1987

Sing Muse: Legal Scholarship for New Law Teachers

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The title's borrowed phrase conjures up images of an inspired writer serving as a vessel for the work of the deities. In the mythology of the law school community the image persists, slightly transformed: legal scholars, moved by extraordinary inspiration, produce writings of great intellectual and legal merit. The image admittedly overstates the situation, but it molds the expectations of new teachers embarking on their careers as productive scholars. They believe both that their initial writings must appear as epic productions in the eyes of their senior colleagues and that these works are the product of an occult mystic process.

Myths, at least in most legal writing, are for debunking and the illusion of Homeric inspiration is no different. First works need not be masterworks to launch a successful writing career. Further, the process by which those works are created is not the exclusive province of the divinely inspired. This article explores one possible approach to legal scholarship which can help those new to law teaching make a good start in this facet of their career. The suggested approach is premised on two major theses: (1) producing several smaller works that build in scope and difficulty is appropriate and valuable at the outset of a writing career, and (2) the actual creative writing process is not characterized by large leaps of genius and bursts of frantic activity but by a far more methodical routine within the ability and power of all new law teachers.

I. Building a Writing Agenda

The backbone of a productive writing career is an ongoing agenda for scholarship. The components of such an agenda are not limited to a list of topics to write about. A writing agenda also addresses matters relating to the frequency of publication and the type of opus attempted.

A. Frequency of Output

Most people work more efficiently if they have a timetable, even if it is a self-imposed schedule that carries no external sanctions for noncompliance. Legal scholarship is no different from other tasks in this regard. Completing

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 Cite as 37 J. Legal Educ. 1 (1987).

and submitting for publication at least one item per year is a good pace. If a scholar can maintain this pace, he or she will soon appear to be a prolific author. It is a realistic and manageable rate, especially if the novice scholar avoids overambitious articles in the early years of his or her writing career. The one-a-year pace also has the advantage of regularity: the production of scholarly articles, becomes, like other seasonal activities, part of a law teacher's annual schedule.[1]

B. Types of Output

It is the extraordinary composer of music who produces a workable symphony before first composing lesser works such as variations, preludes, and sonatas. The same sort of progression is appropriate to learning the art and craft of legal writing. There are some legal scholars, Tony Amsterdam and David Currie come to mind, whose breadth and scope of ability are so great that even their earliest works are fully mature works and endure as the basis for subsequent doctrinal development. For those individuals, this article's pedestrian advice about building up to more sophisticated writing is totally irrelevant. But few legal scholars are so gifted, and most must start with rather different tools and insights than those which suffice for the Amsterdams and Curries.

It should already be apparent that I do not believe that lengthy and dispositive law review articles are the only form of acceptable scholarship for new law teachers. There are numerous other works, less difficult to produce, that hone and expand writing skills while also gaining publication credit. For the purposes of discussion, I will invent a three-tier taxonomy of publications which includes "busy work," "lower order of difficulty," and "higher order of difficulty." The categorization is my own, but it probably would receive general assent as an accurate reflection of the relative value of various types of writing as evidence of industriousness and scholarship.

Busy work. Bar journal articles, survey pieces, glorified op-ed pieces appearing in non-law reviews, law alumni magazine articles, previews of U.S. Supreme Court cases, nonsubstantive book reviews, segments of commission reports or studies, etc.

Lower orders. Glorified casenotes, substantive book reviews, critiques of another person's article, state-of-the-law articles, narrow and/or popular sensation topics (e.g ., drafting women for the armed services), legislative testimony reworked for law review publication, treatise sections, etc.

Higher orders. Affirmative thesis articles, law reform articles, book chapters (of a legally sophisticated, rather than "popular" nature), frontal attacks on the citadel of major legal doctrine, reconciliation of theory with practice articles, longer works such as monographs and books.

What should leap out from the preceding lists is that there are more avenues to building a publication record than the production of an unbroken string of major law review articles. At almost all law schools,

1. More will be said later in this article about assuring sufficient time for writing time.

tenure candidates, to be successful, must in time produce higher order works. Nevertheless, the combination of busy work, lower order pieces, and higher order pieces builds a far stronger overall record than do higher order pieces alone. Additionally, easier works build confidence and often contribute to the completion of larger and more difficult works. Smaller projects that fall in the busy work category can serve as the foundation for lower order work.

