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Legal Writing in the Twenty-First Century: A Sharper Image*

Jill J. Ramsfield**

I. INTRODUCTION

Eight years ago, the Legal Writing Institute (LWI)1 sought to clarify and objectify information about legal writing programs. Until that time, information about legal writing programs occurred in occasional articles, many of which were focused on single programs.2 No one source existed that allowed law schools to make informed decisions about originating or redesigning programs. Then, with the first survey, images began to emerge, images that showed that legal writing programs were not the fuzzy nebulae, exploding stars, or black holes that some had thought them to be, but distinct entities with definable characteristics.3 Since that time, the LWI has sponsored two more surveys, whose results are

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** Professor of Law, Georgetown University Law Center. I would like to thank Kristin Anderson for her wisdom, insight, and technical facility in gathering this information and analyzing it; Melissa Bradley for tireless and flexible research assistance; Flossie Davis, for completing the graphs; Brien Walton for helping to create the surveys on which the 1992 and 1994 data is based; John Lewis and the Planning and Institutional Research Department at Georgetown for entering the results, computing the statistics, and creating the graphs; and, of course, legal writing professors who completed the surveys for their untiring loyalty.

1 The Legal Writing Institute was founded by J. Christopher Rideout and Laurel Oates at the University of Puget Sound (now Seattle University) in 1984. Its purpose is to unite legal writing professionals intellectually, to share resources, and to monitor and encourage the development of effective legal writing courses across the United States and Canada. The Institute holds conferences every other year; over 300 LRW professionals participated in the 1994 conference.


3 See Jill J. Ramsfield, Legal Writing in the Twenty-First Century: The First Images, 1 LEGAL WRITING 123 (1991). In that article, the first survey was likened to the Hubble telescope, new but imperfect. The 1992 and 1994 surveys are giving us sharper images as participants give more detailed information and suggest more detailed questions for subsequent surveys.
reported here.

Those results show a sharper galactic image: sophisticated programs run by seasoned professionals. The image has both brighter and darker aspects. The brighter aspects are increases in tenured positions, longer contracts for legal writing professors, and more advanced courses. But while those aspects are brighter than, say, twenty years ago, other aspects are altogether too dim. Law graduates still emerge from law school with too little writing experience, law schools still have too few writing courses, legal writing professors still receive too little money, and programs still struggle to have any budget at all.

It may be that, to progress, law schools need clearer images of the legal writing galaxy. So, to that end, this article will provide the information gathered from the most recent research into legal writing. It does not analyze each of the surveys' one hundred or so questions. Rather, it focuses on current conditions, trends seen over the last six years, and new developments. Perhaps this information will shake up the conventional wisdom on legal writing. Perhaps this information will assist other law schools in joining those who have discovered an important premise for legal education of the next century: well-designed legal writing programs produce better-trained graduates—graduates who can communicate what they know.

II. WHAT THE SURVEYS SAY

A. The Survey's Design

The three LWI surveys were designed to collect information

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4 Some of the fuzzy images come from old viewpoints, used when current professors were in law school, which was before legal writing pedagogy had been developed. For an exploration of these traditional viewpoints and a summary of legal writing pedagogy, see J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 WASH. L. REV. 35 (1994).

5 This article incorporates information from the 1990, 1992, and 1994 surveys. We continued to receive surveys through May of 1995, so this article incorporates information through the 1994-95 school year. Over a typical school year, we receive more than 100 phone calls from faculty and deans throughout the country soliciting information about specific schools, selected groups of schools, structures of programs, salary ranges, and other subjects.

6 See Rideout & Ramsfield, supra note 4, at 40-48. Cf. these conventional perspectives of legal writing with the conventions previously held by astronomers as noted in Michael D. Lemonick, Cosmic Close-ups; Stunning New Photos from the Hubble Space Telescope Put the Mysteries of the Universe Into Sharp Focus, TIME, Nov. 20, 1995, at 90 (stating that images from the corrected Hubble are requiring astronomers to redefine their previously held concepts of the universe).
and monitor how legal writing programs function and change. Historically, law schools have changed their programs when they are not working. The information used to design and build new programs before these surveys was largely anecdotal, probably gathered by members of a faculty committee, and often compiled from the results of some phone calls. These LWI surveys instead collected information from most schools in the United States; each survey has a response rate of about eighty percent. The questions were designed to elicit information about the structure and design of programs, their relationship to the rest of the curriculum, the status and salary of those teaching in the programs, and trends from 1990 to now. With the cooperation of all of those responding to the surveys and of the Institute for Research at Georgetown University, the following results emerged.

B. The Results: Curriculum

1. Gradual Modernization of the First Year Program

All law schools now have some form of first-year legal writing course, whether or not it is taught by legal writing professors. First-year legal writing programs have metamorphosed in the four-
year period mostly in the areas of credit allocation, grading, and combining legal research and writing. Most schools still require two semesters of legal writing during the first year only, but that number is changing. Eighteen percent of the schools responding now require legal writing beyond the first year. Only eight schools are left that require just one semester of legal writing.

Legal writing is, then, a permanent part of the law school core curriculum. Legal writing courses themselves have also moved away from the traditional split among subparts to a more holistic approach. Less than one-third of those schools responding said, for example, that legal research is taught separately from legal writing, down from one-half in 1990. That integrated approach requires students to use research to analyze a legal question, to structure an explanation, and to choose key language for presenting the analysis. Such an approach may indicate that schools are moving toward both the process and social constructivist views of teaching legal writing.

Those two views require intense student-professor interaction. Perhaps as a result, there has been some movement toward reducing class size. Generally, the surveys show a slight decrease in the number of students per legal writing professor since 1990. Thirty-seven percent of the schools indicated a ratio of thirty-five or fewer students per legal writing professional; twenty-seven percent have

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11 98 schools (74%). 1994 Survey, supra note 9, at question 6. 11% require 3 semesters, 3% require 4 semesters, 2% require more than 4 semesters, and 4% responded “other.” Id.
12 74%. 1994 Survey, supra note 9, at question 7. 17% of schools require students to take legal writing during all of the first year plus part of another year; 1% require part of the first year plus part of another year. Id. See infra section B.2 for a discussion of advanced courses.
13 That is one fewer than in 1990. See Jill J. Ramsfield & Susan Keller, Survey of Legal Research and Writing Programs (1990) [hereinafter 1990 Survey] at question 5; 1992 Survey, supra note 9, at question 5; 1994 Survey, supra note 9, at question 6. Twenty-four now require more than two semesters, up from 17 in 1990. See infra section B.2 for a more detailed discussion of requirements beyond the first year.
14 1994 Survey, supra note 9, at question 9; 1990 Survey, supra note 3, at question 8.
15 See Rideout and Ramsfield, supra note 4, for an explanation of these theories. There is still some concern that legal writing professors are emphasizing writing over research, a question that the surveys do not address. See Joan S. Howland and Nancy J. Lewis, The Effectiveness of Law School Legal Research Training Programs, 40 J. LEGAL Ed. 381 (1990).
16 Schools are realizing that the workload required of legal research and writing professors demands that they have fewer students to teach than their colleagues. The trend is toward teaching fewer students. In 1992, only 29% of the schools reported that their legal writing professors taught at least 45 fewer students than did other professors. By 1994, this number had increased to 33%. The number of schools reporting that their legal writing professors teach between 31-45 fewer students than do other professors also increased, from 3% to 6%. 1994 Survey, supra note 9, at question 57; 1992 Survey, supra note 9, at question 46.
thirty-five to fifty.\textsuperscript{17} Twenty-three percent have fifty to seventy five.\textsuperscript{18} Five percent have seventy-five students to one legal writing professional and seven percent have over one hundred and twenty-six students for each legal writing professional.\textsuperscript{19} While the slight decrease is encouraging, these last two numbers are astounding. Traditional composition courses keep the number of students to about sixteen to maximize discussion and expert feedback; those two elements virtually disappear when the class size is so large. Legal writing professors at some schools receive some reprieve from class preparation: although there has not been much change in the number of courses taught by legal writing professors, eighty percent of legal writing professors teach one to four fewer courses than do other full-time faculty at their institutions.\textsuperscript{20}

Whatever the student load, most legal writing professors are awarding grades, rather than Honors/Pass/Fail. Those grades also have more impact on the students because, of the seventy-six percent of schools that grade legal writing,\textsuperscript{21} seventy-four percent average the grade into the general grade point average.\textsuperscript{22}

The research content of first-year courses has changed only slightly. In the research part of the courses, most schools use open research assignments\textsuperscript{23} on specific tasks\textsuperscript{24} to introduce legal research. One-half of the schools responding still use closed packets, that is, assignments for which the research is provided.\textsuperscript{25} Eighty-eight percent of schools teach computer training\textsuperscript{26} and eighty-three percent require work in citations as part of research assignments.\textsuperscript{27}

\textsuperscript{17} 1994 Survey, supra note 9, at question 18. In 1992, 42% had fewer than 35 students and 19% had 35-50 students. 1992 Survey, supra note 9, at question 16. In 1990, the percentages were as follows: 40% had fewer than 35 students and 18% had 35-50 students. 1990 Survey, supra note 13, at question 16.

\textsuperscript{18} 1994 Survey, supra note 9, at question 18. This class size is unwieldy without assistance and can quickly lead to professor burnout, a phenomenon one hopes is not intentional.

\textsuperscript{19} Id.

\textsuperscript{20} 1994 Survey, supra note 9, at question 58.

\textsuperscript{21} Id. at question 11.

\textsuperscript{22} Id.

\textsuperscript{23} 78%. Id. at question 22.

\textsuperscript{24} 74%. Id.

\textsuperscript{25} 50%. Id. See also 1992 Survey, supra note 9, at question 20 (57% required closed packet research); 1990 Survey, supra note 13, at question 20 (49% required closed packet research). This approach does not conform to the social constructivist theory because it is not a simulation of practice. Proponents suggest that providing the research allows students to concentrate more on the writing in the early stages of law school.

\textsuperscript{26} 1994 Survey, supra note 9, at question 22. In 1992 this figure was 86%. 1992 Survey, supra note 9, at question 20. In 1990, 84% required Westlaw or Lexis training. 1990 Survey, supra note 13, at question 20.

\textsuperscript{27} 82%. 1994 Survey, supra note 9, at question 22. In 1992, 88% required citation work.
Slightly more schools reported teaching legislative history and looseleaf services in 1994 than did in 1990. Also, as in the past, in the majority of the schools where legal research is taught separately, librarians do it.

Writing assignments, however, show more variety than in 1990. While the most common assignments remain the same—legal memoranda and appellate briefs—more schools are requiring client letters, pretrial briefs, trial briefs, and drafting documents. In addition, courses are stretching requirements beyond the appellate arguments to require arguments in pretrial motions, in-class presentations, and other more objective settings. For the assignments required in the first-year courses, the trend, then, favors using pretrial-related writing and advocacy in place of appellate writing and advocacy assignments. Moot court is still included as part of the first-year course at some schools, but its use decreased from 1990 to 1994. Rewrites of assignments, now considered essential to teaching effective writing, are used to

1992 Survey, supra note 9, at question 20. In 1990, the figure was 81%. 1990 Survey, supra note 13, at question 20.

28 40% include legislative histories and 44% use administrative law research. 1994 Survey, supra note 9, at question 22. In both 1990 and 1992 the percentage for legislative histories was 37%. 1992 Survey, supra note 9, at question 20; 1990 Survey, supra note 9, at question 20. The percentage requiring administrative law research in 1990 was 38%. Id.

29 45 schools (34%) teach research separately; 62% of those schools use librarians. 1994 Survey, supra note 9, at question 9.

30 99%. Id. at question 23.

31 72%. Id.

32 44%. Id.

33 39%. Id.

34 21%. Id.

35 18%. Id.

36 72%. Id. at question 24.

37 28%. Id.

38 21%. Id.

39 9%. Id.

40 The increase was 54%; 40% in 1994 and 26% in 1990. 1994 Survey, supra note 9, at question 23; 1990 Survey, supra note 13, at question 21.

41 Increase of 40%; 28% in 1994 and 20% in 1990. 1994 Survey, supra note 9, at question 24; 1990 Survey, supra note 13, at 128.


43 11% decrease; 72% in 1994 and 81% in 1990. 1994 Survey, supra note 9, at question 24; 1990 Survey, supra note 13, at 128.

44 62%. 1994 Survey, supra note 9, at question 12.

45 Id. In 1990, 75% included moot court in the first year program. 1990 Survey, supra note 13, at question 11. In 1994, that number was 62%.

some extent in seventy-nine percent of legal writing courses, but required on all assignments by only twenty-five percent of schools. Of the schools that require rewrites of assignments, a percentage that has remained fairly constant over the last four years, slightly more of these schools require rewrites of all, rather than some, assignments.

The modernization of the curriculum, then, seems to manifest itself in a slight movement away from the traditional litigation and appellate advocacy to newer modes of practice, such as the motions practice and negotiations. What is not more modern is the resistance to rewrites, a message that can be fatal to lawyers and scholars alike; only experts can get it right the first time.

On all of these assignments, legal writing professors give more feedback than they did previously. In the majority of schools, legal writing professors give written feedback more than four times per year, and this number of schools is increasing. In 1990, the most common response was that students receive written feedback more than four times per year, but some schools gave feedback two or fewer times per year. All schools in the 1994 survey gave written feedback three or more times per year, and most schools reported giving written feedback over four times per year, an increase of nine percent from 1990. While more schools are using students to assist in teaching legal writing, most of the feedback is still given by legal writing professors, who respond to papers at ninety-two

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47 The other 54% require rewrites in only some assignments. 1994 Survey, supra note 9, at question 25.
48 In 1992, 83% required rewrites. 1992 Survey, supra note 9, at question 23. In 1990, the figure was 86%. 1990 Survey, supra note 13, at question 23.
50 In 1990, by comparison, 78% of schools gave written feedback more than four times per year. 1990 Survey, supra note 13, at question 24.
51 Id.
52 Two schools gave this response in 1990. Id. at question 24. That situation may have changed since, but we did not receive responses from those same schools on the 1994 survey.
54 See supra note 51.
55 65% used students to assist in 1994. 1994 Survey, supra note 9, at question 67. This is a leap from the 45% that used student assistants in 1990. 1990 Survey, supra note 13, question 67.
56 54%. 1994 Survey, supra note 9, at question 27. About one-half of schools have solely
percent of the schools. At those schools, the professors comment on between seventy-six and one hundred percent of the papers.

In addition to commenting extensively, legal writing professors conduct conferences with students. The number of conferences, or oral feedback, with students per semester remained fairly constant at two or fewer conferences per semester, but it is now much more likely that the legal writing professors will be conducting the conferences. In 1990, nine percent of schools reported having legal writing professors conduct over three-quarters of conferences, in 1994, forty-one percent did.

This means that legal writing professors are participating increasingly in one-to-one teaching, both in written and oral comments. This teaching, added to regular classroom teaching, may average twenty or more face-to-face hours a week. This heavy teaching load may account for the slight increase in student teaching assistants. This is an enormous workload, one that should be carefully considered in evaluating legal writing professors' contributions to law schools. Such a workload may also explain the rarity of coordination with other first-year courses.

legal writing professors giving feedback. Of those schools who have both student assistants and legal writing professors giving feedback, the majority have legal writing professors giving the written feedback. Id. at Questions 27, 30.

At 40% of the schools, both legal writing professors and students comment on papers; at 52% percent of the schools, legal writing professors alone comment. The rest use a combination of students commenting as peers and "other," which was usually the response given when all three groups—legal writing professors, teaching assistants, and peers—commented on papers. 1994 Survey, supra note 9, at question 27.

This is the case at 72% of the schools, which means that the overwhelming bulk of the commenting is done by legal writing professors. Id. at question 28.

Legal writing professionals conduct the conferences at 90% of the schools, sharing the task with student teaching assistants at 33% of the schools. 1994 Survey, supra note 9, at question 31.


1990 Survey, supra note 13, at question 29.

1994 Survey, supra note 9, at question 31.

Most legal writing classes meet two (43%) or three (8%) times a week. 1994 Survey, supra note 9, at question 19. That is about two hours. The average number of students is between 36 and 50. Students receive written feedback over four times a year (id. at question 26) on about five assignments (id. at question 23). Students also have conferences with legal writing professors (id. at questions 29 and 30). For a 28-week year, then, legal writing professors are likely to spend 56 hours in class, 338 hours reading papers (1.5 hours a paper), and 180 hours in conferences. That is just over 20 hours a week, a conservative estimate, at that. That does not include class preparation, office hours, or "drop-in" questions, which are the daily routine of legal writing professors. This is a good recipe for quick burnout.

See Levine, supra note 7, at 531, 544-45.
In the 1994 Survey, only 24% of schools reported that they coordinate their assignments with other first-year assignments. In 1990, 30% did. But those twenty-four percent are taking advantage of principles developed in the Writing Across the Curriculum (WAC) movement. This movement, designed to use the discipline of writing to teach students all subjects, began twenty years ago in undergraduate schools. Writing, the movement says, forces students to articulate the learning process, no matter what the subject area. The WAC research shows that students who use writing in biology, chemistry, sociology, computer science, and history, among many other courses, perform better. The same could be true in law schools. Coordinating requires extensive planning, months in advance. The decline in the amount of integration with other courses may be due to the demands this planning adds to an overly-burdened legal writing professor's schedule. He may have to work with a faculty member who has not yet written her syllabus. There may also be resistance on the part of another faculty member to coordinate, especially if she looks at legal writing as a so-called "skills" course. Worse, some faculty may assume that the legal writing professor's role is to correct grammar on assignments.

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**1994 Survey, supra note 9, at question 13. At 76% of the schools, legal writing assignments are not coordinated with assignments in other first year courses. Id.**

**1990 Survey, supra note 13, at 12.**

**See Rideout & Ramsfield, supra note 4, at n.31.**

**See, e.g., Richard C. Freed & Glenn J. Broadhead, Discourse Communities, Sacred Texts, and Institutional Norms, 38 C. COMPOSITION AND COMM. 155 (No. 2, 1987); Anne J. Herrington, Writing to Learn: Writing Across the Disciplines, 43 C. ENG. 379 (No. 4, 1981); Susan H. McLeod, Writing Across the Curriculum: The Second Stage, and Beyond, 40 C. COMPOSITION AND COMM. 387 (No. 3, 1989); Robert Parker, The "Language Across the Curriculum" Movement: A Brief Overview and Bibliography, 36 C. COMPOSITION AND COMM. 173 (No. 2, 1985); David R. Russell, Writing Across the Curriculum in Historical Perspective: Toward a Social Interpretation, 52 C. ENG. 52 (No. 1, 1990); Writing, Teaching, and Learning in the Disciplines (Anne Herrington & Charles Moran, eds. 1992).**

**A successfully coordinated program at Georgetown during the 1992-93 school year involved four faculty members and a legal writing professor. The project planning began with joint meetings in February of the preceding academic year. A series of meetings resulted in the creation of the topic, research issues, deadline schedules, feedback standards, and coordination among the professors and the legal writing professor. A similar project, started in May of the previous academic year but with no subsequent faculty meetings, was not as successful.**

**I do not use the word "skills" in referring to legal writing. To me, legal writing is an art. The academy reflects this attitude by its own measures for excellence, which depend heavily on written scholarship. Translating ideas from mind to text is a complex series of tasks that go well beyond what the word "skills" encompasses. See, e.g., Ann Johns, Coherence and Academic Writing, 20 TESOL Q. 247 (1986)(characterizing writing as a complex series of choices); Carl Bereiter, Development in Writing, in COGNITIVE PROCESS IN WRITING 73-93 (Lee Gregg & Erwin R. Steinberg, eds., 1980) (characterizing writing as not only instrumental, but epistemic when properly developed).**
designed by the faculty, an approach that echoes traditional views of legal writing that are now unhelpful. Neither side should give up on the idea of coordinating writing assignments with other courses’ materials, however. Well-designed writing problems in all courses are worth the effort.

When the courses themselves cannot be integrated, other services can. Many first-year programs add some kind of service to those traditionally provided by the legal writing professor, namely, tutorials, student teaching assistants, or other academic support programs. Leading some of these programs are writing specialists who bring to legal writing their expertise in, for example, composition theory and linguistics. These specialists assist students in exploring their writing in a non-threatening situation as they transfer from one discourse community into the legal discourse community. These specialists, experienced in the role writing plays in learning, also assist students in meeting the first-year courses’ heavy demands.

First-year programs, then, are longer, more rigorous, more oriented to current composition theory and pedagogical practice, and more broadly based than previously. This modernization affects the inner structure of first-year programs. But the story no longer ends there. Upper-level students now have more opportunities to develop their writing abilities.

2. Increase in Upper Level Programs

One of the most important changes since 1990 has been the creation of upper-level courses. Many schools have added advanced courses to their curricula and many are requiring these courses. Students are increasingly required to study and practice writing beyond the second year, whether in the contexts of persuas-
sion, scholarship, negotiations, or client counseling. One-third of schools require students to take upper-level courses in the legal writing department. These are not courses with a writing component that are taught by untrained faculty; rather, these are writing courses taught by those who have studied writing pedagogy, designed and planned extended curricula that build on first-year courses, and implemented the curricula in a unified manner. These courses include legal drafting, advanced research, appellate advocacy, and specialized seminars. The classes are smaller, with fewer than twenty-five students in eighty percent of the required advanced courses. In addition, nearly half of the legal writing departments responding offer upper-level electives. In these upper-level courses that require papers, most students receive comments from the legal writing professor on one draft and the final paper.

In addition, two-thirds of schools require writing courses outside of the legal writing department; those courses are offered in greater numbers than courses within the departments. Those courses cover the same topics as the required legal writing courses, but are much more numerous, the greatest numbers being seminars or courses in appellate advocacy or advanced research. In many of those required upper-level courses, papers must be of a specific length, generally between twenty-one and thirty pages.

All of this means that students are writing more in law school.

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77 1994 Survey, supra note 9, at question 32. But just 24 schools now require more than 2 semesters, up from 17 in 1990. Id. at question 6; 1990 Survey, supra note 13, at question 32.

78 1994 Survey, supra note 9, at question 32. Within legal writing departments, legal drafting is required by 4% of schools and offered by 20%. Advanced research is required by 3% and offered by 16%. Appellate advocacy is required by 12% and offered by 22% (this is the most commonly offered or required class). Seminars on writing are required by 7% and offered by 16%. Specialized writing courses are required by 2% and offered by 10%. 8% of schools require, and 10% offer, other courses within the department. Id. at questions 32 & 34. In 1990, only 17 schools require upper-level legal writing courses, but 60% of schools offer upper-level courses. 1990 Survey, supra note 13, at question 5.

79 See id. 1994 Survey, supra note 9, at question 33.

80 Id. at question 34.

81 52%. Id. at question 36. This number has fluctuated. It was 62% in 1992 and 39% in 1990. 1992 Survey, supra note 9, at question 37; 1990 Survey, supra note 13, at 129.

82 Id. at question 37. This question was not asked before 1994.

83 1994 Survey, supra note 9, questions 34 and 40. Legal drafting is offered outside the legal writing department in 25% of the schools, advanced research in 32%, appellate advocacy in 35%, seminars in 42%, specialized writing courses in 14%, and other courses in 7%. Id. at question 40. See note 78 for discussion of question 34.

84 Id. at question 40. See supra notes 78 and 83.

85 65% require a specific length. 1994 Survey, supra note 9, at question 38.

86 53%. 1994 Survey, supra note 9, at question 39. 19% require 11-20 pages; 16% require 31-40 pages, and 9% require over 40 pages. Id.
Schools are requiring more semesters of legal writing\textsuperscript{87} and are allocating more credit hours to it.\textsuperscript{88} While most schools require two semesters of legal writing now, as they did in 1990,\textsuperscript{89} the number of schools requiring three or more semesters of legal writing has increased.\textsuperscript{90} In addition to being more of a central part of the law school curriculum, legal writing classes are also meeting more often. More schools report that legal writing classes meet two to three times a week now than did so in 1990.\textsuperscript{91}

This increase in advanced writing courses and required semesters will benefit students by giving them more practice under the direction of experts. It will benefit law schools when legal writing professors can help design three-year curricula that intentionally build writing expertise.

3. Increased Experience and Expertise of Legal Writing Directors and Professors

To design, develop, and deliver good programs, legal writing professors also need experience and expertise. This usually means that they should know law practice, composition theory, and teaching methodology. They must have enough expertise to direct their methodology to the local population; that is, no one program or approach will work at every school. More schools have recognized the value of investing in expertise by creating tenure-track positions for legal writing directors and professors.\textsuperscript{92}

Since 1990, more schools have separate legal writing directors and more directors are on tenure track.\textsuperscript{93} Those directors almost

\textsuperscript{87} Id. at question 6. See supra notes 11 and 12; Appendix C, Graph 5.
\textsuperscript{88} 1994 Survey, supra note 9, at question 8; 1992 Survey, supra note 9, at question 7; 1990 Survey, supra note 13, at question 7. See also Appendix C, Graph 6.
\textsuperscript{89} 74% required 2 semesters in 1994, while 79% did in 1990. 1994 Survey, supra note 9, at question 6; 1990 Survey, supra note 13, at question 5.
\textsuperscript{90} 3% since 1990. In 1990, 17 schools required more than three semesters. 1990 Survey, supra note 13, at question 5. In 1994, 21 schools required more than three semesters. 1994 Survey, supra note 9, at question 6.
\textsuperscript{91} 33% increase. In 1994, 52% of classes were held two to three times per week. 1994 Survey, supra note 9, at question 19. In 1992 the figure was 47% and in 1990 it was 39%. 1992 Survey, supra note 9, at question 17; 1990 Survey, supra note 13, at question 17.
\textsuperscript{92} See Levine, supra note 7. Levine created his own survey that goes beyond these surveys in asking detailed questions about tenure. He properly points out that these surveys were not designed to elicit the information his did. Id. at 536. The following information does not differentiate, for example, between those positions created especially for legal writing and those occupied by a faculty member previously awarded tenure in a non-legal writing field. See id. But this information was consistently elicited and used among these surveys.
\textsuperscript{93} 83% have separate directors, a 15% increase. 1994 Survey, supra note 9, at question
all hold at least a J.D., and a few have both a J.D. and Ph.D.\footnote{In 1992, 77% had separate directors and in 1990, 72% did. 1992 Survey, supra note 9, at question 102; 1990 Survey, supra note 13, at question 42.}

Now, forty-two percent of those directors are on tenure track, compared with only thirty percent in 1990.\footnote{95% have a J.D., and at least another 2% have an additional advanced degree. 1994 Survey, supra note 9, at question 82. In 1992, 92% had a J.D. and 1% had a J.D. and an additional degree. 1992 Survey, supra note 9, at question 103. This question was not on the survey in 1990.} Of those who are not on tenure track, one-half have a one-year contract and one-half have more than one year. All of these contracts are renewable.\footnote{In 1994 and 1992, 43% of directors were tenure-track. 1994 Survey, supra note 9, at question 83; 1992 Survey, supra note 9, at question 104. In 1990, 30% were tenure-track. 1990 Survey, supra note 13, at question 43.} Nearly half of the directors also have publishing responsibilities,\footnote{94% have a J.D., and at least another 2% have an additional advanced degree. 1994 Survey, supra note 9, at question 82. In 1992, 92% had a J.D. and 1% had a J.D. and an additional degree. 1992 Survey, supra note 9, at question 103. This question was not on the survey in 1990.} which encourage them to develop legal writing theory and methodology.\footnote{Nearly half of the directors also have publishing responsibilities, which encourage them to develop legal writing theory and methodology.}

The population of legal writing professors in full-time residence at law schools has also increased. Sixty-three percent of schools have five or more professors teaching first-year legal research and writing,\footnote{In 1994, 73% of schools had five or more full-time professors teaching first-year legal research and writing. 1994 Survey, supra note 9, at question 18.} compared with fifty-eight percent in 1990, a nine percent increase.\footnote{1990 Survey, supra note 13, at question 38.} The number of schools with one full-time legal writing professor also increased,\footnote{24% had one full-time professor in 1994; in 1992, 23%; in 1990, 14%. The number of schools with 10 or more full-time professors decreased: 3% had 10 or more in 1994; in 1992, 8%; in 1990, 4% had 10 or more professors, but the question did not specify "full-time." 1994 Survey, supra note 9, at question 17. 1992 Survey, supra note 9, at question 38; 1990 Survey, supra note 13, at question 38. This may mean that schools are hiring more part-time legal writing professors. Or it may correspond to the use of adjuncts, who are not legal writing experts, in combination with full-time legal writing professors. Because only the extreme answers changed, it may also show a tendency to moderate programs to what the majority of the legal writing community is doing.} and the use of adjuncts...
The general growth in legal writing professor population is also reflected in attendance at the LWI conventions: eighty-three in 1984, 350 in 1994.

Those professors are staying longer, without limits on their contracts. Legal writing professors’ contracts are usually one year long and renewable. There has been a slight increase in the number of two- and three-year contracts. Generally, legal writing professors stay only three to five years, but eighteen percent stay over ten years. Seventy-four percent of the schools responding do not impose a limit on the number of years legal writing faculty can stay. The level of expertise is rising, then, as the opportunities for tenure, longevity, and attendant experience increase.

4. Combination of Experts and Peers to Teach Legal Writing

Only a handful of schools remain that use students solely to teach legal writing. In early legal writing programs, before any methodology was developed, it was thought sufficient to have up-

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102 In 1994, 13% use adjuncts without professionally trained legal writing professors. 1994 Survey, supra note 9, at question 41. In 1990, that number was 25%. This is good news because adjunct programs by definition draw experts in practice who may not be experts in legal writing methodology. While some adjunct programs are successful, many suffer, with adjuncts who teach poorly, are unavailable to students, and fail to teach research, design effective problems, or study legal writing theory. These courses should be left to the experts.

103 Legal writing professors at 74% of the schools have one-year contracts. 1994 Survey, supra note 9, at question 47. The length of the contracts has increased and, as this has happened, the percentage of schools having one-year contracts, while remaining high, has decreased. In 1992, 79% had one-year contracts and in 1990, 84% did. 1992 Survey, supra note 9, at question 64; 1990 Survey, supra note 13, at question 64.

104 99% of contracts are renewable. 1994 Survey, supra note 9, at question 48. This number has remained uniformly high across the survey years. In 1992, 99% also renewed contracts. 1992 Survey, supra note 9, at question 65. In 1990, 96% were renewable. 1990 Survey, supra note 9, at question 65. The percentage has remained fairly constant.

105 130% increase since 1990. In 1990, 2% were two years, and 8% were three years. In 1994, 11% were two years and 12% were three year contracts. 1994 Survey, supra note 9, at question 47; 1990 Survey, supra note 13, at question 64. See also Appendix C, Graph 16.

106 1994 Survey, supra note 9, at question 49. The average length of time legal writing professors stay has increased from just over two years in 1990 to three to five years in 1994. 1990 Survey, supra note 13, at question 40. See also Appendix C, Graph 16.

107 1994 Survey, supra note 9, at question 49.

108 Id. at question 50. In 1992, only 59% of schools imposed no limit. 1992 Survey, supra note 9, at question 41. This question was not included in 1990.

109 That number was six in 1990, 17 in 1992, and eleven in 1994. 67% of those having sole responsibility are third-year students. 1994 Survey, supra note 9, at question 75. And those students who have sole responsibility do not receive tuition waivers. In 1994, 100% did not. Id. at question 76. In 1992, 76% of schools used third-year student teachers and 93% did not provide those students with tuition waivers. 1992 Survey, supra note 9, at questions 85 and 87. In 1990, 56% of students were second year and 44% were third year; 80% did not receive a tuition waiver. 1990 Survey, supra note 13, at questions 85 and 86.
per-level students assist first-years in learning research and writing. As these programs faltered and the methodology developed, schools hired recent graduates in a kind of “clerkship” arrangement.110 Those programs also faltered. Gradually, schools began hiring directors to design more stable programs. From their work and the work done by composition theorists and linguists on discourse communities, legal writing methodology developed.111 The logical step was to hire more experienced faculty and to keep them longer. Thus more schools are using full-time, contract-track faculty to teach legal writing but are keeping the student assistants.

Schools are discovering that the combination of expertise and peer evaluation is an effective one for teaching legal writing.112 Since 1990, schools are providing more student teaching assistants to help other students.113 That increase may be compensating for a decrease in providing tutorials for students.114 Compensation for student teaching assistants, most of whom are second- and third-year students,115 is generally salaried.116 Credits, whether in combi-

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110 The job was designed as a stepping stone for a career in academia. In that era, the early seventies, recent graduates could remain in an academic setting, teach a simple legal writing course, publish, and move on to a permanent academic career.


112 56% of the schools were using students in 1994, which is a 15% increase from 1990 when 49% of schools had student assistants. 1994 Survey, supra note 9, at question 67; 1990 Survey, supra note 13, at question 57, 67, 77, 90, 99.

113 See id.


115 1994 Survey, supra note 9, at question 68; 96% of schools had either second-year or third-year students or both. 59% had both, 10% had second-year students only, and 27% had third-year students only. Id. Just 1% had graduate students as teaching assistants. Id. In 1992, 100% of schools had second- or third-year students or both for teaching assistants. 1992 Survey, supra note 9, at question 57, 67, and 77. Of the schools responding, 67% had both, 29% had third-year students and 4% had second-year students. Id. In 1990, 98% of schools had second- or third-year students or both: 60% had both, 31% had third-year students and 7% had second-year students. 1990 Survey, supra note 13, at questions 58 and 59. While both the percentage of schools using second-year students and that of schools using third-year students has decreased, this percentage has been offset by the number using both.

116 54% in 1994. 1994 Survey, supra note 9, at question 69. This is a 37% increase over 1990. 1990 Survey, supra note 13, questions 59, 69, 79, 86, & 95.
nation with a salary or a loan, are becoming a less common way to compensate student instructors.\textsuperscript{117} Teaching assistants are more likely to receive tuition waivers than credits, but most do not receive either.\textsuperscript{118}

Probably, the use of these student teaching assistants is more substantive: they are the peer review and evaluation that is now a hallmark of writing pedagogy.\textsuperscript{119} Students are more willing to share their problems and talk through the writing process with peers than they may be with professors. This participation in the writing program of student teaching assistants strongly encourages students to discuss the writing process, to take risks, and to create innovative approaches. At the same time, this approach gives them a friendly member of the legal discourse community with whom to talk and a living example that the transition into the discourse community can be made.

These students are supervised by legal writing professors.\textsuperscript{120} Those experts, then, can design the course and the assignments, present the theory, use the methodology, and introduce students to techniques garnered from legal practice. Students can create a trusting atmosphere that encourages first-year students to experiment, ask more questions, and take important risks as they acculturate to the legal discourse community.

C. The Results: Salary and Status

1. Salaries Are Losing Ground

Even though legal writing professors’ salaries are increasing,\textsuperscript{121}

\begin{itemize}
\item \textsuperscript{117} 58\% decrease. In 1994, 19\% used salary, and an additional 15\% combined salary and credits. 1994 Survey, supra note 9, at question 69. In 1990, 46\% used salary and another 22\% combined salary and credits. 1990 Survey, supra note 13, questions 59, 69, 79, 86, & 95.
\item \textsuperscript{118} 81\% do not receive tuition waivers. 1994 Survey, supra note 9, at questions 69, 70. In 1992 and 1990, the figure was fairly similar at 85\% and 83\%, respectively. 1992 Survey, supra note 9, at questions 60, 70, and 80; 1990 Survey, supra note 13, at questions 59, 69, 79, 86, & 95.
\item \textsuperscript{119} See e.g., KENNETH BRUFFEE, A SHORT COURSE IN WRITING (1980). Bruffee, a proponent in peer review, ushers readers through techniques for using peer review to become one’s own best audience.
\item \textsuperscript{120} 91\% of the students who have sole responsibility for teaching legal writing are supervised by legal writing professors. 1994 Survey, supra note 9, at question 73. One-hundred percent of those supervisors have J.D.s. The survey does not ask about supervision of student teaching assistants in programs with legal writing professors because they are, by definition, assisting the legal writing professor.
\item \textsuperscript{121} The most common salary range for the fifteen full-time tenure-track legal writing
those increases are not keeping pace with those of the rest of the faculty. Directors, forty-two percent of whom are tenure track and ninety-five percent of whom hold J.D.s, earn between $40,000 and $60,000 per year. Most instructors earn between $25,000 and $40,000. Only two schools responded that their full-time, non-tenure contract teachers make over $60,000. Schools who award tenure to legal writing professors offer salaries that range from only $40,000 to $80,000. Only one school reported offering over $80,000 to a full-time, tenure-track legal writing professor.

The salary gap between legal writing professors and other full-time faculty is increasing. In 1992, only twelve percent of schools reported that their faculty on average made over $30,000 more than their legal writing colleagues. In 1994, that number was fifty-one percent. That means that nearly forty percent more law schools have increased the disparity between legal writing professors' salaries and those of other professors. Even between clinicians and legal writing professors, the gap is sometimes wide. Such a

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122 This is the average range. 1994 Survey, supra note 9, at question 43. The most common salary is between $40,000 and $50,000 (25%); 14% of directors receive less than $40,000 and 20% receive over $60,000. Id.
123 Question 44 gives both the raw number and the percentage. See Appendix C, Graph 15.
124 13%. 1994 Survey, supra note 9, at question 43.
125 47% have salary ranges from $50,000 to $80,000; 20% have $60,000 to $70,000; and 13% have $70,000 to $80,000. Id.
In 1990, by comparison, 3% had salary ranges from $30,000 to $40,000; 17% from $40,000 to $50,000; 38% from $50,000 to $60,000; and 7% from $70,000 to $80,000. 1990 Survey, supra note 13, at question 52.
126 Id. In 1990, 2 schools reported full-time tenure track salaries over $80,000. Id. In 1992, that number was 3. 1992 Survey, supra note 9, at question 50.
127 1992 Survey, supra note 9, at question 44.
128 51% had over $30,000 difference. 1994 Survey, supra note 9, at question 55.
129 At 27% of schools, clinicians make $30,000 or more than their legal writing colleagues. At 25% of schools, they earn between $10,000 and $30,000 more, and at 40% of the schools, they make between $0 and $10,000 more. Id. at question 56. In 1992, 7% of schools paid clinicians $30,000 or more than they paid legal writing professors. Forty-eight percent paid between $0 and $10,000 more and 45% paid between $10,000 and $30,000 more. 1992 Survey, supra note 9, at question 45.
gap is hard to explain in objective terms. These relatively lower salaries are going to professors who have more experience than professors in previous years. Legal writing professors have an average range of four to seven years’ practice experience before coming to teaching. Generally, academic salary levels are based on years out of law school, a formula that seems to have been dropped in determining legal writing professors’ salaries. This kind of dualism is precisely what confronted African Americans and women who sought equality.

