

COLUMBIA  
LAW REVIEW



PUBLISHABLE NOTES MANUAL

2009-2010

## Deadlines

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## The Notes Committee

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**\*\* Notes will be submitted anonymously for the Committee's consideration, so please do not discuss your Note topic with any member of the Notes Committee other than your own editor, who will be assigned to you after you hand in a Prelim (see section IV.A below).**

**Questions about technical issues like procedures and deadlines should be directed to the Executive Notes Editor at ENE@columbialawreview.org.**

**Questions regarding the substance of your Note should only be directed to your own editor.**

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## **I. What is the Publishable Notes Program? What Is a Note?**

Publishable Notes is a program through which Columbia 2Ls who are not members of the *Law Review* may submit their Notes for selection for publication in the *Review*. Those whose Notes are selected for publication are invited to join the journal as senior editors for their 3L year, though they are not required to do so. Publishable Notes participants will be submitting their Notes at the same time as 2L *Law Review* staff editors. The submissions process is anonymous (see section IV.C below), so the Notes Committee will not know which Notes were submitted through Publishable Notes and which were submitted by staff editors. The *Law Review* will select no more than two Notes through the Publishable Notes program. The *Review* is publishing one Note this spring which was written by a student who is not on the journal.

A Note is a work of legal scholarship, written by a student, that identifies a specific, unresolved legal problem and offers a solution. Notes are frequently relied on in the legal world, though they are read more often than they are cited. Practitioners, judges, clerks, scholars, legislative staffers, and students all depend on Notes for clear, concise articulations of complicated areas of the law, for arguments to use in briefs, and for support in judicial opinions.

Notes are shorter than Articles (which are usually written by professors) and much narrower in scope. Notes rarely present ideas for “frameworks,” “approaches,” or doctrinal developments. The legal marketplace developed Notes as vehicles for focusing and solving discrete legal problems because students have time to delve into small but important issues that might not be worth a professional author’s time. A Note’s author will often be the best authority on the specific problem she addresses. The *Review* favors Notes that answer discrete questions fully rather than broad questions shallowly, because the *Review* seeks to influence legal thinkers—on the bench, in legislatures, and in academia.

Notes take clear positions on the issues they address. But they’re not advocates’ briefs. They’re academic contributions, so, like scholarly work in most fields, they must recognize all sides of the issue discussed and be as objective as possible. By doing so, a Note’s author assures her reader that nothing is being hidden, and so lends credibility to the position she ultimately takes. In short, a Note author should articulate his position forcefully while treating contrary arguments seriously and respectfully.

Notes serve a specific purpose for legal scholars and practitioners, and they serve this purpose best when they meet readers’ expectations. A Note will be most useful when its author structures it as Notes in the past have been structured, allowing readers to find what they expect to find, where they expect to find it, and to use the Note easily. Therefore, the next few pages describe the structure of Notes and their most common types.

### **A. The Wide World of Notes**

The Notes below have been frequently cited over the past few years. Reading their titles and descriptions will give you a sense of the typical Note’s scope. If any of these Notes sound interesting, pull them up on Lexis or Westlaw and skim them to get a sense of the genre.

- Laurence Drew Borten, Note, Sex, Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089 (2002) (describing historical justifications for the special legal status of sexual partners, and examining how courts, in determining the validity of marriages without intercourse, are influenced by this history).
- Nellie Eunsoo Choi, Note, Contracts with Open or Missing Terms under the UCC and the Common Law: A Proposal for Unification, 103 Colum. L. Rev. 50 (2003) (arguing that the UCC's treatment of open-term contracts for sale of goods should be extended to open-term contracts for services).
- Brian A. Jacobs, Note, Trademark Dilution on the Constitutional Edge, 104 Colum. L. Rev. 161 (2004) (asserting that courts have interpreted the Federal Trademark Dilution Act beyond what the Patent-Copyright Clause allows, and putting forward an interpretation of the Act that would be constitutional).
- Denise Ping Lee, Note, The Business Judgment Rule: Should It Protect Nonprofit Directors?, 103 Colum. L. Rev. 925 (2003) (noting that the move from nonprofits-as-trusts to nonprofits-as-corporations has led to some courts applying a more relaxed negligence standard to nonprofits).
- Matthew J. Medina, Note, The Constitutionality of the 2003 Revisions to Canon 3(E) of the Model Code of Judicial Conduct, 104 Colum. L. Rev. 1072 (2004) (arguing that the ABA's disqualification rule is unconstitutional in light of *Republican Party of Minnesota v. White*, and suggesting a replacement).
- Pankaj Venugopal, Note, The Class Certification of Medical Monitoring Claims, 102 Colum. L. Rev. 1659 (2002) (arguing that the split between state and federal courts as to class certification for "medical monitoring claims"—i.e., the harm complained of is an increased risk of injury, which requires monitoring—should be resolved in favor of allowing certification under Rule 23(b)(3) or its state-law counterparts).
- Bela August Walker, Note, The Color of Crime: The Case Against Race-Based Suspect Descriptions, 103 Colum. L. Rev. 662 (2003) (explaining how race-based descriptions of criminal suspects are not only discriminatory, but inefficient—and offering a more accurate alternative).
- Z.W. Julius Chen, Note, Following the Leader: Twombly, Pleading Standards, and Procedural Uniformity, 108 Colum. L. Rev. 1431 (2008) (arguing that, following *Twombly*, states should not abandon *Conley* notice-pleading standard merely to preserve uniformity with federal procedure).

## **B. The Structure of Notes**

A good Note describes the background law, explains the problem at issue, and argues for a resolution that would solve the problem. The standard Note does these three things in Parts I, II, and III, respectively, and frames the three parts with an Introduction and Conclusion.

We don't require you to use the three-part structure. But you should recognize that, by writing a Note, you're performing a service to the legal community. To make your scholarship as helpful as possible, you should try to conform to the standards of the genre.