To draw on a personal example: I wrote my first preview of United States Supreme Court cases about a case entitled *Cappaert v. United States*[2] in 1976.[3] The following year an elaboration of the issues raised by that case became my first glorified casenote.[4] Still later, in 1978, the doctrinal outgrowth from that case formed a section of my second major article.[5] The example illustrates the process of building up from a "busy work" project to an article that argues an affirmative thesis about what ought to be done in adjudicating a genre of hotly contested Indian water rights claims.[6]

C. What Topics Belong on the Agenda

The other aspect of generating a writing agenda is substantive. Law teaching is attractive in part because the teacher is free to pursue an intellectual agenda dictated by personal interests rather than one determined by the needs of others, notably employers or clients. Even so, and especially in the beginning years of a professorial career, it is sensible to mold one's writing agenda around personal strengths and existing areas of expertise. This remains true even if, in the longer term, other substantive areas of the law provide more challenging and interesting topics. A new teacher coming to academia after three years of prosecuting state law antitrust cases, should build at least one or two initial writing efforts on the existing base of his specialized knowledge. Drawing on expertise in early writings does not wed a writer to that field, but it does have several important advantages, one of which is currency in the field. The new teacher's practice expertise and knowledge of the field help to safeguard the topic selection process against the possibility of preemption by other writers. Substantive expertise includes an awareness of which legal issues are settled and which are not; which positions are hackneyed or "written out" and which are not. There is no reason to resist exploiting this knowledge.

The experiences that may provide a leg up on topics are not limited to legal practice expertise. New teachers coming from a judicial clerkship may have gained insights into tough legal issues that confronted the court and

2. 426 U.S. 128 (1976).

3. See Robert H. Abrams, Cappaert v. United States, October 1975 Term, Preview of United States Supreme Court Cases 3 (February 19, 1976).

4. See Robert H. Abrams, Implied Reservation of Water Rights in the Aftermath of Cappaert v. United States, 7 E.L.R. 50043 (1977).

5. See Robert H. Abrams, Reserved Water Rights, Indian Rights and the Narrowing Scope of Federal Jurisdiction: The Colorado River Decision, 30 Stan. L. Rev. 1111 (1978).

6. Several more examples of the "busy work"-to-major-article progression can be found in the writings and activities section of my vitae, which is available upon request.

were not resolved by the court's action in the case. The point is that topics made "easy" by virtue of prior experience, topics that are less likely to require great quantities of time to "get up to speed," are prime candidates for initial writing efforts.

A writing agenda is in some regards like a working hypothesis. It is an evolving set of ideas for topics that may prove workable and interesting; it is not an immutable blueprint. As research, teaching, and other professional activities introduce a new teacher to subjects of interest, his or her agenda evolves and begins to include topics from the new areas as well.

Not all agenda items end up as publications, but that does not mean that items ought to be discarded hastily when no progress on them seems likely. For eight years I have had an open agenda file on change in common law as a taking of property, and I doubt if I will ever write anything about it, but the fact that the item is on the agenda alters my reading habits and keeps me alert for ideas that relate to the topic. Some of the material I culled for that file proved useful later as a small part of a water law casebook.[7]

Ideas that belong on a writing agenda arise in many ways. One day, while teaching personal jurisdiction materials in the civil procedure course, I attempted to emphasize the importance of considering choice of law possibilities by remarking that I thought the failure to forum shop for favorable choice of law was a form of legal malpractice. After class I debated whether I really thought that was, or should be, true. In that way I added an agenda item that influences the ways in which I approach my reading of such things as *United States Law Week,* or the semi-complimentary copies of advance sheets distributed by West Publishing Company. Now, because the topic is on my agenda, I am alert for new decisions involving legal malpractice, a topic I would otherwise ignore.

D. Background Activity

I admit to having a very regimented view of what law faculty members ought to do with their time and energies, and two of my requirements for law professors are (1) keeping current and (2) aiding in the development of the law and the legal profession. Keeping current and the reasons for doing so are largely self-explanatory, but the need to serve the profession is less so.