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180 59%. 1994 Survey, supra note 9, at question 42. It is most common for schools to use full-time contract track legal writing professors (44%) who have practiced between four and seven years before entering legal writing (59%). Id. In 1992 and 1990, it was also most common for schools to use full-time contract track professors who had practiced for four to seven years (57% and 55%). 1992 Survey, supra note 9, at questions 39 and 63-66; 1990 Survey, supra note 13, at 156.

181 “That profitable formula is most significant; it is precisely like the ‘equal but separate’ formula of the Jim Crow laws aimed at the North American Negroes. As is well known, this so-called equalitarian segregation has resulted only in the most extreme discrimination. The similarity noted is in no way due to chance, for whether it is a race, a caste, a class, or a sex that is reduced to a position of inferiority, the methods of justification are the same. . . . In both cases the dominant class bases its argument on a state of affairs that it has itself created.” Simone DeBouvier, The Second Sex 212 (1967). “If we are to gain understanding, we must get out of these ruts; we must discard the vague notions of superiority, inferiority, equality which have hitherto corrupted every discussion of the subject and start afresh.” Id. at 236. “The cult of true womanhood was a compound of four ideas: A sharp dichotomy between the home and the economic world outside that paralleled a sharp contrast between female and male natures, the designation of the home as the female’s only proper sphere, the moral superiority of woman, and the idealization of her function as mother. In the Victorian mind these conceptions were loosely connected with the older tradition of the female’s intellectual inferiority.” Barbara J. Harris, Beyond Her Sphere: Women and the Professions in American History 33 (1978).

“The statuses of men and women have been constructed around a whole series of dichotomous categories: the ‘one’ and the ‘other’, the public and private domains, work and home, rationality and emotionality, culture and nature, mind and body, autonomy and dependence, to name just a few. The first of each of these pairs tends to be associated with men and positively valued, while the second is associated with women and negatively valued. The interpretation of social reality in this way, as a series of opposites, leaves little room for gradation or overlapping categories. Thus women represent what men are not; thus reason and emotion are treated as incompatible, home is presented as the domain of women, the public world of politics the domain of men, and so on. What is the significance of this dichotomizing process for an understanding of power relations between the sexes? Are women and men to be understood as fundamentally different from each other, even as polar opposites? Or are the differences between them relatively minor compared with what they have in common?” The Open University, Defining Women: Social Institutions and Gender Divisions 3-4 (Linda McDowell & Rosemary Pringle, eds., 1992).

Can we not ask the same questions here? “Dualisms are very common motifs in western social and political thought — mind/body, nature/culture, emotion/reason, subject/object, public/private, individual/social, concrete/abstract, and so on. All of them should be approached with extreme caution because more often than not they line up with that fundamental dichotomy, male/female.” Id. at 31. In the field of law, this dichotomy emerges as “substantive” professors/legal writing professors.
2. Status Remains Low and More Women Fill Positions

This dualism affects not only salary but also power. Non-tenure-track legal writing professors are generally not allowed to vote in faculty meetings, though non-tenure-track clinicians are. Faculty are eligible for sabbaticals; legal writing professors are not. Similary, the female ghetto seems to be reemerging. For a short time, the number of male legal writing professors increased, but that number again has diminished since 1990: at twenty-five percent more schools, over half of the legal writing professors are female. As privileges and salaries are separated from the power sources, so-called “pink ghettos” appear.

What we have, then, is insurance against progress. First, legal writing professors have no power; tenure track faculty vote, clinicians sometimes vote, but legal writing professors rarely vote. The effects of this stripping of power are far-reaching for schools and their students. Legal writing professors have no decision-making power in designing and implementing the core curriculum, despite the permanent existence of writing courses in the first year. Committees, such as Placement, Appointments, and Academic Standards, have no legal writing professors as members, even though legal writing professors work most closely with first-year students. They are often expected to work closely with new faculty, too, and to be most keenly aware of new courses. Second, research, badly needed in this new field, is rendered almost impossible by the heavy workload and lack of sabbaticals. Third, the low status and salary in turn lower morale and may encourage legal writing professors to moonlight, leave the profession, or relegate it exclusively to women. The low status and salary also lower interest in

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132 58%. 1994 Survey, supra note 9, at question 52. This question was not previously asked.
133 76% Id. at question 53. In 1992, 71% of clinicians were allowed to vote in faculty meetings. 1992 Survey, supra note 9, at question 43. The question was not asked in 1990.
134 79%. 1994 Survey, supra note 9, at question 54. This question was not previously asked.
135 In 1994, 75% of school have greater than one-half female writing professors. 1994 Survey, supra note 9, at question 60. In 1992, 65% of schools had a majority of female writing professors. 1992 Survey, supra note 9, at question 49. In 1990, 60% did. 1990 Survey, supra note 13, at question 41.
136 Cf. Richard Chused, The Hiring and Retention of Minorities and Women on American Law School Faculties, 137 U. Pa. L. Rev. 537 (1988)(describing legal writing as a “pink ghetto" because it attracted more women than men). All schools reported no difference between the salaries for male and female instructors within the legal writing department. 1994 Survey, supra note 9, at question 60. It is the wide gap between faculty and legal writing professors that makes the job less attractive.
the field itself. And daily reminders of low status create poor relations with faculty members and decrease the chances of designing a unified curriculum.

This treatment of legal writing professors, a kind of taxation without representation,\textsuperscript{137} renders its worst damage on the students by sending a powerful message: writing is not important. Sending this message breaches professional educational ethics. Lawyers and scholars write for a living. Law schools are intentionally shutting out the people who assist them in doing this well.

3. The Higher the Tier, the Less Professionalized the Legal Writing Program

As all legal academicians know, each year law schools are rated and divided into tiers.\textsuperscript{138} While the surveys did not ask any questions relating to tiers, it was possible to examine the patterns that emerged by comparing the surveys to the 1995 ratings. Schools in the first, or highest, tier have fewer full-time legal writing professors.\textsuperscript{139} These schools are also less likely to allow legal writing professors to be eligible for sabbatical.\textsuperscript{140} The emphasis in these schools seems to be more on student help in teaching legal writing because the higher the tier, the more likely the schools are to have student teaching assistants comment on papers in the place of legal writing professors.\textsuperscript{141} And there is less emphasis on research, with schools in the top tier hiring fewer research assistants in the department than schools in other tiers.\textsuperscript{142} Schools in the first tier are more likely to grade legal writing by using a pass/fail or honors/pass/fail system.\textsuperscript{143} And the higher the tier, the more likely schools are to provide student help for first-year students, but the

\textsuperscript{137} The "taxation" here is the large chunk of salary that legal writing professors do not get. In other words, they pay quite a price to participate in legal academia. Yet they have no representation when voting on issues that may affect their own salaries or status; nor can they vote on the issues that affect the students with whom they work so closely.

\textsuperscript{138} This is done by a private corporation, \textit{U.S. News and World Reports}. The formula for rating law schools is controversial and complex, consisting of five categories: student selectivity, placement success, faculty resources and two separate measures of institutional reputation. \textit{The Top 25 Law Schools}, \textit{U.S. News & World Rep.}, Mar. 20, 1995, at 84. While many schools dispute the system and their standing, the profession at large honors these ratings, including law students and potential law students.

\textsuperscript{139} See Appendix D, Table 1.

\textsuperscript{140} See Appendix D, Table 2.

\textsuperscript{141} See Appendix D, Table 3.

\textsuperscript{142} See Appendix D, Table 4.

\textsuperscript{143} See Appendix D, Table 5.
less likely they are to provide other services for students.\textsuperscript{144}

This phenomenon, as seen through the current theoretical and practical lenses of legal writing, shows schools holding on to the old theories about teaching legal writing, namely, that legal discourse is simple enough to be taught by novices. That reluctance of first-tier schools to proceed as other schools have is reflected in very real terms: schools in the top tier are the least likely to have a tenure-track director,\textsuperscript{146} despite their ability to attract more men than women.\textsuperscript{146}

The surveys also showed that quite a few questions had similar distributions for top and bottom tiers, with those in the middle three tiers having similar programs, but different from those schools in the top and bottom tiers. The trend resembles a bell curve. This may be because schools in the top tier focus more on legal theory or do not feel the need to change; schools in the bottom tier may literally not be able to afford much change.\textsuperscript{147} Schools in the second through fourth tiers focus on the practical; they are more likely than schools in the first or fifth tiers to include closed packet research,\textsuperscript{148} document drafting,\textsuperscript{149} or pretrial briefs in the first year curriculum.\textsuperscript{150} These exercises emphasize writing those documents that new lawyers will encounter immediately. Schools in the second through fourth tiers are also less likely to include trial briefs or other speaking experiences, which again emphasize writing.\textsuperscript{151} Not surprisingly, then, schools in these tiers are more likely to require seminars in the second or third year\textsuperscript{152} and more likely to offer upper-level legal writing electives.\textsuperscript{153} Schools in tiers two through four also retain student teachers longer\textsuperscript{154} and assign

\textsuperscript{144} See Appendix D, Table 6.
\textsuperscript{145} The fifth tier is the next least likely. See Appendix D, Table 7.
\textsuperscript{146} Schools in the top tier are the most likely by far to have fewer than 50% female legal writing professors. See Appendix D, Table 8.
\textsuperscript{147} This is another similarity to apartheid or separate spheres. The most established try to hold onto the status quo and others try to emulate them, resulting in a perpetuation of the onerous system, despite its damaging effects on society as a whole.
\textsuperscript{148} See Appendix D, Table 9.
\textsuperscript{149} See Appendix D, Table 10.
\textsuperscript{150} See Appendix D, Table 11.
\textsuperscript{151} Id.
\textsuperscript{152} See Appendix D, Table 12.
\textsuperscript{153} There is some skew to the lower end. See Appendix D, Table 13. Those schools of tiers one and five that offer electives are more likely than schools in tiers two, three and four to offer appellate advocacy, but less likely to offer seminars or specialized writing courses as electives.
\textsuperscript{154} See Appendix D, Table 14.
fewer students to each legal writing professor. Schools in the middle tiers, then, require more writing and make available more advanced writing courses, more long-term assistance for writers, and more professional guidance.

In addition to revealing information about tiers, the surveys revealed distinctions between private and public schools. Private schools are requiring more semesters of legal writing than are public schools. Private schools also have more full-time legal writing professors than do state schools, and they pay them higher salaries. In general, then, legal writing professors fare better at private, mid-tier law schools.

4. Legal Writing Budgets Are An Insignificant Portion of the Law School Budget

Very few schools have significant budgets for their legal writing program. In fact, many schools appropriate nothing beyond salaries for legal writing. The vast majority of schools have yearly legal writing budgets, excluding salaries, of less than $50,000. If the average law school budget is $5,000,000, a low estimate, schools are devoting less than one percent of their resources to legal writing. Even with salaries added in, the percentage jumps to only about four or five percent. In this, there has been little change since 1990.

Of all of the statistics, this is the most telling. Historically, schools have promoted teaching legal writing on the cheap, and many law schools have yet to discover the newer theme: investment. Money invested now can be endowment later. Students who are introduced early to legal discourse, who are trained in it as musicians are in conservatory, will perform well. The more they prac-
tice in law school, the more likely they will be to perform well—if under the tutelage of experts. Schools that recognize this, that produce consistently good researchers and writers, will reap more than just the gratitude of their graduates. Of course, in the short run, exams will be better, research assistants will be better, and seminar papers will be more engaging. In the long run, capable graduates will recognize the value of their training, a value that breeds loyalty and endowments. The tradition of penny-pinching in legal writing must be broken, even in a time of budget slashing. To be stingy with legal writing is a bit like buying expensive seeds but cheap farm equipment: what comes up cannot be properly, productively harvested.

III. CREATING AN EVEN SHARPER IMAGE

As the surveys offer clearer, more detailed images of legal writing programs, as trends begin to emerge, and as schools adjust focus, we learn more about this legal writing galaxy. We know much more now than we did even eight years ago when these surveys were first conceived. We know that legal writing is a field of inquiry, that it attempts to define and characterize features of the legal discourse community, and that to do so requires models and methodology. We also know from the paucity of authority in the previous three footnotes that much more research needs to be done. Legal writing professors must both borrow appropriate theories from composition and linguistics experts and develop their own. These theories need to define the discourse community more specifically to maximize communicative competence. For example, researchers need to determine the legal discourse community’s features; to track the evolution of the legal community’s goals and requirements; to suggest how that evolution affects legal writing; to define the methods and mechanisms used by the community to provide information and feedback to each other and to audiences outside the community; to analyze how legal writers shift registers when addressing different audiences; to characterize the genres designed for specific uses within the community and how they differ; or to demonstrate how writing is used to measure competence.

183 See Stratman, supra note 111. Stratman suggests that it is indeed its own field, worthy of extensive study and research.

184 See Williams, supra note 111. See also Rideout and Ramsfield, supra note 4 at 56-61.

185 See id.
within the community. From what researchers discover about the discourse community, they must develop methodology. And from that methodology, they may redefine law curricula.

To do so, they need time and money, as do all academic researchers. This means that the growing population of legal writing experts needs to have the same trilogy of benefits as do other legal academicians: job security, research grants, and sabbaticals.

Information on how to create effective, long-lasting legal writing programs, indeed effective law school curricula, will come from that research. The images from these surveys hint at what that research will reveal: more required writing courses; more graded writing courses; more writing grades averaged in to the GPA; more diversity in writing course offerings; lower teacher-student ratios; more intense peer work; more use of resident experts in other disciplines, such as linguistics and composition; and more attention to the researching-and-writing-in-cyberspace explosion.

In the midst of that explosion, two future trends may emerge: more integration of writing with other courses and less use of revolving-wheel programs. As to the first, the research and developing methodology are likely to suggest that students gain more from projects jointly conceived and courses jointly taught. By experiencing the heuristic power of writing on the one hand, and the distinct use of writing as theory and law on the other hand, students will move further faster. They will self-teach more effectively and communicate more thoroughly via exams and papers. Students ought to, with vigilant methodology, leave law school self-aware as thinkers and communicators. Faculty ought not fear more work; the proper methodology will move their expert intervention from after-the-fact exam-reading to before-the-fact guidance. As to the second trend, revolving wheel programs, such as those using adjunct faculty and limiting legal writing instructor contracts, will die out because they are inherently temporary and inexpert. Faculty composition in such programs by definition changes rapidly, which means that some are always novices in legal writing methodology. Even if they are experienced, adjunct faculty are hard to monitor because they are either off-campus or job hunting. They are less

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168 Scholars elsewhere have been analyzing such problems in other discourse communities. See, e.g., Richard M. Cor, Toward a Grammar of Passages (1988); Deborah Schiffrin, Discourse Markers (1993); John M. Swales, Genre Analysis (Cambridge University Press 1990); Theo van Els, et al., Applied Linguistics and the Learning and Teaching of Foreign Languages (Wolters-Noordhoff bv 1984); Voices on Voice (Kathleen Blake Yancey, ed., National Council of Teachers of English 1994).
available to students, less united as a core of teachers. They may not have the time or the patience for developing or following methodology, preferring to teach as many novices do: only to their own learning style. And, of course, they are less likely to research and write about legal writing.

According to these surveys, at least two of the recommendations made six years ago have been implemented: the number of upper level writing courses and the amount of compensation for professionals have increased slightly. Most importantly, the field of legal writing has grown tremendously since 1990. Legal writing professors and the courses they teach are an integral part of the law school now. Their presence will infuse law school curricula with an increased awareness of the richness and complexity of legal discourse and the need to teach it steadily, monitor students' progress closely, and measure students' performances carefully. Still left, then, are the needs for more integration with all courses, more awareness of all of the manifestations of legal discourse—as speech, as logic, as writing.

And still needed is the wholesale acceptance into the legal academic community of legal writing professors. The trend toward intellectual apartheid is unwise, impractical, and unethical. Widening the gap between legal writing professors and other professors lacks the wisdom of a unified academic community, devoted to producing capable, competent lawyers. Separating legal writing professors from others is oddly impractical because it suggests that analyzing law and writing about it are separate activities. This is the kind of impractical separateness that some struggling attorneys experience: they cannot understand why, having received good grades from a good school, they are about to get fired from a good firm because they cannot write. All of us, in all law schools, must sharpen our own images. Together, we can create an intellectually egalitarian setting in which to study and perfect legal discourse.

IV. Conclusion

The Hubble telescope’s mirrors were ground imperfectly, but even then sent back useful photographs from space. Today's photographs, taken with corrected mirrors, have redefined our universe, our origins, our future. The first survey gave us some view of legal writing; these last two surveys may be returning us to our origins, after all. The laws of Hammurabi, the Magna Carta, and

187 See Ramsfield, supra note 3, at 131-34.
our constitution all had effect precisely because they were written down. No one focused on those historical moments as important because of writing "skills." They were important because the law itself became written, because law is writing.

Our need as lawyers and scholars to study written law, to write, and to do both well is endemic. These surveys tell us that our pursuit of excellence in writing is irrepressible. We can turn away from our origins as the scribes of society or we can embrace them. The sharper image these surveys offer is of legal writing as a galaxy of unexplored theories and methodology, not as the black hole it was previously thought to be. That galaxy, hidden in earlier, fuzzy images, has distinct features, complex constellations of discourse relationships, and devoted experts. We need those legal writing experts to help us redefine our legal education universe.
This is the second survey of the Legal Writing Institute. The survey is divided into four parts:

- Part I: Program Structure
- Part II: Professional Status
- Part III: Directors and Specialists
- Part IV: Descriptions

In Part II, please choose the colored sheet that best corresponds to your situation, and fill in only that sheet. In Part IV, please provide a description of your program so that results can be compiled for instructive and comparative purposes.

Please return the completed survey by Monday, August 17, 1992 to:

Jill J. Ramsfield
Georgetown University Law Center
600 New Jersey Ave. N.W.
Washington, D.C. 20001
(202) 662-9525
LEGAL RESEARCH AND WRITING QUESTIONNAIRE
July 1992

Name: ____________________________________________
School: __________________________________________

PART I. PROGRAM STRUCTURE

A. First Year Structure

1. How many students are in your school (J.D. students only)?
   a) 100 or fewer  f) 501 - 600  k) 1001 - 1100
   b) 101 - 200     g) 601 - 700  l) 1101 - 1200
   c) 201 - 300     h) 701 - 800  m) 1201 - 1300
   d) 301 - 400     i) 801 - 900  n) 1301 - 1400
   e) 401 - 500     j) 901 - 1000 o) over 1400

2. How many students are in your graduate school?
   a) 100 or fewer  f) 501 - 600  k) 1001 - 1100
   b) 101 - 200     g) 601 - 700  l) 1101 - 1200
   c) 201 - 300     h) 701 - 800  m) 1201 - 1300
   d) 301 - 400     i) 801 - 900  n) over 1300
   e) 401 - 500     j) 901 - 1000 o) no graduate program

3. What is the size of the first year class?
   a) 1 - 50        d) 201 - 300  g) 501 - 600
   b) 51 - 100      e) 301 - 400  h) over 600
   c) 101 - 200     f) 401 - 500

4. Your school is a:
   a) state school
   b) private school

5. How many semesters of Legal Research and Writing (LRW) are required?
   a) none, not required  d) three semesters
   b) one semester       e) four semesters
   c) two semesters      f) more than four semesters

6. When are students required to take LRW?
   a) all of first year only  c) second semester of first year only
   b) first semester of first year  d) all of first year plus part of another year
   please specify

7. How many semester credit hours are allocated to LRW?
   a) no credits       d) three credits
   b) one credit       e) four credits
   c) two credits      f) other

8. If legal research is taught separately, who teaches the course?
   a) librarians
   b) legal research professionals
   c) other
9. If legal research is taught separately, how many credit hours are allocated to it?
   a) no credits   b) two credits   c) other
   d) one credit   e) three credits

10. How is LRW graded?
    a) graded by letter averaged into GPA
    b) graded by letter not averaged into GPA
    c) graded by numbers averaged into GPA
    d) graded by numbers but not averaged into GPA
    e) graded pass/fail or S/U
    f) graded honors/pass/fail
    g) other

11. Is moot court part of the first year LRW course?
    a) yes
    b) no

12. Are the legal writing assignments coordinated with assignments in other first year courses?
    a) yes
    b) no

13. How many writing assignments are coordinated with assignments in other first year courses?
    a) none
    b) one assignment
    c) two assignments
    d) three assignments
    e) four assignments
    f) over four assignments

14. What other services are provided for first year students?
    a) tutorial
    b) students helping students
    c) other

15. How many professionals teach first year LRW?
    a) one
    b) two
    c) three
    d) four
    e) five or more

16. How many first year students are there for each LRW professional?
    a) 1 - 10
    b) 11 - 20
    c) 21 - 35
    d) 36 - 50
    e) 51 - 75
    f) 76 - 100
    g) 101 - 125
    h) 126 - 150
    i) over 150

17. How many times per week does the LRW professional meet with students?
    a) once a week
    b) twice a week
    c) three times a week
    d) once every other week
    e) other

18. How many first year LRW students are there for each LRW student instructor?
    a) 1 - 10
    b) 10 - 15
    c) 15 - 20
    d) 20 - 25

19. How many times per week do student instructors meet with students?
    a) once a week
    b) twice a week
    c) three times a week
    d) once every other week
8. First Year Content

20. What assignments are required in the legal research course?
   a) open library research  
   b) closed packet research  
   c) combination of open and closed packet research  
   d) research projects on specific tasks  
   e) legislative histories  
   f) administrative law research  
   g) Westlaw/Lexis training  
   h) citations  
   i) other

21. What assignments are required in the legal writing course?
   a) client letters  
   b) legal memoranda  
   c) pretrial briefs  
   d) final briefs  
   e) appellate briefs  
   f) drafting documents  
   g) drafting legislation  
   h) other

22. What speaking skills are covered in the first year LRW course?
   a) pretrial motion argument  
   b) appellate brief argument  
   c) objective argument (e.g., report to partner on research findings)  
   d) in-class presentations  
   e) other

23. Do you require rewrites of assignments?
   a) yes, all assignments require at least one rewrite  
   b) yes, but not all - please specify percentage  
   c) no

24. How many times do students receive written feedback per year?
   a) less than two  
   b) two  
   c) three  
   d) four

25. Who comments on papers?
   a) LRW professionals  
   b) student assistants  
   c) both  
   d) fellow students  
   e) other

26. If you answered both to the above, on what percentage of the papers do LRW professionals comment?
   a) 0 - 25%  
   b) 26 - 50%  
   c) 51 - 75%  
   d) 76 - 100%

27. How many conferences with students are held per semester?
   a) less than two  
   b) two  
   c) three  
   d) four

28. Who conducts conferences with students?
   a) professionals  
   b) student assistants  
   c) both  
   d) other

29. If you answered both to the above, what percentage of conferences are conducted by the LRW professionals?
   a) 0 - 25%  
   b) 26 - 50%  
   c) 51 - 75%  
   d) 76 - 100%
C. Upper Level Writing Courses (If not applicable please check ___)

30. Who teaches upper level LRW courses?
   a) LRW professionals
   b) full-time faculty
   c) adjunct faculty

31. How many students are there for each faculty member for upper level courses?
   a) 1 - 10          c) 16 - 20          e) over 25
   b) 11 - 15         d) 21 - 25

32. What second or third year courses on LRW are required?
   a) none required
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) specialized writing courses
   g) other ______________

33. If there are required courses, do papers have to be a specific length?
   a) yes
   b) no
   c) not applicable

34. If so, of what length are the papers?
   a) 1 - 10 pages
   b) 11 - 20 pages
   c) 21 - 30 pages
   d) 31 - 40 pages
   e) over 40 pages
   f) not applicable

35. In the required courses, do professors comment on drafts?
   a) yes
   b) no
   c) not applicable

36. If so, on how many drafts do students receive comments?
   a) one
   b) two
   c) one draft and the final
   d) final draft only

37. What upper LRW courses are offered as electives?
   a) none
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) legislative drafting
   g) specialized writing courses
   (please specify ______________)
PART II. PROFESSIONAL STATUS

38. How many full-time LRW professionals are employed by your school?
   a) 1  c) 4 - 5  e) 8 - 9
   b) 2 - 3  d) 6 - 7  f) 10 or more

39. On the average, how many years do LRW professionals practice before entering the field of LRW?
   a) 0 - 2  c) 6 - 10
   b) 3 - 5  d) over 10

40. On the average, how many years do LRW professionals remain on the faculty?
   a) 1 year  d) 4 years  g) 7 years
   b) 2 years  e) 5 years  h) over 7 years
   c) 3 years  f) 6 years

41. Is there any imposed limit on the number of years LRW professionals may stay?
   a) 1 year  d) 4 years  g) 7 years
   b) 2 years  e) 5 years  h) over 7 years
   c) 3 years  f) 6 years

42. Are LRW professionals allowed to vote in faculty meetings?
   a) yes
   b) no

43. Are clinicians allowed to vote in faculty meetings?
   a) yes
   b) no

44. What is the difference between the mean salary of faculty members and LRW professionals?
   a) 0 - $10,000  e) $25,001 - $25,000
   b) $10,001 - $15,000  f) $30,001 - $35,000
   c) $15,001 - $20,000  g) over $35,000
   d) $20,001 - $25,000

45. What is the difference between the mean salary of clinicians and LRW professionals?
   a) 0 - $10,000  e) $25,001 - $25,000
   b) $10,001 - $15,000  f) $30,001 - $35,000
   c) $15,001 - $20,000  g) over $35,000
   d) $20,001 - $25,000

46. Do LRW professionals teach more students than full-time faculty?
   a) fewer students, please indicate number ______________
   b) more students, please indicate number ______________

47. Do LRW professionals teach more courses than full-time faculty?
   a) fewer courses, please indicate number ______________
   b) more courses, please indicate number ______________
48. Do LRW professionals teach courses other than LRW?
   a) yes, please indicate number of courses and title(s)
   ____________________________________________
   b) no, they choose not to
   c) no, they are not allowed to

49. What is the percentage of LRW professionals (excluding student assistants)?
   a) 0 - 25%
   b) 26 - 50%
   c) 51 - 75%
   d) 76 - 100%

50. Are female and male LRW professionals paid the same salary for equivalent years of employment as LRW professionals?
   a) yes
   b) no, please specify difference _______________________

51. How many research assistants are hired?
   a) one
   b) two
   c) three
   d) four or more
52. What is the salary of tenured faculty teaching LRW?
   a) $0 - 30,000
   b) $30,001 - 40,000
   c) $40,001 - 50,000
   d) $50,001 - 60,000
   e) $60,001 - 70,000
   f) $70,001 - 80,000
   g) over $80,000 please specify

53. What percentage of your teaching load is LRW?
   a) 0 - 5%
   b) 6 - 10%
   c) 11 - 15%
   d) 16 - 20%
   e) 21 - 25%
   f) over 25%

54. Do you teach LRW on a rotating basis?
   a) yes
   b) no

55. If yes, how often do you rotate?
   a) every other semester
   b) every other year
   c) every two years
   d) every four or more years

56. What is the average yearly LRW budget (not including salaries)?
   a) $0 - $50,000
   b) $50,001 - 100,000
   c) $100,001 - 150,000
   d) over $150,000 please specify

57. Do you use student assistants for teaching purposes?
   a) yes
   b) no (go on to Part III)

58. If yes, what level are the students?
   a) first
   b) second
   c) third
   d) graduate
   e) other

59. What is the compensation for student instructors?
   a) salary - please specify
   b) credits - please specify
   c) combination of salary and credits - please specify
   d) other

60. Do the student instructors receive a tuition waiver?
   a) yes
   b) no

61. How many semesters are students allowed to teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - please specify

62. On the average, how many semesters do students teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - please specify
<table>
<thead>
<tr>
<th>Full-Time Professionals On Non-Tenure Track Contracts</th>
</tr>
</thead>
</table>

63. What is the salary for LRW professionals?  
- a) $15,000 - 20,000  
- b) $20,001 - 25,000  
- c) $25,001 - 30,000  
- d) $30,001 - 35,000  
- e) $35,001 - 40,000  
- f) $40,001 - 45,000  
- g) $45,001 - 50,000  
- h) $50,001 - 55,000  
- i) $55,001 - 60,000  
- j) over $60,000 - please specify  

64. How long are the contracts?  
- a) one year  
- b) two years  
- c) three years  
- d) four years  
- e) five years  
- f) over five years - please specify  

65. Are the contracts renewable?  
- a) yes, please specify number of years  
- b) no, please specify  

66. What is the average yearly LRW budget (not including salaries)?  
- a) $0 - $50,000  
- b) $50,001 - 100,000  
- c) $100,001 - 150,000  
- d) over $150,000  

67. Do you use student assistants for teaching purposes?  
- a) yes  
- b) no (go on to Part III)  

68. If yes, what level are the students?  
- a) first  
- b) second  
- c) third  
- d) graduate  
- e) other  

69. What is the compensation for student instructors?  
- a) salary - please specify  
- b) credits - please specify  
- c) combination of salary and credits - please specify  
- d) other  

70. Do the student instructors receive a tuition waiver?  
- a) yes  
- b) no  

71. How many semesters are students allowed to teach LRW?  
- a) one  
- b) two  
- c) three  
- d) four  
- e) five or more - please specify  

72. On the average, how many semesters do students teach LRW?  
- a) one  
- b) two  
- c) three  
- d) four  
- e) five or more - please specify
73. What is the salary for LRW adjuncts?
   a) $0 - 1,000  
   b) $1,001 - 2,000  
   c) $2,001 - 3,000  
   d) $3,001 - 4,000  
   e) $4,001 - 5,000  
   f) $5,001 - 6,000  
   g) $6,001 - 7,000  
   h) over $7,000

74. How long are the contracts?
   a) one year  
   b) two years  
   c) three years  
   d) four years  
   e) five years  
   f) over five years - please specify

75. Are the contracts renewable?
   a) yes  
   b) no

76. What is the average yearly LRW budget (not including salaries)?
   a) $0 - 50,000  
   b) $50,001 - 100,000  
   c) $100,001 - 150,000  
   d) over $150,000

77. Do you use student assistants for teaching purposes?
   a) yes  
   b) no (go on to Part III)

78. If yes, what level are the students?
   a) first  
   b) second  
   c) third  
   d) graduate  
   e) other

79. What is the compensation for student instructors?
   a) salary - please specify  
   b) credits - please specify  
   c) combination of salary and credits - please specify  
   d) other

80. Do the student instructors receive a tuition waiver?
   a) yes  
   b) no

81. How many semesters are students allowed to teach LRW?
   a) one  
   b) two  
   c) three  
   d) four  
   e) five or more - please specify

82. On the average, how many semesters do students teach LRW?
   a) one  
   b) two  
   c) three  
   d) four  
   e) five or more - please specify
### Law Students Only

83. Who supervises the students?
- a) tenure track faculty - non LRW professional
- b) tenure track - LRW professional
- c) contract track faculty - non LRW professional
- d) contract track faculty - LRW professional
- e) no one
- f) other ______________________

84. Does the supervisor have a J.D.?
- a) yes
- b) no

85. What level are the students?
- a) first
- b) second
- c) third
- d) other ______________________

86. What is the compensation for student instructors?
- a) salary - please specify ________________
- b) credits - please specify ________________
- c) combination of salary and credits - please specify ________________
- d) other ______________________

87. Do the student instructors receive a tuition waiver?
- a) yes
- b) no

88. How many semester credit hours do law student instructors receive?
- a) one
- b) two
- c) three
- d) four

89. What is the percentage of female graduate student instructors?
- a) 0 - 25%
- b) 26 - 50%
- c) 51 - 75%
- d) 76 - 100%

90. How many semesters are students allowed to teach LRW?
- a) one
- b) two
- c) three
- d) four
- e) five or more - please specify ________________

91. On the average, how many semesters do students teach LRW?
- a) one
- b) two
- c) three
- d) four
- e) five or more - please specify ________________

92. What is your average yearly budget (not including salaries)?
- a) $0 - 50,000
- b) $50,001 - 100,000
- c) $100,001 - 150,000
- d) over $150,000
Graduate Law Students Only

93. Who supervises the students?
   a) tenure track faculty - non LRW professional
   b) tenure track - LRW professional
   c) contract track faculty - non LRW professional
   d) contract track faculty - LRW professional
   e) no one
   f) other

94. Does the supervisor have a J.D.?
   a) yes
   b) no

95. What is the compensation for student instructors?
   a) salary - please specify
   b) credits - please specify
   c) combination of salary and credits - please specify
   d) other

96. Do the graduate student instructors receive a tuition waiver?
   a) yes
   b) no

97. What is the salary for graduate student LRW instructors?
   a) under $10,000
   b) $10,001 - 15,000
   c) $15,001 - 20,000
   d) over $20,000

98. What is the percentage of female graduate student instructors?
   a) 0 - 25%
   b) 26 - 50%
   c) 51 - 75%
   d) 76 - 100%

99. How many semesters are students allowed to teach LRW?
   a) one
   b) two
   c) three
   d) four
   e) five or more - please specify

100. On the average, how many semesters do students teach LRW?
    a) one
    b) two
    c) three
    d) four
    e) five or more - please specify

101. What is your average yearly budget (not including salaries)?
    a) $0 - 50,000
    b) $50,001 - 100,000
    c) $100,001 - 150,000
    d) over $150,000
PART III. DIRECTORS AND SPECIALISTS

102. Is there a separate Director of LRW?
   a) yes
   b) no

103. What is the Director’s background?
   a) J.D.
   b) Ph.D. in English
   c) J.D. and Ph.D. in English
   d) Other ________________________________

104. Is the Director of LRW tenure track?
   a) yes
   b) no

105. What is the salary for the Director?
   a) $0 - $20,000
   b) $20,001 - $30,000
   c) $30,001 - $40,000
   d) $40,001 - $50,000
   e) $50,001 - $60,000
   f) $60,001 - $70,000
   g) $70,001 - $80,000
   h) over $80,000

106. Does the Director teach?
   a) full LRW load
   b) part LRW load, please specify ________________________________
   c) part LRW load plus other courses, please specify ________________________________
   d) only other courses, please specify ________________________________
   e) no
   f) Other, please specify ________________________________

107. Do non-J.D., non-Ph.D. writing specialists work in the program?
   a) no
   b) yes, part time, please specify number of individuals __
   c) yes, full-time, please specify number of individuals __

108. Do non-J.D., Ph.D. writing specialists work in the program?
   a) no
   b) yes, part time, please specify number of individuals __
   c) yes, full-time, please specify number of individuals __

109. Do J.D., Ph.D. writing specialists work in the program?
   a) no
   b) yes, part time, please specify number of individuals __
   c) yes, full-time, please specify number of individuals __
PART IV. DESCRIPTIONS

110. Below, please write a summary of your first year course. Please include 1) length of course; 2) credits allotted; 3) research assignments given; 4) writing assignments given; and 5) rewrites and conferences required.
For purposes of this survey, the term "LRW teacher" encompasses anyone whose primary responsibility is to teach LRW courses, including professors, associate professors, and instructors. The term does not encompass adjuncts, student teaching assistants, or tenure-track faculty who teach courses other than LRW courses.
APPENDIX B

List of Schools Participating in the Surveys

1992 Survey Participants

University of Akron, C. Blake McDowell Law Center
The University of Alabama School of Law
Albany Law School, Union University
American University, Washington College of Law
University of Arizona College of Law
Arizona State University College of Law
University of Arkansas, Fayetteville, Leflar Law Center
University of Arkansas at Little Rock School of Law
University of Baltimore School of Law
Baylor University School of Law
Boston College Law School
Boston University School of Law
University of Bridgeport School of Law
Brigham Young University, J. Reuben Clark Law School
Brooklyn Law School
University of California at Berkeley School of Law
University of California at Davis School of Law
University of California, Hastings College of the Law
University of California at Los Angeles School of Law
California Western School of Law
Capital University Law School
Case Western Reserve University Law School
The Catholic University of America School of Law
University of Chicago Law School
University of Cincinnati College of Law
Cleveland Marshall College of Law
Cleveland State University, Cleveland-Marshall College of Law
University of Colorado School of Law
Columbia University School of Law
University of Connecticut School of Law
Cornell Law School
Creighton University School of Law
Cumberland School of Law of Samford University
University of Dayton School of Law
University of Denver College of Law
De Paul University College of Law
University of Detroit Mercy School of Law
Detroit College of Law at Michigan State University
Dickinson School of Law
Drake University Law School
Duke University School of Law
Duquesne University School of Law
Emory University School of Law
University of Florida, College of Law
Florida State University College of Law
Fordham University School of Law
George Mason University School of Law
Georgetown University Law Center
George Washington University National Law Center
University of Georgia School of Law
Golden Gate University School of Law
Gonzaga University School of Law
Hamline University School of Law
Harvard University Law School
University of Hawaii William S. Richardson School of Law
University of Houston Law Center
Howard University School of Law
University of Idaho College of Law
University of Illinois College of Law
Illinois Institute of Technology - Chicago-Kent College of Law
Indiana University School of Law, Bloomington
Indiana University School of Law, Indianapolis
University of Iowa College of Law
University of Kansas School of Law
University of Kentucky College of Law
Lewis and Clark Northwestern School of Law
Louisiana State University Law Center
University of Louisville School of Law
Loyola University School of Law, Chicago
Loyola Law School
Loyola University School of Law, New Orleans
McGeorge School of Law, University of the Pacific
University of Maine School of Law
Marquette University Law School
John Marshall Law School
University of Maryland School of Law
Mercer University Law School
University of Miami School of Law
The University of Michigan Law School
University of Minnesota Law School
Mississippi College School of Law
University of Mississippi School of Law
University of Missouri-Columbia, School of Law
University of Missouri-Kansas City School of Law
William Mitchell College of Law
University of Montana School of Law
University of Nebraska College of Law
University of New Mexico School of Law
State University of New York at Buffalo School of Law
New York Law School
New York University School of Law
University of North Carolina School of Law
University of North Dakota School of Law
Northeastern University School of Law
Northern Illinois University College of Law
Northern Kentucky University, Salmon P. Chase College of Law
Northwestern University School of Law
Notre Dame Law School
Nova Southeastern University Shepard Broad Law Center
Ohio Northern University, Pettit College of Law
The Ohio State University College of Law
University of Oklahoma Law Center
University of Oregon School of Law
Pace University School of Law
University of Pennsylvania Law School
Pepperdine University School of Law
University of Pittsburgh School of Law
University of Puerto Rico School of Law
University of Puget Sound School of Law
University of Richmond The T.C. Williams School of Law
Rutgers, The State University of New Jersey School of Law,
Camden
Rutgers, The State University of New Jersey, S. I. Newhouse
Center for Law & Justice
St. John's University School of Law
Saint Louis University School of Law
St. Mary's University of San Antonio School of Law
University of San Diego School of Law
University of San Francisco School of Law
Santa Clara University School of Law
Seton Hall University School of Law
University of South Carolina School of Law
University of South Dakota School of Law
University of Southern California Law Center
Southern Illinois University School of Law
Southern Methodist University School of Law
Southwestern University School of Law
Stanford Law School
Stetson University College of Law
Suffolk University Law School
Syracuse University College of Law
Temple University School of Law
University of Tennessee College of Law
The University of Texas School of Law
Texas Tech University School of Law
University of Toledo College of Law
Tulane University School of Law
The University of Tulsa College of Law
University of Utah College of Law
Valparaiso University School of Law
Vanderbilt University School of Law
Vermont Law School
Villanova University School of Law
University of Virginia School of Law
Wake Forest University School of Law
Washburn University School of Law
Washington and Lee University School of Law
University of Washington School of Law
Washington University School of Law
Wayne State University Law School
West Virginia University College of Law
Western New England College School of Law
Whittier Law School
Widener University School of Law
Willamette University College of Law
College of William and Mary, Marshall-Whyte School of Law
University of Wisconsin Law School
University of Wyoming College of Law
Yale Law School
Yeshiva University, Benjamin N. Cardozo School of Law
1994 Survey Participants