Readers expect Notes to be organized into three parts. If a student wants to learn the background law in a particular area, he will turn to Part I. If a clerk wants to read about why prior decisions got the issue wrong, or how a particular case unexpectedly impacts the fact pattern at bar, or where a current legislative policy breaks down, she will turn to Part II. If a litigator wants to argue for a solution that favors his client, he will turn to Part III. Sticking to the traditional structure allows readers to find what they need.

Some Notes have broken the three-part mold, though it is rare. Here are two examples:

- Saira Mohammed, Note, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 Colum. L. Rev. 809 (2005) (discussing background in Part I; analyzing the problem in Part II; proposing a solution in Part III; and, in Part IV, considering significant counterarguments to the proposed solution).
- Eric Grannis, Note, *Fighting Words and Fighting Freestyle: The Constitutionality of Penalty Enhancement for Bias Crimes*, 93 Colum. L. Rev. 178 (1993) (in Part I, surveying bias-crime laws; in Part II, countering the critique that these laws punish thoughts; in Part III, discussing First Amendment law; in Parts IV and V respectively, showing how bias crimes pass First Amendment and case-law hurdles).

If it makes sense to do so, you can depart from the tripartite structure described below. However, be sure you can defend that decision, and be sure that your roadmapping is excellent throughout (see below).

Here is the standard format for the three-part Note:

- **Introduction:** Your Introduction should be succinct—usually about four short paragraphs. It should catch the reader's attention, provide the basic information necessary to know what the Note is about, and briefly state the problem. The final paragraph of the Introduction should explain what the Note argues. This sentence usually begins: "This Note argues that . . ." **It is the most important sentence of your Note.** The paragraph should then briefly outline what each Part of the Note will discuss, typically using only one sentence per Part. These sentences are the first and most important roadmap, and they are crucial to the success of your Note. Most practitioners and judges do not have time to slog through an entire Note when it's only partially relevant to the question they're facing, so they must be able to identify quickly which Part of the Note is important to their work.
- **Part I:** Part I gives background information and describes the case law that has preceded the issue you plan to discuss. Remember that Notes are aimed at nonexperts. It is better to explain too much than to risk losing readers on the points you make later. Don't worry that you're not saying anything new in Part I—you're not supposed to. Just make sure that you clearly set up the issue you plan to discuss in Part II without dwelling on unnecessary background law. Try not to make any *arguments* in Part I; just describe the background law impartially. Be brief and descriptive.

- **Part II:** Part II describes in detail the problem or issue your Note addresses and explains why it is important. For example, it might describe a new development and why that development has made past interpretations or approaches somehow deficient; it might criticize past treatment of an issue and explain why what has gone before is inadequate to deal with the problem you're presenting; it might explore the nuances of a circuit split on an issue and explain why the issue is important enough to demand resolution. Be clear why the problem or issue you address is important and why the prior treatment described in Part I cannot resolve it.
- **Part III:** Part III presents your approach to the problem or issue presented in Part II. It is where you propose your solution. Be sure to argue thoroughly for your approach by addressing counterarguments and considering new concerns it might raise.
- **Conclusion:** Your Conclusion should be short and sweet, perhaps only a paragraph or two. Minimize footnotes and leave out "see supra" cites. The Conclusion should not simply restate your Introduction, but should put your solution into broader perspective.

Your Note should also follow these important practices:

- **Roadmaps:** Besides the roadmap in the Introduction, each Part should be roadmapped in an introductory paragraph. Tell the reader what the Part will do and how the Part fits into the overall structure of your Note. Address your roadmap to a reader who is skimming your Note or who is entering your Note at that point. Keep your roadmaps simple. The reader should have a good idea of what you are going to say, but the reader does not need to see every single detail of your argument up front. Roadmaps are also a good idea at the beginning of a particularly long or complex Section.
- **Sections and Subsections:** For the same reason you use roadmaps (to aid those who are skimming the Note to find only what they need to know), you should also divide Parts into Sections, and Sections into Subsections. The reader, by looking at only your Part, Section, and Subsection headings, should be able to understand roughly what is going on in the Note.
- **Headings:** The headings of your Sections and Parts should contribute to your Note. They should not be so general that they could fit any piece. For example, do not use "Background" or "The Solution" as the heading for a Section. Instead, try to incorporate a more substantive description of what each Section or Part discusses.

### C. Common Types of Notes

- **The circuit split or "messy doctrine" Note:** Two or more circuit or district courts, or the highest courts in two or more states, will decide a discrete issue differently. The Note analyzes why courts have reached different decisions and instructs future courts to act in a certain way. One problem for Notes that address federal circuit splits is that your Note will be preempted

if the Supreme Court grants cert or if another scholar writes with similar observations. (On the other hand, maybe the Court will cite your Note.) A recent “circuit split” example is Chris Brummer, Note, Sharpening the Sword: Class Certification, Appellate Review, and the Role of the Fiduciary Judge in Class Action Lawsuits, 104 Colum. L. Rev. 1042 (2004) (analyzing circuit split as to whether, when evaluating a proposed class’s satisfaction of Rule 23 requirements, a trial judge should scrutinize the merits of the plaintiffs’ complaint). A recent “messy doctrine” example is Jaren Casazza, Note, Valuation of Diversity Jurisdiction Claims in the Federal Courts, 104 Colum. L. Rev. 1280 (2004) (detailing significant difficulties federal courts have in valuing claims for nontraditional damages and suggesting a consistent approach).