For me, keeping current involves reading or skimming summary or annotation-like publications, such as *United States Law Week* or the News & Analysis section of the *Environmental Law Reporter,* to keep abreast of developments in the law and to get a feel of what issues are alive and topical in other fields not within my area of expertise. Keeping current also includes reading selected new cases and statutes and similar materials. I also think it imperative to look at the contents of *all* of the mainstream legal periodicals and to read, at least in a cursory fashion, a variety of articles that hold some interest for me. Reading a few articles each month is educative both in acquiring substantive information and for observing and internalizing

7. See Joseph L. Sax & Robert H. Abrams, Legal Control of Water Resources, 125-29 (1986).

writing techniques. It is especially important for new authors to read some of the truly good articles in the better journals and make some attempt to determine what makes those articles so good.

Law professors enjoy a position that allows them relative leisure to engage in scholarly activities as well as kindred pursuits that help to advance the legal profession. I think that legal academics should not only write, they should serve the profession. If law faculty do not take on responsibilities for improving the state of the law and the legal profession, who will?

Taking on these additional duties is termed "keeping busy," but especially in the pre-tenure years it is important to avoid being deluged by busy work that interferes with one's professional development as a teacher and as a scholar. Thus "keeping busy" must be made subordinate to keeping free of projects that will thwart writing efforts. Ideally, early efforts at keeping busy will be devoted to the kinds of projects that mature into publications. Service activities and quasi-teaching activities are both capable of being either valuable steps toward writing or impediments to writing.

The two lists that follow offer some guidance to the kinds of busy work that tend to lead toward writing publishable material, even if it is only material of the lower orders, and the kinds of busy work that often impede writing efforts.

Busy but Free

Law reform committees with other working members
Panelist on topics within one's area of expertise
Writing previews
Giving legislative testimony
Very limited consulting as an expert
Drafting amicus briefs that are "article ready"
Attending substantive conferences

Traps

Law reform committees where the academic is the sole draftsman
Serving on law school committees
Law school or university politics
Advisor to student teams
Supervising numerous student projects
Teaching involving substantial client contact work
Changing courses that you teach

Even the best of "busy work" can become a trap if it consumes too much time. As a rough guide, projects that require more than a half-day per week should be avoided. Likewise, do not let "command appearances" (i.e., meetings and travel) threaten your control of your own schedule. If these activities demand more than a day or two per month, the risk of their being a hindrance to writing increases appreciably.

II. A Word about Word Processors, Research Assistants, and Co-Authors

The single words about each of these three subjects, word processors, research assistants and co-authors, are, respectively, "Always," "Sometimes," and "Never."

No law school can possibly offer secretarial support sufficient to provide all of its faculty with instant turnaround on all manuscripts. The simple solution to the problem of this potential bottleneck is to compose on a word processor and so retain total control over the editing and printing of drafts.[8] Some law schools are beginning to provide individual faculty members with microcomputer-based word-processing units. Alternatively, the price of computers, printers, and software has fallen to the point where $2,000 will purchase a system equal to all the needs of most legal scholars. The purchase is the academic equivalent of the new suits one buys when taking a position with a fancy law firm.

Research assistants do not write articles, nor can they eliminate work that ultimately must be done by an author of a law review article. Research assistants, on their own, occasionally can go out and find valuable material that must be considered in the scholarly process. They can locate identified material, retrieve it, and prepare a vague, often unreliable, summary of the contents. They can become good and reliable cite-checkers. Some research assistants are good sounding boards for arguments and ideas with whom an author can establish a dynamic much like that which sometimes develops between a judge and a law clerk. The research assistant's value to the author varies greatly from individual to individual, but the new teacher should be warned that research assistants can consume as much or more of an author's time as they save. Thus they are an aid, but not of the magnitude a new law teacher might expect.

Co-authors are not the anathema I suggested by saying "Never." I have co-authored five articles and my only book. I am still good friends with four of my six co-authors, brother to one, and husband to another. Still, I do not recommend collaboration at the outset of a law school career. It introduces two unrelated types of problems. First, when writing is evaluated in the tenure-review process, co-authored articles never count as much as do solo efforts. Review committees, especially university-wide committees, discount co-authored articles because more than one person contributed to the end product and there is no reliable guide by which to ascertain how much of the effort should be attributed to the tenure candidate. Second, working with another person seldom saves either time or energy. Integrating two people's work into a single cohesive product consumes additional hours. Furthermore, delays caused by one of the co-authors can hamstring the other. The major value of co-authorship is the intellectual give and take it involves, which improves the end product. An author can obtain this same sort of support, however, by discussing work-in-progress with friends in the profession or selected colleagues.

