer-review group. No matter what framework you are working in and no matter how many resources you have at your disposal, you will likely find yourself doing the bulk of the work on your own. Whether you need some direction, some inspiration, or want to see an example of how another student approached a scholarly writing project, this book can serve as a helpful guide.