- **The “how X impacts Y” or side effects Note:** These Notes draw attention to the fact that a recent decision or recent legislation might have an unexpected impact on a situation not considered by the judges or legislators involved. These Notes then discuss whether the impact is good or bad and whether the case or law should be extended in this way. Many of the Notes in the *Review* fit this mold. Some examples are Joshua Naftalis, Note, “Wells Submissions” to the SEC as Offers of Settlement under Federal Rule of Evidence 408 and Their Protection from Third-Party Discovery, 102 Colum. L. Rev. 1912 (2002) (arguing that Rule 408, which covers offers of settlement, should be extended to the “Wells submission” process, in which prospective defendants have the opportunity to dissuade the SEC from bringing formal actions against them); Joshua Wilkenfeld, Note, Newly Compelling: Reexamining Judicial Construction of Juries in the Aftermath of *Grutter v Bollinger*, 104 Colum. L. Rev. 2291 (2004) (applying *Grutter*, which upheld attempts to ensure student diversity, to the practice of selecting juries to ensure juror diversity).
- **The policy Note:** When Notes criticize legislation on policy grounds, they can help advance the debate and may even influence legislative staffers; on the other hand, they will be preempted if the laws change. Good examples are David M. Adlerstein, Note, In Need of Correction: The “Iron Triangle” of the Prison Litigation Reform Act, 101 Colum. L. Rev. 1681 (2001) (criticizing the PLRA for not meeting its goals, such as controlling costs and instituting procedural conduits for the protection of prisoners’ rights); James R. Levine, The Federal Tort Claims Act: A Proposal for Institutional Reform, 100 Colum. L. Rev. 1538 (2000) (arguing that the “discretionary function” exception to FTCA has swallowed much of the liability the FTCA creates and should be reformed).
- **The cross-disciplinary Note:** Notes that borrow insights or analysis from other disciplines can shed light on legal thinking. These Notes work especially well if the author has significant expertise in another area (for instance, if you earned a doctorate before coming to law school). For a couple of examples, see Lisa Ells, Note, Juvenile Psychopathy: The Hollow Promise of Prediction, 105 Colum. L. Rev. 158 (2005) (arguing that the legal system’s methods for assessing criminal psychopaths and determining the likelihood of recidivism will not work on children); Sarah C. Haan, Note, The “Persuasion Route” of the Law: Advertising and Legal Persuasion, 100 Colum. L. Rev. 1281 (2000) (discussing how changes in commercial persuasion influence legal persuasion).
- **The historical Note:** Remember that Notes must address a live legal issue. Therefore, a Note that traces legal history must, in Part III, demonstrate the relevance of that history to the current debate. For example, see Elissa Alben, Note, GATT and the Fair Wage: A Historical

Perspective on the Labor-Trade Link, 101 Colum. L. Rev. 1410 (2001) (using history of GATT trade debates to argue that current WTO text has limited value as a tool to promote human-rights-based labor standards); Laurence Drew Borten, Note, Sex, Procreation, and the State Interest in Marriage, 102 Colum. L. Rev. 1089 (2002) (describing historical justifications for the special legal status of sexual partners, and examining how courts, in determining the validity of marriages without intercourse, are influenced by this history); Aziz Z. Huq, Note, Peonage and Contractual Liberty, 101 Colum. L. Rev. 351 (2001) (examining two turn-of-the-19th-century Thirteenth Amendment cases, arguing that these cases are best understood in light of freedom of contract jurisprudence, and demonstrating how this interpretation still influences the Supreme Court today).

- **The empirical research Note:** This type of Note is extremely useful but rare. It's hard to find an area that you can research in a limited amount of time. A good example is Timothy B. Tomasi & Jess A. Velona, Note, All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals, 87 Colum. L. Rev. 766 (1987) (analyzing and comparing the decisions of Reagan appointees to prior Democratic and Republican appointees). (We don't know why this Note was co-authored, but that is no longer an option.) Empirical Notes are hard to preempt—you are only preempted if someone has done the same (or a similar) empirical study. In other words, you can say, "Professor X detailed legal theory Y. Theory Y is as follows. This Note will prove (or disprove) it." Just because theory Y has been articulated elsewhere does not mean that your *empirical* Note is preempted (but preemption rules would prevent you from writing a standard Note that was merely a defense of theory Y).
- **The "looking at X through Y legal philosophy" Note:** These Notes examine a particular legal problem through a well-defined, non-mainstream perspective, such as Feminism, Law & Economics, or Critical Legal Studies. Examples include Khiara M. Bridges, Note, On the Commodification of the Black Female Body: The Critical Implications of the Alienability of Fetal Tissue, 102 Colum. L. Rev. 123 (2002) (analyzing laws regulating fetal tissues from a critical race studies perspective); Justin A. Nelson, Note, The Supply and Demand of Campaign Finance Reform, 100 Colum. L. Rev. 524 (2000) (looking at campaign finance from a law & economics perspective).
- **The broad philosophical look Note:** Every now and then a Note successfully takes a look at a big-picture question and proposes a new way of understanding the law, or develops an innovative analytic framework to be applied to the law. If these Notes are successful, they'll be cited for many years (because they're essentially preemption-proof). On the downside, this type of Note is incredibly difficult to write—not only because it's hard to be both creative and relevant, but also because it's difficult to find a "broad look" topic that fits into a Note's smaller scope. Published examples include Alexander K.A. Greenawalt, Note, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, 99 Colum. L. Rev. 2259 (1999) (arguing that culpability for genocide should extend to those who may personally lack a specific genocidal intent, but who have knowledge of the genocidal consequences of their acts); Olivia A. Radin, Note, Rights as Property, 104 Colum. L. Rev. 1315 (2004) (deducing the implicit framework the Supreme Court has used to determine when to treat rights as property).

#### D. Topics and Structures to Avoid

- **The “musings” Note:** These Notes amount to “a bunch of interesting thoughts about [X].” A Note that describes a recent Supreme Court decision or legal phenomena and merely offers a handful of observations fails to meaningfully contribute to the legal community. A Note should be an incisive identification of a discrete problem and a proposal of a targeted solution. It’s not a venue for various thoughts on an interesting topic.
- **The research Note:** These Notes merely paint a portrait of the legal landscape without offering any creative thought or original analysis. Notes should offer more than a mere summary of the law—they should provide a thoughtful solution to a previously unidentified problem.
- **The monster Note:** A Note like this proposes to tackle gargantuan topics and sweep legal academia off its feet. Notes should tackle narrow, modest topics rather than issues that are excessively broad and more likely to be preempted. Note topics should be manageable and well-defined, focused on one central idea or concept.
- **A “same problem, new solution” Note:** These Notes fail to identify a new problem and instead merely propose a different solution to a problem already identified and addressed by others. The goal of a Note is to bring to light a legal problem that no one else has addressed.