Albany Law School, Union University
American University, Washington College of Law
University of Arizona College of Law
Arizona State University College of Law
University of Arkansas, Fayetteville, Leflar Law Center
University of Arkansas at Little Rock Law School
University of Baltimore School of Law
Boston College Law School
Brigham Young University, J. Reuben Clark Law School
Brooklyn Law School
University of California at Berkeley School of Law
University of California at Davis School of Law
University of California, Hastings College of the Law
California Western School of Law
Case Western Reserve University Law School
The Catholic University of America School of Law
University of Central Florida
University of Chicago Law School
University of Cincinnati College of Law
Cleveland State University, Cleveland-Marshall College of Law
University of Colorado School of Law
Creighton University School of Law
Cumberland School of Law of Samford University
University of Dayton School of Law
University of Denver College of Law
DePaul University College of Law
Drake University Law School
Duke University School of Law
Emory University School of Law
University of Florida, College of Law
Florida State University College of Law
Fordham University School of Law
George Washington University National Law Center
Georgetown University Law Center
Georgia State University College of Law
Gonzaga University School of Law
Hamline University School of Law
Harvard University Law School
University of Houston Law Center
Howard University School of Law
University of Idaho College of Law
University of Illinois College of Law
Illinois Institute of Technology—Chicago-Kent College of Law
Indiana University School of Law, Bloomington
Indiana University School of Law, Indianapolis
John Marshall Law School
Lewis and Clark Northwestern School of Law
University of Louisville School of Law
Loyola Law School
University of Maine School of Law
Marquette University Law School
University of Maryland School of Law
McGeorge School of Law, University of the Pacific
Mercer University Law School
University of Miami School of Law
The University of Michigan Law School
University of Minnesota Law School
University of Mississippi School of Law
University of Missouri - Columbia, School of Law
University of Missouri - Kansas City, School of Law
William Mitchell College of Law
University of Nebraska College of Law
New England School of Law
University of New Mexico School of Law
New York Law School
University of North Carolina School of Law
University of North Dakota School of Law
Northeastern University School of Law
Northern Illinois University College of Law
Northwestern University School of Law
Nova Southeastern University Shepard Broad Law Center
Ohio Northern University, Pettit College of Law
The Ohio State University College of Law
Oklahoma City University School of Law
University of Oregon School of Law
Pace University School of Law
University of Pennsylvania Law School
Pepperdine University School of Law
University of Pittsburgh School of Law
University of Puerto Rico School of Law
Quinnipiac College School of Law (formerly University of Bridgeport)
University of Richmond, The T.C. Williams School of Law
Roger Williams University School of Law
Rutgers, The State University of New Jersey, S. I. Newhouse
   Center for Law and Justice
St. John’s University School of Law
Saint Louis University School of Law
St. Mary's University of San Antonio School of Law
University of San Diego School of Law
University of San Francisco School of Law
San Joaquin University Law School
Seattle University School of Law (formerly Puget Sound)
Seton Hall University School of Law
University of South Carolina School of Law
University of South Dakota School of Law
South Texas College of Law
University of Southern California Law Center
Southern Illinois University School of Law
State University of New York at Buffalo School of Law
Stetson University College of Law
Suffolk University Law School
Temple University School of Law
University of Tennessee College of Law
The University of Texas School of Law
Texas Tech University School of Law
Texas Wesleyan University School of Law
Thomas H. Cooley Law School
University of Toledo College of Law
Touro College Jacob D. Fuchsberg Law Center
Tulane University School of Law
The University of Tulsa College of Law
University of Utah College of Law
Valparaiso University School of Law
Vermont Law School
Villanova University School of Law
University of Virginia School of Law
Wake Forest University School of Law
Washburn University School of Law
University of Washington School of Law
Washington University School of Law
Washington and Lee University School of Law
Wayne State University Law School
West Los Angeles School of Law
West Virginia University College of Law
Western New England College School of Law
Western State University College of Law
Whittier Law School
Widener University School of Law
Williamette University College of Law
University of Wyoming College of Law
**PART I. PROGRAM STRUCTURE**

**A. First-Year Structure**

1. How many students are in your school (J.D. students only)?
   - a) 100 or fewer
   - b) 101 - 200
   - c) 201 - 300
   - d) 301 - 400
   - e) 401 - 500
   - f) 501 - 600
   - g) 601 - 700
   - h) 701 - 800

2. How many students are in your graduate school?
   - i) 801 - 900
   - j) 901 - 1000
   - k) 1001 - 1100
   - l) 1101 - 1200
   - m) 1201 - 1300
   - n) 1301 - 1400
   - o) over 1400

3. What is the size of the first-year class?
   - a) 1 - 50
   - b) 51 - 100
   - c) 101 - 200
   - d) 201 - 300
   - e) 301 - 400
   - f) 401 - 500
   - g) 501 - 600
   - h) over 600

4. Your school is which of the following?
   - a) state school
   - b) private school
5. Your school is located in what region?
   a) Northeast          g) Southwest
   b) Mid-Atlantic       h) West
   c) Southeast          i) Alaska
   d) Midwest            j) Hawaii
   e) South              k) Canada
   f) Northwest          l) Other

6. How many semesters of Legal Research and Writing (LRW) are required?
   a) none                e) four semesters
   b) one semester        f) more than four semesters
   c) two semesters       g) other
   d) three semesters

7. When are students required to take LRW?
   a) all of the first year only
   b) first semester of the first year
   c) second semester of the first year only
   d) all of the first plus part of another year

8. How many semester credit hours are allocated to LRW?
   a) no credits
   b) one credit
   c) two credits
   d) three credits
   e) four credits
   f) other

9. If legal research is taught separately, who teaches the course?
   a) librarians
   b) legal research instructors only
   c) other

10. If legal research is taught separately, how many credit hours are allocated to it?
    a) no credits
    b) one credit
    c) two credits
    d) three credits
    e) other
11. How is LRW graded?
   - a) graded by letter averaged into GPA
   - b) graded by letter but not averaged into GPA
   - c) graded by numbers averaged into GPA
   - d) graded by numbers but not averaged into GPA
   - e) graded pass/fail or s/u
   - f) graded honors/pass/fail
   - g) other

12. Is moot court part of the first-year LRW course?
   - a) yes
   - b) no

13. Are legal writing assignments coordinated with assignments in other first-year courses?
   - a) yes
   - b) no

14. If yes, how many writing assignments are coordinated with assignments in other first-year courses?
   - a) none
   - b) one assignment
   - c) two assignments
   - d) three assignments
   - e) four assignments
   - f) over four assignments

15. What other services are provided for first-year students?
   - a) tutorial
   - b) student teaching assistants helping students
   - c) other

16. How many individuals teach first-year LRW (excluding part-time student teaching assistants)?
   - a) one
   - b) two
   - c) three
   - d) four
   - e) five or more

17. How many full-time LRW teachers (total) are employed by your school?
   - a) 1
   - b) 2 - 3
   - c) 4 - 5
   - d) 6 - 7
   - e) 8 - 9
   - f) 10 or more
18. How many first-year students are there for each LRW teacher?
   a) 1 - 10  
   b) 11 - 20  
   c) 21 - 35  
   d) 36 - 50  
   e) 51 - 75

19. How many times per week does the LRW teacher meet with students?
   a) once a week  
   b) twice a week  
   c) three times a week

20. How many first-year LRW students are there for each LRW student teaching assistant?
   a) 1 - 10  
   b) 10 - 15  
   c) 15 - 20  
   d) 20 - 25

21. How many times per week do student teaching assistants meet with students?
   a) once a week  
   b) twice a week  
   c) three times a week

B. First-Year Content

22. What research assignments are required in the first-year LRW course?
   a) open library research  
   b) closed packet research  
   c) combination of open and closed packet research  
   d) research projects on specific tasks

23. What writing assignments are required in the first-year LRW course?
   a) client letters  
   b) legal memoranda  
   c) pretrial briefs  
   d) trial briefs  
   e) appellate briefs  


24. What speaking skills are covered in the first-year LRW course?
   __ a) pretrial motion argument
   __ b) appellate brief argument
   __ c) objective argument (e.g. report to partner on research findings)
   __ d) in-class presentations
   __ e) other

25. Do you require rewrites of assignments?
   __ a) yes, all assignments require at least one rewrite
   __ b) yes, but not all: ___ %
   __ c) no

26. How many times do students receive written feedback per year?
   __ a) less than two
   __ b) two
   __ c) three
   __ d) four
   __ e) over four

27. Who comments on papers?
   __ a) LRW teachers
   __ b) student teaching assistants
   __ c) both
   __ d) fellow students
   __ e) other

28. If you answered both to the above, on what percentage of the papers do LRW teachers comment?
   __ a) 0 - 25%
   __ b) 26 - 50%
   __ c) 51 - 75%
   __ d) 76 - 100%

29. How many conferences with students are held per semester?
   __ a) less than two
   __ b) two
   __ c) three
   __ d) four
   __ e) over four

30. Who conducts conferences with students?
   __ a) LRW teachers
   __ b) student teaching assistants
   __ c) both
   __ d) other

31. If you answered both to the above, what percentage of conferences are conducted by the LRW teachers?
   __ a) 0 - 25%
   __ b) 26 - 50%
   __ c) 51 - 75%
   __ d) 76 - 100%
C. Upper-Level Courses Taught Through LRW Departments

32. What second- or third-year courses on LRW are required in the LRW department?
   a) none required
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) specialized writing courses
   g) other

33. How many students are there for each LRW teacher of upper-level courses?
   a) 1 - 10
   b) 11 - 15
   c) 16 - 20
   d) 21 - 25
   e) over 25

34. What upper-level LRW courses are offered as electives by the LRW department?
   a) none
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars or workshops
   f) specialized writing courses
   g) other

35. In the required courses, do LRW teachers comment on drafts?
   a) yes
   b) no
   c) not applicable

36. If so, on how many drafts do students receive comments?
   a) one
drafts
   b) two
drafts
   c) one draft and the final
draft
   d) final draft only

D. Upper-Level Courses Not Taught Through LRW Departments

37. What second- or third-year courses on LRW are required in departments other than the LRW department?
   a) none required
   b) legal drafting
   c) advanced research
   d) appellate advocacy
   e) seminars
   f) specialized writing courses
   g) other

38. If there are required courses, do papers have to be a specific length?
   a) yes
   b) no
   c) not applicable
39. If so, of what length are the papers?
   ___ a) 1 - 10 pages
   ___ b) 11 - 20 pages
   ___ c) 21 - 30 pages
   ___ d) 31 - 40 pages
   ___ e) over 40 pages
   ___ f) not applicable

40. What upper-level LRW courses are offered as electives by departments other than the LRW department?
   ___ a) none
   ___ b) legal drafting
   ___ c) advanced research
   ___ d) appellate advocacy
   ___ e) seminars or workshops
   ___ f) specialized writing courses
   ___ g) other

PART II. PROFESSIONAL STATUS

   A. LRW Teachers

41. Who teaches LRW courses?
   ___ a) full-time tenure-track faculty - LRW teacher
   ___ b) tenure-track faculty - non-LRW teacher
   ___ c) full-time contract-track faculty - LRW teacher
   ___ d) full-time contract-track faculty - non-LRW teacher
   ___ e) adjuncts
   ___ f) students teaching exclusively
   ___ g) other

42. On the average, how many years do LRW teachers practice before entering the field of LRW?
   ___ a) 0 - 3
   ___ b) 4 - 7
   ___ c) 7 - 10
   ___ d) over 10

43. If you use them, what is the salary range for full-time tenure-track LRW teachers?

44. If you use them, what is the salary range for full-time contract-track LRW teachers?

45. If you use them, what is the salary range for adjunct faculty?

46. If you use them, what is the salary range for students who have sole responsibility for teaching LRW?
47. How long are the contracts for contract-track LRW teachers?
   a) 1 year  
   b) 2 years  
   c) 3 years  
   d) 4 years  
   e) 5 years  
   f) over 5 years

48. Are the contracts renewable?
   a) yes  
   b) no

49. On the average, how many years do LRW teachers remain on the faculty?
   a) 1 year  
   b) 2 years  
   c) 3 years  
   d) 4 years  
   e) 5 years  
   f) 6 years  
   g) 7 years  
   h) over 7 years

50. Is there any imposed limit on the number of years LRW teachers may stay?
   a) 1 year  
   b) 2 years  
   c) 3 years  
   d) 4 years  
   e) 5 years  
   f) 6 years  
   g) 7 years  
   h) over 7 years  
   i) none

51. Are full-time tenure-track faculty allowed to vote in faculty meetings?
   a) yes  
   b) no

52. Are full-time non-tenure-track faculty allowed to vote in faculty meetings?
   a) yes  
   b) no

53. Are clinicians allowed to vote in faculty meetings?
   a) yes  
   b) no

54. Are LRW teachers eligible for sabbaticals?
   a) yes  
   b) no

55. What is the difference between the mean salaries of faculty members and LRW teachers?
   a) 0 - $10,000  
   b) $10,001 - $15,000  
   c) $15,001 - $20,000  
   d) $20,001 - $25,000  
   e) $25,001 - $30,000  
   f) over $30,000
56. What is the difference between the mean salaries of clinicians and LRW teachers?

- a) $0 - $10,000
- b) $10,001 - $15,000
- c) $15,001 - $20,000
- d) $20,001 - $25,000
- e) $25,001 - $30,000
- f) over $30,000

57. How many students do LRW teachers teach compared to the number taught by other full-time faculty members?

- a) in excess of 45 more students
- b) 31 - 45 more students
- c) 16 - 30 more students
- d) 1 - 15 more students
- e) same number of students
- f) 1 - 15 fewer students
- g) 16 - 30 fewer students
- h) 31 - 45 fewer students
- i) in excess of 45 fewer students

58. How many courses do LRW teachers teach compared to the number taught by other full-time faculty members?

- a) in excess of 4 more courses
- b) 3 - 4 more courses
- c) 1 - 2 more courses
- d) same number of courses
- e) 1 - 2 fewer courses
- f) 3 - 4 fewer courses
- g) in excess of 4 fewer courses

59. Do LRW teachers teach courses other than LRW?

- a) yes
- b) no, they choose not to
- c) no, they are not allowed to

60. What is the percentage of female LRW teachers (excluding student assistants)?

- a) 0 - 25%
- b) 26 - 50%
- c) 51 - 75%
- d) 76 - 100%

61. Are female and male LRW teachers paid the same salary for equivalent years of employment as LRW teachers?

- a) yes
- b) no – Discrepancy

62. How many research assistants are hired within the LRW department?

- a) one
- b) two
- c) three
- d) four or more

63. What percentage of the LRW teaching load consists of teaching LRW courses?

- a) 0 - 25%
- b) 26 - 50%
- c) 51 - 75%
- d) 76 - 99%
- e) 100%
64. Are LRW courses taught on a rotation basis?  
   — a) yes  
   — b) no

65. If yes, how often do teachers rotate?  
   — a) every other semester  
   — b) every other year  
   — c) every two years  
   — d) every four or more years

66. What is the average, yearly departmental LRW budget (not including salaries)?  
   — a) $0 - $50,000  
   — b) $50,000 - $100,000  
   — c) $100,000 - $150,000  
   — d) over $150,000

67. Do you use students to assist in teaching LRW?  
   — a) yes  
   — b) no (if no, proceed to section C)

68. If yes, at what level are these student teaching assistants?  
   — a) first year  
   — b) second year  
   — c) third year  
   — d) graduate  
   — e) other

69. What is the compensation for these student teaching assistants?  
   — a) salary  
   — b) credits  
   — c) combination of salary and credits  
   — d) other

70. Do these student teaching assistants receive a tuition waiver?  
   — a) yes  
   — b) no

71. How many semesters are these student teaching assistants allowed to teach LRW?  
   — a) one  
   — b) two  
   — c) three  
   — d) four  
   — e) five or more

72. On average, how many semesters do student teaching assistants stay to teach LRW?  
   — a) one  
   — b) two  
   — c) three  
   — d) four  
   — e) five or more
C. Law Students Who Have Sole Responsibility For Teaching LRW

<table>
<thead>
<tr>
<th>Question</th>
<th>Options</th>
</tr>
</thead>
<tbody>
<tr>
<td>73. Who supervises the students?</td>
<td>a) tenure-track faculty - LRW teacher</td>
</tr>
<tr>
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<td>b) tenure-track - non-LRW teacher</td>
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<tr>
<td></td>
<td>c) contract-track faculty - LRW teacher</td>
</tr>
<tr>
<td>74. Does the supervisor have a J.D.?</td>
<td>a) yes</td>
</tr>
<tr>
<td>75. At what level are the students?</td>
<td>a) first year</td>
</tr>
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<td></td>
<td>b) second year</td>
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<td>c) third year</td>
</tr>
<tr>
<td>76. What is the compensation for student instructors?</td>
<td>a) salary</td>
</tr>
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<td>b) credits</td>
</tr>
<tr>
<td>77. Do the student instructors receive a tuition waiver?</td>
<td>a) yes</td>
</tr>
<tr>
<td>78. How many semester credit hours do law student instructors receive?</td>
<td>a) one</td>
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<td></td>
<td>b) two</td>
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<tr>
<td>79. What is the percentage of female law student instructors?</td>
<td>a) 0 - 25%</td>
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<tr>
<td></td>
<td>b) 26 - 50%</td>
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<tr>
<td>80. How many semesters are students allowed to teach LRW?</td>
<td>a) one</td>
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<td>b) two</td>
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<td>c) three</td>
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</tbody>
</table>
### PART III. DIRECTORS AND SPECIALISTS

<table>
<thead>
<tr>
<th>Question</th>
<th>Options</th>
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<tbody>
<tr>
<td>81. Is there a separate Director of LRW?</td>
<td>a) yes</td>
</tr>
<tr>
<td></td>
<td>b) no</td>
</tr>
<tr>
<td>82. What is the Director's background?</td>
<td>a) J.D.</td>
</tr>
<tr>
<td></td>
<td>b) Ph.D. in English</td>
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<td>c) J.D. and Ph.D. in English</td>
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<td>d) other</td>
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<td>83. Is the Director of LRW tenure track?</td>
<td>a) yes</td>
</tr>
<tr>
<td></td>
<td>b) no</td>
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<td>84. If no, how long is the Director's contract?</td>
<td>a) one year</td>
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<td>b) two years</td>
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<td>c) three years</td>
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<td>d) four years</td>
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<td>e) five years</td>
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<td></td>
<td>f) six years</td>
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<td></td>
<td>g) seven years</td>
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<td></td>
<td>h) other</td>
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<td>85. Is the Director's contract renewable?</td>
<td>a) yes</td>
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<td>b) no</td>
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<td>86. What is the Director's salary?</td>
<td>a) $0 - $20,000</td>
</tr>
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<td>b) $20,000 - $30,000</td>
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<td>c) $30,001 - $40,000</td>
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<td>d) $40,001 - $50,000</td>
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<td></td>
<td>e) $50,001 - $60,000</td>
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<tr>
<td></td>
<td>f) $60,001 - $70,000</td>
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<td></td>
<td>g) $70,001 - $80,000</td>
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<td></td>
<td>h) over $80,000</td>
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<tr>
<td>87. Does the Director teach?</td>
<td>a) full LRW load</td>
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<td>b) part LRW load</td>
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<td>c) part LRW load plus other courses</td>
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<td>d) only other courses</td>
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<td>e) no</td>
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<td>f) other</td>
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<td>88. Does the Director have publishing responsibilities?</td>
<td>a) Yes - Please specify:</td>
</tr>
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<td></td>
<td>b) No</td>
</tr>
<tr>
<td>89. Do non-J.D., non-Ph.D. writing specialists work in the program?</td>
<td>a) no</td>
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<td>b) yes, part-time</td>
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<td></td>
<td>c) yes, full-time</td>
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</tbody>
</table>
90. Do non-J.D., Ph.D writing specialists work in the program?
   a) no 
   b) yes, part-time 
   c) yes, full-time 

91. Do J.D., Ph.D. writing specialists work in the program?
   a) no 
   b) yes, part-time 
   c) yes, full-time
Graph #1
Number of J.D. Students per School

Graph #2
Type of Schools Participating
Public or Private
Graph #3
Professional Status of Legal Writing Professors
According to Type of School (1994 Data)

Graph #4
Salary Ranges of Full-Time Tenure Track Legal Writing Professors
According to Type of School (1994 Data)
Graph #5
Number of Semesters of Legal Writing Required

Semesters
Percent

Survey year
- 90
- 92
- 94

Graph #6
Number of Credit Hours Allocated to Legal Writing

Credit Hours
Percent

Survey year
- 90
- 92
- 94
Graph #7
Grading of Legal Writing
1994 Data

Letter ave. into GPA
Numbers ave. in GPA
Letter not in GPA
Pass/fail or S/U
Honors/pass/fail
Other

Graph #8
Number of Individuals Who Teach First-Year Legal Writing
(Excluding Part-Time Student Teaching Assistants)

Survey year
0 10 20 30 40 50 60 70
Percent
Legal Writing Professors
One two three four five or more
90 92 94
Graph #9
Number of Full-Time Legal Writing Professors at the School
1994 Data

Graph #10
Number of Full-Time Legal Writing Professors
Employed at the School

Survey year
- 90
- 92
- 94
Graph #11
Number of First-Year Students Per Legal Writing Professor

Graph #12
Number of Times Per Year Students Receive Written Feedback
1994 Data
Graph #13
Who is Teaching the Legal Writing Courses
1994 Data

Graph #14
Salary Range of Full-Time Contract-Track Legal Writing Professors (1994 Data)
Graph #15
Salary Range of Full-Time Contract-Track Legal Writing Professors

Survey year

Salary Range

Graph #16
Limit on Number of Years Legal Writing Professors May Stay

1994 Data
Graph #17
Difference Between Mean Salaries of Legal Writing Professors and Other Faculty Members (1994 Data)

Graph #18
Difference Between the Mean Salaries of Faculty Members and Legal Writing Professors

Survey year
92 94

Difference between mean salaries
Graph #19
Percentage of Schools that Use Students To Assist Teaching Legal Writing

Graph #20
Percentage of Schools that have a Separate Director of Legal Writing
Table 1
Number of Full-Time Legal Writing Professors by School Tier

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
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<tbody>
<tr>
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<td>4</td>
<td>3</td>
<td>1</td>
<td>4</td>
<td>0</td>
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<tr>
<td></td>
<td>26.7%</td>
<td>16.7%</td>
<td>3.7%</td>
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<td>33.3%</td>
<td>22.2%</td>
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<td>13.3%</td>
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<td>7</td>
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<td>5</td>
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<td>13.3%</td>
<td>27.8%</td>
<td>25.9%</td>
<td>29.4%</td>
<td>18.5%</td>
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<td>6</td>
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<td>6</td>
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<td>5.6%</td>
<td>22.2%</td>
<td>8.8%</td>
<td>22.2%</td>
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<td></td>
<td>0.0%</td>
<td>0.0%</td>
<td>3.7%</td>
<td>2.9%</td>
<td>3.7%</td>
</tr>
<tr>
<td>10 or More</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>0.0%</td>
<td>7.4%</td>
<td>2.9%</td>
<td>0.0%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that employ that number of full-time legal writing professors.

Table 2
Eligibility of Legal Writing Professors for Sabbatical by School Tier

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Eligible</td>
<td>0</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>6.3%</td>
<td>16.7%</td>
<td>18.5%</td>
<td>36.0%</td>
</tr>
<tr>
<td>Not Eligible</td>
<td>9</td>
<td>15</td>
<td>20</td>
<td>22</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>100%</td>
<td>93.3%</td>
<td>83.3%</td>
<td>81.5%</td>
<td>64.0%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier whose legal writing professors are eligible for sabbatical.
### Table 3

People who Comment on Student Papers by School Tier

<table>
<thead>
<tr>
<th>Tier</th>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>5</td>
<td>6</td>
<td>16</td>
<td>23</td>
<td>19</td>
<td>69</td>
</tr>
<tr>
<td>Legal Writing Professors</td>
<td>33.3%</td>
<td>30.0%</td>
<td>55.2%</td>
<td>65.7%</td>
<td>67.9%</td>
<td>54.3%</td>
</tr>
<tr>
<td>Student TAs</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>13.3%</td>
<td>5.0%</td>
<td>3.4%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>3.1%</td>
</tr>
<tr>
<td>Professors and TAs</td>
<td>7</td>
<td>11</td>
<td>11</td>
<td>10</td>
<td>7</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td>46.7%</td>
<td>55.0%</td>
<td>37.9%</td>
<td>28.6%</td>
<td>25.0%</td>
<td>36.2%</td>
</tr>
<tr>
<td>Fellow Students</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>0.0%</td>
<td>3.4%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>0.8%</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>2</td>
<td>2</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>6.7%</td>
<td>10.0%</td>
<td>0.0%</td>
<td>5.7%</td>
<td>7.1%</td>
<td>5.5%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that have those people comment on student papers.

### Table 4

Number of Research Assistants in the Legal Writing Department by School Tier

<table>
<thead>
<tr>
<th>Tier</th>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>None</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>6</td>
<td>8</td>
<td>25</td>
</tr>
<tr>
<td></td>
<td>50.0%</td>
<td>27.8%</td>
<td>8.7%</td>
<td>18.8%</td>
<td>33.3%</td>
<td>23.8%</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>6</td>
<td>3</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>1.25%</td>
<td>11.1%</td>
<td>17.4%</td>
<td>18.8%</td>
<td>12.5%</td>
<td>15.2%</td>
</tr>
<tr>
<td>2</td>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td></td>
<td>1.25%</td>
<td>11.1%</td>
<td>13.0%</td>
<td>12.5%</td>
<td>12.5%</td>
<td>12.4%</td>
</tr>
<tr>
<td>3</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>0.0%</td>
<td>4.3%</td>
<td>15.6%</td>
<td>4.2%</td>
<td>6.7%</td>
</tr>
<tr>
<td>4 or more</td>
<td>2</td>
<td>9</td>
<td>13</td>
<td>11</td>
<td>9</td>
<td>44</td>
</tr>
<tr>
<td></td>
<td>25.0%</td>
<td>50.0%</td>
<td>56.5%</td>
<td>34.4%</td>
<td>37.5%</td>
<td>41.9%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that employ that number of research assistants.
Table 5

Grading of Legal Research and Writing Course by School Tier

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Letter</td>
<td>0</td>
<td>9</td>
<td>13</td>
<td>29</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>45.0%</td>
<td>44.8%</td>
<td>80.6%</td>
<td>60.7%</td>
</tr>
<tr>
<td>Letter</td>
<td>0</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td></td>
<td>0.0%</td>
<td>10.0%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>3.6%</td>
</tr>
<tr>
<td>Number</td>
<td>3</td>
<td>3</td>
<td>8</td>
<td>5</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>20.0%</td>
<td>15.0%</td>
<td>27.6%</td>
<td>13.9%</td>
<td>21.4%</td>
</tr>
<tr>
<td>Pass/Fail</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>0</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>40.0%</td>
<td>10.0%</td>
<td>13.8%</td>
<td>0.0%</td>
<td>7.1%</td>
</tr>
<tr>
<td>Honors/Pass/Fail</td>
<td>4</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>26.7%</td>
<td>10.0%</td>
<td>10.3%</td>
<td>2.8%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Other</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>13.3%</td>
<td>10.0%</td>
<td>3.4%</td>
<td>2.8%</td>
<td>7.1%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that use that grading system.

Table 6

Availability of Student Help for First-Year Students by School Tier

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Help Not Provided</td>
<td>4</td>
<td>5</td>
<td>11</td>
<td>18</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>28.6%</td>
<td>26.3%</td>
<td>41.4%</td>
<td>50.0%</td>
<td>57.1%</td>
</tr>
<tr>
<td>Help Provided</td>
<td>10</td>
<td>14</td>
<td>17</td>
<td>18</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>71.4%</td>
<td>73.7%</td>
<td>58.6%</td>
<td>50.0%</td>
<td>42.9%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that provide or do not provide student help for first-year students.
Table 7
Tenure-Track Status of Legal Writing Directors by School Tier

<table>
<thead>
<tr>
<th>Tier</th>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tenure</td>
<td>1</td>
<td>8.3%</td>
<td>7</td>
<td>38.9%</td>
<td>10</td>
<td>43.5%</td>
</tr>
<tr>
<td>Track</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Not Tenure</td>
<td>11</td>
<td>91.7%</td>
<td>11</td>
<td>61.1%</td>
<td>13</td>
<td>56.5%</td>
</tr>
<tr>
<td>Track</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier whose legal writing directors are or are not tenure-track.

Table 8
Percentage of Female Legal Writing Professors by School Tier

<table>
<thead>
<tr>
<th>Tier</th>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-25%</td>
<td>0</td>
<td>0.0%</td>
<td>1</td>
<td>5.9%</td>
<td>1</td>
<td>3.7%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>26-50%</td>
<td>5</td>
<td>50.0%</td>
<td>3</td>
<td>17.6%</td>
<td>2</td>
<td>7.4%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>51-75%</td>
<td>1</td>
<td>10.0%</td>
<td>5</td>
<td>29.4%</td>
<td>16</td>
<td>59.3%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>76-100%</td>
<td>4</td>
<td>40.0%</td>
<td>8</td>
<td>47.1%</td>
<td>8</td>
<td>29.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that have that percentage of female legal writing professors.

Table 9
Requirement of Closed Packet Research by School Tier

<table>
<thead>
<tr>
<th>Tier</th>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do Not Require</td>
<td>9</td>
<td>60.0%</td>
<td>10</td>
<td>50.0%</td>
<td>12</td>
<td>41.4%</td>
</tr>
<tr>
<td>Require</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>14</td>
<td>40.0%</td>
<td>14</td>
<td>40.0%</td>
<td>19</td>
<td>67.9%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>19</td>
<td>67.9%</td>
<td>17</td>
<td>58.6%</td>
<td>21</td>
<td>60.0%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>32.1%</td>
<td>9</td>
<td>32.1%</td>
<td>9</td>
<td>32.1%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>9</td>
<td>40.0%</td>
<td>10</td>
<td>50.0%</td>
<td>17</td>
<td>58.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>6</td>
<td>49.6%</td>
<td>6</td>
<td>49.6%</td>
<td>6</td>
<td>49.6%</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that require closed packet research.
Table 10

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do Not Require</td>
<td>13</td>
<td>17</td>
<td>22</td>
<td>25</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>86.7%</td>
<td>85.0%</td>
<td>75.9%</td>
<td>69.4%</td>
<td>85.7%</td>
</tr>
<tr>
<td>Require</td>
<td>2</td>
<td>3</td>
<td>7</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td></td>
<td>13.3%</td>
<td>15.0%</td>
<td>24.1%</td>
<td>30.6%</td>
<td>14.3%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that require drafting documents.

Table 11

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do Not Cover</td>
<td>12</td>
<td>13</td>
<td>18</td>
<td>23</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>80.0%</td>
<td>65.0%</td>
<td>62.1%</td>
<td>82.1%</td>
<td>71.9%</td>
</tr>
<tr>
<td>Cover</td>
<td>3</td>
<td>7</td>
<td>11</td>
<td>5</td>
<td>36</td>
</tr>
<tr>
<td></td>
<td>20.0%</td>
<td>35.0%</td>
<td>37.9%</td>
<td>17.9%</td>
<td>28.1%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that cover pretrial motion arguments.

Table 12

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Required</td>
<td>12</td>
<td>14</td>
<td>15</td>
<td>27</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>85.7%</td>
<td>73.7%</td>
<td>57.7%</td>
<td>77.1%</td>
<td>81.5%</td>
</tr>
<tr>
<td>Required</td>
<td>2</td>
<td>5</td>
<td>11</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>14.3%</td>
<td>26.3%</td>
<td>42.3%</td>
<td>22.9%</td>
<td>18.5%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that require seminars in the second or third year.
### Table 13

**Availability of Upper-Level Legal Writing Electives by School Tier**

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Available</td>
<td>10</td>
<td>15</td>
<td>15</td>
<td>24</td>
<td>20</td>
</tr>
<tr>
<td>Available</td>
<td>3</td>
<td>4</td>
<td>11</td>
<td>11</td>
<td>7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Not Available</td>
<td>76.9%</td>
<td>78.9%</td>
<td>57.7%</td>
<td>68.6%</td>
<td>74.1%</td>
</tr>
<tr>
<td>Available</td>
<td>23.1%</td>
<td>21.1%</td>
<td>42.3%</td>
<td>31.4%</td>
<td>25.9%</td>
</tr>
</tbody>
</table>

*Note: Percentages provided indicate the percentage of schools *within that tier* that offer upper-level legal writing electives.*

### Table 14

**Number of Semesters Students Stay to Teach by School Tier**

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>2</td>
<td>6</td>
<td>9</td>
<td>14</td>
<td>10</td>
<td>5</td>
</tr>
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<td>2</td>
<td>0</td>
<td>3</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>0</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>25.0%</td>
<td>20.0%</td>
<td>20.0%</td>
<td>17.6%</td>
<td>37.5%</td>
<td>22.1%</td>
</tr>
<tr>
<td>75.0%</td>
<td>60.0%</td>
<td>70.0%</td>
<td>58.8%</td>
<td>62.5%</td>
<td>64.7%</td>
</tr>
<tr>
<td>0.0%</td>
<td>13.3%</td>
<td>0.0%</td>
<td>17.6%</td>
<td>0.0%</td>
<td>7.4%</td>
</tr>
<tr>
<td>0.0%</td>
<td>6.7%</td>
<td>10.0%</td>
<td>5.9%</td>
<td>0.0%</td>
<td>5.9%</td>
</tr>
</tbody>
</table>

*Note: Percentages provided indicate the percentage of schools *within that tier* that have student teachers stay that many semesters.*
Table 15
Number of First-Year Students per Legal Writing Professor by School Tier

<table>
<thead>
<tr>
<th>Tier 1</th>
<th>Tier 2</th>
<th>Tier 3</th>
<th>Tier 4</th>
<th>Tier 5</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10</td>
<td>2</td>
<td>0</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>2</td>
<td>7.1%</td>
<td>0.0%</td>
<td>3.6%</td>
<td>2.9%</td>
<td>3.2%</td>
</tr>
<tr>
<td>11-20</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>5</td>
<td>19</td>
</tr>
<tr>
<td>2</td>
<td>21.4%</td>
<td>20.0%</td>
<td>10.7%</td>
<td>14.3%</td>
<td>15.2%</td>
</tr>
<tr>
<td>21-35</td>
<td>3</td>
<td>4</td>
<td>6</td>
<td>6</td>
<td>23</td>
</tr>
<tr>
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<td>21.4%</td>
<td>20.0%</td>
<td>21.4%</td>
<td>17.1%</td>
<td>14.3%</td>
</tr>
<tr>
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<td>1</td>
<td>4</td>
<td>8</td>
<td>9</td>
<td>30</td>
</tr>
<tr>
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<td>7.1%</td>
<td>20.0%</td>
<td>28.6%</td>
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<td>28.6%</td>
</tr>
<tr>
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<td>17.1%</td>
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</tr>
<tr>
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<td>7</td>
<td>12</td>
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<td>20.0%</td>
<td>25.0%</td>
<td>28.6%</td>
<td>28.6%</td>
</tr>
<tr>
<td>3</td>
<td>21.4%</td>
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<td>28.6%</td>
<td>28.6%</td>
<td>28.6%</td>
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<td>10.0%</td>
<td>7.1%</td>
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<td>25.7%</td>
</tr>
<tr>
<td>126-150</td>
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<tr>
<td>2</td>
<td>7.1%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>0.0%</td>
<td>0.0%</td>
</tr>
<tr>
<td>Over 150</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>2</td>
<td>28.6%</td>
<td>10.0%</td>
<td>2.9%</td>
<td>0.0%</td>
<td>10.7%</td>
</tr>
</tbody>
</table>

Note: Percentages provided indicate the percentage of schools within that tier that have that number of students for each legal writing professor.
Doctrine of the Last Antecedent:  
The Mystifying Morass of Ambiguous Modifiers  
Terri LeClercq*

I. INTRODUCTION

Students enter law school to learn the law, not to learn to write — or so many of them believe. They have yet to appreciate that law is language and, therefore, for law to be clear, the language of the law must be clear. Even those who seem to appreciate the law/language connection often do not see, until an instructor points it out, how difficult it can be to achieve clarity using the multifaceted English language. It is important, therefore, for legal writing faculty to offer their students a glimpse into the legal complications that sentence structure can create.