8. Incidentally, no secretary touched this manuscript before its submission to the Journal of Legal Education other than as part of the duplication and mailing process.

III. The Act of Writing

For most people writing is a time-intensive process. Inexperienced teachers often find that preparing classes and interacting with students and colleagues demand literally all of their productive time and energies during the regular school year. The summer is, for most legal academics, the primary writing season.

An obvious concomitant of using the summer for writing is that one cannot take two-month vacations or teach summer school without compromising its potential for productivity. Spending a summer writing need not be unpleasant—it is not necessary to spend ten hours a day slaving away, but discipline is required to establish and preserve several large blocks of time each week to work steadily on a chosen task.

Legal scholarship is a creative endeavor, but a great deal of it can be reduced to a series of relatively mechanical steps, the most elementary of which are organize, research, and draft. The hard creative work is in the organization process. Far and away the most intellectually demanding part of writing any article is determining how its pieces fit together into a logical and persuasive whole. The most time consuming parts are the research and drafting, but these are not as difficult as most neophyte legal academics imagine.

All legal scholarship, and indeed most expository writing, is comprised of a series of small, usually prosaic, segments linked in a logical progression to present an analysis of a problem and to arrive at a conclusion. A law review article is made either mundane or outstanding by the absence or presence of a few vital sections that break new ground or introduce new modes of legal analysis. Thus even in the best works the majority of the material is fairly straightforward exposition. For example, a large portion of Joseph Sax's famous public trust article[9] consists of small descriptive segments that detail a series of cases. Those discrete case analyses are combined to form a necessary background for the vital analytical points that follow. As another example, in my most ambitious affirmative thesis article, the initial small segments do no more than depict a series of generic situations in which the extant state court concepts of personal jurisdiction are unresponsive to the needs of federal courts adjudicating equivalent cases.[10] The fun part of the article is contained in two short segments[11] proposing that the federal courts could eliminate the inquiry into personal jurisdiction so long as federal conflict of laws principles are slightly altered at the same time.[12] The

9. Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471 (1968).

10. See Robert H. Abrams, Power, Convenience and the Elimination of Personal Jurisdiction in the Federal Courts, 58 Ind. L.J. 1, 3–12 (1982).

11. *Id.* at 32–38 and 52–56.

12. As an aside, I am not 100 percent sure that my proposal is a good one. This in no way diminishes the value of the article as a part of the literature that advances the law. The point of mentioning this is that works need not be abandoned just because they are not perfect or perfectly true.

reminder of the article is, at bedrock, a series of small segments defending the proposal (both before and after its explicit articulation to the reader) from a series of plausible objections.

At least in my case, no mystical experience or creative act went into writing the small segments, not even the ones that stated the novel idea. The act of writing was little more than simple grind-it-out, three yards and a cloud of dust, drafting.[13] My sincere belief is that most articles emerge that same way.

I will gloss over the more individualized part of the writing process—how ideas are generated and cast into a feasible framework that becomes the outline for an article, and the relationship between that process and doing research. Here there is no discernible general pattern of how people work most efficiently. Describing my personal research-to-writing process may help to instill confidence because it shows that some relatively implausible methods seem to work out fairly well. In all events, my example should help free some new writers from the feeling that all their research must be fully complete and exhaustive before they begin writing.

I begin by tinkering with a topic on my agenda. Most items on that agenda have been there long enough so that I have done some background reading about the area and am generally familiar with the major cases and statutes germane to the issues at hand. The first step is casting the potential topic into an outline and then revising that outline several times, each time trying to include a few more specifics. Then, before doing any more research, I begin to write, leaving my detailed research to be done during the drafting process. When I encounter areas where detailed authority is needed, I go to the library and gather more detailed information. My writing process probably differs from that of most people who do a far greater proportion of their detailed research before beginning to write. Nevertheless, it is important for an author to think she can begin writing even before she is satisfied that she has exhausted every possible research avenue. In my experience, the worst that happens is that unexpected developments in the ongoing research force me to reevaluate my thesis and modify the direction of the finished work. Under my small-segments-as-building-block theory of writing, and with the aid of word-processing technology, the revision process is a bit tiresome but not debilitatingly long.