## II. Choosing a Topic

Choosing a viable topic is the most important and often the most difficult part of the process. You should look for a topic that interests you, is manageable in the time you have, and hasn't been exhausted. Keep in mind that you'll be choosing a topic in the shadow of the threat of preemption (described in the next section; a Note can be preempted in a few ways, usually when a higher authority explores the issue, making the Note irrelevant.) A good phrase to keep in mind is that a Note should address a "**live legal controversy**." A Note should identify a narrow, unaddressed problem and offer a solution that is novel and useful to the legal community.

The best way to find a Note topic is to (1) come up with some rough Note ideas, and (2) bounce those ideas off of your Notes Editor and a professor (or a few professors). Here are some ways to narrow your search within your area(s) of interest:

### **1. Talk to contacts from your summer job.**

Many Note topics come from summer jobs. That's partly because practitioners are often called on to research unsettled areas of the law, and partly because lawyers often ask summer clerks to tackle unresolved areas of the law that no one else has the time to examine.

A good way to begin is to review any memos you were asked to write over the summer. Do you recall any unresolved questions that were outside the scope of your assignment but seemed interesting? Did any memo conclude "I don't know"—either because there was authority on both sides of the question, or because it was unclear how a recent case or law might impact the subject you were asked to look into? Any of these things might indicate a fledgling Note topic.

If nothing Note-like sprung from your summer assignments, why not pick up the phone and call the people you worked with? They'll still remember you (at least in August). Ask whether they've stumbled on any interesting gray areas recently that might lend themselves to the kind of sustained inquiry required by a Note. This is their chance to receive six months of free legal research.

You might find that many workplace suggestions are memo-worthy but not Note-worthy (i.e., they might be too lightweight or too narrow to support the kind of research and legal thinking that goes into the average Note). Nevertheless, you may find some Note-sized topics in the mix.

One final comment: If you want to write about a case that you worked on last summer, you'll need to clear it with your former boss. Different organizations have different policies and confidentiality concerns, and as a future member of the bar it is important that you take these concerns into account. A Note scheduled to be published in 2004 was cancelled because of concerns raised at the last minute by the author's summer firm.

## 2. Look for circuit splits or controversies among states.

The classic “circuit split” Note is discussed above in Part II.C. There are several ways to locate splits:

- To locate circuit splits generally, check out the “Circuit Split Roundup,” published by *U.S. Law Week*. Ask the reference librarian to direct you to the collection, kept in the third-floor reserves under P Un46. Or you can search the Westlaw directory of *U.S. Law Week* articles: You’ll find it in Directories / Legal Periodicals / Legal Newspaper Databases / BNA United States Law Week. Search for “circuit /5 split”, and add any search terms related to your area of interest (you can try the same trick for any of the other legal newspaper databases located on Westlaw or Lexis).
- To find circuit splits that have been identified in judicial decisions, go to Westlaw or Lexis, select the U.S. Courts of Appeals database, and input a few words related to your topic. Then add one of the following phrases to your search terms: (1) circuit or authorit! /5 split; (2) “decline to follow” /s circuit or appeals; or (3) disagree /s circuit /s first or second or third or fourth or fifth or sixth or seventh or eighth or ninth or tenth or eleventh or D.C.
- SCOTUSblog, at <http://www.scotusblog.com>, occasionally mentions splits (but be careful if the issue is too ripe for a cert grant—you don’t want to be preempted).
- Split Circuits, at <http://splitcircuits.blogspot.com/>, is a blog dedicated to tracking developments concerning splits among the federal circuit courts.
- Casebooks and treatises highlight circuit splits and different treatments among states—in casebooks, check those notes that appear at the end of each subchapter (all the open-ended questions contained in those notes are just waiting to be tackled by enterprising law students). For once these questions might be helpful!
- Don’t forget Google.

## 3. Think of “side effects” stemming from court decisions or legislative enactments

The classic “How Does X Impact Y” Note is discussed above in Part II.C. Look at:

- En banc decisions: If an appellate court decided to sit en banc, you can bet the case presents some tricky and important issues. En banc decisions are great ways to find Note topics, especially if the case is narrowly decided and the dissent is a scorcher. You can find en banc decisions by searching Westlaw or Lexis: Select either the U.S. Courts of Appeals database or the “all states” database, input a few search terms particular to your topic, and then add this seven-word phrase: “sitting en banc” or “rehearing en banc”.
- Periodicals: One August afternoon, after a day of subbing, sit down in the library and scan the most recent issues of the *National Law Journal*, the *New York Law Journal*, and *U.S. Law Week*. These publications often discuss developments in the law and the impact such developments might have on real life.

- Loose-leaf newsletters: If you already know your topic of interest, sit down with a reference librarian and ask what loose-leaf services the library collects (or knows of) regarding your topic. These services can be extremely specialized. For instance, Mealey’s Litigation Reports publishes loose-leaf newsletters on areas from “Business Interruption Insurance” to “Welding Rod Litigation.”
- SCOTUSblog, at <http://www.scotusblog.com>: In addition to gossip and updates about the Supreme Court and its cases, you’ll find information about big cases working their way up the appellate ladder, discussions of ways in which new Supreme Court cases might impact the legal landscape, and links to commentary in the media, the academy, and the blogosphere.
- The “How Appealing” Blog, at <http://legalaffairs.org/howappealing>: This site rounds up links to the latest appellate opinions—not all the opinions, just the newsworthy or controversial ones. It also provides links to media discussions of appellate opinions. It’s a good place to find controversial cases, which in turn lead to areas of the law that are unsettled and therefore good places to find Note topics.