Consider the following example: A probationary police officer walks into an attorney's office, believing that he has been unfairly passed over for promotion. He had gained some weight while under the stress of taking and passing the three tests required for promotion to police officer. Instead of receiving the promotion he believed he deserved, however, he was turned down by a committee that said he failed to meet one of the four requirements for promotion:

To qualify for police officer, the candidate must be within the weight range for his/her height, score 85 on the first test battery, score 90 on the special placement battery, and achieve an 85% accuracy score on the shooting range WITHIN SIX WEEKS OF HIRING.

Although the police rookie's weight was within the weight range when he applied for officer, he now weighs too much. Does

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1 Students may be unaware of the impact of statutory interpretation on our court system. In the first four months of 1995, for example, the United States Supreme Court issued seventeen decisions: 14 involved statutory interpretation; the other five dealt with criminal law and procedure. See William Banks, At the Halfway Point, 81 A.B.A. J. 50 (1995).
"within six weeks of hiring" modify only the shooting range score (see Illustration 1, below), or all four of the promotion requirements (see Illustration 2, below)? As written, the modifier is ambiguous, and therefore the rookie has good reason to feel unfairly treated.

Illustration 1

candidate must be within the weight range score 85 on first battery score 90 special battery achieve 85% on shooting range within weeks six of hiring

Illustration 2

candidate must be within the weight range score 85 on first battery score 90 special battery achieve 85% on shooting range within weeks six of hiring

This article will examine ambiguous modifiers and the problem they create for legal writers by first briefly tracing the history of inherent ambiguities in the English language and then describing the Doctrine of the Last Antecedent, which is the most significant attempt to date to resolve ambiguity stemming from one particular type of modifier: a phrase or word that has the potential of
modifying more than one antecedent. An examination of the Doctrine of the Last Antecedent reveals its inherent flaws and its contradiction of other principles of interpretation. The article will then focus on two recent court decisions that examine the Doctrine. The article concludes with suggestions for drafting clear documents and interpreting ambiguous modifiers.

II. ENGLISH HAS INHERENT AMBIGUITIES

A rich and varied language, English has evolved from an interesting overlay of ancient Greek and Latin; the tribal languages of Jutes, Saxons, and Angles; and Norman French. Until the mid-Middle Ages, English writers and speakers signaled the relationships among words by inflectional endings, just as speakers of Latin and Greek had. By the late Middle Ages (1150-1500), English nouns lost all inflections except plurals (-s) and possessives (-'s and -es'). Thus the modern noun, plus its modifying adjectives and adverbs, has the same form no matter where it is inserted into the sentence, including identical nominative and objective forms:

The plaintiff asked for a continuance. (nominative)
The judge denied the request of the plaintiff. (objective)

Now, rather than relying of inflection, modern English relies on location in the sentence and on prepositions to provide meaning. Only pronouns remain highly inflected. A noun placed at the

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2 My thanks to Stephen Sepinuck, associate professor at Gonzaga University, who first sent me case names to investigate for this problem, and to Houston attorney James Brill, for sending additional references.
3 Additional case examples are outlined in the attached Appendix.
4 In Latin, for instance, the noun "woman" had ten forms. To use "the woman" as a subject, speakers and writers used the nominative form: femina. To indicate "of a woman," they used the genitive (possessive) inflection, -ae, "feminae." The possibilities for one word look like this: femina, feminae (of the), feminae (to or for the), feminam (indirect object), femina (direct object); and the plurals feminae, feminarum, feminis, feminas, feminin.
5 According to historians Pyles and Algeo, prepositional words developed as the language lost inflection. Chaucer was the first, for instance, to use the preposition "during," sometime around 1385. The Poet of Piers Plowman first used both "concerning" and "except." Changes in prepositions increased during the late Middle and early Modern periods; for instance, Shakespeare used "on" to signal contemporary "at": "And what delight shall she have to looke on [at] the divell?" Othello 2.1.229 (quoted in THOMAS PYLES AND JOHN ALGEO, THE ORIGINS AND DEVELOPMENT OF THE ENGLISH LANGUAGE 207 (3d ed. 1982)).
6 Contemporary pronouns are nearly as complex and inflected as early Latin pronouns. They reflect 1) person (1st person: I, me, mine, we, our, us; 2nd person: you, your; 3rd person: he, she, it, his, her, they, them, their, its), 2) gender (she, he, it), and 3) number (singular and plural). Until the 13th century, the French prefix "th" signaled the singular (thee, thy, thou) and the French "y" signaled plural (ye, you, your). As English moved away
beginning of an independent clause, for instance, usually functions as the subject. A noun placed after a verb is usually its object. Adjectives modify the nouns closest to them; adverbs and adverbal clauses have slightly more freedom of movement because they are more easily identifiable and can modify adjectives, verbs, and other adverbs.

A major problem in language comprehension has developed as our words (semantics) have simplified (lost their inflections) while our written sentence structures (syntax) have become increasingly complex. Syntax has shifted from a coordinate structure that had a conspicuous number of additive conjunctions to join words, phrases, and clauses,\(^7\) to a modern syntax of subordination, which is more sophisticated but also more difficult to interpret.\(^8\) Today's technical English is highly subordinate and deeply embedded. Legal language, one of many technical languages used both within and outside its initiating community, contains yet another layer of complexity: it is characterized not only by its archaic and repetitive words but also by its complicated, embedded strings of phrases that make up typical sentences.\(^9\)

Adding to the problems of uninflected words and subordinate syntax is the ever-widening distance between the speaker/writer and the audience. Early Greek and Latin orators could pause, lower and raise their voices, and respond to questions from the audience. Their audiences were right there watching them. The few who wrote and read belonged to the same academies and shared a

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from the French, it dropped most of the French insistence on the distinction between formal and intimate, and thus the endings lost their meanings.

Modern-day verbs are also still inflected for tenses (six, that use -ing, -s, -ed, -en), for moods (indicative, subjunctive, imperative), and for voice (active and passive). See, e.g., GEORGE CURME, ENGLISH GRAMMAR 114-32 (1947).

\(^7\) See generally WALTER ONG, ORALITY AND LITERACY (1982). The heavy use of conjunctions is polysyndeton, Greek for many (poly) and connectives (syndeton).

\(^8\) Coordinated: Attorneys and judges are all interested in justice. Attorneys want justice for their clients. Judges want justice for the community. These interests can be identical or contradictory. The two groups may have different world views.

Subordinated: Although both attorneys and judges are interested in justice — one for specific clients and the other for community, their interests in justice can be either identical or contradictory, depending on their view of the world.

\(^9\) “Embedding” is the combination of two or three sentences into one sentence.

1. Students who enter law school are nervous.
2. Some nervous students tend to talk too much.
3. Some nervous students clamp their teeth together and vow to reveal nothing.

Complete sentences become a modifying word, clause, or phrase:

Nervous, some law students tend to talk too much, while others clamp their teeth together and vow to reveal nothing.
common background and status. Today's communicator is increasingly removed from the audience — by physical distance, by age, and by educational differences. Just as today's writers cannot see their readers' responses, technical writers cannot anticipate a homogeneous audience or anticipate all the questions that word choice or complicated syntax can raise. The wider and less familiar the audience, the more the need for clarity, and the greater the need for a speaker or writer to establish a specific perspective. Legal writers must anticipate the diversity of audience experience and expectation for each document. Either the writers expressly define their semantics and syntax within the four corners of a document, or readers must depend on some other interpretive cue — their own backgrounds, their own hopes for the document to say what they need it to say. To anticipate all questions about semantics and syntax is impossible, of course, but legal writers are held to a high standard of clarity. Their language creates the law, the contract, and the interpretation for a client.

The antecedent of a modifier or a pronoun depends on the contextual denotation:

Victims depend on jurors to understand their motives.

Out of context, the antecedent of the pronoun "their" can be either victims or jurors. Perhaps victims expect the jurors to get inside the victims' minds and understand why the victims have appealed to the court for help. But perhaps the victims, instead, expect the jurors to recognize their own motives as they sit in the jury box and decide the facts. The syntax of the sentence gives no help for interpreters and thus is ambiguous. If the context of the sentence does not point to the antecedent, then even sophisticated readers unfamiliar with the author's intent are unable to interpret the pronoun effectively. And that is where legal interpreters admit defeat. If two interpretations are possible, the court cannot al-

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10 Antecedents are nouns or phrases within a sentence that are later substituted by indefinite pronouns (it, they, etc.) or demonstrative pronouns (that, this), or are modified within the sentence by adjectives, adverbs, or phrases. These modifiers are "referential and qualifying phrases," according to JABEZ SUTHERLAND, SUTHERLAND ON STATUTORY CONSTRUCTION § 267 (1st ed. 1891).

11 When puzzled by a language construction, courts refer to an established body of "principles of interpretation" that have developed through both statute and case law. However, Lawrence M. Solan explains that the "principles of interpretation sometimes exist side by side with their opposites, creating a body of mutually inconsistent legal rules, available to any lawyer or judge who wishes to use them to support almost any position whatsoever." THE LANGUAGE OF JUDGES 29 (1993), referring to Karl Llewellyn's essay Remarks on Theory of Appellate Decision and Rules or Canons About how Statutes Are to be Construed.
ways default to an "inherent" sense of language or the syntax of modifiers to explain its "plain meaning," because linguistic principles for interpretation also frequently conflict. Non-linguists are eager to find grammar "rules" that provide guidance for interpretation, but unfortunately, few non-linguists can distinguish between a "rule" that governs language and a "linguistic principle" that helps to interpret language.

The English language has fewer absolute "rules" than most other languages. Most of what information we learn about the rules of English grammar is a fusion of stylistic advice and rules for classical languages that evolved into English. English does not have a set of rules that eliminates ambiguity; it has linguistic principles that help readers unravel meaning. Specifically, no English-language rule resolves the ambiguity that a modifier creates when it has more than one antecedent. It is thus a surprise to some writers to learn that in 1891 a lawyer devised an interpretive doctrine that judges have haphazardly employed as a grammar rule to resolve legal ambiguity.

III. DOCTRINE OF THE LAST ANTECEDENT

The problem of ambiguous modification has increased as both English syntax and the law have become more complicated. By the late 1880s, Jabez Sutherland, who wrote SUTHERLAND ON STAT-

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13 Linguistic strategies to help readers parse sentences are not rules. The linguistic strategies reflect the "natural" process new readers use as they intuitively learn to interpret language. Solan summarizes several of these strategies, for instance "minimal attachment" and "late closure." These strategies are not the same as the few iron-clad rules of English language that have evolved. See MAXINE HAIRSTON, SUCCESSFUL WRITING 244-271 (1981) offering a survey of "extremely serious," "serious," and "moderate" lapses from standard English and a brief summary of the traditional rules from standard English); Terri LeClercq, Grammar Rules Versus Suggestions, 53 TEXAS B.J., 1314 (December 1990).

14 SUTHERLAND, supra note 10.

15 David Mellinkoff has traced problems for legal interpreters into the sixteenth century. THE LANGUAGE OF THE LAW § 84 (1963). Mellinkoff refers to the problem as the Wandering Afterthought, which is one result of long sentences. Id. at 371-72. His examples include Shridley v. Ohio, 23 Ohio St. 130 (1872); Estate of Jones, 55 Cal. 2d 531 (1961); Gioriades v. Glickman, 272 Wis. 257, 262 (1955); Gray v. General Construction Co., 250 S.W. 342, 343-344 (Ark. 1923); Randall v. Bailey, 288 N.Y. 280, 287 (1943); Holmes v. Phenix Ins. Co., 98 F. 240 (8th Cir. 1899); Cushing v. Worrick, 75 Mass. 382 (1857). In LEGAL WRITING: SENSE AND NONSENSE 71 (1982), Mellinkoff again addresses the problem when he admonishes against long sentences, this time examining IRC Section 172(b)(2) and a case that parsed it, Foster Lumber Company, Inc. v. United States, 500 F.2d 1230, 1232 (8th Cir. 1974).
UTORY CONSTRUCTION, had grappled with enough legal ambiguity after investigating complicated and litigated statutes\(^\text{16}\) that he invented a grammar/punctuation rule in hopes of resolving future statutory problems:

Referential and qualifying phrases, where no contrary intention appears, refer solely to the last antecedent. The last antecedent is the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence. This proviso usually is construed to apply to the provision or clause immediately preceding it. The rule is another aid to discovery of intent or meaning and is not inflexible and uniformly binding. Where the sense of the entire act requires that a qualifying word or phrase apply to several preceding or even succeeding sections, the word or phrase will not be restricted to its immediate antecedent.

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.

Implicit in Sutherland’s rule is acknowledgment of the English language’s propensity to “cluster” — that is, words next to each other are interpreted by readers to form a unit of thought.\(^\text{17}\) From that general concept he concluded that referential and qualifying phrases (modifiers) refer solely to the nearest (the last) antecedent that makes sense. In the first part of the Doctrine, Sutherland made no reference to punctuation. In the second paragraph, however, he narrowed his interpretation: if a string of antecedents is followed by a comma, that comma separates the modifier from the last antecedent and thus allows it to modify each of the antecedents.\(^\text{18}\)

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\(^\text{16}\) SUTHERLAND, supra note 10.

\(^\text{17}\) Lyn Frazier, Syntactic Complexity, in Natural Language Parsing 135 (David Dowty et. al. eds., 1985). Clustering is a strategy the mind uses to lump units of words together, like the Late Closure strategy, which “specifies that incoming items are preferentially analyzed as a constituent of the phrase or clause currently being processed.”

\(^\text{18}\) SUTHERLAND, supra note 10.
Illustration 3

Doctrine of the Last Antecedent

General Rule

<table>
<thead>
<tr>
<th>first</th>
<th>second</th>
<th>last</th>
</tr>
</thead>
<tbody>
<tr>
<td>antecedent, antecedent (and so on) antecedent</td>
<td>referential/qualifying phrase</td>
<td></td>
</tr>
</tbody>
</table>

Referential/qualifying phrase refers only to last antecedent

Comma Before Modifier

<table>
<thead>
<tr>
<th>first</th>
<th>second</th>
<th>last</th>
</tr>
</thead>
<tbody>
<tr>
<td>antecedent, antecedent (and so on) antecedent</td>
<td>referential/qualifying phrase</td>
<td></td>
</tr>
</tbody>
</table>

Added comma requires referential/qualifying phrase to refer to all antecedents

Our academy rookie would be entitled to promotion, according to Sutherland, because the closest noun to the (comma-less) modifier "within six weeks" is the shooting-range requirement.

Illustration 4

<table>
<thead>
<tr>
<th>first</th>
<th>second</th>
<th>last</th>
</tr>
</thead>
<tbody>
<tr>
<td>antecedent, antecedent (and so on) antecedent</td>
<td>referential/qualifying phrase</td>
<td></td>
</tr>
</tbody>
</table>

within weight, score 85, score 90, achieve 85\% within 6 weeks

Sutherland admitted that the general part of the rule, the "closest antecedent," was but "another aid" to help in interpretation and admitted that it is "not inflexible and uniformly binding."¹⁰ In situations where the essence of the entire act causes readers to understand that the qualifying phrase refers to more

¹⁰ Sutherland, supra note 10.
than merely the last antecedent, then Sutherland was willing to conclude that all the antecedents were to be qualified by the phrase.

Even with all those concessions, the Doctrine of the Last Antecedent is problematic: it contradicts other linguistic principles; it contradicts the historical use of the comma; and the doctrine, itself poorly drafted, does not provide a concrete conclusion to the problem of ambiguous modifiers. Its existence since 1891 is generally unknown to legal writers except to those who have litigated the problem. Thus, rather than becoming "one more aid" in interpretation as Sutherland hoped, the Doctrine of the Last Antecedent has, in its hundred-plus year history, created as much confusion and disagreement as the ambiguous modifier its drafter set out to clarify.

A. Contradicting Other Linguistic Principles

Linguistic principles are not rules. They are not law. Rather, the principles of linguistics help readers infer meaning. Linguistic principles also aid those who teach reading and those who speak publicly so they can pause for an anticipated comma or know to repeat a specific noun rather than rely on a distant pronoun. Occasionally linguistic principles overlap, and occasionally the principles even contradict each other. For instance, using a series of linguistic diagrams, Lawrence M. Solan painstakingly contrasts Sutherland's Doctrine with a 1938 linguistic principle that was the articulated basis of the decision in Board of Trustees of the Santa Maria Joint Union High School District v. Judge:

[W]hen a clause follows several words in a statute and is applicable as much to the first word as to the others in the list, the clause should be applied to all of the words which precede it.22

20 See Appendix for examples.
21 Linguists have labelled two of these common principles as the Minimal Attachment principle (readers attach incoming items by using the fewest number of transformations) and the Late Closure principle (readers preferentially analyze incoming items as a part of the phrase or clause they are currently processing). They have even analyzed constraints for readers, for instance the Constraint on Relational Ambiguity (no transformational rule may apply if it creates an ambiguity within the grammar of the sentence) and the Impermissible Ambiguity Constraint (by which readers know that a clause is being misanalyzed each time they read it and will always be misanalyzed because the sentence does not contain the necessary internal cueing that allows for interpretation). Frazier, supra note 17, at 135-140.
22 Board of Trustees of the Santa Maria Joint Union High School District v. Judge, 50 Cal. App. 3d 920, 123 Cal. Rptr. 830 (1975), quoted in Solan, supra, note 11, at 34.
In *Santa Maria*, the court announced that the modifier (a clause) applied to all the words of a list. This “across-the-board” application of the modifier contradicts the general portion of Sutherland’s Doctrine. The complication that ignited *Santa Maria* developed just as the academy rookie’s did: readers had to determine whether modifiers near a list of nouns referred to 1) the whole compound phrase (“across-the-board”) or 2) only the last conjunct of the compound phrase. According to the ruling in *Santa Maria*, our academy rookie would have not only had to be thinner within six weeks of promotion, but to pass the three tests as well.

Once the ambiguity has been created, no grammar rule can intercede and point to a single “plain” antecedent. Because linguistic principles conflict about this solution to the ambiguously positioned modifier, readers are free to interpret the modifier any way that favors their position.\(^23\) If a legal writer creates such a quandary, then the reader who determines the antecedent will be a judge. The judge will have investigated the laws and realized that the interpretation of the ambiguity could turn on which of several legal principles to apply; frequently, however, the principles conflict, and there is no definitive hierarchy to apply to the contradictions. So the judge may turn to linguistic analysis, and again, there is no definitive hierarchy to apply to linguistic contradictions.\(^24\)

**B. Contradicting the Historical Comma**

What marks the Doctrine of the Last Antecedent as unique is not merely that an attorney decided to create a grammar rule; the rule’s last paragraph also invents a punctuation rule that contradicts both common sense and the traditional role of the comma:

Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedents by a comma.\(^25\)

Although the Doctrine is specific about applying a qualifier to

\(^{23}\) Readers might ask acquaintances which way they read the *Santa Maria* language; in my own casual survey, 12 of 15 people read the “across-the-board” application.

\(^{24}\) Indeed, as linguists study the property of language, they have to separate the “sheer fascination” of functional explanations from the reality: “It is all too easy to be seduced by what looks like a plausible explanation for some linguistic phenomenon, but there is really no way of proving that it is the correct explanation, or even that functional considerations are relevant at all.” Stephen Crain and Janet Dean Foror, *How Can Grammars Help Parsers?* 94, in *Natural Language Parsing* (David Dowt et al. eds., 1985).

\(^{25}\) SUTHERLAND, supra note 10.
all antecedents if the qualifier is separated by a comma, interpreters are left to wonder if the "last antecedent" without a comma must therefore modify only that last antecedent. Apparently Sutherland would interpret "long-distance phone calls will not be answered day or night except for emergencies" to mean that only night emergencies are answered; if the writer had created the phrase but added the comma ("long-distance phone calls will not be answered day or night, except for emergencies"), Sutherland would expect the phone to be answered both day or night. Without the comma, Sutherland implied, the qualifier attaches to that closest antecedent only. The qualifier detached from all the antecedents therefore has to modify all of them. No traditional or transformational grammarian has discovered this anomaly.

Most punctuation rules involving commas follow the spirit of the Greek "komma," to cut or to segment. Thus a restrictive element (one necessary to limit the antecedent) is not cut from the sentence by a comma, while a nonrestrictive (descriptive, additive) element is separated from the sentence by a comma. Similarly, an appositive is separated from the noun it renames so that readers understand it as a parenthetical, a renaming of the noun. Sutherland's Doctrine asks that the role of a comma be interpreted the opposite way: if a comma follows a series of antecedents, the comma does not cut the modifier from the last noun or phrase in the series but rather becomes a super glue that binds the modifier to all the antecedents.

What can be said about the doctrine's emphasis on the comma to glue the modifier to all previous antecedents is disquieting: for Sutherland, the comma can always be seen as an indication of multiple antecedents; however, the absence of the comma can signal either limited modification or sloppy writing — and the courts are left to decide which it is.

C. Sutherland's Own Drafting Problem

If all legal writers and all courts had followed Sutherland's

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26 Andrea Lundsford & Robert Connors, The St. Martin's Handbook (2d ed. 1992). "The restrictive element is not set off from the element that it modifies with commas, dashes, or parentheses. The tree that I hit was an oak. The oak at the side of the road was a hazard." Id. at 741. "A word, phrase, or clause that modifies but does not limit or change the essential meaning of a sentence element" is nonrestrictive and thus "Quantum physics, a difficult subject, is fascinating. He addressed, acerbically, the failure of the system." Id. at 737.

27 Robert Martineau, Drafting Legislation and Rules in Plain English (1991), incorporated Sutherland's doctrine as one of the primary principles for legislative drafting:
1891 Doctrine, then the legal system would be rid of a significant source of ambiguity. They have not, of course, and it is not. Sutherland began his solution to ambiguous modifiers with a general principle — modifiers refer solely to the last antecedent — that contradicts other linguistic principles, including the principle of "across the board" interpretation. And then he narrowed the scope of the Doctrine by adding a specific test: "Evidence that a qualifying phrase is supposed to apply to all antecedents instead of only to the immediately preceding one may be found in the fact that it is separated from the antecedent by a comma." It would appear that Sutherland wanted the question of modification to be resolved by the existence of a comma (a placement that contradicts the traditional understanding of a comma), but he does not actually say that the absence of a comma signals modification of last antecedent only.

Unfortunately for those who need to depend on it, the Doctrine of the Last Antecedent itself calls for interpretation because Sutherland begins with what seems the fall-back rule of statutory interpretation and concludes with his specific point. He begins with a qualifier, that interpreters should use the Doctrine of the Last Antecedent "where no contrary intention appears." Appears where? Within the phrase or within the document as a whole? In the notes of a committee that wrote the original rule? If the language offers no "contrary intention," then the meaning is already "plain." If the contrary intent shows up within the sentence itself, then there is no need for the rule. And legislative intent or the

"Use a comma to indicate that qualifying language is applicable to all of the preceding clauses ("the court may receive additional evidence in writing or by oral testimony, unless the court decides it is merely cumulative"). Here without the comma after testimony it would not be clear whether the 'unless' clause applies to both written evidence and oral testimony or only to the latter. In many instances, placing the qualifying language first is preferable." Id. at 102-103. Similarly, 82 C.J.S. § 334 (Relative and Qualifying Terms and Relation to Antecedents) summarizes the importance of intent over grammar with a reminder of Sutherland's Doctrine: "Generally, the presence of a comma separating a modifying clause in a statute from the clause immediately preceding is an indication that the modifying clause was intended to modify all the preceding clauses and not only the last antecedent one. The rule of last antecedent is invoked in those ambiguous sentences where a series of nouns or noun phrases is followed by a relative phrase, the noun equivalent to the relative phrase being the last noun or noun phrase in the series, and such rule can have no application to an adverbial phrase modifying a verb. Generally, a comma should precede a conjunction connecting two coordinate clauses or phrases in a statute in order to prevent the following qualifying phrases from modifying the clause preceding the conjunction." See supra note 11. This article does not attempt to enter the "plain" meaning controversy. Even plain language is under attack: Justice Scalia, for instance, said that "[p]lain language should be ignored when it leads to absurd results," Green v. Bock Laundry Machine Co., 490 U.S. 504, 527-28 (1989) (Scalia, J., concurring).
drafter's intent is usually in question to begin with, so that search rarely clarifies the sentence in question. But Sutherland's fifth sentence "where the sense of the entire act requires . . ." implies that the reader has already investigated the phrase within the context of the entire act. Thus the Sutherland rule is a jumble. He probably meant to emphasize intent, and the sense of the act as a whole, over the announced doctrine.

Worse for those who try to apply the rule to ambiguous sentences, Sutherland's general rule does not mention punctuation while his specific edict on "global" application of a modifier depends on the presence of a comma. Interpreters are left to wonder if the rule contradicts itself or if perhaps they can take whatever they need from the rule and ignore the rest.

It would have made more sense for this interpreter of statutes to reorganize his sentences to explain the logic of his steps and to specifically define the comma/no comma distinction:

1. Investigate the act (or contract, or other document) as a whole and judge the ambiguous phrase within its context for consistency and for logic.

2. If no "contrary intention appears" (in the text or from legislative history), then apply the Doctrine of the Last Antecedent:

   a. If no comma separates the modifier ("referential and qualifying phrase[ ]") from its antecedent, the modifier refers solely to its last antecedent.

   b. If a comma separates the modifier ("referential and qualifying phrase[ ]") from its antecedent, the modifier refers to all of the possible antecedents.

Not too surprisingly, interpreters have had trouble following and applying Sutherland's rule of construction. They have applied, misapplied, and dismissed it. The reality is that readers cannot easily resolve the ambiguities that a writer has created through misplaced antecedents, even when readers resort to legislative intent and linguistic analysis. And because Sutherland's general rule does not provide guidance about a comma distinction, his specific advice for modifiers that follow commas is of limited use.

IV. RECENT COURTS OVERRULE THE DOCTRINE

In two recent cases, courts followed Sutherland's advice to use the Doctrine "as an aid" rather than a rule and overturned appellate decisions that depended on the Doctrine of the Last Antecedent.

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*See attached Appendix for examples.*
dent Doctrine. In 1989 the Texas Supreme Court considered an appeal court's use of the Doctrine and concluded that, if a doctrine of construction were allowed to contradict the policy behind insurance, it would be a disservice to citizens who buy underinsured motorist coverage. Even more recently, the 1993 Supreme Court investigated the Doctrine as applied in a bankruptcy/secured claims case and concluded that ambiguous modification in the Bankruptcy Code should not compel a reading that would allow debtors to avoid repaying mortgage loans.

In *Stracener v. United Services Automobile Association*, the Texas Supreme Court analyzed the Texas Insurance Code (TIC) and its definition of underinsured motorist coverage. A string of prepositional phrases in the TIC muddies the antecedent of the modifier "reduced by the amount recovered or recoverable." The court was charged with analyzing the following language from the TIC:

The underinsured motorist coverage shall provide for payment to the insured of all sums which he shall be legally entitled to recover as damages from owners or operators of underinsured motor vehicles because of bodily injury or property damage in an amount up to the limit specified in the policy, REDUCED BY THE AMOUNT RECOVERED OR RECOVERABLE from the insurer of the underinsured motor vehicle. (emphasis added)


Not surprisingly, it is convoluted language like that in *Strachener* that propels attorneys and judges to linguistic principles for interpretive aid. The plaintiff contended that since he had purchased underinsured motorist coverage from Insurance Company and then sustained damages from defendant Driver B, who had a small basic liability policy, then Insurance Company must pay the difference between guilty defendant's policy and the total of plaintiff's damages. The defendant argued that the TIC requires the Insurance Company to pay only the difference between the un-

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30 Montayne v. Transamerica Insurance Co., 638 S.W.2d at 521. My thanks to Rebecca White Berch, Arizona State University College of Law, and Julius Getman, University of Texas, for their aid in interpreting the courts' interpretations. Lisa Paulson, Margaret Medina, Carol Huneke, and Jacqueline Sandoval, University of Texas research assistants, provided early help with case analysis.


33 TEX.INS.CODE ANN. § 5.06-1(2)(b),(5) (WEST 19__) (EMPHASIS ADDED).
derinsured motorist policy limit and the amount of plaintiff's underinsured policy.

The court was asked to determine whether the phrase "reduced by the amount recovered" modifies the phrase "in an amount up to the limit specified in the policy" or the phrase "of all sums which he shall be legally entitled to recover as damages ...." The options can be charted:

Illustration 5

\[
\begin{array}{c}
\text{coverage shall provide payment} \\
\text{of sums} <\text{which} > \text{he... entitled} \\
\end{array}
\]

\[
\begin{array}{c}
\text{coverage shall provide payment} \\
\text{of sums} <\text{which} > \text{he... entitled} \\
\text{in amount up to limit recovered} \\
\text{specified in policy} \\
\end{array}
\]

In arguing that the underinsured-motorist limit should be reduced by the amount recoverable, the defendants and the appeals court relied on the closest-antecedent principle that a qualifying phrase is said to modify the words or clause immediately preceding it. This interpretation followed the Texas Supreme Court's interpretation in Montayne v. Transamerica Insurance Company,\textsuperscript{84} but overlooked the Doctrine's comma distinction.

The Texas Supreme Court disagreed with its own earlier analysis in Montayne:

\textit{Under USAA's interpretation, when a purchaser of underinsured motorist coverage with a $15,000 limit suffers}\textsuperscript{84} 638 S.W.2d at 521.
$100,000 in damages from a negligent motorist with $15,000 liability limits, the injured party is not entitled to recover any benefits from the purchase of underinsured motorist coverage. According to the USAA, the tortfeasor, in this situation, would not be an underinsured motorist.\textsuperscript{35}

That result made no sense to the court. It also disagreed with the use of\textit{ any} doctrine of construction over the purpose of the code:

Doctrines of construction, such as that of the last antecedent, are merely aids to be used in determining the meaning and intent of communications. Such doctrines must give way when there are indications that they are inapplicable. In analyzing the statute, the \textit{Montayne} court did not note that the 'reduced by' clause is separated by a comma from the remainder of the provisions of section (5). We find that this separation of the clause creates an ambiguity and, in keeping with the purpose of the statute, hold that the 'reduced by' clause modifies the word 'damages' used in the phrase 'all sums which he shall be legally entitled to recover as damages.'\textsuperscript{36}

Groping instinctively toward Sutherland's caveat about the comma, the court leaped over direct linguistic analysis and concluded that not only was the analysis wrong, but its results would unfairly restrict underinsured motorist coverage; policy owners would still be uninsured for the total damages if the defendants' analysis were accepted.

The insurance company tried to use the closest-antecedent "rule" to justify its interpretation of muddy language. The court used the mud from varying linguistic principles to achieve its understanding of fairness.

A second, more recent, case\textsuperscript{37} involved the analysis of two sections of the Bankruptcy Code. When a debtor applies for bankruptcy, a bankruptcy court can adjust indebtedness through a flexible repayment plan. Section 1322(b)(2) of the Bankruptcy code allows modification of the rights of both secured and unsecured creditors.\textsuperscript{38} The modification is subject to special protection for creditors whose claims are secured only by a lien on the debtor's home. Section 1322(b)(2) language provides the plan may

\textsuperscript{35} Montayne \textit{v.} Transamerica Insurance Co., 638 S.W.2d, 77 S.W.2d 381 (Tex. 1989).
\textsuperscript{36} \textit{Id.} at 383.
\textsuperscript{38} 11 U.S.C. § 1322(b)(2)(19___).
modify the rights of holders of secured claims, OTHER THAN A CLAIM SECURED ONLY BY A SECURITY INTEREST IN REAL PROPERTY THAT IS THE DEBTOR’S PRINCIPAL RESIDENCE, or of holders of unsecured claims, or leave unaffected the rights of holders of any class of claims. 89 (emphasis added)

Does “other than a claim secured” modify the prepositional phrase “of secured claims” or the noun phrase “rights of holders”? In Nobelman v. American Savings Bank, both a bankrupt couple and their bank agreed that the “other than” exception prohibited modification of the rights of a homestead mortgage. But they disagreed about the “secured claim,” as Section 506(a) defines it. The couple had a $71,335 balance on their mortgage when they declared bankruptcy. Their modified Chapter 13 plan valued the home at only $23,500 (uncontroverted valuation). Because Section 506(a) operates automatically to adjust downward the amount of a lender’s undersecured home mortgage, the couple contended that they should have to repay only the current value; the remainder of the bank’s claim was now unsecured. Thus the operative clause “other than a claim secured only by a security interest in . . . the debtor’s principal residence” refers to its immediate antecedent “secured claims.”

Illustration 6

| modify | rights |
|       |       |
|       | of    |
|       | holders |
|       | of    |
|       | claims | <other than> claim | secured |
|       | secured | only by | interest |
|       | interest | security | in |
|       | security | real estate |

The district and appeals courts did not address the separation that

89 Id. (emphasis added).
40 My thanks to colleague W.W. Gibson who brought this decision and numerous real estate examples to my attention.
The Supreme Court acknowledged that "this reading of the clause is quite sensible as a matter of grammar." In other words, the clause is genuinely ambiguous. Not only could the appeals court's analysis be correct, but so also could an analysis that sees the "claim secured" refer to the first claim, the secured one, and thus cover the lienholder's entire lien:

Illustration 7

![Diagram showing the structure of a sentence with stacked prepositional phrases]

The stacked prepositional phrases create ambiguity for the modifier: does the modifier apply to the direct object (rights) or the last of its propositional phrases (of secured claims)? Muddy writing cannot be cured by the court's resorting to one linguistic principle.

In both *Nobelman* and *Stracener*, the courts interpreted ambiguous language only after examining the language for internal consistency and after considering the consequences of the Doctrine. Both courts held for sensible public policy and fairness.

V. Conclusion

A. How Writers Can Avoid the Ambiguity

To avoid generating the ambiguities discussed in this article, writers should examine carefully each modifier that has more than one antecedent and redraft if misinterpretation is possible. Redrafting may add length to the sentence, but length is better than
litigation before a court that may, or may not, know or apply the Doctrine, correctly or incorrectly.

1. If the antecedents are coordinate and connected by “and,” writers can a) repeat the modifier, b) place the modifier first as a condition precedent and necessary for the following antecedents, or c) add qualifying words that limit or expand the modifier's application. For example:

Repeat the modifier.

To qualify for police officer status, an academy rookie must be within the doctor-prescribed weight range for his/her height within six weeks of hiring, score 85 on the first test battery within six weeks of hiring, score 90 on the special placement battery within six weeks of promotion, and achieve an 85% accuracy score on the shooting range within six weeks of hiring.

Place the modifier first as a condition precedent.

Within six months of hiring, the academy rookie must achieve the following for promotion: weigh within the doctor-prescribed range for his/her height, score 85 on the first test battery, score 90 on the special placement battery, and score 85% accuracy on the shooting range.

Add qualifiers that limit or expand the range for the qualifier.

To qualify for promotion, an academy rookie must qualify in all of the following categories within six months of promotion: be within the doctor-prescribed weight range for his/her height, score 85 on the first test battery, score 90 on the special placement battery, and achieve an 85% accuracy score on the shooting range.

Admittedly, each of the solutions above adds additional words to a sentence, but the solutions illustrate why there can never be a pure balance between concise and precise in legal writing. Precision must always outweigh conciseness.

Of the above three solutions, the third is the most concise and offers fewest chances of error because it signposts the extended or
limited application (all, each, both). The first solution, repeating
modifiers each time, has the limited application for especially short
modifiers. If writers try to follow Sutherland by deliberately ad­
dding a comma to separate the modifier from two or more anteced­
ents, they will be breaking from the traditional use of punctuation.
Only if the court also chooses to follow the Doctrine, and knows
how to apply it, will writers be assured of achieving their meaning.

If writers follow Sutherland’s negative comma-use rule, that of
omitting the comma to deliberately connect the antecedent to only
the closest antecedent, their chances are slimmer yet: what court is
attuned to looking for the missing comma as a (non)signal for in­
tended meaning?

2. If the modifier follows a string of antecedents that are not
coordinate, but are subordinate instead, writers should place the
modifier as near its true antecedent as possible, or break the sen­
tence to offer clarity:

Subordinate string (what are we questioning?):

It is the witness of the court that we are investigating.

Rewrites:

(worrying about the witness): We are investigating the court’s
witness.
(distinguishing between courts): That person is a witness in
the case before the court that we are investigating.

B. How Statute Interpreters Can Work With Ambiguity

Statute interpreters must first look for meaning within the
four corners of the statute — the closed universe — and examine it
for consistency. If it is possible to find clues to a modifier’s antece­
dent within the other phrases’ construction, or to piece together
intent from direct inferences, then intent should rule over punctu­
ation and grammar. If a statute offers no internal clues to help interpreters, then interpreters should investigate the legislative
history of the statute when it is available.41 If the intent is unpene­
trable, then interpreters will have to resort to examining the un­

41 For a discussion of the use of legislative history in the federal court, see Lori Outzs,
A Principled Use of Congressional Floor Speeches in Statutory Interpretation, 28 COLUM.
derlying linguistic constructs. Trained linguists can help here.

Federal or state style manuals can also serve as interpretive aids. Several state legislatures have a drafting agency that creates manuals of suggested style, so that if a question arises about a modifier with several antecedents, then the courts can look to that style manual for guidance. For those state style manuals that do not address ambiguous modifiers, interpreters should ask, "why not?" Other states have driblets of manuals, many contradictory, that should be synthesized into a more definitive aid. State style

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42. See, e.g., DONALD HIRSCH, DRAFTING FEDERAL LAW (1979). This publication addresses questions of form and style for the United States House of Representatives and is published through the Office of Legislative Counsel.


44. The Legislative Reference Bureau of Wisconsin, for instance, distributes the Wisconsin BILL DRAFTING MANUAL (1989-1990), which contains this caution regarding the use of modifiers:

(17m) MODIFIERS. (a) Be careful that you modify only the words you intend to modify. For example, "an 18-year-old parolee, probationer or convict" is ambiguous: does "18-year-old" modify only "parolee" or does it also modify "probationer" and "convict"? Similarly, "licensees may hunt moose, deer or ducks that are not on the endangered species list" is ambiguous. (b) If you intend to modify all of the terms in a series, write something such as: 

"... a person who is a parolee, probationer or convict and is at least 18 years old...

or

"... licensees may hunt any of the following if the animal is not on the endangered species list: 1. Moose. 2. Deer. 3. Ducks.

If you intend the modifier to modify only one term in a series, write something such as: "a probationer or convict, or a parolee who is at least 18 years old," or "licensees may hunt ducks that are not on the endangered species list, moose or deer."

