I. The Two Genres of Legal Writing

A. Instrumental writing
   1. serves a specific purpose in legal practice
   2. memoranda, briefs, pleadings, contracts, etc.

B. Critical (scholarly) writing
   1. shares new ideas about the law with the larger legal community
   2. innovative and introspective
   3. seminar papers, cert papers, casenotes, law review articles, etc.

II. Characteristics of Legal Scholarly Writing

A. Advocates a legal or social goal
   1. informed by a desirable goal (equal educational opportunity, economic efficiency, etc.)
   2. recommends or disapproves some means to that goal
   3. does not merely describe or interpret the law
   4. seeks to persuade the legal community of the soundness of the author’s conclusions

B. Some more common species of legal scholarly writing
   1. the “case cruncher”
      a. analyzes case law in area that is confused, in conflict, or in transition
      b. resolve the conflict or problem by offering a solution that best advances the desirable goal of equity, or efficiency, or …
   2. the law reform article
      a. argues that a legal rule or institution is not just incoherent, but is fundamentally inequitable or unfair
      b. demonstrates how to change the rule to avoid the perceived evil
   3. the legislative note
      a. analyzes proposed or recently enacted legislation
      b. offers comments, criticisms, and/or suggestions for improvement
   4. the interdisciplinary article
      a. applies insights from another field, such as psychology, economics, sociology, or philosophy
      b. shows how these extra-legal insights can enable the law to deal better with some recurring problem
5. the explication of legal history
   a. uncover the origins and development of a legal rule or institution
   b. illuminates its current operation and/or shortcomings

C. typical four-part structure
   1. introduction
      a. describes the subject matter of the paper
      b. plainly states the author's thesis
      c. provides explicit roadmap through the rest of the paper
   2. background
      a. supplies whatever information a law-school-educated person will need to understand the section that follows: the author's original analysis
      b. should not assume any but the most general knowledge of the law
   3. analysis
      a. the focal point of the paper
      b. original: says something new -- no matter how modest -- about the law
      c. closely and carefully reasoned
      d. builds to a convincing conclusion
   4. conclusion
      a. summarizes the author's views
      b. may suggest related issues or invite the reader to further reflection

D. Extensive use of footnotes
   1. legal scholarly writing is thick with footnotes -- few textual sentences stand without them
   2. three functions of footnotes
      a. to document the text -- providing both authority and bibliography
      b. to attribute borrowed ideas to their sources -- avoiding plagiarism
      c. to embellish the main text -- permitting the author
         i. to engage in creative digressions
         ii. to offer personal, even humorous asides to the reader

III. How to Get a Feel for Scholarly Writing

   A. Do a lot of scholarly reading -- read articles in law reviews, including student notes and comments.

   B. See ELIZABETH FAJANS & MARY R. FALK, SCHOLARLY WRITING FOR LAW STUDENTS, West (1995).