A caution about the writing and research process is in order: legal scholarship and legal annotation are two different occupations. Do not burden research and drafting efforts with the compulsion to cite (let alone discuss) every relevant datum, be it case, statute, or law review article. If someone wants an annotation, they will seek out an annotation. The burden of legal scholarship is to shape ideas, not to catalogue their previous incarnations.

13. Robert J. Glennon, a former colleague now at the University of Arizona, once said that the first step in writing is to take off your shoes. Then you crawl under your desk with a hammer and nails and nail the shoes to the floor. Finally, you sit down at the desk, insert your feet into the shoes, and tie your shoes on again.

Concern with precedents in most instances ought to be founded on the persuasive value of the precedent, not on the mere fact that some judge issued it x number of years ago. Likewise, why describe three cases that make the same point when the point itself is what is salient and a single example will illustrate the setting? The purpose of most legal scholarship is to sift materials and present an analytic end product, not to recreate a journal surveying all the materials considered.

Discipline plays an important part in the drafting process. During the research and drafting phase I find it vital to keep moving toward closure. This is more important than getting everything stated with great clarity. For example, I try to force myself to go on and write another of the small segments rather than polishing up earlier output. Nonetheless, the temptation to do some rewriting along the way is irresistible, especially when I find that a slight modification of my thesis has rendered the emphasis or tone of a previously completed segment inappropriate.

This process of writing and doing some revising as I go, usually produces a first complete draft that has numerous rough spots. This is not unexpected. There is no need to produce a perfect draft, or even a very good one, at this stage. With the completed first draft in hand it is possible to stand back and review the overall coherence of the piece, self-critically assessing its strengths and weaknesses. This is the point at which changing emphasis and revising can improve a piece many-fold.

This is also one of those moments when a strong ego is an aid. Some lower order articles, such as glorified casenote pieces, may need only a smoothing of transitions, beefing up a small segment of an argument, or rewording a few key analytic sentences to make their intended meaning so plain that even student law review editors will understand them. But often the draft, especially of a higher order work, will seem awful, and more revision will be required. Whole pieces of arguments may be garbled or misordered. Sometimes, I find that my defense of a thesis would not persuade me, much less someone who does not share my biases and predilections about the law. When this happens it is not cause for disappointment or alarm; it is simply time to address the problems. This may involve toning down an original aggressive position, but even then it may be advisable to share the revisionary insight with future readers by adding a small segment or textual footnote explaining why the more aggressive position is untenable.

A good example of this process occurred during one of my recent efforts to write about reserved water rights (What, again?!) for a forthcoming symposium. My general thesis was that the United States was doing an inadequate job of protecting valuable reserved water rights for the benefit of wilderness lands. The narrow issue that was most problematic was the degree of discretion vested in the administrative official in charge of the federal wilderness program to interpret and compromise the scope and extent of the water rights involved. Initially, my thesis, reflected in my outline, was that principled discretion existed, subject to judicial review. When I reached the problematic section I was not wholly satisfied with what my research turned up, but I completed the draft anyway. A few weeks later, after discussing the

topic with my colleagues, I concluded that only a more extreme position, refusing discretion in all but a narrow set of circumstances, was defensible. At that point, my draft needed some reworking, but the bulk of the draft, although modified slightly to incorporate the changed thesis, remained intact. Two short sections analogizing the case to non-discretionary settings were added, and only a few paragraphs were deleted.

The example raises the question of whether to share drafts with colleagues and friends. In general, comments on a draft provide valuable suggestions, both substantive and editorial. Some pitfalls, however, may accompany the draft circulation process. Drafts are just that—they are not the finished product, and they seldom reach the same level of quality as that attained by the final published version of the same work. Sometimes, colleagues with whom the draft is shared will base their assessment of the piece on their reading of the draft. Other times, colleagues who suggest changes will be critical of that work if their suggestions are not incorporated. In all events, ego is at risk on both sides of the draft and comment process.

Personal experience leads me to counsel in favor of circulating drafts. If the climate at a law school is not receptive to such a process, seek out friends at other institutions. It is not imperative to have readers who are expert in the topics addressed by an article, although comments made by persons with specialized knowledge can be unusually helpful.