45. The Office of the Reviser of Statutes in St. Paul, Minnesota, has produced a 163-page manual, MINNESOTA RULES: DRAFTING MANUAL (1990), as part of its project to redraft the entire corpus of statutes into Plain Language. Its coverage of modifiers is specific: modifiers should appear right next to the words they modify. After the advice is an example of an ambiguous modifier and a correction.

Not quite so useful is Florida's GUIDE FOR BILL DRAFTING (1985), which admonishes writers to pay attention to punctuation by announcing that writers should be sure that the punctuation they use is an aid to understanding, not a source of confusion.

In 1994, the Texas agency that helps the Texas House members draft bills revised its style manual. Section 7.31 of the TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL instructs legislative drafters to place modifying words or phrases "so that there is no doubt what they modify." The editors warn that "poor placement of modifiers is probably the main contributor to ambiguity in statutes." Id. at 98.

In 1991, Ontario's Office of Legislative Counsel published LEGISLATIVE DRAFTING CONVENTIONS, which includes a section on "clause sandwiches."

The National Labor Review Board publishes a style manual, as does the Continuing Legal Education board of British Columbia. Although style manuals exist, not all of them
manuals create an interesting paradox: the very help they strive to offer can become yet another layer in the interpretive morass, another "authority" to weigh against all the rest. 46

C. Courts and Ambiguity

The only reasonable answer to legislative ambiguity47 is to look to the legal principles underlying the legislation rather than to stylistic principles that blur answers with contradictory style suggestions. Courts must return to interpretation armed with the competing concepts within the law, with an articulated sense of fairness, and with a general sense of the complexity of syntax.

Judges faced with interpretive questions have a problem, no doubt, but dealing with that problem by looking beyond the law can create another set of problems. Perhaps, as Solan contends, judges hope to produce "fairness" in spite of the applicable law and use sophisticated linguistic principles as an escape hatch to achieve that fairness.48 But that escape hatch can become just as controversial as the contrasting legal principles if judges acknowledge all the pertinent principles of linguistics rather than the one that best suits their goals.

address the substantive problems created by ambiguous modifiers. Drafting Federal Law, for instance, pinpoints as a drafting problem "vague modifiers" that are not precisely defined in the legislation. But the manual does not help drafters with modifiers that have several antecedents.

44 One solution might be for legislative bodies to pass laws adopting their state manual, so that the manual's advice about modifiers, for instance, could supersede other solutions. But then judges would be bound to a style manual that was created by stylists who are usually outside the legislature or judiciary, and most judges would argue that they know more about the law than language stylists. Perhaps the National Association of State Legislatures should persuade each state's representative stylists to agree to agree. Even then, state style manuals will not be able to cover the uniform acts that state legislatures adopt as written; the number of exceptions to the new state style manuals might make a volume as thick as the ones that today hold court decisions interpreting legislation. As the style manuals are updated, the legislatures would, I suppose, have to re-adopt the new manual's suggestions. Thanks to Charlotte Norris, editor of the 1994 Texas Legislative Council Drafting Manual for patiently and graphically describing the varying consequences of a state-mandated style book.

44 In contracts ambiguities are resolved in favor of the party that did not draft the document. Farnsworth on Contracts, 2d ed. §7.11 (19 ); Semmes Motor v. Ford Motor Co., 429 F.2d 1197 (2d Cir. 1970); Victoria v. Superior Court, 40 Cal. 3d 34, 710 P.2d 833 (1985). But, as Solan points out, even this established legal principle runs amuck when parol evidence is introduced. See supra, note 11 at 89.

44 Solan believes linguistics is used as a crutch to help make decisions both "definitive and neutral." See supra note 11 at 37-38.
Guess the Ambiguity: Appendix of Cases

1. *McCormack Trucking Co. v. United States*, 298 F. Supp. 39 (D.N.J. 1969). This case was controversial both at the bench and among critics because the court consciously applied the doctrine of last antecedent over intent, citing as its logic the abuse of the comma.

**Language:** The plaintiff could ship “[b]etween points in Connecticut, Pennsylvania, New Jersey, and New York within 100 miles of Columbus Circle, New York . . . .” (emphasis added)

**Question:** Does the 100 mile limit modify only the State of New York, as urged by McCormack, or all of the States in the preceding series, as concluded by the Commission?

**Answer:** (Judge Coolahan) “[A]s a matter of grammatical construction, there can be no question but that the 100-mile provision in the Sub 70 Certificate applies only to New York. Whether the grammatical rule be designated as the ‘Doctrine of the Last Antecedent’ or as a matter of simple common sense, the absence of a comma after the Certificate’s first reference to ‘New York’ indicates most clearly that this is the case.”

(Judge McLaughlin, dissent) The background of this litigation “must not be swept under the rug.” Division One, the first court to rule on this case, concluded that “if the last antecedent could ever be applicable, it would be where there was patent ambiguity.” The history of the case provided compelling evidence to the court that everyone had always agreed to this phrase’s meaning. The dissent traced the lack of grammarians’ rule about this ambiguity, researching Follett and Fowler. The dissent argued that the majority relied on the “incredible argument that despite the Commission’s intention, the plaintiff’s acquiescence and the fact that the Commission had always upheld its 1948 position completely, nevertheless, because of the absence of at best a most questionable comma, the certificate . . . is to be construed twenty years after . . . significantly different from what the Commission gave and what the plaintiff was knowledgeably given.”


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50 *H.W. Fowler, Modern English Usage*, 587-89 (1965). Fowler introduces punctuation problems but offers no rule, only the advice to recast sentences to avoid ambiguity.
LANGUAGE: "The degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree, UNLESS THE INHERITANCE comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance." (emphasis added)

QUESTION: Does "unless the inheritance" modify both initial clauses or only the last clause?

ANSWER: In nearly every other state the first clause of this inheritance doctrine is separated by a period or a semicolon. "We do not believe, however, that a problem of this moment should be decided solely by rules of punctuation. There are more cogent rules of statutory construction."

"Appellants’ interpretation ignores the rule announced in Davis v Gibbs, 39 Wis. 2d 481, 236 P.2d 545 (1951), in which we said:

'Where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent.' The last antecedent is the last word, phrase or clause that can be made an antecedent without impairing the meaning of the sentence.

Application of this rule to the instant case leads to the conclusion that the restrictive, adverbial clause introduced by 'unless the inheritance . . .' refers to and modifies the second clause 'the kindred of the half blood shall inherit equally with those of the whole blood in the same degree' which, of course, is the last antecedent that can be used without impairing the meaning of the sentence. . . . We find no express legislative intent to the contrary." 396 P.2d at 790.

In a grudging concurrence, Judge Hill said:

"This case provides a field day for the grammarians . . . . The opinion moves in erudite and complex syntax that turns all opposition into admiration.

Therefore, I must concur, albeit grudgingly, for I am satisfied that the legislature meant something other than the intricacies of construction indicate it meant. . . . This concurrence is written to bring this specific situation to the attention of the legislature and to suggest the desirability of adding a grammarian to its technical staff." 396 P.2d at 792.

App. 1982). Finding no legislative intent to the contrary, the court applied the last antecedent doctrine; the dissent argued that the comma changed the necessary interpretation.

**LANGUAGE:** The Bulk Transfers Act exempts "[s]ales by executors, administrators, receivers, trustees in bankruptcy, or any public officer UNDER JUDICIAL PROCESS." (emphasis added)

**QUESTION:** Does the phrase "under judicial process" modify only "sales by executors" or does it modify sales by all officers under judicial process?

**ANSWER:** "Under a traditional rule of statutory construction, the qualifying phrase 'under judicial process' modifies only 'public officer'; the phrase does not refer to 'executors'. . . . 'Public officer' is the last antecedent that 'under judicial process' can refer to without impairing the meaning of the sentence. . . . No contrary intention appears in the statute." 651 P.2d at 226.

The court also distinguished this repealed version of the statute from its predecessor, which exempted "sales or transfers of property by executors, administrators, receivers, or public officers, acting under judicial process." 651 P.2d at 226.

In the dissent, Judge Ringold noted that the majority opinion turned on an overly "technical and erroneous analysis" and placed "inordinate emphasis on the lack of a comma following the word 'officer.'" 651 P.2d at 226.

Ringold argued that the legislative history of this bill reflected "apparent disregard for" the placement of the comma, and he traced three versions that evidence a legislative schizophrenia. He argued that it makes no legal sense to speak of an executor or a public officer under judicial process. The specific purpose of the act is to protect the creditors of a business. Rather than looking to an arbitrary comma, the court instead should have traced legislative intent.


**LANGUAGE:** "A person who knowingly or intentionally: (3) flees from a law enforcement officer after the officer has, BY VISIBLE OR AUDIBLE MEANS, identified himself and ordered the person to stop, commits resisting law enforcement." (emphasis added)

**QUESTION:** Must a policeman audibly command the defendant in order to fulfill the requirement that he "order" the defendant to stop?

**ANSWER:** First determine if the legislative intent is made clear
by the "plain wording of the statute. In doing so it is proper and pertinent to examine such things as punctuation." 412 N.E.2d at 82.

"Where commas set off a modifying phrase it is evident that the phrase was intended to apply to all principles instead of only one adjacent to it." Id. at 82-83. The defendant's contrary interpretation would have required no commas before and after "by visible or audible means." Id. at 83.


LANGUAGE: "Any person who (1) has been convicted by a court of the United States or of a State . . . of a felony . . . and who receives, possesses, or transports in commerce OR AFFECTING COM­MERCE . . . any firearm shall be fined. . . ." (emphasis added)

QUESTION: Does "affecting commerce" apply only to "transports," or does it also modify "receiving" and "possessing" firearms?

ANSWER: "The Government, noting that there is no comma after 'transports,' argues that the punctuation indicates a congressional intent to limit the qualifying phrase to the last antecedent. But many leading grammarians, while sometimes noting that commas at the end of a series can avoid ambiguity, concede that use of such commas is discretionary. . . . When grammarians are divided, and surely where they are cheerfully tolerant, we will not attach significance to an omitted comma." 404 U.S. at 340, n.11.

"Not wishing to give point to the quip that only when legislative history is doubtful do you go to the statute, we begin by looking to the text itself. . . . While the statute does not read well under either view, 'the natural construction of the language' suggests that the clause 'in commerce or affecting commerce' qualifies all three antecedents in the list." Id. at 339.

The Court refused "to adopt the broad reading in the absence of a clearer direction from Congress." Id.

6. Martin v. Aleinikoff, 389 P.2d 422 (Wash. 1964). Six antecedents with two subordinate clauses were enough to cause the court to divide, separate, number, and finally choose an interpretation. The dissent believed that the decision flew in the face of legislative intent.
LANGUAGE: At issue was a 151-word sentence in Section 4 of the Unfair Practices Act (Laws of 1939, chapter 221; RCW 19.90). It shall be unlawful . . . to make or give, any special or secret rebate, payment, allowance, refund, commission or unearned discount, . . . or to secretly extend to certain purchasers special services or privileges not extended to all purchasers purchasing upon like terms and conditions, or to make and enter into any collateral contract or device of any nature, WHEREBY A SALE below cost is effected, to the injury of a competitor, AND WHERE the same destroys or tends to destroy competition. (emphasis added)

QUESTION: Do the two subordinate adverbial clauses in the sixth clause refer only to clause six or to all of the clauses?

ANSWER: "Where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent." 389 P.2d at 425. The court decided to divide the clauses. "For purposes of clarity and reference, we [the majority] separate and number the several portions of the statute as follows:

It shall be unlawful for any person engaged in business within this state. . . ., 1) to sell . . . , 2) or to give away, 3) or to use . . . , 4) or to make or give . . . , 5) or to secretly extend . . . , 6) or to make or enter into any collateral contract or device of any nature, (a) whereby a sale below cost is effected, to the injury to a competitor, and (b) where the same destroys or tends to destroy competition.

Id.

Thus the sixth infinitive phrase was judged to contain two subordinate clauses (even though the judges agreed that "[t]he statute is not a model of legislative draftsmanship"). Id. at 425.

Judge Finley, who dissented, saw the language differently. "I consider this [the majority's] result unsound, both because it is contrary to the usual construction of statutory language and, even more importantly, because it flies in the face of clearly announced legislative policy of developing an integrated, consistent body of antitrust and competition-fostering statutory law." Id. at 428. Judge Finley read the final section as emphasizing discriminatory practices that cause the "injury of a competitor, and where the same destroys or tends to destroy competition." Id. at 428-29.

The question thus becomes whether sales below cost refers to, and limits, the prohibition against price discrimination. The answer, according to Finley, should have followed the "normal usage of the language of the statute itself," but did not.
7. *In re Renton*, 485 P.2d 613 (Wash. 1971). This case could cause interpreters to reconsider vocations. The court held that intent can be understood because of the application of grammar rules to the statutory language.

**LANGUAGE:** In an attorney's fee statute: "the court may award the condemnee reasonable attorney's fees and reasonable expert witness fees ACTUALLY INCURRED." (emphasis added)

**QUESTION:** Does this language authorize the payment of reasonable attorney fees or only of reasonable attorneys fees actually incurred?

**ANSWER:** "It is well settled that the primary consideration on construing the provisions of a statute is to determine the intent of the legislature, and where possible this intent should be gathered from the language contained in the statute itself . . . ." A plain reading clearly indicates that it was the intention of the legislature to provide for reasonable attorney's fees, and the phrase 'actually incurred' was intended to modify 'reasonable expert witness fees' and not 'reasonable attorney's fees.' Construing the statute in this manner is consistent with the applicable rule of statutory construction which provides that a qualifying or conditioning phrase (i.e., 'actually incurred') relates solely to the last antecedent (i.e., 'reasonable expert witness fees')." 485 P.2d at 614-15.

The court also explained that this decision was consistent with other cases that allow the trial court to determine the reasonableness of attorney's fees.


**LANGUAGE:** "Personal estate" for purposes of taxation is defined by the Revised Statues of Maine, chapter nine, section five, to include "all obligations for money or other property; money at interest, and debts due the person to be taxed MORE THAN THEY ARE OWING." (emphasis added)

**QUESTION:** Does the phrase 'more than they are owing' relate to debts alone? The plaintiff contended that it modified and related to both money at interest and debts.

**ANSWER:** Legislative intent controls. "The punctuation, the comma after 'introduced,' seems to favor the defendants' interpretation. On the other hand the two subjects of taxation are intimately related . . . . The legislature evidently intended to include in the description, 'money at interest and debts due the persons to be taxed'. . . . There would seem to be no reason in justice why it should apply a different rule of taxation to one than the other
"This court has frequently declared that, when the meaning of a statute is in doubt, it is well to resort to the original statute and there search for legislative will first expressed." Thus, the words are precisely the same as an 1845 version, "but the punctuation is materially different. In the original act there is no comma after the word 'interest,' and there is one after 'taxed,' thus making it at once clear that the clause 'more than they are owing' relates to and modifies both money at interest and debts due . . . ." The court found that a revision in 1857 had changed the punctuation, but there was no notice that the legislature had changed its intention. The court adopted the rule that "[t]he punctuation however is subordinate to the text and is never allowed to control its plain meaning, but when the meaning is not plain, resort may be had to the marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author's meaning clear."

9. Gudgeon v. County of Ocean, N.J., 342 A.2d 553 (N.J. 1975). Although the court looked first to intention, it also found that punctuation supported its holding.

Question: Does the statute refer solely to transfers of first and second classes (rather than fifth, as was plaintiff)?

Answer: "The legislative history clearly indicates that [the statute] was intended to apply only to counties of the first and second classes. . . . Where a comma is used to set a modifying phrase off from previous phrases, the modifying phrase applies to all the previous phrases, not just the immediately preceding phrase. . . . [T]herefore, the modifying phrase ‘counties of the first of second class’ refers to both the phrase ‘position . . . in county employment’ and the phrase ‘position of a municipal government.’

**Language:** "[The] demand for an extradition of a person charged with crime in another state . . . shall be accompanied by a copy of the INDICTMENT FOUND, OR INFORMATION, SUPPORTED by affidavit in the state having jurisdiction of the crime, or by a copy of an affidavit made before a magistrate in such a state, together with a copy of any warrant which was issued thereupon . . . ." (emphasis added)

**Question:** Must the indictment — and not merely the information — be supported by an affidavit sufficient to establish probable cause to believe that the fugitive committed the charged offense?

**Answer:** No. Reference to a 1926 report of the original Act “leaves no doubt that [the drafters] meant the phrase ‘supported by affidavit’ to qualify ‘information’ only.” 382 A.2d at 1042. The court traced the phrase and its commas through revisions that “were not intended to produce any substantive departure” from the original Act. *Id.* “[W]e can ascribe no importance to the two additional commas inserted in the Maine version. They merely reflect an approach to punctuation . . . . Although in general punctuation can help in construing an unclear statute, the two commas inserted . . . are themselves the sole cause of any ambiguity at all in that section. That ambiguity is completely swept away both by the express command that section 3 be construed to promote uniformity of law among the states and by confederations of the practical dealings among the states on extradition matters.” *Id.* at 1043.


**Language:** “Whoever willfully and maliciously sets fire to any meetinghouse, courthouse, jail, town house, college, academy or other building erected for public use, or to any store, shop, office, barn or stable of his wife or another within the curtilage of a dwelling house, so that such dwelling house is thereby endangered and such public or other building is thereby burned in the nighttime, shall be punished . . . .”

**Question:** Does the absence of a comma after “endangered” create a construction whereby “allegations relative the ‘curtilage of a dwelling house’ and ‘that such a dwelling house is thereby endangered’ are essential elements of the crime of burning a public
building in the nighttime?"

**Answer:** "[T]he history of a statute is pertinent in casting light upon its meaning. The legislative intent controls." 247 A.2d at 102.


**Language:** "The term ‘holding company’ shall mean any corporation . . . (ii) at least sixty percent of the actual value of the total assets of which consist of stock, securities or indebtedness or SUBSIDIARY CORPORATIONS." (emphasis added)

**Question:** Does the phrase ‘of subsidiary corporations’ modifies only indebtedness, or stock and securities as well?

**Answer:** All three. The rule of the last antecedent is "but another aid to discovery of intent or meaning" and is thus "not an inflexible and uniformly binding rule." 325 A.2d at 909. The court found that another rule applied to the proper construction of the law in issue: "When several words are followed by a [modifying phrase] which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the [modifying phrase] be read as applicable to all." *Id.*

13. *Davis v. Gibbs*, 236 P.2d 545 (Wash. 1951) The final comma was not at issue. The only question was which antecedent was the last one.

**Language:** A petition "signed by at least twenty per cent of the qualified electors of such county, residents within the limits of the territory proposed to be annexed to such city, **WHO VOTED** in the last previous election as shown by the official poll books . . . ." (emphasis added)

**Question:** Does the "who voted" qualification refer to "residents" only or also to "qualified electors"?

**Answer:** "Where no contrary intention appears in a statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent . . . . The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence." 236 P.2d at 546.

Respondents contended that the "who voted" clause referred to "twenty per cent of the qualified electors," and its purpose was to require that a number equal to 20% of electors be signers of the petition. Appellants contended that "who voted" related to the last antecedent, "residents within the limits of the territory," and thus required the petition signer to have voted in the "last previous

The placement of a modifier in a string of prepositions modifies the last antecedent only.

**LANGUAGE:** The term “Indian country” means “(a) all land within the limits of any Indian reservation **UNDER THE JURISDICTION of the United States Government. . . .**” (emphasis added)

**QUESTION:** Does the modifying phrase “under the jurisdiction of the United States Government” qualify “all lands within the limits”?

**ANSWER:** Respondents argued that because the land upon which the alleged crime took place was transferred by patent to a non-Indian, the state has jurisdiction over the crime. Au contraire, held the court. “When a contrary intention does not appear in the statute, relative and qualifying words and phrases, both grammatically and legally, refer to the last antecedent. The last antecedent is the last word which can be made an antecedent without impairing the meaning of the sentence. In this instance, the last antecedent is the word reservation.” 302 P.2d at 965.


**LANGUAGE:** From Section 6550 of the Streets and Highway Code: “In order to obtain a deed the purchaser of the property or his assigns shall, 30 days prior to the expiration of the time of redemption, or 30 days before the date of his application for a deed, serve upon the owner of the property purchased, or his agent **IF HE IS NAMED IN THE CERTIFICATE OF SALE** and upon the party occupying the property, if the property is occupied, a written notice . . . .If the property is unoccupied, a similar notice must be posted in a conspicuous place upon the property . . . .” (emphasis added)

**QUESTION:** Does “if he is named in the certificate of sale” modify both “owner” and “agent”?

**ANSWER:** “[T]he clause and the word ‘agent’ both appear in the same part of the sentence and are separated from the word ‘owner’ by a comma. The evident purpose of such punctuation is to limit the qualifying clause to ‘agent.’ Giving support to this conclusion is the established rule that ‘a limiting clause is to be confined to the last antecedent, unless the context or the evident meaning of the statute requires a different construction.’” 260 P.2d at 37. “Section 6550, in its original and in its present form, makes clear the inapplicability of the qualifying clause to the word ‘owner.’” *Id.*
Greco-Roman Analysis of Metaphoric Reasoning*

Michael Frost**

INTRODUCTION

Frequently and almost instinctively lawyers use figurative and metaphoric language when they want to emphasize or crystallize their analysis or arguments.1 When they rely on familiar metaphoric cliches—the law as a “seamless web,” cases with “progeny,” corporations with “veils,” and constitutional “penumbras” they reveal not only their appreciation for the power of figurative language but also their substantial reliance on metaphoric reasoning.2 Lawyers’ predilection for using figurative language in what are otherwise rather dry and logical arguments has recently prompted some legal commentators and other analysts to examine the impact and place of metaphors in forensic discourse.3 Most modern analyses center on the issues raised by Justice Cardozo’s oft-cited admonition that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”4 Recent analysts who “narrowly watch” or scrutinize how met-

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1 Numerous modern definitions of metaphor exist ranging from Robert Frost’s that a metaphor is “saying one thing and meaning another,” JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 57 (1973), to that of the PRINCETON ENCYCLOPEDIA OF POETRY AND POETICS 490 (ed. Alex Preminger) (1965), which defines metaphor as “[a] condensed verbal relation in which an idea, image, or symbol may, by the presence of one or more other ideas, images, or symbols, be enhanced in vividness, complexity, or breadth of implication. . . . The metaphorical relation has been variously described as comparison, contrast, analogy, similarity, juxtaposition, identity, tension, collision, [and] fusion. . . .”
2 This entire article analyzes the subject of “metaphoric reasoning,” but, generally speaking, metaphoric reasoning is the use of metaphors and similes to explain, describe, persuade, or emphasize.
aphors affect legal reasoning spend most of their time explaining how metaphors either "liberate" thought or "enslave" it.

However, resourceful as they are in discovering the connections between metaphors and the law, modern analysts seldom rely on the works of classical rhetoricians who studied the matter in considerable detail and whose analysis goes far beyond the "liberate/enslave" dichotomy. Aristotle's Rhetoric and his Poetics, Quintilian's Institutio Oratoria, and Cicero's De Oratore, for example, all include extensive discussions of the analytical and persuasive value of metaphors in forensic discourse. Their analysis of how metaphors work and when they are appropriate reveals as much about legal reasoning as do most modern commentaries on the topic. Moreover, in addition to discussing the logical value of metaphoric reasoning, these classical treatises also examine its persuasive and aesthetic impact. While their focus on the aesthetics of legal discourse may strike modern analysts as somewhat odd, classical rhetoricians regarded aesthetics as a natural, proper, and necessary component of legal analysis and argument. In the hope of inducing modern legal analysts to examine the classical sources for themselves, this article surveys classical techniques for analyzing legal metaphors and metaphoric reasoning and briefly compares them with modern approaches to the same topic.

Part One of this essay summarizes the logical, emotional, and credibility implications of legal metaphors from a classical perspective. It demonstrates that classical rhetoricians favored metaphors as part of the logical proof in legal arguments because metaphors are subtle, concise and intellectually engaging and because they provide a unique intellectual dimension without sacrificing logical integrity. They also favored them because their emotional and aesthetic qualities captured the audience's attention, eased the demands on the audience's intelligence and made the experience pleasurable. Classical rhetoricians were so convinced of the emotional force of particular metaphors that they even categorized some of them according to effect, suitability, proper placement and persuasive value. And, finally, Part One explains how, under the
classical rubric, an advocate’s choice and use of metaphors reflected on his credibility, resourcefulness, probity, genius and even good taste.

Part Two examines parallels between classical and modern opinions about metaphors’ suitability in legal discourse. It also explains why some modern analyses of legal metaphors focus almost exclusively on logic and why most modern analysts are suspicious of the very emotional and intellectually intuitive qualities that attracted classical rhetoricians. In addition, Part Two shows how several modern approaches to legal metaphors, based as they are on language theory and cognitive psychology, resemble and recall the classical rhetoricians’ approach.

I. GRECO-ROMAN THEORIES OF FORENSIC DISCOURSE

Greek and Roman rhetoricians composed extensive treatises on almost every aspect of legal discourse. They were by no means monolithic in their approaches and advice; that is, they frequently differ from one another as to particular strategies and techniques. Even so, they agreed with one another about the basic principles. They discussed analytical methodology and discovery of issues and arguments as well as the most persuasive ways to organize arguments. Part of their analysis of legal discourse focused on its logical integrity (logos), its emotional appeal (pathos) and on authorial credibility (ethos). Although these rhetoricians discuss logos, pathos, and ethos separately, they regarded all three as integrally connected to one another and resisted any impulse to compartmentalize them or regard one as more important than the others.

In using this three-pronged approach, they assumed that legal arguments and analysis do not succeed solely on the basis of their logical integrity. Quintilian stresses this point when he observes

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8 Although Greco-Roman commentaries on legal discourse assumed a listening rather than a reading audience, their observations regarding metaphors apply as fully to the written as to the spoken word. See R. ENOS, THE LITERATE MODE OF CICERO’S LEGAL RHETORIC 60 (1988). “Oral and written expression were so inextricably bound in ancient discourse that its unity was an unquestioned presumption upon which theories of rhetoric were developed.” Id. This presumption was based on the fact that silent reading was rare (especially for Greeks) and that most writing was intended to be presented orally. Id.


10 Michael Frost, BRIEF RHETORIC—A NOTE ON CLASSICAL AND MODERN THEORIES OF FORENSIC DISCOURSE, 38 Kansas LR 411 (Winter 1990)

11 ARISTOTLE, RHE TORIC, 8. For an extended discussion of how these concepts apply to modern legal discourse see Michael Frost, ETHOS, PATHOS AND LEGAL AUDIENCE, 99 Dickinson LR 85 (Fall 1994)
that “oratory in which there is no guile fights by sheer weight alone.” In large part, the “guile” Quintilian had in mind was an advocate’s exploitation of all available stylistic resources.

Because of its importance and difficulty, Quintilian and others focused a great deal of attention on the place of style or “diction” in legal discourse. By far the longest and most detailed parts of their treatises are devoted to style since, according to Aristotle, “it is not enough to know what to say—one must also know how to say it” and, according to Quintilian, “it cannot possibly be acquired without the assistance of the rules of art.” Classical rhetoricians described these stylistic “rules of art” in exhaustive detail, even to the point of recommending specific syntactic and semantic forms to suit specific rhetorical purposes.

In tacit recognition of the intrinsically figurative nature of all language, Greek and Roman analysts treated metaphors, similes and other figurative devices as both figures of thought and figures of speech. Consequently, within the larger context of their analysis of inductive and deductive reasoning, classical rhetoricians devoted considerable attention to metaphors as figures of thought. As figures of thought, metaphors were regarded as intrinsically valid and perfectly “natural” devices for analysis and argumentation, rather than as mere belletristic embellishments. Quintilian called attention to how intrinsic and pervasive metaphors are in everyday discourse when he said,

Let us begin [our analysis of tropes]. . .with the commonest and by far the most beautiful of tropes, namely, metaphor, the Greek term for our translatio. It is not merely so natural a turn of speech that it is often employed unconsciously or by uneducated persons, but it is in itself so attractive and elegant that however distinguished the language in which it is embedded it shines forth with a light that is all its own.

12 3 QUINTILIAN at 359.
13 ARISTOTLE, RHETORIC at 182.
14 3 QUINTILIAN at 185. “Therefore it is on this (style) that teachers of rhetoric concentrate their attention, since it cannot possibly be acquired without the assistance of the rules of art: it is this which is the chief object of our study, our exercises and all our efforts at imitation, and it is to this that we devote the energies of a lifetime; it is this makes one orator surpass his rivals, this that makes one style of speaking preferable to another.”
15 ARISTOTLE, RHETORIC at 194-196 and 202-206; 3 QUINTILIAN, INSTITUTIO ORATORIA at 349ff.
16 Frost, BRIEF RHETORIC, 424.
17 3 QUINTILIAN at 303. (Emphasis added) Cicero also notes that, “the use of metaphor is of wide application.” DE ORATORE at 121. A trope is “a deviation from the ordinary and principal signification of a word.” EDWARD P.J. CORBETT, CLASSICAL
Based on his observation that metaphors are quite common and, in fact, are "natural" figures of thought, Quintilian, like other Greek and Roman rhetoricians, acknowledged the intrinsically figurative nature of all language. For him, metaphors were not uniquely figurative; they were simply the "most beautiful" rhetorical figures.

By characterizing metaphors as the "most beautiful of tropes," Quintilian is not simply repeating Aristotle's observations about language in general and metaphors in particular. He adds to and comments on the Aristotelian position. Aristotle's high regard for metaphors sprang from his conviction that metaphors help compensate for the stylistic deficiencies of prose. However, by Quintilian's time, metaphors were considered the "supreme ornament" of forensic discourse and figured prominently in an approach to legal analysis which assumed that thinking and writing on legal topics were as figurative and metaphorical as they were logical.

A. Logos

Although classical rhetoricians devoted comparatively little attention to the contributions that metaphors make to the logical integrity (logos) of legal discourse, they nonetheless assumed that metaphors do have some limited logical value. For example, within the context of classical logical conventions, metaphors operate almost like examples do in inductive proofs. Quintilian understood them in this way when he noted that similes (a form of metaphor) "are designed for insertion among our arguments to help our proof." Under classical theory, metaphors contribute to logical or analytical legal discourse primarily by means of comparisons in

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18 See ARISTOTLE, RHETORIC at 187 where he says that "all the more attention must be devoted to metaphors because here [in forensic prose] the resources of the writer are less abundant than in verse." Cicero echoes this point in DE ORATORE at 121, where he says that use of metaphors "sprang from necessity due to the pressure of poverty and deficiency [of prose]." He then illustrates his point metaphorically "For just as clothes were first invented to protect us against cold and afterwards began to be used for the sake of adornment and dignity as well, so the metaphorical employment of words was begun because of poverty, but was brought into common use for the sake of entertainment." (emphasis added)

19 3 QUINTEILIAN at 199 "Metaphor. ...which is the supreme ornament of oratory, supplies words to things with which they have strictly no connexion."

20 For a description of how Greco-Roman advocates used "examples" see Michael Frost, Greco-Roman Legal Analysis: The Topics of Invention, 66 St. John's LR 116 (1992). See also ARISTOTLE, RHETORIC at 147-149; CICERO, DE INVENTIONE at 89-91 (H.M. HUBBELL trans. 1949); and 2 QUINTEILIAN at 275.

21 3 QUINTEILIAN at 251.
which meanings in one context are transferred to another context. According to Quintilian, this transference occurs when, "[a] noun or verb is transferred from the place to which it properly belongs to another where there is either no literal term or the transferred [term] is better than the literal. We do this. . . because it is necessary. . . to make our meaning clearer. . . ."\textsuperscript{22}

All metaphors are analogies, and most classical rhetoricians include them with other analogical tropes, like similes, whose principal effects arise from the creation of limited comparisons. Analogical tropes function by means of "reciprocal representations"\textsuperscript{23} in which "both subjects of comparison [are placed] before our very eyes, displaying them side by side."\textsuperscript{24} The comparison allows the audience to gain cognitive insights not usually achievable by linear or syllogistic reasoning. Aristotle saw metaphors as vehicles with "which we give names to nameless things."\textsuperscript{25} In a similar vein, Cicero observed that "when something that can scarcely be conveyed by the proper (literal) term is expressed metaphorically, the meaning we desire to convey is made clear by the resemblance of the thing that we have expressed by the word that does not belong."\textsuperscript{26} That is, a metaphor may be the only way to make or emphasize a particular point.

Aristotle was attracted to metaphors because they challenge the audience to seek resemblances where none usually exist. Metaphors are intellectually engaging in ways that differ from the usual deductive and inductive methods. He thought that, because metaphors provide insights not achievable by other means, they must spark cognitive intuitions available only through a discovery process. For Aristotle, the act of understanding or “solving” a metaphor is similar to solving a riddle; in both cases the solving is itself an act of learning.\textsuperscript{27} Cicero focused on a related but slightly different source of intellectual attraction when he recommended using metaphors because they increased the rhetorical impact of intellectual insights without compromising logical integrity. That is, the audience’s “thoughts are led to something else and yet without go-

\textsuperscript{22} 3 QUINTILIAN at 304. See also Quintilian’s observation at 351 that all tropes (including metaphors) transfer “expressions from their natural and principal signification to another” or transfer “words and phrases from the place which is strictly theirs to another to which they do not properly belong.”
\textsuperscript{23} 3 QUINTILIAN at 255.
\textsuperscript{24} Id. at 255.
\textsuperscript{25} ARISTOTLE, RHETORIC at 188.
\textsuperscript{26} CICERON, DE ORATORE at 123. (emphasis added)
\textsuperscript{27} ARISTOTLE, RHETORIC at 213.
ing astray, which is a very great pleasure."\textsuperscript{28}

Classical rhetoricians were also attracted to metaphors because they were concise, subtle, and provided a unique "wholeness" of insight. According to Aristotle, metaphors achieve their effect in part because they can convey "fresh knowledge"\textsuperscript{29} almost as fast as they are stated.\textsuperscript{30} Cicero too commended metaphors for their ability to convey complex ideas concisely.\textsuperscript{31} Quintilian observed that metaphors work subtly, "[f]or although it may seem that proof is infinitesimally affected by the figures (of speech, like metaphors) employed, none the less those same figures lend credibility to our arguments and steal their way secretly into the minds of the judges."\textsuperscript{32} In addition to their conciseness and subtlety, metaphors provide the audience with a greater sense of the "whole meaning of the matter, whether it consists in an action or a thought."\textsuperscript{33}

B. Pathos

The "wholeness" of meaning that classical rhetoricians had in mind included the emotional aspect of the matter. Although modern theories of legal discourse generally disfavor patently emotional arguments and analysis, classical theory recognized the inevitability of emotional appeals and sanctioned their use. Aristotle, for instance, emphasizes pathos as one of the three means of persuasion at an advocate’s disposal: "Persuasion is effected through the audience, when they are brought by the [argument] into a state of emotion; for we give very different decisions under the sway of pain or joy, and liking or hatred."\textsuperscript{34} Although Aristotle recognized the emotional component in legal arguments, he did not endorse arguments based solely on the emotions. Instead, he insisted that decisions should be based on "right reason" and that "the man who is to judge should not have his judgment warped by [advo-
cates] arousing him to anger, jealousy, or compassion. One might just as well make a carpenter's rule crooked before using it as a measure."

Even though Aristotle clearly recognized the dangers of emotion-based arguments, he nevertheless provided detailed descriptions of how and when to play on the emotions.

Within classical analysts' discussion of emotional arguments, metaphors play a small but significant part. According to Quintilian and other Greco-Roman rhetoricians, metaphors are by nature emotional in force. He noted that a "[m]etaphor is designed to move the feelings" and that "there is no more effective method of exciting the emotions than an apt use of figures [like metaphors]."

The most characteristic emotional response that classical analysts ascribe to metaphors is pleasure. Aristotle, for instance, says "we may start from the principle that we all take a natural pleasure in learning easily; so, since words stand for things, those words are most pleasing that give us fresh knowledge. . . . Accordingly, it is metaphor that is in the highest degree instructive and pleasing." Cicero makes a similar observation when he notes that "everybody derives more pleasure from words used metaphorically and not in their proper sense than from the proper names belonging to the objects." He thinks the pleasure may arise from the fact that the audience's "thoughts are led to something else and yet without going astray, which is a very great pleasure." Quintilian too thought that,

rhetorical ornament[s] contribute not a little to the furtherance of our case . . . . For when our audience finds it a pleasure to listen, their attention and their readiness to believe what they hear are both alike increased, while they are generally filled with delight, and sometimes even transported by admiration.

Classical rhetorician's analysis of metaphors' emotional impact also includes a detailed examination of the sources of this pleasure. Aristotle, for instance, identifies the essentially paradoxical quality

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88 ARISTOTLE at 2.
89 ARISTOTLE at 92ff.
37 3 QUINTILIAN at 311.
38 3 QUINTILIAN at 359.
39 ARISTOTLE, RHETORIC at 206.(emphasis added)
40 CICERO at 125.(emphasis added)
41 CICERO at 125.(emphasis added)
42 3 QUINTILIAN at 213.(emphasis added)
of metaphors when he notes that they are pleasurable in part because they make intellectual tasks easier and in part because they challenge the mind to seek resemblances. That is, the intellectual task is easier because it is pleasurable and challenging because the resemblances are not expressly identified by the author.

Aristotle and other rhetoricians also think that metaphors achieve some of their strongest effects by means of novel insights and pleasurable surprise. Aristotle notes that "liveliness through the use of metaphor is . . . gained when there is an added element of surprise." Quintilian observes that "the more remote the [metaphor] is from the subject to which it is applied, the greater will be the impression of novelty and the unexpected which it produces." When analyzing the pleasure derived from metaphors, these rhetoricians devote considerable attention to aesthetic considerations. That is, while they were acutely conscious of the intellectual force of metaphors, they were equally conscious of metaphors' ability to embellish prose and make it more interesting. They constantly allude to metaphors' "charm" and "distinction," and their "agreeable and entertaining qualities." In addition to metaphors' other virtues, Quintilian thought that metaphors acted as an "ornament to oratory, and serve[d] to make it sublime, rich, attractive or striking."

Unlike most analyses of aesthetic value which eventually degenerate into expressions of personal taste, the analyses of classical rhetoricians agreed not only on how metaphors please but also on a number of other aesthetic points. They agreed, for instance, that most effective metaphors are based on sight, rather than hearing, taste or touch. Cicero said that metaphors have a "direct appeal to the senses, especially the sense of sight" and Quintilian thought that metaphors were designed to "give special distinction to things and place them vividly before the eye."