#### 4. Consult with a professor

You are *strongly encouraged*, but not required, to consult with at least one professor while writing your Note.

Probably, you’ll need to approach a professor you’ve never met before. That’s okay—they’re used to hearing from students who are thinking about Notes, and many professors are happy to help. Your approach should be something like this: (1) First, narrow your topic to a few ideas, or to a discrete area of the law that would lend itself to exploration in one or two directions; (2) Talk to your editor about which professors would be appropriate for your idea; (3) Email the lucky professor and say: “I’m researching a Note for the law review in the area of X. You were recommended to me by (the Notes Committee / another professor / etc.). Would you be willing to chat for a few minutes about my research?” You’ll be surprised at how amenable most professors are to this approach.

If you meet with a professor, you don’t have to know the exact issue your Note will address. But you should have a clue about the contours of the law regarding the topic you’re investigating. Professors respond better to curious and motivated students than students seeking handouts. That said, if you suggest a Note topic, you might get a Note topic in return: Plenty of professors might respond, “I don’t think your Note Idea X would work, because of such-and-such. How about looking into Note Idea Y, which is closely related and would be so much more interesting?”

In general, professors are great resources for brainstorming and sharpening your Note’s focus. **Keep in mind, however, that professors’ recommendations have not been vetted for preemption.** You may begin research on the professor’s suggestion only to find that someone has recently covered the question, or that the topic is too big for one Note, or that your research has led you to an idea you like better than the one you began with. Don’t be afraid to follow up with the professor as you discover new aspects of your topic.

You should also talk with a professor about your Note because we Notes Committee members are not experts in all (or maybe any) areas of the law. Our job is to act as informed and careful lay readers. For solid legal advice on your Note, consult with a professor. You will not get tremendous amounts of law-based feedback from us (though we'll certainly tell you if we know the area well and you're way off track, or if we feel that you haven't explained the law clearly enough).

### **5. If you get stuck...**

Check out the following resources:

- Richard Delgado, How to Write a Law Review Article, 20 U.S.F. L. Rev. 445 (1986).
- Elizabeth Fajans & Mary R. Falk, Scholarly Writing for Law Students: Seminar Papers, Law Review Notes, and Law Review Competition Papers (2d ed. 2000). In particular, see their chapter titled "Inspiration: Choosing a Subject and Developing a Thesis."
- Heather Meeker, Stalking the Golden Topic: A Guide to Locating and Selecting Topics for Legal Research Papers, 1996 Utah L. Rev. 917.
- Eugene Volokh has made this area into a cottage industry. He has a book (*Academic Legal Writing: Law Review Articles, Student Notes, and Seminar Papers* (2003)) and a website (<http://www.law.ucla.edu/volokh/writing>). It's all based, more or less, on a piece he wrote a few years ago: Writing a Student Article, 48 J. Legal Ed. 246 (1998).
- These sources were taken from <http://lib.law.washington.edu/ref/lawrev.html>.

### III. Preemption

#### A. What is Preemption?

The *Review* wants to publish Notes that will impact the legal community for years to come. That's why your Note must address a "live legal controversy." If your Note addresses an issue that's already been treated, it will have no impact. No one will use it or cite it, so there's no point in publishing it. The *Review* does not publish preempted Notes.<sup>1</sup>

**Your Note is "preempted" if it analyzes a legal problem that has been thoroughly analyzed elsewhere or that events have rendered irrelevant.**

Thus, it's your Note's analysis of a legal problem that's vulnerable to preemption—its Part II, typically. Even if your Note proposes a new solution to that problem in its Part III, it's preempted if the problem has been analyzed thoroughly elsewhere or has become irrelevant.

Here are some characteristic, but not exclusive, examples of preemption:

- If your Note analyzes a circuit split and the Supreme Court grants cert to resolve the split, your Note has almost certainly been preempted. Even if you propose Solution "A" and the Court chose Solution "L", no one will ever use or cite your Note because it no longer addresses a "live legal controversy." In this case, events have rendered the legal problem that your Note analyzes irrelevant.
- If your Note analyzes a statute that Congress substantially amends, your Note has almost certainly been preempted. Even if you propose weakening the law and Congress strengthened it, no one will ever use or cite your Note because it concerns an outdated legislative regime. In this case, events have rendered the legal problem that your Note analyzes irrelevant.
- If your Note analyzes a legal problem and a professor publishes an Article that analyzes the same problem, your Note has almost certainly been preempted. Even if you propose Solution "G" and the professor proposes Solution "M", no one will ever use or cite your Note because it's written by a student and a professor's work is available. In this case, the legal problem that your Note analyzes has been thoroughly analyzed elsewhere.
- If your Note analyzes a legal problem and another law student publishes a Note that analyses the same problem, your Note has almost certainly been preempted. In this case, the legal problem that your Note analyzes has been thoroughly analyzed elsewhere.

Whether a Note has been preempted is not always clear. If the Notes Committee believes that the question is close, we will decide as a committee whether a Note has been preempted. A Note author may appeal the committee's decision to the EIC, whose decision will be final. Preemption is also not always a black-and-white issue, and the Notes Committee may be less likely to select a Note for publication if it is "sort of" preempted, even if it is otherwise worthy.

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<sup>1</sup> There is a narrow exception to this rule. The *Review* does not cancel a preempted Note if that Note has progressed substantially through the production process before it is preempted. At that point, the logistical cost of removing the Note would be greater than the damage to the *Review*'s reputation caused by publishing the Note.

## **B. How to Check for Preemption**

You should keep an eye out for preemption soon after a topic has begun to engage your serious interest. This way, you won't invest too much time researching and writing on a topic already covered by someone else whose work you're merely replicating. Even after you've chosen a topic, preemption continues to be a threat when you're writing your Note and, if your Note is selected, when you're revising your Note in preparation for publication. It's possible that you'll write a Note, be selected for publication, and spend the summer slaving over your revisions, only to discover at the last minute that your Note has been preempted and lose your spot on the Note calendar. Note authors can often "write around" preemption, but it usually requires a lot of work. The preempted author would most likely have to change the Note's focus and spill a lot of ink distinguishing the preemptive authority.