Generally, it is most helpful to circulate a draft to only a few people. Readers can be carefully selected to ensure that the draft will be read promptly, by individuals who can be expected to make useful comments. At a number of law schools, such as Wayne State, faculty members regularly make colloquium-like presentations of works-in-progress. Often these sessions generate substantial, and humbling, feedback. On reflection it should be no surprise that an unfinished work, no matter how skilled its author, is flawed, and that the flaws will be noted by a group of law professors trained in an array of legal sub-disciplines. Although this sort of criticism is a tool for improving a piece, the dynamic of the presentation can resemble oral argument defending a weak position before an *en banc* panel of very well informed, very active judges. I would recommend that a new law teacher not venture into that forum until after he or she has completed three or four articles and gained the confidence that accrues with such a track record.

Once a draft is completed, an article should never be abandoned. Changes in the draft will improve it. Further, it is well to keep in mind that few articles are perfect. This is not an endorsement of mediocrity but an acknowledgment that writers still learning their craft should not expect that all their improvements will come at once.

IV. The Politics of Writing and Tenure

The approach to initial efforts of legal scholarship embraced here is tied to a particular view of the usual law school tenure-granting process. How junior faculty members are evaluated in that process necessarily affects new law teachers pondering what and how to write.

In making tenure decisions, virtually all law schools attempt to evaluate a candidate's scholarship, teaching, and service. Schools vary in their approach to the process and in the relative weights allegedly given to the three categories, but I submit that writing is the dominant concern, the currency of our profession. Some challenge the wisdom of relying preponderantly on scholarship in making tenure decisions. Teaching, they might argue, is so important a responsibility of law faculty that it ought to be weighed more heavily. Although I agree that teaching is important, I think that even in those few instances where a law school truly embraces the institutional aspiration to excel in teaching, writing should still figure most prominently in granting tenure. Writing makes for better teachers. Writing requires teachers to keep abreast of their chosen fields and to apply extensive self-critical analysis to their own views. It is, for example, easy to have an opinion about the proper resolution of an issue. The self-critical process of reducing that opinion to writing intended for scrutiny by an expert audience forces greater rigor in argumentation and logic. Writing thus induces clearer thought and hones the ability to transmit that same skill to students.

The importance of writing to the tenure-granting process can be expressed in a series of three propositions:

1. Productive writers receive tenure.

2. Non-writers are denied tenure.

3. In cases not governed by the two primary rules the most important determinant in tenure decisions is the quantity of creditable writing produced by the candidate.

Only the final proposition is controversial. The two major arguments in its favor touch on (1) the institutional aspirations common to almost all law schools and (2) the difficulties inherent in collectively making accurate qualitative assessments of the limited scholarly output of the typical tenure candidate.

Law schools, perhaps more than other institutions, are prestige conscious. They have a pecking order defined by a host of variables, one of which is the school's reputation among others in the law teaching world. Among the most important determinants of this peer prestige-rating is the scholarly production of the faculty. Publications by faculty members, because they reach the audience made up of legal academics, are the primary criterion by which a law school's intellectual climate is judged either vital or moribund.

The institutional desire to be rated favorably affects tenure decisions. To the extent that a grant of tenure can lead to a thirty-year occupancy of a faculty slot, there is a legitimate institutional concern that the slot be occupied by a productive faculty member. In the present era of contracting student populations and law school faculties, faculty turnover rates have slowed. In such a world, each grant of tenure appears more serious, and the instinct to avoid risks in decision making flourishes, especially considering the rich pool of talented individuals still seeking to become law teachers.

Given this background, consider how two otherwise equal tenure candidates *X* and *Y* will fare if *X* has published several creditable works and *Y* has

but a single, somewhat more ambitious, piece published at the end of four or five years. The task of tenure committees is to predict a candidate's future output based on the necessarily limited sample of that candidate's early career writing achievements. Even if *Y*'s lone article is felt to be somewhat more profound or "better" than any one of *X*'s articles, *X* is in a far stronger position to receive tenure. *X*'s demonstrated ability to "get work out" makes the grant of tenure to *X* a low-risk proposition. At worst, *X* is likely to be productive, if not profound. If *X*'s early (pre-tenure) writing shows any degree of intellectual sophistication, it seems probable, even likely, that *X*'s writing will mature as *X* gains the expertise and breadth of knowledge that are acquired over a span of years in academia. *Y*'s future is far more problematic. The one article holds the promise for more, even better things, but the risk remains that *Y* will seldom write.