Understandably, given the analogical nature of metaphors,
they also agreed, with Aristotle, that successful metaphors depend on the degree of correspondence or proportion between the metaphor and the subject to which it is applied. Quintilian takes Aristotle's preference for correspondence and his observation that "metaphors are of four kinds" as the basis for a four-part classification system: "In the first we substitute one living thing for another . . . Secondly, inanimate things may be substituted for inanimate . . . or inanimate may be substituted for animate . . . or animate for inanimate." Quintilian's list demonstrates a classical rhetorician's acute sensitivity to subtle distinctions and appreciation for the logical and aesthetic values of symmetry and asymmetry.

Aristotle's preference for antithesis as a means of argument and illustration provides one important variation on this principle of correspondence. For him,

the more concise and antithetical the saying, the better it pleases, for the reason that, by the contrast, one learns the more, and, by the conciseness, learns with the greater speed. . . .[W]hen the words are metaphorical, and the metaphor is the right kind, and there is antithesis with balanced structure, and a sense of activity as well [the livelier is the effect]. . . .

During their discussions of correspondence and analogy, classical rhetoricians also devote considerable attention to a special class of metaphor: the simile. Generally speaking, similes were regarded as just another type of analogical trope. In some cases, similes are simply decorative embellishments; in others, they are integral parts of the argument. Aristotle disdained similes as less subtle and sophisticated than metaphors and noted that

[t]he simile . . . is a metaphor, differing from it only in that the simile adds the phrase of comparison, which makes it longer, and hence less pleasing. Nor does it, like the metaphor, say 'this is that; and hence the mind of the hearer does

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81 ARISTOTLE, RHETORIC at 187.  
82 Id. at 208.  
83 3 QUINTILIAN at 306-07.  
84 ARISTOTLE, RHETORIC at 214-215. (emphasis added)  
85 ANONYMOUS, RHETORICA AD HERENNIUM 141 (H. Caplan trans. 1954) "Embellishment consists of similes, examples, amplifications, previous judgements, and the other means which serve to expand and enrich the argument. . . ." (emphasis added)  
86 3 QUINTILIAN at 359.
not have to seek the resemblance. 67

Cicero, however, thought highly of similes because “a simile can be drawn from everything—a single word supplied by it that comprises the similarity, if used metaphorically, will give brilliance to the style.” 68 Quintilian too thought that “[t]he invention of similes has . . . provided an admirable means of illuminating our descriptions” and required only that “the subject chosen for our simile [be] neither obscure nor unfamiliar: for anything that is selected for the purpose of illuminating something else must itself be clearer than that which it is designed to illustrate.” 69 Aristotle’s reservations notwithstanding, most rhetoricians analyzed and used similes in the same way they did other metaphors.

As the preceding analysis reveals, these rhetoricians generally agreed that all figurative language, and especially metaphors and similes, should be symmetrical and precise. Moreover, they also agreed on matters such as the sensory appeal of metaphors and the proper degrees of correspondence and antithesis. And, finally, they agreed that certain kinds of metaphors had specific emotional effects 80 and had fixed opinions about where they should appear. 81

Fond as they were of metaphors, they nevertheless recognized their potential for offending, confusing, or emotionally abusing the audience. Consequently, they devoted almost as much attention to improper use of metaphors as they did to their proper use. Aristotle said that “faulty metaphors arise when they are either too grand or too obscure.” 82 Cicero warned against using metaphors “where there is no real resemblance” or which are “too far-fetched.” 83 Quintilian concluded that, “while a temperate and

67 ARISTOTLE, RHETORIC, 207.(emphasis added)
68 CICERO, DE ORATORE, 127.(emphasis added)
69 3 QUINTILIAN at 251.(emphasis added)
80 See ARISTOTLE, RHETORIC at 187 for Aristotle’s list of “effects”. Also see ANONYMOUS, AD HERE. at 343 “Metaphor is used for the sake of creating a vivid mental picture . . . for the sake of brevity . . . for the sake of avoiding obscenity . . . for the sake of magnifying . . . for the sake of minifying . . . [and] for the sake of embellishment.”
81 A “metaphor should always either occupy a place already vacant, or if it fills the room of something else, should be more impressive than that which it displaces.” 3 QUINTILIAN at 311. See also CICERO, DE ORATORE at 129 “[T]he metaphor ought to have an apologetic air, so as to look as if it had entered a place that does not belong to it with a proper introduction, not taken it by storm, and as if it had come with permission, not forced its way in.” (emphasis added)
82 ARISTOTLE, RHETORIC at 192. See also Cicero’s observation in DE ORATORE, 129, “I deplore a metaphor that is on a bigger scale than the thing requires—a hurricane of revelry, or on a smaller scale—the revelling of a hurricane.” (emphasis added)
83 CICERO, DE ORATORE at 129. See also ANONYMOUS, AD HERE. at 143 “A
timely use of metaphor is a real adornment to style, on the other hand, its frequent use serves merely to obscure our language and weary our audience, while if we introduce them in one continuous series, our language will become allegorical and enigmatic.”  

He was particularly critical of cliches and cautioned against “those hackneyed phrases of forensic pleading, ‘to fight hand to hand,’ ‘to attack the throat,’ or ‘to let blood’... [because] they do not strike the attention: for it is novelty and change that please in oratory.”

The range and type of emotional effects these rhetoricians envisaged is reflected in their own use of metaphors. They themselves frequently chose or created metaphors to illustrate various rhetorical effects and stylistic alternatives. Like Aristotle explaining that metaphors should closely resemble their objects, classical rhetoricians sometimes make their point metaphorically and then explain it. Or, like Cicero insisting that metaphors must make the meaning clearer, they sometimes leave the metaphors unexplained. Frequently, they create their own metaphors. Quintilian illustrates his point regarding a “bold, manly and chaste” style of embellishment with an unusually long and highly symmetrical agricultural metaphor. He begins by asking the rhetorical question,

[Is beauty an object of no consideration in the planting of fruit trees? Certainly not! For my trees must be planted in due order and at fixed intervals. What fairer sight is there than rows of trees planted in echelon which present straight lines to the eye from whatever angle they be viewed? But it has an additional advantage, since this form of plantation enables every tree to derive an equal share of moisture from the soil. When the tops of my olive trees rise too high, I lop them away, with the result that their growth expands laterally in a manner that is at once more pleasing to the eye and enables them to bear more fruit owing to the increase in the number

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simile is defective if it is inexact in any aspect, and lacks a proper ground for the comparison, or is prejudicial to him who presents it.”(emphasis added)  

ARISTOTLE, RHETORIC at 212, “Metaphors... should be drawn from objects that are related to the object in question, but not obviously related; [in rhetoric] as in philosophy the adept will perceive resemblances even in things that are far apart. Thus [the philosopher] Archytas said that an arbitrator and an altar were the same, since both are a refuge for the injured.”

Cicero quotes a passage whose carefully chosen verbs personify the elemental forces of a storm, “A shivering takes the sea./Darkness is doubled, and the murk of night/And stormclouds blinds the sight, flame ‘mid the cluds/Quivers...” DE ORATORE at 123.
of branches. 68

Even in those sections of classical treatises not exclusively devoted to matters of style, they often employ metaphors. 68 Cicero, for instance, uses a nature metaphor to assert that all rhetorical eloquence has a single source, “eloquence is one, into whatever shores or realms of discourse it ranges...the flow of language though running in different channels does not spring from different sources, and wherever it goes, the same supply of matter and equipment of style go with it.” 70 At the very beginning of his analysis of the proper arrangement or organization of legal arguments, Quintilian illustrates the importance of good organization by pointing out that “just as it is not sufficient for those who are erecting a building merely to collect stone and timber and other building materials, but skilled masons are required to arrange and place them, so in speaking, however abundant the matter may be, it will merely form a confused heap unless arrangement be employed to reduce it to order and to give it connexion and firmness of structure.” 71

These and other metaphors that frequently appear in what are essentially “analytical” treatises reveal that classical rhetoricians habitually used metaphors as a mode of thought as well as a stylistic embellishment. While their metaphors may not evoke the same emotions in modern audiences that they did in contemporary ones, their choice and placement of metaphors nonetheless demonstrate these rhetoricians’ conviction that an aesthetic response to language provides an important visceral and emotional complement to a purely logical or intellectual response. For them, metaphors had an inherent aesthetic appeal and an identifiable and quantifiable emotional content that advocates could use in the same way as they use other rhetorical resources.

C. Ethos

Under classical theory, the “emotional” effect of the argument or analysis was also linked to the credibility of the person who makes it. For Greco-Roman rhetoricians, the advocate’s ethos was as important as the logical (logos) or emotional (pathos) content of

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68 3 QUINTILIAN at 215-217.
69 Aristotle, for instance, compared judgement warped by emotion to a carpenter’s rule made crooked before use, ARISTOTLE, RHETORIC at 2.
70 CICERO, DE ORATORE at 19-21.(emphasis added)
71 3 QUINTILIAN at 3.
what he writes. Aristotle stressed this point when he said that "we might almost affirm that [the advocate's] character (ethos) is the most potent of all the means to persuasion." He also stressed, however, that the advocate's credibility or probity should not depend on "an antecedent impression that the speaker is this or that kind of man." Rather, credibility "should be created by the speech itself." That is, the advocate deliberately strives to create a particular ethos by means of the speech.

Within the speech itself, the advocate's character is revealed as much by his stylistic choices as by his choice of substantive points. All these rhetoricians emphasized the importance of consciously selecting a specific style to achieve a specific rhetorical effect. Quintilian, for instance, thought style selection was a two-step process:

[W]e must consider first our ideal of style, and secondly how we shall express this ideal in actual words. The first essential is to realize clearly what we wish to enhance or attenuate, to express with vigour or calm, in luxuriant or austere language, at length or with conciseness, with gentleness or asperity, magnificence or subtlety, gravity or wit. The next essential is to decide by what kind of metaphor, figures, reflexions, methods and arrangement we may best produce the effect which we desire.

By focusing as he did on the advocate's deliberate decisions about what points to emphasize and which style to use, Quintilian stressed that the advocate's choice of metaphor is more a matter of premeditation than it is of inspiration. Good advocates do not just hope that an apt metaphor will occur to them; instead they consciously seek or create the proper metaphor to achieve a specific rhetorical effect.

Although both Aristotle and Cicero thought stylistic decisions, including decisions about which metaphors to use, contributed significantly to the advocate's ethos, they made only modest claims for the contribution made by metaphors. Aristotle does, however, suggest in his Rhetoric that good metaphor selection indicates the advocate's resourcefulness and insight: "the adept will perceive re-

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72 ARISTOTLE, RHETORIC at 9.
73 ARISTOTLE, RHETORIC at 9.(emphasis added)
74 ARISTOTLE, RHETORIC at 8.
75 ARISTOTLE, RHETORIC at 46, "Character is manifested in choice [in what men choose to do or avoid]; and choice is related to end or aim."
76 3 QUINTILIAN at 233.(emphasis added)
semblances even in things that are far apart."\(^{77}\) In his *Poetics*, however, Aristotle posits a stronger and clearer connection between good metaphor selection and *ethos*. During his discussion of poetic diction he asserts that,

> [i]t is a matter of great importance to use each of the [stylistic] forms ... in a fitting way, ... but by far the most important matter is to have skill in the use of metaphor. This skill alone it is not possible to obtain from another; and it is, in itself, a *sign of genius*. For the ability to construct good metaphors implies the ability to see essential similarities.\(^{78}\)

Cicero does not go quite so far as Aristotle, but he too thought metaphor selection contributes to an advocate’s *ethos*. He says only that good metaphors are a “mark of cleverness” in the writer.\(^{79}\)

Quintilian, on the other hand, thought that good metaphors make an appreciable contribution to the advocate’s *ethos*. In his view, an advocate commends both himself and his argument to the audience by skillful selection and use of figurative language:

> [B]y the employment of skillful ornament (including metaphors) the *orator commends himself* at the same time (as he commends his argument), and whereas his other accomplishments appeal to the considered judgment, this gift appeals to the enthusiastic approval of the world at large, and the speaker who possesses it fights not merely with effective, but with flashing weapons.\(^{80}\)

Quintilian’s use of the “flashing weapons” metaphor illustrates how the emotional appeal of “commending” oneself complements the logical appeal to “considered judgment.” By skillfully cultivating a close relationship between logical and emotional appeals the advocate is able to make the inherent or substantive merits of his case even more compelling than they would otherwise be.

Not only does an advocate’s *ethos* depend on the careful selection of good metaphors, it also depends on avoiding enigmatic, obscure, allegorical or cliched metaphors or overusing metaphors to

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\(^{77}\) ARISTOTLE at 212.(emphasis added)

\(^{78}\) ARISTOTLE, ARISTOTLE'S POETICS: A TRANSLATION AND COMMENTARY FOR STUDENTS OF LITERATURE 41 (Leon Golden, trans. 1968)(emphasis added)

\(^{79}\) CICERO, DE ORATORE at 125.

\(^{80}\) 3 QUINTILIAN at 213.(emphasis added)
the point they "weary the audience." Although these rhetoricians do not address this point directly, it is implicit in their insistence that advocates avoid misusing metaphors.

As they described the various ways careful metaphor selection contributes to an advocate's ethos, these rhetoricians illustrated how successful legal arguments depend as much on deliberate stylistic choices as they do on substantive choices. They assumed that selecting good metaphors, and avoiding bad ones, are integral parts of an advocate's deliberate cultivation of a particular ethos and that ethos is as important as logos or pathos to the success of an argument.

Clearly, Greco-Roman rhetoricians thought metaphors were a natural, important, and even essential, analytical and stylistic resource in legal discourse. They recognized the unique and emphatic contributions good metaphors make to the intellectual integrity, emotional wholeness, and general credibility of legal arguments. Further, their assumptions regarding the intrinsically figurative nature of all language prompted them to exhaustively analyze how advocates could use metaphors for particular argumentative and rhetorical effects.

D. Application to Modern Legal Metaphors

The metaphors which appear in judicial opinions have a greater social and legal impact than those in any other form of modern legal discourse and offer a good vehicle for determining whether classical analytical principles apply to modern legal discourse. However, the classical principles must be applied with due allowances for the differences in classical and modern purpose, point of view and legal context. Classical principles were devised using legal metaphors drawn from oral arguments by passionate advocates not from written opinions by impartial judges. Even so, applying classical principles to an extended metaphor in Shanley v. Northeast Ind. School Dist. 462 F.2d 960 (5th Cir. 1972), a routine First Amendment case, reveals a great deal about its author's emotional inclinations, credibility strategies and reasoning processes.

The Shanley case involved high school students who distributed an underground newspaper near a school. The court ruled that the students had a First Amendment right to do so and decided the case against school officials who tried to prevent the dis-

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81 3 QUINTILIAN at 307-309.
tribution. The court supported its decision in part by referring to another First Amendment case also defending high school students’ First Amendment rights, *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969). Beginning with a pun, Judge Goldberg employs a rather lengthy farm/irrigation metaphor to make his point,

*Tinker's* dam to school board absolutism does not leave dry the fields of school discipline. This court has gone a considerable distance with the school boards to uphold its disciplinary fiats where reasonable . . . . *Tinker* simply irrigates, rather than floods, the fields of school discipline. It sets canals and channels through which school discipline might flow with the least possible damage to the nation’s priceless topsoil of the First Amendment . . . .

Like Quintilian, who also used an extended farming metaphor to support his position, 83 Judge Goldberg used this metaphor to evoke pastoral, agricultural associations in support of the court's First Amendment decision. A classical analyst would maintain that by selecting this, rather than another metaphor, Judge Goldberg deliberately chose to present himself and his argument in particular way and used an emotion-laden image to do so. Moreover, he consciously attempted to establish or increase his own credibility or *ethos* by playing on the emotional content or *pathos* of a particular metaphor. By aligning or associating Americans’ long-held reverence for agriculture and farming with his own position on an abstract principle, he made a metaphoric argument or gave a metaphoric explanation for his position.

He equated the First Amendment protections provided by *Tinker* opinion with a *dam* which governs a possible *flood* of uncontrolled and oppressive school discipline which would overwhelm students’ rights. As he extended the metaphor, he also tried to create the *ethos* of even-handedness with the *canal* and *channel* images which demonstrate his awareness of the need for some controlled discipline in a school environment. The metaphor also depends on other, less explicit associations: farmers’ natural fear of floods and their understandably protective attitudes about topsoil; the aesthetic appeal of symmetrical canals, etc. which contribute in less direct ways to the judge’s point. The purpose of these and other associations are less susceptible to clear analysis and raise the problems common to all interpretation—interpreter’s bias,

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83 *Shanley* at 978.

83 *Supra, note 68.*
over-interpretation, auctorial intent. Detailed analysis of this sort also risks ignoring or devaluing the reasons why writers use legal metaphors in the first place, for their nonrational or intuitive impact.

In addition, the persuasive impact of this particular metaphor depends on a number of variables, including the overall context in which the metaphor appears, its associations with other metaphors in the opinion, and the audience’s general susceptibility to metaphors and its feelings about the outcome of the case (if the audience does not like the outcome, it probably will not like the metaphor either). These variables notwithstanding, the preceding analysis reveals a number of emotional resonances and credibility strategies that a strictly logical analysis might not disclose. This does not mean that logical analysis of metaphoric content is less important; in fact, it is crucial. But, by concentrating primarily on the logic or logos of legal metaphors, both modern analysts and those who create metaphors may overlook numerous opportunities for understanding how these metaphors affect the emotional impact and auctorial credibility of legal discourse.

Legal metaphors in other judicial opinions are amenable to the same sort of classical analysis and likewise reveal interesting information about the judge’s reasoning processes, stylistic strategies, and personal ethos. Whatever the audience’s response to it, Judge Goldberg’s metaphor reflects a basic seriousness about the subject matter and the case that contrasts strongly with the irreverent spirit behind Justice Michael Musmanno’s metaphors in the case of Pavlicic v. Vogtsberger, 136 A.2d 127 (Pa. 1957).

In this case, George Pavlicic, 80, sued Sara Jane Mills, 28, for recovery of gifts he gave her in anticipation of their marriage. During the course of their lengthy engagement, Pavlicic gave Mills sev-

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84 Of course, some of these same context problems arise when interpreting other forms of legal discourse, whether the discourse in question is a statute, a regulation, a contract, or a municipal ordinance.

85 See HAIG BOSMAJIAN, METAPHOR AND REASON IN JUDICIAL OPINIONS 181 (1992) whose treatise focuses on the connections between legal metaphors and judicial reasoning. He criticizes Judge Goldberg’s metaphor, apparently because he mixes metaphors and because metaphors should be unobtrusive,

One problem with this water-control extended metaphor is that while earlier in the court’s opinion the Plessy decision was personified as having progeny, the Tinker decision is depersonalized into a structure, a dam. Further, the extended metaphor brings too much attention to itself, what with ‘irrigates,’ ‘floods,’ ‘fields of school discipline,’ ‘canals and channels,’ and ‘topsoil of the First Amendment.’

Bosmajian’s criticisms depend on the assumption that legal writing style, including use of figurative language, should never call attention to itself and that mixing metaphors betrays aesthetic insensitivity or an indefensible inconsistency.
eral gifts, including a house, a car and the down payment on a saloon, each time with the understanding that he gave the gift because Mills agreed to marry him. Before giving Mills the house, for example, Pavlicic said, “If you marry me, I will take the mortgage off.” She said: “Yes.”\textsuperscript{88} However, Mills did not marry Pavlicic. Instead, she left town with the down payment for the saloon, bought a saloon, and then married another man.

In deciding that Pavlicic’s case was a conditional gift case, not a breach of contract to marry case, Justice Musmanno uses a variation of the traditional “sea of matrimony” metaphor to explain his decision,

A gift delivered by a man to a woman on condition that she sail the sea of matrimony with him is no different from a gift based on the condition that the donee sail on any other sea. If, after receiving the provisional gift, the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the gift must be restored to the donor. How much more applicable is this principle of justice when the donee not only refuses to voyage with the donor, but, on the contrary, transfers to another ship and sails away with the donor’s rival\textsuperscript{87}

In selecting and then using the “sea of matrimony” metaphor in this jocular fashion, Justice Musmanno reveals a very distinctive judicial ethos. He seems to be amusing himself as he interweaves abstract contractual principles into his nautical business metaphor. Moreover, this metaphor is similar in tone to others in the same opinion. Elsewhere he observes that Sara Jane Mills had previously been married to a “young man and their matrimonial bark had split on the rocks of divorce,”\textsuperscript{88} and that “[t]o allow Sara Jane to retain the money and property which she got from George by dangling before him the grapes of matrimony which she never intended to let him pluck would be to place a premium on trickery, cunning, and duplicitous dealing.”\textsuperscript{89} The “sea of matrimony” metaphor, especially when combined with several other mock-serious metaphors in the opinion, projects a self-indulgent judicial ethos that a careful and resourceful advocate should be aware of when preparing written or oral arguments.

\textsuperscript{88} Id. at 128.
\textsuperscript{87} Id. at 130.
\textsuperscript{89} Id. at 128.
\textsuperscript{89} Id. at 130.
Justice Musmanno’s frequent and self-satisfied willingness to treat a serious subject in an unserious manner contrasts sharply with the ethos created by Judge Goldberg’s irrigation metaphor in Shanley. Their judicial temperaments are appreciably different. A strictly logical analysis of either the Goldberg or the Musmanno opinion, however, would disregard the ethos implications of the metaphors and focus instead on the governing legal principle, thereby overlooking potentially useful aspects of the case.

Justice Musmanno’s irreverent tone persists even while he strives to bias the pathos or emotional content of the metaphors against Mills. Mills refuses to “leave the harbor,” her “anchor” of contractual performance sticks in the “sands of irresolution,” she “refuses to voyage” and, finally, she “sails away with the donor’s rival.” Musmanno’s metaphor characterizes Mills and Pavlicic’s marital engagement as a simple business relationship and portrays Mills as ungrateful, stubborn and deceitful, a fickle procrastinator whose real motives are mercenary not romantic. While Justice Musmanno could have made the same point without using a metaphor, by using it he introduces emotional resonances in the case that are qualitatively different from those that would be introduced by simply using a list of pejorative adjectives. As was the case with Judge Goldberg’s metaphors, it is a matter of opinion whether Justice Musmanno’s metaphors persuade or illuminate where his logic would not. Or whether his metaphors engage or alienate his readers. As the preceding analyses reveal, classical analysis of the metaphors in modern judicial opinions can repay the effort. In both the Shanley and Pavlicic opinions, the metaphors were included to illustrate or emphasize a particular point, they have an undeniable and appreciable effect (positive or negative), and, intentionally or not, they reveal aspects of the judges’ reasoning processes and judicial temperament that might otherwise go unnoticed.

II. Modern Theories of Metaphoric Reasoning

For the most part, modern legal commentators ignore the subject of metaphors in legal discourse. Those who do address the subject fall roughly into two groups: those who think metaphors are imprecise and inessential rhetorical embellishments whose principal, if not only, purpose is to emphasize a logical point and make it more memorable, and those who think metaphors and “metaphoric reasoning” are an important, even central, cognitive faculty in almost all legal reasoning. Although both groups offer useful insights about how metaphors work and when they are appropriate, neither
group seems to rely on Greco-Roman analysis of metaphorical reasoning. Moreover, neither group addresses the subject of metaphorical reasoning as systematically or thoroughly as the Greco-Roman rhetoricians.

A. Metaphoric Embellishment and Imprecision

Those in the first group usually disfavor the use of metaphors in legal discourse. Generally speaking, they minimize the positive qualities of metaphors and focus instead on their potential for abuse. Their skepticism regarding the usefulness of metaphors is epitomized by Justice Cardozo’s oft-cited admonition that “[m]etaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” He and several other U.S. Supreme Court justices have strong reservations about introducing the “mists of metaphor” into judicial opinions. Judicial skepticism about metaphors usually centers on metaphors’ capacity for oversimplifying complex legal doctrines as well as stifling further thought and encouraging “uncritical” acceptance of received dogmas. Given judges’ concerns about illogical reasoning, imprecise or uncritical analysis, and their own susceptibility to the emotional effect of metaphors, this judicial skepticism is understandable.

However, this general skepticism about metaphors extends even to those who write treatises on the subject of effective advocacy. Like their classical counterparts, these treatise writers are interested in the rhetorical impact of all language. However, although they share with classical writers a common interest in the effective use of language, modern treatise writers devote little or no attention to the careful selection, creation, or placement of metaphors in legal discourse and none to metaphors’ contribution to legal reasoning.

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91 Haig Bosmajian, “The Judiciary’s Use of Metaphors, Metonymies and Other Tropes to Give First Amendment Protection to Students and Teachers,” 444 Journal of Law & Education 443 (1986). Bosmajian quotes several U.S. Supreme Court justices, including Justices Potter Stewart, Felix Frankfurter, and Oliver Wendell Holmes, on the inadvisability and dangers of metaphors in judicial opinions. Holmes “observed in 1912: ‘It is one of the misfortunes of the law that ideas become encysted in phrases and therefore for a long time cease to provoke further analysis.’” Hyde v. United States, 225 U.S. 347, 391 (1912)
92 Bosmajian, at 443 quotes Justice Potter Stewart’s observation that “the Court’s task is not responsibly aided by the uncritical invocation of metaphors like the ‘wall of separation,’ a phrase nowhere to be found in the Constitution.” Engel v. Vitale, 370 U.S. 421, 445 (1962)(emphasis added)
These writers are generally adverse to placing metaphors in legal briefs or memoranda. For the most part, they think metaphors should be used solely to emphasize points and make them memorable. Moreover, they ignore the positive qualities of metaphors and focus instead on their stylistic inadequacies and potential for abuse. Using analyses which echo those of the classical rhetoricians' regarding abuse of metaphors, these writers warn against over-using metaphors or using them in a self-consciously "literary" or belletristic manner. They think that metaphors call unnecessary attention to themselves or that they are inexact or imprecise. At best, they are subject to multiple interpretations; at worst, they are uncontrollable and evoke reasoning or associations the advocate did not intend. These and other criticisms generally treat metaphors as inessential and distracting embellishments which detract from logical argument and analysis.

Even when they do think metaphors make a meaningful contribution to legal analysis or argument, these writers ignore the pathos and ethos components which were so important to Greco-Roman rhetoricians's analysis of metaporphic effects. Instead, they...
focus on the quasi-logical effects of metaphors. If they mention the emotional effect of metaphors at all, it is usually in a negative context. Trite or “poorly chosen figures of speech [are] likely to irritate the reader.”99 “Too many figures of speech make for ornate and confusing prose” or “obscure” illustration.100 Using metaphors for their “own sake can be distracting rather than emphatic, or embarrassing rather than impressive.”101 “Too many mental pictures flashed before the reader in rapid succession become wearying.”102

While these negative emotional effects are certainly possible, they are not the only effects. These analysts either minimize or fail to examine the intellectual pleasure that a well-chosen metaphor creates in a reader.

B. Inherent Metaphors and Cognitive Psychology

Despite widespread skepticism about using metaphors in legal discourse, some analysts take a more sympathetic view. Relying on a combination of literary analysis techniques and cognitive psychology theory, they analyze the use and effect of metaphors in ways that resemble the techniques of their Greco-Roman counterparts. In some recent discussions of metaphors’ place in legal discourse, for instance, these analysts reject the view that metaphors are merely superficial stylistic devices. They assert, with Haig Bosmajian, that “it is now well established that the tropes, especially the metaphor, are not simply rhetorical flourishes used to embellish discourse.”103 Instead, these analysts maintain that metaphors are essential devices for achieving certain sorts of intellectual insights.

By taking this view of metaphors, they seem to disregard Justice Cardozo’s warning that metaphors can “enslave” thought and to focus instead on his statement that metaphors start “as devices

\[\text{footnotes}\]

99 STATSKY & WERNET at 294.(emphasis added)
100 PECK at 23.(emphasis added)
101 Ray & COX at 237.(emphasis added)
102 WEIHOFEN at 119.(emphasis added) Quintilian at 3 QUINTILIAN 307-309 makes the same point regarding wearying the audience.
103 BOSMAJIAN at 441.
to liberate thought.” Cardozo’s allusion to the “liberating” effect of metaphors is reminiscent of classical rhetoricians’ recognition that metaphors provide insights or “fresh knowledge” that can “scarcely be conveyed” by other means. Under this view, metaphors become important intellectual components of legal analysis rather than mere mnemonic or focusing devices.

Like their classical counterparts, these modern analysts base their assertions about the intellectual importance of metaphors on the fact that language is intrinsically figurative. They reach the same conclusions that classical analysts like Cicero and Quintilian reached when they noted the commonplace and natural occurrence of metaphors in everyday speech. And, like the classical analysts, they conclude that metaphors are, in effect, repositories of universal wisdom and emotional force which should be exploited whenever possible.

Citing the authority of British attorney and linguist Owen Barfield, modern analysts like James E. Murray stress the importance of metaphors and the intrinsically figurative nature of language,

one of the first things that a student of etymology—even quite an amateur student—discovers for himself is that every modern language, with its thousands of abstract terms and its nuances of meaning and association, is apparently nothing, from beginning to end, but an unconscionable tissue of dead, petrified metaphors.

By appropriating the conventional vocabulary of case analysis, James B. White illustrates Barfield’s point regarding the pervasiveness of metaphors from a slightly different perspective,

[A] problem has parts which fit together to make a whole; arguments have strengths and weaknesses; interests have bulk or weight, which permit them to be measured, weighed, and balanced; general rules, like boxes, have lots of specific rules inside them; every rule has a reason (or a policy) which determines its proper course. . .conflicts between rules can be harmonized . . .every case presents a problem with a solution;

104 Berkey v. Third Ave. Ry., 244 N.Y. 84, 94; 155 N.E. 58, 61 (1926).(emphasis added)
105 ARISTOTLE, RHETORIC at 206.
106 CICERO, DE ORATORE at 123.
107 3 QUINTILIAN at 303; CICERO, DE ORATORE at 121 notes that “the use of metaphor is of wide application.”
108 OWEN BARFIELD, POETIC DICTION: A STUDY IN MEANING 63-64 (1964).
and so on.\footnote{109}

This example and others like it have led White and others to conclude that "spatial" metaphors "may be inherent in language. In language in general, abstract concepts are formed in spatial terms. They arise out of experiences in the world."\footnote{110} Modern claims about the concrete, experiential source of metaphoric language are related to Cicero's assertion that metaphors have a "direct appeal to the senses."\footnote{111} Metaphors have a visceral, emotional impact in part because they originated in the world of the senses; in one sense, their effects are as physiological as they are logical.

These observations on the inherently metaphoric nature of language have led some legal analysts to examine metaphors in light of cognitive psychology theories. These theories attempt to explain how metaphors contribute to our "reasoning" processes. Starting with the assumption that all metaphors involve some measure of transferred meaning from one subject to another, these theories suggest that metaphors "foster insights" that demand a "simultaneous awareness of both subjects (of comparison) that is not reducible to any mere comparison between the two. It is this insight that gives metaphor its cognitive value—the very insight that is lost when one foregoes the metaphorical and remains stuck in the literal and the literal only."\footnote{112}

Other analysts concur in the view that metaphors provide insights which are impossible to achieve with literal language, but think that metaphors are capable of "converting or transferring 'chunks' of information from the vehicle to the topic; enabling us to talk about experience which cannot be literally described."\footnote{113}

\footnotetext[109] {109 JAMES B. WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 695 (Boston, 1973); PECK at 21 illustrates the frequency of metaphors with a short extract from Justice Cardozo's opinion in Meinhard v. Salmon, 249 N.Y.458, 164 N.E. 545, 546 (1928). He also provides metaphoric wordlists which reinforce the point made in White's quotation. Id. at 22-23.}

\footnotetext[110] {110 WHITE at 707; see also Burr Henly, "'Penumbra': The Roots of a Legal Metaphor," 15 Hastings Constitutional Law Quarterly 82 (1987) who says "metaphors portray one part of experience by borrowing terms associated with another part. Thus, they require a jump from one category of experiences and related descriptive terms to another. Metaphors that are overtly spatial involve the most obvious kind of category jump. With such spatial metaphors, legal ideas are described and discussed as if they existed in two- or even three-dimensional form. . .." (emphasis added)}

\footnotetext[111] {111 CICERO, DE ORATORE at 127.}


\footnotetext[113] {113 BOSMAJIAN at 152 quoting A. PAIVIO, PSYCHOLOGICAL PROCESSES IN...}
For them, metaphors function as translators of experience. Relying on both literary theory and cognitive psychology, analysts like Steven L. Winter think that our very thought processes are metaphorical and that we should think of metaphors, as a cognitive function—that is, as the imaginative means by which we conceive the multiple relations of a complex world. In that event, we will no longer ask what metaphor “obscures” as if there were some determinate reality “behind” the metaphor. Rather, the renunciation of the traditional opposition between metaphor and reality allows us to recognize that metaphors are our way of having a reality and, therefore, that the important question about any metaphor is, which (partial) reality does it enable?114

As Part I of this analysis illustrates, modern analysts' conclusions that metaphors “foster insights,” or that they transfer “chunks” of information, or that they are “imaginative means” of “conceiving . . . multiple relations,” and “liberate” the imagination were made more than 2,000 years ago. Aristotle and other classical rhetoricians saw metaphors as a means of giving “names to nameless things.”115 Cicero noted that metaphors have the capacity for expressing what can “scarcely be conveyed” by a literal term.116 Quintilian thought that one of metaphors' central functions was to transfer information and insights from one place to another.117 All three rhetoricians noted that metaphors provide a unique “wholeness” of insight that is absent from merely literal reasoning.118 Since classical scholars have already studied the topic so thoroughly, modern analysts could certainly profit from a greater familiarity with classical insights on related matters. At a minimum, they might examine more closely the ethos and pathos effects of metaphors.

However, as with those analysts who regard metaphors only as stylistic embellishments, even those who think metaphors are essential to legal reasoning neglect the pathos and ethos aspects of metaphors. The closest modern analysts come to examining these

THE COMPREHENSION OF METAPHOR (emphasis added)

115 ARISTOTLE, RHETORIC at 188.
116 CICERO, DE ORATORE at 123.
117 3 QUINTILIAN at 304.
118 CICERO, DE ORATORE at 125 and at 127.
aspects is in their analysis of the metaphoric patterns in a few, narrowly limited groups of Constitutional law cases. For example, in his analysis of rhetorical figures in recent U.S. Supreme court cases on First Amendment protections for students and teachers, Haig Bosmajian asserts that “[t]he metaphors and other tropes relied upon by the opposing Justices provide us with some insight into their respective views on education, especially when we look at their approaches to education as “inculcation.” This point recalls Aristotle’s observation that “[c]haracter is manifested in choice [in what men choose to do or avoid]; and choice is related to end or aim.” That is, an author’s ethos is revealed through the metaphoric language he chooses to use.

To support his contention that metaphors provide “insights . . . into [a judge’s] views on education”, Bosmajian points out that “again and again the language quoted from . . . landmark decisions are the figurative expressions, the tropes, especially the metaphors and metonymies.” As an example, he quotes several passages from Justice Jackson’s opinion in the case of West Virginia State Board of Educ. v. Barnette, which have been repeatedly used “in arguments defending the First Amendment rights of students and teacher.” For instance, Jackson wrote:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

Bosmajian traces numerous references to this “fixed star” metaphor in subsequent cases treating the same issues. He also traces the use and interpretation of numerous other metaphors in related cases and ultimately concludes that the “course of the law . . .[may be] decided not so much on the intricacies of the application of the arcane abstractions of the first amendment as it is upon the greater or lesser appeal of the tropes involved in the various opinions.” His point is that metaphors reflect both the character (ethos) of their author and the character of those who subse-

119 BOSMAJIAN at 459. (emphasis added)
120 ARISTOTLE at 46.
121 BOSMAJIAN at 444.
122 319 U.S. 624 (1943).
123 BOSMAJIAN at 444.
124 Barnette, 319 U.S. 642. (emphasis added)
125 BOSMAJIAN at 463.
quently rely on them.

Another analyst, Burr Henly, makes a similar point in connection with what he regards as the “most important and puzzling... metaphor in American constitutional law... Justice William O. Douglas ‘penumbra’ from Griswold v. Connecticut.” 126 He traces the various uses of “penumbra” in legal discourse from its first appearance in Oliver Wendell Holmes’ The Theory of Torts 127 to its appearance in Griswold. After a detailed survey of how “penumbra” has been used or interpreted by several different Supreme Court justices, he concludes that “the penumbra metaphor has often been used as a shorthand for the limits of judicial reasoning. Just as often... judges have used the penumbra metaphor to convey their discretion.” 128 Given these multiple and somewhat contradictory interpretations of “penumbra,” Burr’s analysis seems to confirm Cardozo’s and other judges’ suspicions that metaphors can promote “uncritical” acceptance of received dogma.

The studies of both Burr and Bosmajian illustrate the subtle power that metaphors undeniably exercise on the legal imagination and the force they have in determining how legal concepts are thought about. In a more limited way, they also show how metaphors reveal the character of the judge who selects them and the emotional attraction of certain metaphors. And, finally, their studies show that metaphors play a substantial part in many important Constitutional law cases. Their work as well as the work of analysts who rely on literary analysis and cognitive psychology theories help explain how figurative language, especially metaphors, affects legal reasoning.

III. Conclusion

Both modern and classical analysts agree that legal reasoning relies more heavily on figurative language than is commonly recognized. They also agree that substantive legal points are sometimes necessarily or best expressed in figurative or metaphoric language because merely logical or literal language is unequal to the task. However, unlike classical analysts, modern analysts have generally restricted their analysis to explaining the quasi-logical impact of metaphors and have ignored how metaphors evoke emotional re-

127 Holmes, The Theory of Torts, 7 A.M.L.Rev. 652, 654 (1873), reprinted in 44 Harv. L. Rev. 773, 775 (1931)
128 HENLY at 100.
responses and depend on authorial credibility. In so doing, they ignore two important aspects of metaphorical reasoning. Moreover, they do not satisfactorily explain why certain metaphors capture the legal imagination and others do not.

According to classical rhetoricians, the why is closely linked to the emotional effects created by metaphors and the reader's trust in the person who created them. They understood that the force of a metaphor depends as much on the credibility and character of its author as it does on the audience's intellectual pleasure or surprise at the metaphor's aptness, concision, or subtlety. This intellectual pleasure combined with trust in the writer makes metaphors emotionally as well as intellectually engaging; it also helps create a sense of wholeness or completeness.