Checking for preemption entails a meticulous survey of the pertinent legal or specialized literature to determine whether someone else has already published your Note topic and your treatment of your Note topic. You must do more than just survey some of the pertinent law or law-related scholarly literature that deals with your topic; you must locate and scrutinize all of it. There are four key areas to check:

- Law periodicals: You can access Wilson's Guide to Legal Periodicals via Pegasus in the library.
- Full-text databases: Check both Lexis, Westlaw (which will turn up more, or at the very least different, hits), HeinOnline, and JSTOR. Do not rely only on Lexis and Westlaw.
- Soon-to-be-published scholarship: Check the SSRN abstract database (go to [ssrn.com](http://ssrn.com) and hit the "search" button on the top toolbar) to stay on top of new scholarship in your area. You don't want to devote time or effort to a topic that may be resolved before you finish work.
- (Always, always) Google and <http://scholar.google.com>.

## **C. Why Preemption Matters to *You***

You don't want to devote time and effort to a topic that someone else has already exhaustively examined. You won't add anything to the scholarly literature on such a topic and no one will cite your work. Worse yet, readers will presume your research was so shoddy that you failed to notice someone else had already covered your very topic, or you proceeded in the face of such knowledge. Especially if you publish in the *Columbia Law Review*—where you'll be on stage before the sharpest minds of legal academia—this ignorance of the prior literature would be a huge embarrassment, a sign of academic negligence.

So, you should monitor the legal world for preemption threats throughout the Note-writing process, and you should treat seriously the preemption checks that we ask you to submit at deadlines. Finally, remember that any member of the Notes Committee will be happy to answer questions about preemption at any point in the process.

## IV. Requirements and Deadlines

### A. The Prelim (optional): email due to the Editor-In-Chief (EIC@columbialawreview.org) October 5 at 7:00 p.m.

The preliminary memo, or "Prelim," is optional. It serves as a formal notice to your editor of what your Note will eventually look like, and gives us a chance to give you some feedback early in the process. Failure to submit a Prelim will not be held against you when we decide which Notes to publish, but we will not give comments on your Feedback Draft if you did not submit a reasonably thorough Prelim. We will not read Prelims submitted after the deadline.

If you do submit a Prelim, the Editor-In-Chief will assign you to a Notes Editor who will respond with comments. This Editor will also be available to you after this point to answer questions, and this Editor will also respond to your Feedback Draft if you submit one.

Your Prelim should follow this format:

- i. **The Issue:** State your topic succinctly in two to three sentences.
- ii. **Background:** Assume that the reader does not know a great deal about the specific area of the law about which you're writing. In four to five pages, summarize the key concepts, caselaw, and developments. Conclude by explaining what your issue is in detail and why it is important.
- iii. **Conclusion:** Provide a brief, even if tentative, summary of the initial ideas you have about answering the question you've proposed. This answer may be incomplete as of yet, and may well change as your research progresses, but it's important to articulate at this stage an initial feeling about what the law should be or how we should consider a particular problem.
- iv. **Prior Treatment:** Summarize the Notes and Articles that have discussed your topic and explain why that piece does not preempt yours. It should be clear from this section how your argument differs from those of other authors.
- v. **Bibliography:** In addition to the pieces noted in Part IV, list the major sources you have consulted, and intend to consult.
- vi. **Preemption Check:** Before handing in a Prelim, you must check your topic for preemption. Search the law review databases on: Lexis, Westlaw, Wilson's Guide to Legal Periodicals, the SSRN abstract database, and (always, always) Google and <http://scholar.google.com>.

List all the searches you did in each of these databases so that we will know if you overlooked something. It is very important to do a thorough preemption check right away, so that you don't come across a preemptive piece halfway through your research.

- vii. **Professors:** Please tell us the professor(s) with whom you've discussed your topic.

Above all, your Prelim should convey that your Note will make an original contribution to the field. As indicated above, the Prelim deadline is **October 5 at 7:00 p.m.** The average Prelim is five to ten pages long, but the length is not critical. The more detailed you are about your topic, the better feedback we can give. Sample Prelims have been posted to the Law Review's public G:\ drive folder.

**B. Feedback Draft (optional): email due to your Notes Editor January 4 at 7:00 p.m.**

We carefully avoid calling this draft the “rough draft” because it shouldn't be too rough. You don't have to have every footnote in place—but almost all of them should be in place. The draft does not have to be Bluebooked perfectly—but it should indicate that all of your work is backed up by research. Above-the-line material must be completely written; we don't want to see that one of your sections is still in outline form. Please also include an updated preemption check with your Feedback Draft. As discussed above, we will not respond to feedback drafts unless the author has submitted a satisfactory Prelim.

The more complete your draft is, the more thorough our feedback will be. Ideally, you won't do too much new research or writing between the Feedback Draft and the Submission Draft deadlines—though you can, obviously. The real agenda for the month should be to read your Note carefully several times, polish the rough edges, and revise lingering problems with the Note's structure, clarity, or roadmapping (all discussed below).

Please format your Note according to these guidelines:

- **Length:** Typically, Notes are between 40 and 45 word-processed pages. The further your Note goes beyond 45 pages, the more it will have to justify its length with very tight writing and worthy discussion. If you need more than 60 pages, then you haven't chosen a topic discrete enough for the time allotted or for the profession's expectation of a Note's scope. All things being equal, a shorter Note is a better Note. Understandably, many Note writers wish to include every case, every issue, every good quote, and every brilliant insight that they have. But including too much information will detract from the effectiveness of your argument. To be persuasive, use only those facts, issues, and points essential to solving the problem the Note addresses.
- **Font and format:** Your main text should be in 12-point Times New Roman font double-spaced. Footnote text should be in 11-point Times New Roman font single-spaced (this isn't the standard Word format; you have to change it). Use Microsoft Word; let us know if you don't have it.
- **Text and footnotes:** Notes authors often get tripped up here, so please read the following paragraphs with particular care.