Taking the importance of scholarship as established leads naturally to considering the process by which scholarship is evaluated. There are sufficient reasons why quantity rather than quality of writing carries significantly more weight in tenure decisions. Creating a calculus for measuring the quality of scholarly writings is an elusive task. It is easy to agree on a set of descriptions—adjectives such as superior, excellent, good, fair, and rotten will suffice. But it is not easy to agree on what aspects of a work deserve the aforementioned appellations. Works range from brilliant to stupid, from well-organized to scattered, from thoroughly researched to inadequately researched, from incisive to insipid—and numerous other sets of polar opposites, all highlighting different aspects of legal writing. When assessing a total work, however, which is better: a well-reasoned but pedestrian analysis of the unintended effects of a federal banking regulation, or a promising, but somewhat disorganized, solution to a problem of constitutional theory? If there is no definitive way to compare two articles, imagine how much more difficult is the evaluative task facing tenure committees who must judge, collectively, the merit of the work produced.[14] The secondary concern for quality should not be misunderstood: *bad* writing is not a plus on anyone's tenure ledger, but it is hard to imagine any distinction between fair and good writing sufficiently clear to be the decisive factor in a tenure decision.

Consider, in contrast, the relative clarity of basing tenure decisions not on elusive distinctions in qualitative evaluation, but on quantitative standards. There can be no debate about how many creditable pieces of writing a tenure candidate has produced, and more is better.

There is a very plausible sense in which producing a larger number of works, even works of lesser difficulty, is a protection against the "politics" of the tenure process. In the end, granting tenure is a choice to add the tenure candidate as a long-term colleague. Thus a candidate may fear that the tenure decision is a thinly disguised popularity contest, or an opportunity to

14. In fact, objective and definitive assessments of quality are so hard to make that I suspect the placement of an article in one journal or another often becomes a proxy for quality of writing.

eliminate scholars with "unpopular" views. If one has a substantial publication record on coming into the tenure decision, the possibility that extraneous factors will play a major role is diminished.

Producing a variety of works also lessens the possibility that a tenure candidate will be thought to lack the intellectual merit necessary to be awarded tenure. The institutional decision is, as noted before, one about promise based on past performance. Promise is, of course, manifested by the quality of scholarship. But the more work available, the more evidence of intellectual merit. Consider, for example, a tenure candidate who has written an article presenting a critical legal studies (CLS) analysis of an issue. At some schools, this might result in the article being judged less worthy and evidencing less scholarly potential than more traditional analyses. An array of other publications, some adopting more standard analyses, eliminates the possibility that the candidate will be perceived as incapable of doing other, more highly esteemed, work. The broader array of writings may prevent a "political" bias disfavoring CLS scholarship from playing too prominent a role in making the tenure decision.

V. Conclusion

The formula for legal scholarship advocated in this article is premised on the facts that active writers receive tenure, active writers are better teachers, and almost all legal academics can be active writers. Not all works need be masterworks. A progression of several publications, building in difficulty to higher order of magnitude works, will be at least as tenure-worthy as a writing record containing only a small sample of somewhat higher quality material.

Writing can be the culmination of a deliberate, controlled process that starts from a writing agenda and moves to finished works at a regular pace. Whether the regimen described in this article is necessary for all new teachers is doubtful. For those who are unsure of their writing abilities, however, the regimen provides a reassuring prescription that does not require extraordinary genius or superhuman feats to succeed.

Originally this article was intended to demystify only the writing process, but to determine the worth of its advice about writing it is necessary to have a vision of the entire tenure process. If you believe as I do, that writing is far and away the dominant consideration in the tenure decision and that the difficulty of qualitative evaluation of writing accentuates the importance of quantitative criteria, then the suggestions in this article can be of great value. The methodical approach to writing advocated herein, if followed, emphasizes continuing productivity and should lead the new law professor toward a series of publications.

Write early and often! Enough of these "MuSings."[15]

15. Aviam Soifer of Boston University gave the counterpart speech to this one in July of 1985. He coined the play on words "MuSings" as the title for his speech. That speech was an excellent and far more thorough account of the relationship between writing and tenure, especially in regard to the way non-mainstream writings are evaluated in the tenure process. See Soifer, infra, p. 20.