Until modern analysts examine more fully both the emotional effects of metaphors and the issue of authorial credibility, their analyses will be incomplete. This incompleteness could be rectified by a close re-examination and use of classical analytical techniques and approaches. Rather than invent or construct an entirely new critical apparatus, modern analysts can modify the apparatus created by Greco-Roman rhetoricians over 2,000 years ago.
Legal writing instructors spend a great deal of time emphasizing to their students the importance of audience and purpose in writing.¹ “Think of your readers,” they say. “Work at reaching them!” “Remember what this piece of writing is trying to accomplish,” they exhort. “If it doesn’t accomplish your goal, then it doesn’t matter how much research you did, how eloquently it reads, or how cleverly you analyzed the issue.”

And they are right. Attention to audience and purpose are two of the most important concepts taught in legal writing; indeed, they are the touchstones of every piece of writing.² Why? Because writers who remember their readers and their writing objectives are much more likely to use good judgment about the thousand

¹ The importance of lawyers developing communication skills that include “tailoring the nature, form, or content of written . . . communication to suit [t]he particular purpose of the communication . . . [and] [t]he audience to which the communication is directed . . . .” is discussed in Legal Education and Professional Development—An Educational Continuum 163 (student ed. 1992), commonly known as “The Macrato Report,” named for Robert Macrato, its editor and the chairperson of the ABA Task Force on Law Schools and the Profession. In addition, most, if not all of the currently used legal writing textbooks discuss at length the importance of considering audience and purpose in legal writing. See, e.g., Veda R. Charrow & Myra K. Erhardt, Clear & Effective Legal Writing (1986); Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style 2d ed. (1994); Laurel Currie Oates, Anne Enquist, & Kelly Kunsch, The Legal Writing Handbook: Research, Analysis, and Writing (1993); Helene S. Shapo, Marilyn R. Walter, & Elizabeth Fajans, Writing and Analysis in the Law (1989).

² The importance of audience and purpose has been stressed by virtually all rhetoricians from Aristotle to Kenneth Burke. Edward P.J. Corbett, Classical Rhetoric for the Modern Student, 3d ed. (1990). Nationally noted rhetorician, Maxine C. Hairston, summarizes the position of many modern rhetoricians when she states that “[i]f one had to pick out the piece of advice that recurs most often in books about practical writing in nonschool situations, it would be remember your audience” (emphasis in original). Maxine Hairston, Successful Writing: A Rhetoric for Advanced Composition 45-51 (1981). Her discussion on purpose can best be summarized by three questions writers should ask themselves: Why am I writing? Why is my audience reading? What do they want from me?
small and large decisions that go into creating an effective piece of writing.

That's true for legal memoranda, briefs, and opinion letters, and it is equally true of the comments legal writing instructors write on students' papers.

Surprisingly, though, what remains unexplored territory is whether legal writing instructors effectively practice what they teach about audience and purpose in their own comments on student papers. Although some work has been done on this topic from the legal writing instructor's perspective, little or no attention has been given to the perspective of the intended audience of these comments: the students.

For this reason, it seemed worthwhile to study the comments legal writing instructors put on students' papers and ask the readers of those comments—the students themselves—which comments were the most useful. This article describes such a study that was conducted by the author using students and faculty at the University of Puget Sound School of Law. The results should be useful to new legal writing faculty who are striving to learn how to critique their students’ writing effectively, as well as to experienced legal writing faculty who are interested in whether the conventional wisdom about critiquing is borne out when examined from the student’s perspective.

The discussion that follows begins with a description of the design of the study, including profiles of the student and legal writing instructor participants and a description of the evaluation.

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* Terri LeClercq, Ph.D., the Writing Specialist at the University of Texas School of Law, appears to have written the only published article on critiquing law students' legal writing. Terri LeClercq, Ph.D., The Premature Deaths of Writing Instructors, 3 Integrated Legal Res. 4 (1990-91). In addition, presentations on the written critiques of law students' legal writing have been made at several professional meetings. See, e.g., A. Enquist, Remarks at the National Conference of the Legal Writing Institute (July 31, 1992); M. Beazley and T. LeClercq, Remarks at the National Conference of the Legal Writing Institute (July 27, 1990); A. Enquist, Remarks at the National Conference of the Legal Writing Institute (July 28, 1990); D. Pratt, Remarks at the National Conference of the Legal Writing Institute (August 4, 1988); C. Metteer, Remarks at the National Conference of the Legal Writing Institute (August 4, 1988).

* With the possible exceptions of informal feedback instructors receive in student conferences and formal feedback for individual instructors in student evaluations, the conventional wisdom about effective commenting is based on what legal writing instructors say to each other about what is effective. No one seems to be asking the students what they think is effective.

* I am grateful to Professor Laurel Currie Oates, the Director of the Legal Writing Program at Seattle University School of Law (known at the time of the study as the University of Puget Sound School of Law), the legal writing faculty, and Dean James E. Bond for supporting my work in this study.
sheet the students used to assess the instructors’ critiques. It then moves to an analysis of the data that was compiled in the study, examining the features of the more and less effective critiques and a discussion of the importance of end comments, in-depth explanations, and positive feedback. This section includes a breakdown of the number of margin and interlinear comments on each paper and some tendencies that these numbers suggest. Also included in this section is a categorization of the margin and interlinear comments and how the students rated comments from the various categories. The discussion concludes with some inferences that can be drawn about critiquing law students’ writing based on the students’ responses.

I. DESIGN OF THE STUDY

The basic idea underlying this study was to have several legal writing instructors critique the same student papers and then ask the student authors what was and was not effective about the different critiques. The assumption was that although different instructors may perceive roughly the same strengths and weaknesses in a given student’s writing, they would have different ways of commenting on these strengths and weaknesses. By asking the audience for these comments — the students — which comments were more effective, my hope was that was legal writing faculty could learn how to improve our critiquing of and commenting on student papers.

To make the test circumstances as realistic as possible, four students who were enrolled in the second year legal writing course, Persuasive Writing and Oral Advocacy, were selected as the student participants. Photocopies of the actual papers these students wrote for that course, a brief in support of or in opposition to a motion (trial brief) and an appellate brief, were used as the basis for the study. In addition, legal writing instructors who were currently teaching that course were selected to do the critiques of the papers for the study. Because all students in Persuasive Writing and Oral Advocacy write about the same problem in any given semester, the legal writing faculty members in the study were intimately familiar with the research, issues, and analysis of that problem.

* In my experience as the Writing Advisor to the University of Puget Sound Legal Writing Program, I had frequently observed the differences in commenting styles among the instructors in our program and had also observed the relative effectiveness and ineffectiveness of some of these commenting styles.
Logistically, the plan was quite simple. At the time the students turned in their legal writing papers to their own teachers, they turned in a copy for the study. Each paper then had the student's name removed and a random number assigned to it. All the papers were then photocopied and distributed to the five legal writing instructors in the study. Their instructions were to read the study papers with the stack of papers from their own students. Their instructions also asked them to read and critique the papers just as they would the ones that came in for their class. The only difference was that they were asked only to critique the papers, not assign grades.7

In short, the plan was to have real students in a real legal writing course write the real papers for that course, have those papers critiqued by a number of different legal writing instructors who were really teaching that course and really critiquing papers based on that assignment, and then have those students evaluate those critiques for their usefulness.

A. Profiles of the Student Participants

In order to draw definitive conclusions about what makes the most useful critique, it would have been ideal to do this study with thousands of students8 and hundreds of legal writing instructors. Because that was not feasible, the study was done with students whom the author saw as representative of certain types of students commonly found in law school.

The selection of these students was based on the assumption that there are several factors that may affect how a student might respond to a critique of his or her work. Among the factors considered were the age and maturity of the student, how the student felt about himself or herself as a writer, how well the student was

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7 To avoid problems within the University of Puget Sound's legal writing program, I decided to have the papers in the study critiqued and not graded. Obviously if the student papers in the study received grades from the instructors in the study that differed from the grade they received from their own legal writing instructor, there would be demands for the grades to be changed.

8 In 1988, Robert J. Connors and Andrea A. Lunsford published an analysis of patterns of error in 3,000 student papers. Robert J. Connors & Andrea A. Lunsford, Frequency of Formal Errors in Current College Writing, or, Ma and Pa Kettle Do Research. 39 C. Composition and Comm. 395-409 (1988). Returning to the same data base, Connors and Lunsford then analyzed the "global comments" made by teachers of these papers. This second study is the first large-scale examination of the comments teachers make on college student papers. Robert J. Connors & Andrea A. Lunsford, Teachers' Rhetorical Comments on Student Papers, 44 C. Composition and Comm. 200-223 (1990). To date, no such large-scale study has been done on law students' writing.
doing in law school, and how well the student had done in the pre-
requisite first-year legal writing course. 9

The selection of students was also based on the assumption that individual student personalities play an important role in the way the students react to critiques of their papers. It seemed obvious, for example, that some students' personalities inclined them to resent criticism and comments on their papers while others saw criticism as an opportunity to learn.

For these reasons, the author selected students whom she knew fairly well 10 and who represented a variety of student perspectives. None of the students received any compensation for participating in the study, and all were promised that their names would be kept confidential.

“Mark” (a 30-year-old white male) was selected for the study because he represented the “almost perfect” 11 law student. His law school professors consistently described him as “bright,” “articulate,” and “self-confident.” Mark was clearly enjoying law school and finding that it suited him. His grades were just shy of being able to “grade on” to Law Review, but he was able to “write on” and later served as one of the editors. Mark had had a short career in real estate and sales management before law school. His outgoing personality and salesmanship style made him a well-liked, highly visible student on campus.

Mark had earned a B in the first-year legal writing course, and when asked on the preliminary questionnaire distributed to all four students whether he considered himself a good writer, his response was “Yes” followed by “B.A. English undergrad, writing research as clerk, also work experience called for writing persuasive, informative correspondence—Plus, it is very important to me to communicate clearly and effectively” (emphasis in the original).

“Kathy” (a 38-year-old black female) was a very promising special admission candidate to law school. Kathy had been an admissions recruiter for a major university before coming to law

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9 At the University of Puget Sound Law School, students are required to take a year and a half of legal writing. The students in this study were all second-year students who had already taken the first-year, two-semester legal writing course in objective writing.

10 As the Writing Advisor at the University of Puget Sound Law School, I had had writing conferences with all four of the students in the study. Determinations about their suitability for the study in terms of their personal characteristics were based on what I knew about the students from these conferences and from conversations about these four students with other faculty.

11 The phrase “almost perfect” law student was used by one of Mark's first-year law professors to describe him.
school, so it was not surprising that she brought a warm, gregarious self-confidence with her to law school. Even though she was ranked in the top half of the class, Kathy was struggling with law school, especially exams, and working closely with the Academic Support Program faculty to figure out how she could improve.

Kathy had earned a C in the first-year course, and when asked whether she considered herself a good writer, she answered, “No!! My skills in English are atrocious, and I realize what a handicap this has been for me and will continue to be unless I work on it.”

“Tom” (a 24-year-old white male) represented another fairly typical law student. Tom came to law school straight from his undergraduate education, and for the first time in his educational career, he was disappointed in his work. He was ranked in the bottom third of his class, and his lack of success was having a negative effect on him.

Tom had earned a C+ in the first-year course, and his legal writing instructor remembered him vividly as a student who was “defensive, occasionally almost hostile” about critiques of his legal writing. When answering the question about whether he considered himself a good writer, he responded, rather surprisingly, “Yes. My sentence structure is usually good and I think I can be concise. I have problems grasping the law and applying it, hence C.”

The fourth and final student, “Sarah” (a 39-year-old white female) can best be summarized as “the hard-working student.” Sarah had a quiet, low-key personality, and as a result, was a rather low profile student. She had been a nurse before law school, and although she had risen through the ranks in nursing, she was tired of her first profession and longed for something that she considered more challenging.

Sarah had earned a B- in the first year course and was well remembered by her legal writing instructor as someone “who worked hard to use the suggestions and guidance [he] gave her.” Sarah ranked in the top third of her class, but when asked whether she considered herself a good writer, she wrote, “No. My writing style tends to be very dry and often lacks clarity. Although I have seen improvement over the past year in these two areas, I am not happy with my final drafts.”
B. Profiles of the Legal Writing Instructor Participants

The selection of the legal writing instructors to participate in
the study was based on the hypothesis that at least two different
factors might be significant: gender and years of experience teach­
ing legal writing. Two additional questions the study hoped to ad­
dress were whether students were generally more receptive to com­
ments written by male or female instructors and whether more
experience commenting on papers tended to make the comments
more effective.

For these reasons, six different legal writing instructors at the
University of Puget Sound Law School were asked if they would be
willing to participate in the study. Even though they were not
compensated for the extra work, five of the six agreed to partici­
pate. The chart below gives the profiles of the five who did partici­
pate in the study.

FACULTY PROFILES

| Instructor 1 | female | first year of teaching |
| Instructor 2 | male   | first year of teaching |
| Instructor 3 | male   | second year of teaching |
| Instructor 4 | female | third year of teaching |
| Instructor 5 | female | five+years of teaching |

12 The sixth instructor, who declined to participate, was a male in his third year of
teaching. Had he agreed to participate, the study would have had better male faculty repre­
sentation and better representation of more experienced teaching.
The students participating in the study had no information about the instructors participating in the study other than that they were legal writing instructors at the University of Puget Sound Law School. Similarly, the legal writing instructors had no information about the students other than that they were all second-year students at the University of Puget Sound Law School enrolled in the second-year legal writing course.13

C. The Students' Evaluation Sheet

Based on advice and suggestions from legal writing instructors other than those participating directly in the study14, an evaluation sheet for the instructors' comments was developed. It contained four parts: A) Overall Evaluation, B) The End Comment, C) Margin and Interlinear Comments, and D) Miscellaneous. (A copy of the evaluation sheet and its instructions can be found in the Appendix A.)

A key feature of the evaluation sheet was a horizontal scale for rating the relative usefulness of an instructor's comments.

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<td>very useful</td>
<td>useful</td>
<td>not useful</td>
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A form of this horizontal scale appeared in all four parts of the evaluation sheet: It was used in Part A to rate the comments as a whole, in Part B to rate the end comment, and in Part C to rate each margin and interlinear comment.

Right below each horizontal scale was a section where the student could check whether comments were "illegible," "confusing," or "harmful." Below that was a separate "Remarks" section.

13 To preserve anonymity and still keep the data straight, the student papers were assigned random number codes when they were turned in. Even though each student had two papers in the study, each paper had a different number code so that the instructors would not know which of the second batch of papers, the appellate briefs, could be matched to the trial briefs in the first batch. Similarly, the instructor critiques were all assigned different letter codes, including a different letter code for each instructor's critique of the trial brief and the appellate brief.

14 It seemed obvious that if the instructors participating in the study saw the evaluation sheet beforehand, they might somehow change their critiquing style to match the evaluation sheet.
The instructions on the evaluation sheet told the students to choose one of the five levels and "not create new levels midway between two points." Students were also instructed to use the Remarks section to explain any time they had chosen the very highest (1) or very lowest (5) ratings for a comment or any time they had checked that the comment was confusing or harmful. They were told that they could use the Remarks section for any other comments they wished to make.

The chart below shows how the horizontal scale appeared on the evaluation sheet.

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(Check the following only if applicable.)

____ illegible   ____ confusing    ____ harmful

Remarks:

The following discussion of the term "useful" was also included in the instructions. *Obviously the term "useful" may have a variety of meanings. For example, you may find a comment useful if it helped you to understand something about your writing; will help you the next time you write; or motivated you to work on your writing. You may have other reasons for rating a comment as useful. Again, please use the Remarks section whenever you need to explain a particular meaning of "useful."*

To be sure that none of the comments were missed and that it was clear which critiques went with which comments, each comment on the students' papers was numbered.

Finally the students were instructed to "[r]ead all the comments from one instructor before beginning to mark the evaluation sheet for that instructor's critique." They were also asked to read each instructor's comments at different sittings so that they would not be unduly influenced by the way they had evaluated another instructor's comments.
Immediately after the instructions portion of the evaluation sheet and after a second boldfaced reminder to "READ THROUGH THE ENTIRE CRITIQUE BEFORE BEGINNING TO FILL IN THIS SHEET," students encountered Part A, Overall Evaluation. Here they were asked to rate the instructor's comments "taken as a whole" using the horizontal rating scale. They were then asked four essay/short answer questions about what they saw were the instructor's "top priorities for legal writing," about what the comments suggested were "the chief strengths" of the paper, about what the comments suggested were "the chief weaknesses" of the paper, and about what the comments suggested that they needed to work on.

Part B, The End Comment, simply asked students to checkmark if there was no end comment to the critique and if there was an end comment, to rate it using the horizontal scale complete with the Remarks section.

Part C, Margin and Interlinear Comments, had a rating scale complete with Remarks section for each margin and interlinear comment.

Part D, Miscellaneous, asked students to critique the number of comments on the paper, the tone of the comments, the accuracy of the comments, and effectiveness of the instructor's critiquing style.

In the question about the number of comments, the students were asked to determine whether the comments were "too few," "about right" or "too many," and space was provided for their remarks about the number of comments.

In the question about the tone of the comments, students were asked to select adjectives from the following list to describe the critique's tone: "harsh," "encouraging," "professional," "condescending," "discouraging," "empathetic," "sarcastic," and "friendly." They were also invited to supply their own descriptive word or words to describe the tone of the comments and provided a Remarks section.

For evaluating the accuracy of the comments, they were given a different rating scale and accompanying Remarks section.

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<tr>
<td>very accurate</td>
<td>somewhat accurate</td>
<td>inaccurate</td>
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The evaluation form ended with two two-part questions and two opportunities for comments: 1) What was the most effective quality of this instructor's critiquing style? Why? 2) What was the
least effective quality of this instructor’s critiquing style? Why? 3) Additional comments about the instructor’s critique? and 4) Comments about the evaluation sheet or the evaluation process?

In short, the evaluation sheet was rather long and comprehensive. Even though a great deal of the evaluation could be done by circling ratings on the scales or checkmarking points, the students were also asked for their additional remarks and comments in many different ways. Fortunately, all the students involved in the study appeared to take their tasks seriously and appeared to be extremely conscientious in evaluating the critiques.

II. Analysis of the Data

In all, critiques of 40 different papers were read and analyzed. These critiques included 30 different end comments and 1,416 margin and interlinear comments. What emerged from the students’ reactions to the critiques were seven points about effective critiquing, several of which confirm what experienced legal writing faculty have long believed:
1. Writing an end comment is essential to effective critiquing;
2. Students want in-depth explanations, examples, or both;
3. Students need positive feedback;
4. Too many comments can overwhelm some students;
5. Critiquers should pace themselves so that they have some commenting energy left for the end of the paper;
6. Some types of comments are far more effective than others: illegible, coded, cryptic, and labelling comments are less effective than comments that identify a problem and suggest a solution or go even further and offer a rationale for the solution;
7. Comments phrased as questions can be effective, but they also can draw negative reactions from students.

Surprisingly, the study did not show that experienced legal writing faculty generally write more effective comments than do novice teachers. Indeed, many of the comments and critiques written by first-year teachers received the students’ highest ratings.

Perhaps the best news of the entire study was that the overall ratings showed that the students found almost all the instructors’ critiques to be useful. Seven of the critiques received a 1, the highest rating of “very useful”; twelve critiques received a 2, the second highest rating; nineteen received a 3, or “useful” rating; one re-

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18 I am grateful to my research assistant, Karen Rogers, for her conscientious and cheerful help in compiling much of the data for this study.
ceived a 4, which is a rating lower than "useful" but above "not useful"; and one paper was not given an overall evaluation rating. Notice that two of the instructors in their first year of teaching (Instructor 1 and Instructor 2) each received two number 1 ratings from the students. (See the chart below.)

**OVERALL EVALUATIONS**

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<th>Instructor 1</th>
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Equally surprising was that the students' perception of the accuracy of the comments did not seem to be an overly significant factor in the overall rating of the critique. Perhaps this was not a factor because, in general, the students rated all the critiques as accurate. Four critiques were rated as 1's, "very accurate," 7 critiques were rated as 3's, "somewhat accurate," and all the remaining critiques were rated as 2's, which meant something between "somewhat accurate" and "very accurate."

The study was also unable to show that gender is or is not a factor in effective critiquing.16

A. The Importance of End Comments

Instead, what quickly became obvious was the importance of the end comment and the effect it had on the overall evaluation the students gave the critiques.

The chart below shows the ratings the students gave the end

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16 Because the instructors were anonymous, the students did not know if a given critique was written by a male or female instructor. Although the students occasionally referred to a given critiquer as "he" or "she" in their remarks, those few designations did not seem to be significant.
comments on their papers.

END COMMENT EVALUATIONS

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</table>

Just how strongly all the students felt about the importance of the end comment is best shown by combining the overall evaluations chart with the end comment evaluation chart. Notice first of all that six of the seven critiques with 1 ratings for overall evaluation also had a 1 rating for the end comment. Notice also that the one instructor who did not write end comments, Instructor 3, never received an overall evaluation above 3. Instructor 2 used end comments at times, but did not include one on two of the papers, one of which was rated a 3 and the other was rated a 4.
Simply having an end comment, however, did not guarantee that a critique would receive a high rating from the students. Notice that Tom gave the lowest rating, a 5, to the end comment on his appellate brief from Instructor 4. Tom also checked that the end comment was “harmful” and added the following in the Remarks section:

No need to get on my case that bad. The points are good but HJ\(^{17}\) obviously feels some good will come from rubbing my face in it. Perhaps that’s an effective style but generally adults don’t respond well to bullying, at least I don’t. (footnote added)

(Instructor 4’s end comment for Tom’s appellate brief is included in Appendix B. The handwritten comment across the top was Tom’s response to the opening line in the end comment.)

It also became clear from the students’ notes in the Remarks section that some of the end comments had features that the students found particularly helpful. Mark noted that Instructor 5’s critique of his appellate brief “[r]epeated and summed up what instructor had mentioned throughout paper.” This technique of beginning the end comment with an overview of the evaluation appeared in several of the end comments and was favorably received by the students. (See examples of end comments in Appendix B.)

\(^{17}\) “HJ” was the letter code for Instructor 4 for the appellate briefs.
Many of the end comments set out both what the student was doing right and wrong in the paper. This technique appears to be the feature that motivated Sarah to give the highest rating, a 1, to the end comment written by Instructor 4 on her trial brief. In the Remarks section, she wrote that the "[c]omments lay out positive and negative aspects of my memo\textsuperscript{18}, suggestion for improvement, and one aspect (opposing argument) I totally ignored." (footnote added)

Tom, who was noticeably stingy with high ratings, gave a 2 rating to an end comment that used another teaching technique, listing exactly what that instructor recommended that student work on. In very few words, Tom made it clear what he liked about this end comment: "Gave me specifics to work on" (emphasis in the original).

Both Sarah and Mark brought up the importance of end comments again in the Miscellaneous part of their evaluation forms. Commenting on the most effective quality of one of the instructor’s critiquing style, Sarah wrote, “Summary comments very direct and, for some reason, made incredible sense.” Mark used the additional comments portion of the evaluation form to add, “Typed end notes always impress me—makes me feel the instructor cares by taking the time.”

By contrast, both Sarah and Mark were critical of the critiques that lacked end comments. Sarah stated that “[w]ithout Summary of Comments, I get the feeling this was merely an edit.” In answer to the question about what the instructor saw as the strengths in his paper, Mark wrote, “It was difficult for me to know what (if anything) this instructor liked. The comments made were generally helpful, but I could have used more depth of critique. . . .Without an end note summary/comments, I’m left feeling ‘Is this it?’”

Another variation on end comments that the students rated highly was the use of summarizing comments at the end of sections of their papers. For example, Instructor 4 wrote the following summarizing comments at the end of the Table of Contents for two of the trial briefs.

Points generally well-written w/favorable selection & use of facts. Organization of II and III questionable, however. Major

\textsuperscript{18} Some of the students and instructors refer to these briefs in support of or in opposition to the motion as “memos” because this jurisdiction called such writings “memoranda of points and authorities” at the time these papers were written.
points should correspond to issues in case. Here, there are only (2) main issues, not three. Moreover, II is incorrectly phrased; constitutional violation requires both suggestiveness and unreliability.

* * * * *

Good articulation of your ideas in the point headings. It's very important to be "up front" with what you've got—and you do a good job. But a judge might think from heading II that you are applying a per se rule of exclusion when you have a suggestive procedure. Manson overruled that idea. Excellent format (though consider narrowing right margin somewhat and eliminating . . . . . . . . . . : gives more white space—could add readability).

Both students rated these summarizing comments as 1, "very useful."

It seems then that what the students valued about summarizing comments at the end of sections and end comments was that such comments gave them an overview critique. Unlike the isolated margin comment that pinpointed a single problem, end comments gave the students a "big picture" look at their writing. They helped them make sense of the wide array of margin and interlinear comments and develop some priorities to work on the next time they write.

B. Desire for In-Depth Explanation

A review of the ratings and remarks attached to the end comments, margin comments, and interlinear comments suggested another dominant theme in the students' evaluation: The students wanted more in-depth explanation in the comments on their papers.19

All the students wrote extensively about the need for more explanation and examples in the comments on their papers, but Mark, the strongest student of the four, was adamant about this point. He consistently rated comments that merely labelled a prob-

19 In her 1982 study of comments that undergraduate students choose to use or ignore when revising, Nancy Sommers and her fellow researchers observed "an overwhelming similarity in the generalities and abstract commands given to students." Sommers comments that this phenomenon suggests that "the teacher holds a license for vagueness while the student is commanded to be specific. The students . . . admitted to having great difficulty with these vague directives." Nancy Sommers, Responding to Student Writing, 33 C. Composition & Comm. 153 (1982).
lem without further explanation as a 3 and rated comments with explanation or examples or both as a 1.

The following are representative examples of the types of margin and interlinear comments that Mark saw as lacking in the help or guidance he wanted. Mark's rating of the comment and what he wrote in the Remarks section for that comment follows.

Comment: "Weak move to rules."
Rating: 3
Mark's remarks: "Yes but how could I make it better? Stronger?"

Comment: "There are stronger words for your POV."  
Rating: 3
Mark's remarks: "Yes, but can you give me an example."

Comment: (instructor bracketed "Mr. Wilkerson rightfully disputes the reliability of the other four factors to be considered.") reword
Rating: 4
Mark's remarks: "Give me an example."

Comment: (circled "the witnesses experienced limited degrees of attention") WC
Rating: 4
Mark's remarks: "What would be better? example?"

Comment: "Although your issue stmts are well-written, this section is very long. I'm not sure that the judge would read it."
Rating: 3
Mark's remarks: But not enough help! How do I shorten it without losing significant emphasis & facts?"

Mark also seemed annoyed by comments that were questions to which he did not know the answer. He seemed to view such comments as another version of the instructor not giving him enough explanation.

Comment: "do these two ideas go together?"
Rating: 3
Mark's comments: "What to do with it? 2 sentences?"

Comment: "I'm confused—I'm not sure what you were trying to do in this section. Is it a summary/roadmap? Is it a stmt of the general rules?"
Rating: 3
Mark's remarks: "I need to know what would be appropriate—summary? rules? gen. transition?"

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20 This instructor used the abbreviation POV for "point of view."
21 This instructor used "WC" as a coded comment for "word choice."
Similarly, whenever the comments did go into depth, Mark rated them very high and indicated that he found the explanation useful.

Comment: “I don’t think you really mean ‘whereby’ (look it up), but you should avoid such legalistic sounding words, anyway, esp. in Statement of Case. You may also want to consider breaking the sentence into 2 sentences — will make the events seem to occur more quickly (a plus for defendant).”
Rating: 1
Mark’s remarks: useful suggestions and explanation

Comment: (instructor bracketed student’s language “This is definitely not an indication that the State fulfilled its burden. . . .) “Use stronger, more assertive language, e.g., “This testimony fails to fulfill the State’s burden of . . . .”
Rating: 1
Mark’s remarks: “Good to give example.”

Comment: “Good argument in this section, but how do you respond to the State’s major arguments: 1) DW waived right to silence; 2) DW ‘opened the door’ to inquiry re post-arrest silence”
Rating: 1
Mark’s remarks: “important arguments needed—gave examples—good”

Mark also used the Miscellaneous part of the evaluation sheet to make his point yet one more time. Under the question asking for the “least effective quality of this instructor’s critiquing style” Mark wrote about Instructor 3, “Made you question everything with little or no guidance or support.” For the contrasting question about “the most effective qualities of this instructor’s critiquing style, Mark wrote about Instructor 1: “took the time to write in suggested word choice instead of just saying ‘vague’ or ‘reword’ or ‘not persuasive’ etc.”—that is helpful.”

The other three students, while not as adamant as Mark about the need for more explanation and examples, also rated lower the comments that did not elaborate and remarked that they often needed more help to figure out how to address the point the instructor was making in the comment. Kathy’s remarks reveal the frustration she felt when the comments left her puzzled about what she should have done differently.

Comment: “If I were the judge, I would have to stop and think—you have missed a step.”
Rating: 3
Kathy’s remarks: “What step is missing?”
Comment: “You have not presented case in light most favorable to client.”
Rating: 4
Kathy’s remarks: “I believe as the case read that it is favorable to my client. Please explain further why it’s not favorable??”
Comment: “Not sure what you are saying”
Rating: 5
Kathy’s remarks: “The remarks I made here seem clear to me. Please let me know why they were not clear to you?”
Comment: (instructor circled “three days”) “facts”
Rating: 5
Kathy’s remarks: “Why the remark/comment? I need more of an explanation, if it’s going to be of any use to me.”
Comment: (circled the last es in “the witnesses degree of attention”)
Rating: 3
Sarah’s remarks: “Would have been more helpful to point out how issue statements could be improved.”
Comment: “This section is somewhat repetitious. Why not explain rationale behind 2-pt test? (E.g., corrupting effect, balancing of all ______ 22, etc.) Why not discuss the psychology of suggestion here?
Rating: 1
Sarah’s remarks: “Suggestions would improve introduction. I can see that memo [is] short on rationale.”
She also used the Miscellaneous part to emphasize this point:
“A few comments were too brief.”
“Instructor raised important points, but I had to read comment 4-5 times before I got it.”
Like the other three students, Sarah wanted more explanation in the comments, but unlike the other three who at times seemed to be saying “tell me what you want” or “show me how to do it,” Sarah distinguished between an in-depth explanation that made the change for the student and an in-depth explanation that discussed the reasoning behind the suggested change. In her answers to questions about the instructors’ most effective and least effective critiquing qualities, she wrote the following:
(most effective quality of this instructor’s critiquing style?)
“question format rather than merely providing explanation or answer”
“able to point out problem area without merely supplying answer or fixing it”
“Overall, the comments give reasons for changes without actually making changes.”
The value of more in-depth explanation was most apparent when two or more instructors commented about the same problem in a student’s writing, and the student understood what one instructor was saying but not the other.
For example, Tom had written the following in his appellate brief: “This is an appeal from the judgement of the King County Superior Court, by a jury, that the defendant was guilty of Assault in the Second Degree.” Instructor 4 had merely underlined “the judgement” and “by the jury.” Tom’s rating of this comment, a 4, showed that he probably did not understand what the instructor meant. Instructor 1, however, wrote the following comment about

** Parts of this comment were illegible.
the same problem: “Watch your language. A jury convicts or acquits but cannot render a judgment. The ct. enters judgment on the jury’s verdict.” Tom rated this comment a 3, indicating that the comment was now useful to him.

In another instance, Sarah had written the following: “Admission of unreliable and unnecessarily suggestive evidence, said the Manson court, offends constitutional due process requirements of fairness. U.S. Constitution, amend. XIV.” Instructor 4 had written the comment, “add pinpoint cite,” but Sarah had marked this comment as “confusing” and had asked in the Remarks section, “Isn’t Manson sufficient citation? Do I omit cite to Constitution?” Her confusion was cleared up when she later read Instructor 1’s comment on the same problem: “cite to Manson for this prop, not const.” Sarah rated this comment as a 1 and added, almost ironically, “clarifies HJ’s comment.”

One more pair of comments about the same problem demonstrates that it is difficult to anticipate just how much in-depth explanation some students need. In the case the students were working on, the rule was that the court should look at five factors to determine reliability of the witnesses. Tom chose to discuss only three of the factors and omit the two that hurt his case. Instructor 5 commented on this problem by writing, “What about the other 2 requirements?” Tom rated this comment as a 4, below “useful,” and asked in the Remarks section, “Why put them in? They kill my case.” Later, he understood the error of his ways when he read Instructor 1’s comment on the same problem: “You’ve omitted 2 of the 5 factors. The State will seize on your omission and argue your lack of candor to the ct.” He rated this comment as a 2.

The most extreme versions of comments that lacked in-depth explanation were situations where instructors underlined or circled parts of the student’s writing without further explanation. Invariably the students marked these comments as “confusing,” “ambiguous,” or both. Not much better were coded comments, such as using a circled T to indicate a need for a transition, and cryptic comments such as the single word “confusing,” “point?” or just a question mark or checkmark in the margin. Despite the instructors’ protestations in conversations that followed the data analysis that their own students had the key to the codes and knew what they meant by the short form marks they were using, the students in the study were far less enthusiastic about these “more efficient”
ways of commenting on their papers.

C. Positive Feedback

The students were also unanimous in their remarks indicating that positive feedback is an essential part of their learning. Sarah made the point about balancing positive and negative comments in her answers for three different instructors to the question “what was the most effective quality of this instructor’s critiquing style?” “Instructor balanced positive and negative qualities of my writing while addressing multiple aspects of memo, for example, transitions and arguments.”

“helpful to summarize major defects and positive aspects”

“Good balance between positive and ‘negative’ comments throughout. It’s helpful to know when your writing is effective as well as ineffective.”

The way both Mark and Kathy expressed their need for positive feedback indicated not only their appreciation of the encouragement but also the personal nature of commenting on a student’s writing. Mark wrote the following in his Remarks about several positive margin comments: “Thank you—good to know what you like or what you find persuasive.” “‘OK’—is good to say before critique—I then know I’m on the right track.” “Praise is always welcome & uplifting!” (first comment on the paper was positive) “Starts me off by giving me confidence. No big deal but appreciated.” (Instructor wrote “good—but just try to start even more forcefully”)

Mark: “I like the way this instructor motivates.”

Similarly, Kathy wrote the following:

“Thank you for the positive feedback as well as your constructive criticism.”

“It was nice of WO to comment favorably on my use of details.”

Tom, who was the student with the history of being somewhat hostile toward criticism of his writing, made the strongest statement of the four on the need for positive feedback. He reserved the highest #1 rating almost exclusively for positive, encouraging comments. He also thought of a half dozen ways to say the same thing: he needed positive comments to enable him to continue improving his writing. “Positive remarks essential to figuring out what is good.” “Positive comments essential to improvement.” “Good comments essential.” “Good comments provide understanding of how to suc-

24 “WO” was a letter code for one of the instructors.
ceed.” “Must point out any good stuff to give me guidance.” “Nec-
nessary for improvement, confidence”

The question in the Overall Evaluation part that asked the
students to list the chief strengths of their paper based on the
comments also elicited several answers about the critiques that
lacked positive feedback. Sarah’s and Kathy’s terse responses of
“cannot tell” and “N/A. The instructor did not give me any posi-
tive feedback, thus this section does not apply” seem to disguise
their disappointment over working hard on a project for someone
who does not find anything good to say about it.

Mark, on the other hand, lets his disappointment and anger
show in his comments:
“I'M NOT SURE- almost everything seems to be questioned. Only a
few ‘goods’ to indicate strengths—nothing of significance—“ (em-
phasis in the original)
“Couldn’t really tell!”

Mark returned to this point when he was writing about the
least effective quality of this instructor’s style.

“Not enough encouragement—I don’t know if he liked any-
thing about my paper—(besides ‘good start’)”

“Do I have any strengths in this brief?”

Tom’s answers to the question about what the comments told
him are the chief strengths in his paper seemed stoic and sarcastic
by comparison:

“No indication of strengths”

“Good printer”

From the individual ratings the students gave to positive com-
ments, however, they demonstrated that they wanted positive
feedback for more than just encouragement and a pat on the back. They wanted to know why something was good, presumably so
that they could build on these strengths and use them again when
appropriate.

A comment in the margin that was a simple “good,” for exam-
ple, usually rated a 326. Comments that said something was “good”
and added the reason why usually rated a 2 and occasionally went
as high as a 1.

26 On one occasion one student rated a simple “good” as a 2 but then added in the Remarks section: “‘Good’ although in this case, it might be additionally helpful to include why you thought the assignments of error were good.”
Comments that started with a “good” followed by a “but” usually rated a 2 or a 1.
“Good that you attempted to preempt the State’s arguments. But you needed to use specifics from the record to support your assertions.” Rated 2
“Effective argument except for reader’s lack of knowledge about facts. What did DW tell the police and what did he say trial?” Rated 2
“Good argument in this section, but how do you respond to the State’s major arguments: (1) DW waived right to silence (2) DW ‘opened the door’ to inquiry re post-arrest silence.” Rated 1

In short, all four students—no matter whether they were at the top of the class, middle of the class, or bottom of the class—wanted positive comments on their papers. Over and over again they said that they needed to know what they were doing right, as well as what they were doing wrong, partially because they needed the encouragement and partially because they needed help identifying their strengths so that they could build on them.

D. Tone of the Comments

Closely related to the issue of positive feedback in the critiques was the overall tone of the comments. Here, however, the data was more erratic; consequently, it is more difficult to draw useful inferences.

Of the four students in the study, Mark was by far the most expressive of his feelings about the tone of the critiques. Like the others, he checked several adjectives from the list to describe the
In addition, he used the Remarks section following this question to make several additional comments about tone. Note that the other students, with one exception did not add more remarks about tone.

Below is a chart listing the adjectives that he and the other three students chose to describe the tone in the different instructors' critiques and the remarks that they added for each critique. Words to describe the tone that were not on the list in the question but that were the student's own choice are indicated by parentheses. When a student added a remark to the adjectives he or she chose, an asterisk or asterisks appear to direct the reader to the accompanying remarks.

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26 There was no apparent reason why he skipped this section for Instructor 5's critique of his trial brief.