**As a general rule, the text and footnotes should be balanced.** Any and all support for your claims should be below the line. All information essential to a clear understanding of your Note should be above the line. If the above-the-line text of your Note does not make sense without referring to the footnotes, then you have put too much below the line. A draft

should have roughly as many words of text as of footnotes. If the footnotes are substantially longer, it probably indicates that the author has not focused the Note, made the argument clearly in the text, or eliminated minimally useful material. If the text is substantially longer, the author's arguments probably have too little support.

Up to now, you have probably thought of footnoting as a way to source your statements. That's true, but, for purposes of your Note, you should expand your view of the function of footnotes. Good Notes direct readers to the best scholarly thinking on a given topic. Thus, **the footnotes are just as important as the text itself.** Often, the footnotes are the main thing a reader is looking for. So, you should strive in your footnoting to be to address all relevant sources—it's important to list, where relevant, multiple "Sees," "Cfs," and "But sees." By referring to your footnotes, a reader should be able to assemble whatever significant scholarship exists on the broader issues implicated by your Note. Remember, though, that including every single remotely relevant or minimally useful source is not helpful, and can often obscure the important sources.

Another way of putting it is that writing a Note is like entering a conversation—ideally, your Note adds something new to a broader scholarly discussion taking place in the legal world. But remember that most of your Note's readers are coming late to the conversation. Many have no idea what's already been said in this conversation; it's like they just walked into the room and only heard you. That's why footnoting is so important. The footnotes should clue readers in to all of the relevant or analogous scholarship. It's as if the entire below-the-line section of the Note functions as a kind of annotated bibliography of the entire field.

**An author's effective use of footnotes in these ways is a very important factor in evaluating the quality of a Note.**

We'll read your Feedback Draft *only* to help you by giving you feedback. We will not take the quality of your draft into account during the Note selection process in February.

When giving you editorial advice, your Notes Editor will act as an informed lay reader. Obviously, we're not usually able to give you in-depth substantive feedback on your legal analysis. That's what professors are for. Instead, we aim to provide you with a close, thoughtful read from the perspective of a Note's average reader—that of a clerk or a practitioner who is investigating this particular question for the first time and looking for both an introduction to the topic and some insight into it. If something strikes an NE as not making sense from a legal point of view, the NE will certainly say so. And if the NE comments on the law, and it turns out that the NE has completely misunderstood the law on that point, you should revise in order to explain it more clearly. Your Note should be clear to a member of the legal community who doesn't have a lot of experience in the field you're writing about.

We have four major concerns: structure, roadmapping, authority, and clarity.

- **Structure:** It should be obvious how every single sentence and paragraph fits into your overall argument. What was just shown or proven in the last paragraph? How does that connect to this paragraph? How does this paragraph connect to the goal of the Part, and of the Note as a whole? Does anything seem to be missing? Is any point elaborated on overly much? Does the author ever get ahead of herself (be wary of this, as you know all the pieces

of the puzzle and we do not, and as you probably moved stuff around quite a bit while writing)?

- **Roadmapping:** Roadmapping is the single most important aspect of structure. You must tell the reader what you're going to say and then say what you said you'd say. In many other areas of writing, roadmapping is considered to be poor writing, redundant and mechanical. But for Notes, **roadmapping is essential**. That's because almost no one (except us) will read your Note all the way through. As mentioned earlier, Notes are used rather than read; readers scan Notes to get a feel for the law or an idea for a solution to a problem. Since readers may only read a single part of a Note, each Part must explain at the outset what that Part will demonstrate and why that demonstration is important to the Note as a whole. Sometimes, individual Sections also call for roadmapping (the longer they are, the more useful a roadmap would be).
- **Authority:** Almost everything an author says should be backed up by something. If support is missing, or if a statement seems weakly supported, we will try to flag it so that you can patch it up before the Submission Draft.
- **Clarity:** We hope to understand perfectly every sentence of your Note. If we don't understand what something means, then the author has not provided enough background. Notes are not pitched to expert audiences. They should provide all of the knowledge necessary for a law student to understand the law. When beyond-the-basics legal knowledge is required, the Note must supply that knowledge.

Additionally, we're on the lookout for the hallmarks of good Note-writing:

- Does the author acknowledge counterarguments and address them? Are the arguments persuasive rather than not far-fetched or obvious? Notes aren't briefs, they're works of scholarship. You can't leave out weaknesses in an attempt to prove your point; you have to acknowledge them.
- Does the author reach a conclusion? Notes aren't surveys of the field or "case comments" (pieces that analyze the strengths and weaknesses of a recent opinion and explain how that opinion fits in with the overall law). Notes offer solutions, and solutions require conclusions that are plausible, workable and concrete. As mentioned above, the solution can acknowledge weaknesses or trade-offs, but the author must suggest something definite to the legal community.
- Does the Note leave out essential background information regarding relevant law?
- Does the Note needlessly explain irrelevant opinions and fact patterns?
- Do parts of the Note rely on implicit assumptions that are never expressed or defended?
- Does the author voice opinions that aren't anchored in legal arguments?
- Are there unwieldy, nonsensical, or jargon-laden sentences?

- Are there internal inconsistencies?
- Are there grammatical errors or problems of style and tone?

After you email your Notes Editor your Note on January 5, you should continue working on it in anticipation of the Submission Draft deadline. Don't wait to hear back from the Notes Committee before continuing to edit it yourself. We will try very hard to give you feedback within ten days, but it might not be possible for each of us to write all of our feedback memos in ten days.

**C. Submission Draft and Availability Statement: due February 4 at 7:00 p.m.**

We'll send an email to all 2Ls describing the procedures for submitting the Submission Draft. You'll need to include an updated preemption check, just as at prior deadlines. You may print double-sided.

Submissions will be anonymous, so the Notes Committee will not know whose Note they are reading and voting on. Your own editor will not vote on your Note or reveal your name to the Committee. Before submissions, the Editor-In-Chief will send those of you who submitted Prelims or Feedback Drafts a number to be used to identify your submission. Instead of your name, this number should appear on your Submission Draft and updated preemption check. If you have not submitted a Prelim or Feedback Draft, then your Submission Draft should be submitted to the Editor-In-Chief who will make it anonymous before passing it along to the Committee. Then the Committee will tell the Editor-In-Chief the numbers of the picked-up submissions, and she will match them back up with the names. Don't worry too much about this procedure now; emails will remind you what to do in detail as we approach the due date.

We believe that anonymity helps the Notes Committee operate as impartially as possible. You help us by not letting any members of the Committee (besides your own editor) know about your topic. Please help us with this. If you (or someone else) reveals your topic to one of us, then that Committee member will also sit out any discussion of your Note.

**A Note on Bluebooking:** The *Law Review* does not follow the Bluebook in every respect. If you want your Note to look like the Notes being handed in by *Review* staff editors, then you may want to (1) not use small caps font for the names of periodicals (Rule 16), and (2) not use italics for the titles of articles from periodicals (Rule 16). In both cases, just use standard font instead. You are free to use standard Bluebooking if you wish, and the Notes Committee should not take this into consideration when deciding what to publish. But for the purposes of full disclosure, we should say that we may suspect that Notes with italics and small caps were not submitted by *Law Review* members. While this shouldn't technically matter, it would not be in keeping with our anonymous submission policy if we did not give you the opportunity to hand in a Note which looked like those being submitted by our members.

Each member of the Notes Committee will read all of the Notes with great care. Then, we'll meet to discuss the submissions and to choose the first round of Notes for publication. Typically, between eight and twelve Notes are picked up at this stage. No more than two of these Notes selected for publication will be drawn from the Publishable Notes program. Authors whose Notes aren't picked up in February may be able to resubmit next fall, but next year's Notes Committee will be responsible for that process and we cannot make any promises at this point.

We'll evaluate Notes by the principles outlined above in the Feedback Draft section, with the additional expectation that Notes will be, for the most part, truly polished. We look for Notes that are well-supported and researched, that are innovative, and that can be revised into publishable form within several weeks. All footnotes should be complete, especially those for central, debatable, or novel arguments. Your Bluebooking should be in good shape, but it need not be perfect.

Here's what we're *not* looking for. We aren't trying to publish a "mix" of topics; if five people write on tort law, and all five Notes are stellar, then we will pick up five tort-related Notes. Nor are we looking for Notes on topics that interest us personally. Nor are looking to select a certain quota of Notes from non-members or from members, other than the fact that we will accept at most two Notes submitted by nonmembers. We are looking for the Notes that best conform, in our carefully considered opinions, to the criteria listed above.

We will not review Notes submitted after the deadline.

**Availability statement:** In order to join the *Review* you must be available both semesters of next year (2010-2011), and in order to have your Note published you must be available during the entire spring semester of 2011. The *Review's* production process is time- and labor-intensive, and the Note author must be present for it. To that effect, together with your Submission Draft **you must also hand in a signed statement that:** (i) you will be a full-time student at Columbia Law School for the 2010-2011 school year, and that you will be present in New York City for both semesters of the 2010-2011 school year; or, if you will not be a full-time student here at Columbia, an explanation of your status and a confirmation that you will at least be available and physically in New York City during the spring semester of 2011 to oversee the production of your Note; (ii) you grant the *Columbia Law Review* exclusive rights to publish your Note if it is selected for publication (please include the current title of the Note); (iii) you have not granted another journal publication rights, and to the best of your knowledge have not through your actions led another journal to believe that you granted them publication rights; and (iv) you understand that if you join the *Review*, your staff work will begin in late July or early August 2010. Students whose Notes are selected need not join the *Review*. Students who elect not to join the journal need not be present in New York in August or in the fall, but physical presence in New York during the spring is absolutely non-negotiable. Any questions about the availability requirements should be addressed to the Editor-In-Chief at [eic@columbialawreview.org](mailto:eic@columbialawreview.org).

## V. Tips on Organizing Your Research

Each individual develops her own research procedures. The main trick is to organize for yourself, early in the process, a method for gathering and tracking your research material.

- Learn the background law. Depending on your topic, you may have to learn the background law in related areas. In this regard, casebooks and hornbooks are often a good starting point.
- Talk with a professor with expertise in the particular areas to which your Note relates. They are great sources for “idiot checks” (i.e., whether your idea was discussed and rejected five years ago, is not feasible for some other reason, etc.), for getting a sense of what prior treatment has been given your issue, and for specific questions regarding background law that are still confusing you.
- Take notes on the cases and articles you read, and highlight the parts you’re thinking about using. Always indicate page numbers in your notes—it is aggravating to think, “Oh, I read something two days ago that would back this point up perfectly,” and not be able to track down where that something is located.
- Keep track of which sources you’ve looked at. One way is to keep a Master Source List (MSL) for yourself, writing down sources you want to check out and crossing them off as you go.
- Photocopy anything that is hard to find. You don’t want to have to look for it twice.
- Organize your materials in a way that makes later reference easy. Keeping sources in one place will help you immensely as you write your draft, and will also help cite-checkers if and when your Note undergoes subbing. An alphabetized file folder can help.
- Keep track of the latest developments. If there is a certain statute, case, or article that anyone writing on your topic would need to quote from, enter that statute or case or article’s citation into Westlaw’s KeyCite Alert program or Lexis’s ECLIPSE. After you KeyCite or ECLIPSE a source, you’ll receive weekly email updates of all works citing to your source that have been published within the past week. This way, you’ll receive updates of any new cases or law review pieces relevant to your Note.
- Don’t throw anything away, especially notes that you take from sources you’ve read. Keep a folder for seemingly useless items—you may find that you need them in the future as your topic develops.