27 Tom also added a remark about the end comment that he found so devastating.

28 Mark did not answer the question on tone for his trial brief as critiqued by Instructor 5; Kathy did not answer the same question for the trial brief critiqued by Instructor 2.
ADJECTIVES DESCRIBING TONE OF CRITIQUES

Mark's Assessment

Mark/trial brief
Inst.1: encouraging, professional, empathetic*
Inst.2: encouraging, professional, empathetic, friendly**
Inst.3: (None of the above)***
Inst.4: encouraging, professional, discouraging****
Inst.5

Mark/appellate brief
Inst. 1 encouraging, professional, empathetic, friendly
Inst. 2 encouraging, professional, empathetic, friendly
Inst. 3 discouraging*****
Inst. 4 encouraging, professional, empathetic, friendly, (thoughtful)
Inst. 5 encouraging, professional, empathetic, friendly

Mark's Remarks:
* Was firm but I didn't feel any harshness. Only best intentions
** Tone was excellent and encouraging
*** I did not enjoy this one at all—extremely frustrating
**** (Only where I felt needed more understanding. In general Not unfriendly—but also not friendly—even—this critique more distant at times)
***** No encouragement. Very impersonal. Felt very frustrated. Raised many q's. could use examples.
### ADJECTIVES DESCRIBING TONE OF CRITIQUES

**Kathy’s Assessment**

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<td>Inst. 2:</td>
<td>Inst. 2: encouraging, professional, emphatic, friendly</td>
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<tr>
<td>Inst. 3: professional (very distant)</td>
<td>Inst. 3: (not encouraging; remarks made but usually no substantive comment to enable student to correct)</td>
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<td>Inst. 4: encouraging, professional, friendly</td>
<td>Inst. 4: professional</td>
</tr>
<tr>
<td>Inst. 5: condescending, sarcastic</td>
<td>Inst. 5: encouraging, professional</td>
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<tr>
<td>Tom's Assessment</td>
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**Tom/trial brief**

- Inst. 1: professional, empathetic
- Inst. 2: professional, friendly
- Inst. 3: professional
- Inst. 4: harsh, condescending, sarcastic, professional, friendly
- Inst. 5: professional, (necessarily tough)

**Tom/appellate brief**

- Inst. 1: encouraging, professional, friendly
- Inst. 2: encouraging, professional, friendly
- Inst. 3: (just fine)
- Inst. 4: professional, condescending*
- Inst. 5: condescending

**Tom's Remarks:**

* Comments good, end note a little on the harsh side
Notice that Mark chose negative adjectives to describe the tone in both of Instructor 3’s critiques. (Remember that different letter codes were used to identify the instructors’ critiques, so unless Mark remembered that instructor’s handwriting, he had similar, independent reactions to the tone in that instructor’s comments.) While the other students did not describe that Instructor’s comments negatively, they used words such as “professional,” “neutral,” “objective,” and even “very distant” to describe the tone of those critiques.

Instructor 3’s overall evaluations were the lowest of the five instructors, apparently because that instructor did not use end comments; however, the students’ collective assessment of the tone of Instructor 3’s comments suggests that tone may have been another factor in those lower evaluations. (A representative page of Instructor 3’s critiques is in Appendix C.)

E. Number of Margin and Interlinear Comments

Legal writing instructors often wonder just how much com-
menting they should do on a given student’s paper. While being comprehensive may seem to be the best approach, the worry is that too many comments may overwhelm some students or that the students will have difficulty determining which of many comments are the more important ones.

Analysis of the number of margin and interlinear comments the instructors put on the papers in the study suggests that there is a wide range in the number of comments instructors write on papers and that from the students’ point of view, more comments does not necessarily mean that the instructor did a better job critiquing.

The chart below shows the number of margin and interlinear comments each instructor wrote on each paper. Notice that the range is from 18 comments to 156 comments. The students were asked on the evaluation form if the number of comments was “too many,” “about right,” or “too few.” Five critiques were evaluated as having too few comments, and four critiques were evaluated as having too many comments. In the chart, those marked as too few are in bold and those with too many are underlined.

---

90 Terri LeClercq argues that excessive editing of law students’ writing is counter-productive, leading to an intolerable workload and teacher burn-out. LeClercq also argues that when students are overwhelmed by the number of comments on their papers, they retreat into simple and safe writing to avoid a barrage of teacher comments. 3 LeClercq, Supra, at 4, 9. Muriel Harris of Purdue University states that “of all the failures of communication between teacher and student, the saddest is that which results from an overload of diverse bits of information on the graded paper.” Harris concludes that “the major problem with the overgraded paper is that the instructor has lost both a sense of focus and a point of view.” Muriel Harris, The Overgraded Paper: Another Case of More is Less, How to Handle the Paper Load, 91, 92 (NCTE 1979).

90 One difficulty in counting the number of margin and interlinear comments is determining whether to call some words or marks on the page one or more comments. For this study, we counted all of the words grouped together in some meaningful way as one comment even though the comment may be long enough to fill the entire margin. However, a lone question mark in the margin or a single added comma in a line of text was also counted as one comment.
The following chart again shows the number of margin and interlinear comments each instructor wrote on each paper. Those critiques that were rated number 1, "most useful," have their number of comments underlined.

<table>
<thead>
<tr>
<th></th>
<th>Instructor 1</th>
<th>Instructor 2</th>
<th>Instructor 3</th>
<th>Instructor 4</th>
<th>Instructor 5</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>trial brief</td>
<td>52</td>
<td>18</td>
<td>138</td>
<td>65</td>
<td>80</td>
</tr>
<tr>
<td>appellate brief</td>
<td>30</td>
<td>58</td>
<td>76</td>
<td>54</td>
<td>87</td>
</tr>
<tr>
<td>Kathy</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>trial brief</td>
<td>103</td>
<td>20</td>
<td>156</td>
<td>117</td>
<td>89</td>
</tr>
<tr>
<td>appellate brief</td>
<td>60</td>
<td>31</td>
<td>109</td>
<td>103</td>
<td>134</td>
</tr>
<tr>
<td>Tom</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>trial brief</td>
<td>47</td>
<td>28</td>
<td>75</td>
<td>76</td>
<td>69</td>
</tr>
<tr>
<td>appellate brief</td>
<td>34</td>
<td>70</td>
<td>43</td>
<td>87</td>
<td>113</td>
</tr>
<tr>
<td>Sarah</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>trial brief</td>
<td>37</td>
<td>25</td>
<td>52</td>
<td>73</td>
<td>58</td>
</tr>
<tr>
<td>appellate brief</td>
<td>43</td>
<td>42</td>
<td>62</td>
<td>67</td>
<td>113</td>
</tr>
</tbody>
</table>

The charts also suggest that, not surprisingly, more experienced instructors tend to write more comments than new instructors. Instructor 5, who had far more experience teaching legal writing than any of the other four, averaged 93 comments per paper. Instructors 1 and 2, both of whom were in their first year of teaching legal writing, averaged 51 and 34 comments per paper respectively. Instructor 3 averaged 89 comments per paper, and Instructor 4 averaged 80 comments per paper.

Yet another interesting statistic was the number of comments each student averaged on his or her papers. Mark, Tom, and Sarah averaged 57, 58, and 52 comments per paper respectively, but
Kathy, who was having extreme difficulty in the second-year legal writing course averaged 92 comments per paper. Indeed, six of her ten critiques had over 100 comments apiece. The obvious question, of course, is whether a student can reasonably assimilate all the information contained in 100 or more comments on a paper and whether such extensive commenting does more harm than good.\textsuperscript{81}

One additional observation can be made about the number of margin and interlinear comments. When the comments were counted in the first, second, and third thirds of each of the papers, approximately half of the papers showed a tendency for the number of comments to decrease as the instructor moved from the beginning to the end of the paper.

In the chart below, the total number of comments in each paper is broken down into the first, second, and third thirds of the paper. Those that show a trailing off tendency are underlined. Those that drop off rather drastically are also in boldface type.

<table>
<thead>
<tr>
<th>PAPERS WHOSE NUMBER OF COMMENTS DECREASED</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark</td>
</tr>
<tr>
<td>trial brief</td>
</tr>
<tr>
<td>appellate brief</td>
</tr>
<tr>
<td>Kathy</td>
</tr>
<tr>
<td>trial brief</td>
</tr>
<tr>
<td>appellate brief</td>
</tr>
<tr>
<td>Tom</td>
</tr>
<tr>
<td>trial brief</td>
</tr>
<tr>
<td>appellate brief</td>
</tr>
<tr>
<td>Sarah</td>
</tr>
<tr>
<td>trial brief</td>
</tr>
<tr>
<td>appellate brief</td>
</tr>
</tbody>
</table>

In a post-evaluation discussion with the instructors involved...
in the study, they speculated about why so many of the papers showed the decreasing number of comments as the critique progressed. While all agreed that commenting fatigue was probably the main reason from the trailing off tendency, some other plausible reasons were offered:

(1) The facts and rules, which come at the beginning, are crucial and deserving of extensive critique;
(2) When a problem in a student's writing occurs repeatedly, some instructors only comment on it the first time it appears;
(3) The most significant arguments come early in a brief, and they deserve more extensive critique; and
(4) The end comment is coming up, so instructors save their last comments to include them there.

F. The Relative Success of Certain Types of Comments

While there were a few inconsistencies in the students' ratings and remarks, by and large a pattern seemed to emerge about which types of comments were least successful and which were most successful with the students. The comments themselves tended to fall into approximately six categories: illegible comments, coded or cryptic comments, labelling-the-problem comments, identify-the-problem/suggest-a-solution comments, and suggest-a-solution plus give-the-rationale-for-the-solution comments.

Not surprisingly, illegible comments were invariably rated a 5. Coded and cryptic comments usually rated a 4, although occasionally they rated a 3. Comments that merely labelled the problem were most commonly rated a 3, although they were occasionally rated a 4 and sometimes a 2.

---

**Footnote:** Positive comments were not considered a separate category because most of the other types of comments included some comments that contained positive feedback.
EXAMPLES OF LABELLING COMMENTS

| Comment: | "This discussion is confused + confusing." |
| Rating: | 4 |
| Student Remarks: | "How can this discussion be improved?"

| Comment: | "Very long and detailed and generally unpersuasive" |
| Rating: | 4 |
| Student Remarks: | "I need specifics and not generalities"

| Comment: | "Research sketchy" |
| Rating: | 4 |
| Student Remarks: | "Explain this comment? Why is research sketchy?"

| Comment: | "You are missing the point" |
| Rating: | 4 |
| Student Remarks: | "In what way am I missing the point. It would be more helpful to me if you could give me an example."

| Comment: | Presentation needs to be more sophisticated |
| Rating: | 4 |
| Comment: | Facts need to be explained more clearly |
| Rating: | 4 |

Considerably higher ratings were given to comments that actually revised and edited the student’s writing. Although most were rated a 3, some were rated a 2 by the students. An example of such a comment occurred on one paper where the instructor wrote in the margin “You need to finish the thought” and then proceeded to show the student exactly how to finish the thought by adding in “As in Cuttererge, the court cannot say that the jury would have disbelieved Mr. W’s story without the damaging testimony about Mr. W’s credibility.”

The students also tended to give 2 ratings to comments that identified the problem and suggested a solution.

Comment: “use cases to support these arguments”
Rating: 2

Comment: “anticipate and respond to the state’s arguments—what else could the police have done?”
Rating: 2

Student Remarks: “informs me that more analysis c/have been used.”

Occasionally instructors offered suggestions and provided the rationale for these suggestions. Such comments were almost always rated a 1, possibly because the students realized that the comment
was giving them an insight about legal writing in general and not just about this one writing situation.

Comment: “organize your arguments around legal ‘theories’ & not cases”
Rating: 1
Student Remarks: “this is the best statement for organization of argument section. Had I thought of it, argument section would have been easier to write.”
Comment: (edited out giving rise to an inference of guilt from a very long point heading) “save for later. When you try to put too much into heading, it weakens the heading”
Rating: 1
Student Remarks: “This instructor’s suggestion for reorganization well taken. I can see that ‘giving rise to an inference of guilt’ common to both constitutional arguments, could be broken out into separate section and increase reader’s understanding”
Comment: “This statement of facts is kind of long. It could have been shortened, for example, by reducing the level of detail on unfavorable facts”
Rating: 1
[student wrote “The defense, however, contends . . . .”]
Comment: “Avoid such qualifying language. Just state your contentions, the ct. knows they are just that”
Rating: 1

G. Comments that Contained Questions

In addition to the six categories of comments mentioned above and the pattern that seemed to emerge from them, another pattern emerged in the comments that contained questions. By and large, questions designed to lead the student to the answer received higher ratings (usually 2’s and occasionally 1’s) while terse or cryptic questions, such as “why?” “how?” and “are you sure?” received relatively lower ratings (3’s and 4’s).

The following are a few examples of comments containing questions that suggested to the students how they could have written something:
Comment: “make even better use of facts. How many times did the State comment on defendant’s silence?”
Rating: 2
Comment: “You need to set the stage. Who was being questioned?”
Rating: 2
Comment: Effective argument except for reader’s lack of knowledge about facts. What did DW tell the police and what did he say trial?"
Rating: 2
Comment: “Does Wilkerson match the description? If not, tell us now.”
Rating: 1
Student Remarks: “Good pt.”

The effect of overusing comments phrased as questions, particularly when the questions were short and sometimes cryptic, was evident in Instructor 3’s critique of Mark’s appellate brief. Of the 76 margin and interlinear comments on the brief, 37 were written in question form, and approximately ¾ths of those in question form were short and sometimes cryptic, at least for Mark.

The following are the question comments in this one paper. The first column gives the number of the comment; the second column gives the comment itself.

<table>
<thead>
<tr>
<th>Number of Comment</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>&quot;first name?&quot;</td>
</tr>
<tr>
<td>3</td>
<td>&quot;first name?&quot;</td>
</tr>
<tr>
<td>4</td>
<td>&quot;Do you have the proper sequence?&quot;</td>
</tr>
<tr>
<td>6</td>
<td>&quot;by?&quot;</td>
</tr>
<tr>
<td>7</td>
<td>&quot;when?&quot;</td>
</tr>
<tr>
<td>9</td>
<td>&quot;Why did you break up the parallel structure?&quot;</td>
</tr>
<tr>
<td>10</td>
<td>&quot;Why? Isn’t this important from your pov?&quot;</td>
</tr>
<tr>
<td>11</td>
<td>&quot;POV?&quot;</td>
</tr>
<tr>
<td>14</td>
<td>&quot;same thing?&quot;</td>
</tr>
<tr>
<td>15</td>
<td>&quot;Why parenthetical? Isn’t this important?&quot;</td>
</tr>
<tr>
<td>18</td>
<td>&quot;Is this the std?&quot;</td>
</tr>
<tr>
<td>21</td>
<td>&quot;shouldn’t this come first?&quot;</td>
</tr>
<tr>
<td>23</td>
<td>&quot;Where does this paragraph belong?&quot;</td>
</tr>
<tr>
<td>26</td>
<td>&quot;Why isn’t this parenthetical first?&quot;</td>
</tr>
<tr>
<td>27</td>
<td>&quot;Do they have to be?&quot;</td>
</tr>
<tr>
<td>29</td>
<td>&quot;is this the std?&quot;</td>
</tr>
<tr>
<td>30</td>
<td>&quot;isn’t this the key?&quot;</td>
</tr>
<tr>
<td>31</td>
<td>&quot;What is the std?&quot;</td>
</tr>
<tr>
<td>36</td>
<td>&quot;Do you need to do this? Do the cases require this type of analysis?&quot;</td>
</tr>
<tr>
<td>38</td>
<td>&quot;the officer?&quot;</td>
</tr>
<tr>
<td>39</td>
<td>&quot;POV?&quot;</td>
</tr>
<tr>
<td>40</td>
<td>&quot;how?&quot;</td>
</tr>
<tr>
<td>46</td>
<td>&quot;focus on procedure?&quot;</td>
</tr>
<tr>
<td>49</td>
<td>&quot;why? support?&quot;</td>
</tr>
<tr>
<td>52</td>
<td>&quot;Why? any support?&quot;</td>
</tr>
<tr>
<td>54</td>
<td>&quot;Isn’t the problem that the procedure singled out an individual?&quot;</td>
</tr>
<tr>
<td>55</td>
<td>&quot;Is this the case?&quot;</td>
</tr>
<tr>
<td>56</td>
<td>&quot;must it?&quot;</td>
</tr>
<tr>
<td>57</td>
<td>&quot;No Wash cases?&quot;</td>
</tr>
<tr>
<td>60</td>
<td>&quot;must be both?&quot;</td>
</tr>
<tr>
<td>61</td>
<td>&quot;the witnesses?&quot;</td>
</tr>
<tr>
<td>62</td>
<td>&quot;No Wash cases?&quot;</td>
</tr>
<tr>
<td>64</td>
<td>&quot;What is the std?&quot;</td>
</tr>
<tr>
<td>65</td>
<td>&quot;Does it follow?&quot;</td>
</tr>
<tr>
<td>69</td>
<td>&quot;Why?&quot;</td>
</tr>
<tr>
<td>72</td>
<td>&quot;Where are the details?&quot;</td>
</tr>
<tr>
<td>75</td>
<td>&quot;Why?&quot;</td>
</tr>
</tbody>
</table>
The effect of this many questions, particularly so many terse questions, makes the critique feel a bit like a cross-examination. Not surprisingly, Mark did not respond well to this critique.

H. How Comments Affect Rapport with Students

Certain types of comments—such as the terse or cryptic questions discussed above, coded comments, or short labels—tended to provoke negative responses from the students, while comments that suggested an on-going dialogue\textsuperscript{38} with the student tended to receive favorable responses.

The following chart is again for Mark's appellate brief as it was critiqued by Instructor 3. The first column shows which comments were coded (co) and which were short, one- or two-word questions or labels (sh). Remember that this critique was also one that used numerous questions (37 out of 76 comments.) Notice how the ratings drop as Mark becomes more and more resentful about the critique. The Remarks column shows his remarks exactly as they appeared. (Use the preceding chart for the actual language in the comments phrased as questions.)

\textsuperscript{38} J. Christopher Rideout and Jill J. Ramsfield have noted in their discussion of effective classroom methodologies for legal writing courses that "comments are dialogic" and "that responding to a student's paper is an act of writing that, like all writing, is socially situated ...." J. Christopher Rideout & Jill J. Ramsfield, \textit{Legal Writing: A Revised View}, 69 Washington Law Review 74 (1994).
<table>
<thead>
<tr>
<th>Comment #</th>
<th>Comment Rating</th>
<th>Mark's Remarks</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>2</td>
<td>spelling</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
<td>Yes, need first names</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>Action seems slow-No, I would now rewrite to make the assault go much quicker</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>3</td>
<td>Good pt.</td>
</tr>
<tr>
<td>6</td>
<td>2</td>
<td>Is this wrong? I guess I should have said &quot;1963&quot;?</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>Yes, should keep together. I separated for emphasis though age only real significant difference</td>
</tr>
<tr>
<td>8</td>
<td>3</td>
<td>Isn't what important?</td>
</tr>
<tr>
<td>9</td>
<td>2</td>
<td>Oh, I see-tell the reader why? Because she was too emotional to go to work.</td>
</tr>
<tr>
<td>10</td>
<td>2</td>
<td>? I was told to tell both sides of story.</td>
</tr>
<tr>
<td>11</td>
<td>?</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>2</td>
<td>GIVE ME SOME EXAMPLES OF HOW TO MAKE IT BETTER! &quot;Weak&quot; doesn't do it!</td>
</tr>
<tr>
<td>13</td>
<td>3</td>
<td>Maybe not the same</td>
</tr>
<tr>
<td>14</td>
<td>3</td>
<td>I was told to put parenthesis</td>
</tr>
<tr>
<td>15</td>
<td></td>
<td>&quot;Weak&quot; again. So, tell me how to change it!</td>
</tr>
<tr>
<td>16</td>
<td>4</td>
<td>Good pt. for persuasion</td>
</tr>
<tr>
<td>17</td>
<td>1</td>
<td>No, it's not the standard. Only emotional.</td>
</tr>
<tr>
<td>18</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>19</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>20</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>22</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>24</td>
<td>3</td>
<td>consistency. I guess it belongs at the beginning. However, I'll have to ask you to be certain. You don't tell me.</td>
</tr>
<tr>
<td>25</td>
<td>2</td>
<td>So?/Useful to the extent that it draws my attention to it. Seems POV check again.</td>
</tr>
<tr>
<td>26</td>
<td>2</td>
<td>Yes- unnecessary-</td>
</tr>
<tr>
<td>27</td>
<td>3</td>
<td>Not sure what you want here. not credible</td>
</tr>
<tr>
<td>28</td>
<td>3</td>
<td>Inappropriate? tell me -How can I change this? Help!</td>
</tr>
<tr>
<td>29</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>30</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Comment #</td>
<td>Comment Rating</td>
<td>Mark’s Remarks</td>
</tr>
<tr>
<td>-----------</td>
<td>----------------</td>
<td>-----------------------------------------</td>
</tr>
<tr>
<td>31</td>
<td>2</td>
<td>Use the specific words? which ones?</td>
</tr>
<tr>
<td>32</td>
<td>4</td>
<td>So?</td>
</tr>
<tr>
<td>33</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>34</td>
<td>4</td>
<td>?</td>
</tr>
<tr>
<td>35</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>36</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>37</td>
<td>3</td>
<td>not persuasive, right?</td>
</tr>
<tr>
<td>38</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>39</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>40</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>41</td>
<td>3</td>
<td>So, which word would be better?</td>
</tr>
<tr>
<td>42</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>43</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>44</td>
<td>confusing</td>
<td>?</td>
</tr>
<tr>
<td>45</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>46</td>
<td>confusing</td>
<td>So?</td>
</tr>
<tr>
<td>47</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>48</td>
<td>3</td>
<td>Yes, but what other facts?</td>
</tr>
<tr>
<td>49</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>50</td>
<td>confusing</td>
<td>What do you want here?</td>
</tr>
<tr>
<td>51</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>52</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>53</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>54</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>55</td>
<td>2</td>
<td>No its not. Good pt</td>
</tr>
</tbody>
</table>
Early in the critique, Mark appears to be receptive to the instructor's comments. Something snaps, however, at comment 13, where the instructor had simply written "weak" in the margin. Mark's handwriting in the Remarks section said as much as the words did. His all capital letter printing of "GIVE ME SOME EXAMPLES OF HOW TO MAKE IT BETTER!" was written in oversized letters pressed hard into the page.

He calms down for the next two comments only to be irritated by comment #16, another single word "weak" in the margin. His resentment is back again at comment #23, and from there things continue downhill. There are occasional bright spots where Mark accepts the criticism, but these bright spots are fairly few and far between. More common are Mark's defiant "So?" responses and several frustrated "Help!" and "What do you want here?" reactions.

By contrast, Instructor 1's commenting style seemed to build
rapport with students. One unique feature of these critiques was the instructor’s occasional use of comments that suggested a dialogue was occurring between the teacher and student.

In the following example, the instructor seemed to anticipate the student’s response to her suggestion:

Comment: “Avoid giving undue attention to State’s cases & State’s arguments. Yes, you should address the important cases & arguments on State side, but you need to dispense with them more succinctly”

Rating: 1

The same technique appeared in the end comment this instructor wrote for Kathy’s brief. Here again the instructor seemed to anticipate what question the student would like to ask after reading the instructor’s first suggestion for improvement, and she answers the anticipated question in her parenthetical statement. Later in the end comment the instructor also made an educated guess about why the student made some of the decisions she did.

Overall, this memo is fairly well-organized and written, and it offers some good arguments.

The persuasiveness of the memo could have been enhanced by, among other things, quoting more from the record. (Extensive quotation from analogous cases is frowned upon; the same is not true of quotations from the record.)

There were several unexplained omissions in the analysis. For example, your heading argues that the show-up was suggestive as to Clipse, but you never addressed that point in the body of the argument.

Perhaps you were constrained by a page limitation. If so, you might have saved space by arguing closely related points together (e.g., Parts IIA and IIB) to avoid unnecessary redundancy.

Rating 1

I. Role-Playing Comments

One additional category of comments, role-playing comments, deserves mention. As was noted in the introduction to this article, legal writing teachers are intent upon impressing their students with the importance of paying attention to their readers. For that reason, some legal writing instructors use their comments to remind students of their reader’s likely response to their writing. At times, the comments themselves are written as though the instructor has adopted the reader’s role, be it judge, client, or supervising attorney.
The most experienced instructor in the study, Instructor 5, used role-playing in the comments, and judging from the students' ratings of these comments, the role-playing was well received, even when the instructor changed roles several times within the same critique.

At times the instructor took on the traditional teacher role.
Comment: "good-you have begun stmt of facts by setting out the facts that favor your client"
Rating: 2

Frequently, this instructor stopped just short of playing the judge's role, choosing instead to point to a probable reaction on the part of a judge/reader.
Comment: "Your point heading is too long: it visually intimidates the reader. Thus, even though it was good, most judges wouldn't read it.
Rating: 2
Comment: "At this pt the judge would be confused. Is this another summary of the argument or the arguments themselves?"
Rating: 2

Almost as often this instructor slipped into a writer's role.
Comment: "OK, but I'm not sure that I would have included this stmt."
Rating: 2
Comment: "I would include quotes from record here."
Rating: 2

And on a few occasions Instructor 5 played the role of editor.
Comment: "need to make 'tie' [circled the word testimony and added in "testified that"]
Rating: 2

Never once did the students comment that they were confused by the changing persona this instructor adopted.

J. What the Student Evaluations Did Not Say

The biggest surprise in the student evaluations of the instructors' critiques was that the students never criticized the instructors for their own writing errors. Occasionally, different instructors would omit a word in a margin comment, and some even had numerous typographical errors in their typed end comments. Never once did any of the four students mention these errors; instead, they seemed to assume that all the comments were first draft writing and could not be expected to be error-free.
III. Conclusion

Although it is tempting to try to draw some definitive conclusions from this data about what makes a useful critique of a law student's paper, it is also important to remember the limitations of this study. The four law students who evaluated the critiques were representative of several types of law students, but they were still just four law students, not four hundred or four thousand.

Furthermore, the student-teacher dynamic in critiquing papers is affected by the classroom dynamic. For example, students often read a tone into the comments on their papers based on what they know about their legal writing instructor from class. Some instructors write comments that refer back to specific discussions that occurred in class. The evaluations in the study were all done without the student evaluators having that connection to the individual critiquing teacher's classroom teaching.

Most law students know the gender of the person critiquing their legal writing. Under the conditions in this study, the gender of the critiquer was not known to the students. It is possible that they may have reacted differently to the comments had they known the comments were "written by a woman" or "written by a man," but the information obtained from this study does not suggest any basis for drawing conclusions about the significance or insignificance of gender in critiquing.

Finally, and perhaps most importantly, legal writing papers usually have comments and grades. Adding grades to these papers would have certainly changed the dynamic and affected the students' reactions to the critiques.

Remembering the study conditions and limitations, then, we can draw the following inferences about what the student readers of instructors' critiques think about the comments.

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84 One type of student that was not represented in the study was the student who ignores or barely glances at the comments and is concerned only with the grade on the paper.

85 Still, the four students in the study, despite their differences in ability and personality, had a high level of agreement. In fact, approximately a year and a half after the data had been analyzed, each of the four students who had participated in the study, all of whom had graduated from law school and had taken and passed the bar, were contacted and briefed about the results of the study. None was surprised by what the study had shown, and to a one, they concurred with the conclusions, or inferences, drawn from the data. As part of this post-study briefing, these former students, now lawyers, were reminded that the results were being written up in an article for publication. When asked if there was anything else they would like to add or anything that they would like to say to legal writing instructors from law schools around the country, they were more than willing to get in a last word. Their final comments are included in Appendix D.
1. A well-written end comment is a crucial feature of an effective critique.

End comments that began with an overview of the paper and then discussed the paper's strengths and weaknesses received the highest ratings from the students. Several of the end comments with high ratings organized their points in categories (See, for example, the second and third end comments in Appendix B. One used the following categories: overview, content, organization, persuasiveness, writing style; the other used organization, roadmaps & signposts, analysis, persuasiveness, style, and mechanics.) The students also rated highly those end comments that listed what the writers should focus on the next time they write.

2. Students prefer comments that elaborate or give examples or both.

Short, cryptic, coded, or labeling comments tended to be far less effective than comments that discussed the writer's problems in more depth. The students also appreciated it when the critiquer gave an example of how to fix a given problem.

3. Students need positive feedback about their writing.

Positive comments not only provide needed encouragement, they also point out effective examples in the student's own work that he or she can draw on and use again in other contexts.

4. Instructors should monitor the number of comments they are writing on students' papers.

While it can be tempting for legal writing instructors to comment on everything they see as they are reading a given paper, this practice can lead to excessive commenting, particularly on weaker writers' papers. Excessive commenting may overwhelm the student and create an unnecessary barrier to learning and improvement.

5. Instructors need to pace themselves as they comment on a given paper.

Because none of the instructors wrote "beginning" comments rather than end comments, we have no information from this study about whether the placement of this type of overview critique is important.
Although there may be good pedagogical reasons for writing fewer comments on the last half or last third of a student's paper, instructors should be aware of the number of comments they are making throughout a paper and take care not to run out of critiquing energy.

6. **Students appreciate comments that discuss the rationale underlying the critiquer's comments.**

Students gave their highest ratings to those comments that incorporate rationale into the comment and use a specific instance in a student's writing to teach a general principle about effective legal writing.

7. **Comments phrased as questions can be effective, but they may also have some hidden dangers.**

Too many questions, especially too many terse questions, can create an antagonistic reaction from students. Some students are more frustrated than challenged by comments framed as questions when the students are unable to use the question to determine what problem the instructor is pointing out and what solution would be acceptable.

While those of us who teach legal writing would agree with most, if not all, of the points drawn from the students, we are all painfully aware of the various tensions that surround the particular practice of commenting on and critiquing student writing. One of the tensions, of course, is how to incorporate these ideas into critiquing papers and still stay sane, especially given the number of students some of us teach and the number of papers we critique. Furthermore, even if legal writing instructors had infinite amounts of time and critiquing energy, there is another tension between trying to write comments that explain and elaborate to the extent that the students seem to want and still not write so much that the comments overwhelm the students or rewrite the paper for them. While it is hard to find the right balance, the message from the students seems to be to be more selective about the points raised in comments and then to flesh out these selected comments to be sure that they are clearly explained to the student.

As legal writing professionals, what we need to do next, then, is clear. In addition to exercising whatever collective clout we may have to reduce class sizes so that we can manage the paper load, we need to continue exploring the critiquing frontier. We now
know that end comments are essential, and we have some ideas about what makes some end comments particularly effective. Although we probably will never have, or want, a precise formula for writing end comments, we still need to examine end comment writing in more depth. Some critiquers, for example, use a cross-referencing system that connects margin comments to the overview in the end comment. Still other critiquers insist that beginning comments work far better than end comments because students read these first before they work through all the individual margin and interlinear comments. Are cross-referencing systems effective or confusing? Does it really matter if the overview comment is at the beginning or end of the paper? We should study these questions, and as part of that study, we should ask the students.

We have even more work to do on the issue of comments that offer solutions to students' writing problems. Students seem to be saying "tell us how to fix it," but the conventional wisdom among legal writing professionals has been to resist doing very much revising and editing for the students. Do students learn best when they figure it out on their own or when they see their own prose in an improved state based on their instructor's revisions? How much help is the right amount? We should study this question, and as part of that study, we should ask our students.

And what kind of help works best? If a student has a persistent problem, say with writing topic sentences, is it better for the instructor to write one for the student and then hope the student can use that example as a model for the rest of the paper? Would the student learn more about topic sentences if he or she reads another student's paper that has particularly strong topic sentences? Would it be better to send the student back to the textbook's discussion on topic sentences? Would it be better if the instructor took the time to write a margin comment explaining the underlying rationale for topic sentences? Again, we should study this issue, and as part of that study, we should ask our students.

Given our long standing conviction that asking questions is a better teaching strategy than handing students the answers, we should further explore the use of questions in commenting on student papers. We need to understand the difference between a question comment that suggests to the student writer that he or she made a mistake or overlooked a key point ("Was the roll of bills in a locked glove compartment?" "At what point did the po-

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87 Beginning comments are similar, if not identical, to end comments except that the legal writing instructor attaches them as a cover page to the student's writing.
lice officer read the defendant his rights?” from a real question that seeks information from the student author (“Did you decide not to include Smith v. Jones in your analysis because it was from another jurisdiction?”) Obviously not all question comments are equally effective. Which ones challenge students to think harder and deeper and write better, and which ones intimidate, frustrate, and antagonize? We need to refine this part of our collective knowledge about critiquing, and in order to do that, we will have to ask ourselves and our students about which question comments are effective and which are not.

Finally, we need to ask which kinds of comments promote lasting learning and which ones simply help the student fix a problem in a given assignment. Both kinds of comments are “effective,” but ones that transfer to other writing assignments both in law school and on into practice are certainly the kinds of comments that we want to identify and learn how to write.

Critiquing law students’ writing and commenting on their papers will continue to be a significant part of our work. As such, it deserves all of this attention and more. We have a fairly good idea of what many of the next questions are and what we should study next. As we ask ourselves these questions and study the issues related to the writing we do on student papers, though, let us not forget our own advice: all good writing, including instructor comments on law students’ papers, should consider its audience and its purpose. If we keep those two touchstones in mind, we are apt to be far more successful both in studying effective critiquing and in writing effective critiques.
Appendix A:

Evaluation Sheet for Instructor's Comments
Appellate Brief
Evaluation of Critique done by Instructor _____ (fill in instructor code on coversheet) on student paper ________ (fill in your student number code on cover sheet).

READ THROUGH THE ENTIRE CRITIQUE BEFORE BEGINNING TO FILL IN THIS SHEET.

A. Overall Evaluation

1. Taken as a whole, this instructor's comments were

   1   2   3   4   5
   very  useful  not  useful
   useful

(Check the following only if applicable.)

   _____ illegible   _____ confusing   _____ harmful

Remarks:

2. From all the comments, I assume that this instructor's top priorities for legal writing are the following: (List and number the priorities, that is, number 1 should be the top priority.)

3. From all the comments, I assume that the following are the chief strengths of my paper: (List and number the strengths.)
4. From all the comments, I assume that the following are the chief weaknesses of my paper: (List and number the weaknesses.)

5. Based on all the comments, I assume I most need to work on the following:

B. The End Comment

Many instructors write a comment at the end of each student's paper. If this instructor did not use an end comment, simply check the following and move to section C.

_____ no end comment

If the instructor used an end comment, use this section (B) for your evaluation of it.

1 very useful
2 useful
3
4 not useful
5 useful

(Check the following only if applicable.)

_____ illegible  _____ confusing  _____ harmful

Remarks:
EVALUATION SHEET FOR INSTRUCTOR'S COMMENTS

DIRECTIONS: Fill out a separate evaluation sheet for each instructor's comments. If at all possible, do each evaluation at a different time so that you will not be unduly influenced by the way you evaluated another instructor's comments.

Many questions ask you to rate an instructor's comment(s) using the following scale:

<table>
<thead>
<tr>
<th>1</th>
<th>2</th>
<th>3</th>
<th>4</th>
<th>5</th>
</tr>
</thead>
<tbody>
<tr>
<td>very useful</td>
<td>useful</td>
<td>not useful</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Please choose one of these five levels. Do not create new levels midway between two points. Some comments may also be illegible, confusing, or harmful. There are additional boxes to check if any comment falls into one of these categories.

If you have chosen the very highest rating (1) or the very lowest rating (5), please explain why in the Remarks section for each question. If you have marked that a comment is confusing or harmful, please explain why in the Remarks section for each question. You may also use the Remarks section for any other comments you have.

Obviously, the term "useful" may have a variety of meanings. For example, you may find a comment useful if it helped you to understand something about your writing; will help you the next time you write; or motivated you to work on your writing. You may have other reasons for rating a comment as useful. Again, please use the Remarks section whenever you need to explain a particular meaning of "useful."

Read all the comments from one instructor before beginning to mark the evaluation sheet for that instructor's critique.

I have used a simple numbering system to keep track of which comments get which ratings and critiques. The number of the comment will appear in a box and be written in orange ink. The box with the orange number should be right above or near the comment. Often an arrow indicates which comment the number goes with. When two or more comments seem tied together, I have given them the same number so they can be rated together.

If I have inadvertently missed numbering a comment, please critique it after all the other margin comments and assign it the highest number for a margin comment. Any
numbers that appear on your paper that are not in orange ink are part of that instructor's critique.

Feel free to call me at work (591-2230) or at home (588-8400) if you have any questions. Thanks for your cooperation!
C. Margin and Interlinear Comments

Many instructors write comments in the margins and between the lines of each student's paper. If this instructor did not use margin or interlinear comments, simply check the following and move to section D.

no margin or interlinear comments

If this instructor used margin and interlinear comments, you will notice that they have been numbered with an orange pen. Use the orange numbering system to match each margin and interlinear comment with your evaluation of it.

Comment #1

1 2 3 4 5
very useful not useful

(Check the following only if applicable.)

____ illegible ____ confusing ____ harmful

Remarks:

Comment #2

1 2 3 4 5
very useful not useful

(Check the following only if applicable.)

____ illegible ____ confusing ____ harmful

Remarks:

Comment #3

1 2 3 4 5
very useful not useful

(Check the following only if applicable.)

____ illegible ____ confusing ____ harmful

Remarks:
Comment #43

1  very useful
2  useful
3  not useful
4  useful
5  

(Check the following only if applicable.)

_____ illegible  _____ confusing  _____ harmful

Remarks:

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Comment 44

1  very useful
2  useful
3  not useful
4  useful
5  

(Check the following only if applicable.)

_____ illegible  _____ confusing  _____ harmful

Remarks:

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Comment 45

1  very useful
2  useful
3  not useful
4  useful
5  

(Check the following only if applicable.)

_____ illegible  _____ confusing  _____ harmful

Remarks:

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D. Miscellaneous

Please apply the following to all comments (end comment, margin comments, interlinear comments) on the paper. Use the Remarks section for further explanations.
1. Number of Comments

___ too few   ___ about right   ___ too many

Remarks:

2. Tone of Comments (mark all that apply)

___ harsh   ___ condescending   ___ sarcastic
___ encouraging   ___ discouraging
___ professional   ___ empathic   ___ friendly
___ (you supply the descriptive word or words)

Remarks:

3. Accuracy of Comments (i.e., do you think the instructor was right in what he or she said?)

1 very accurate
2 somewhat accurate
3 inaccurate
4

Remarks:

4. What was the most effective quality of this instructor's critiquing style? Why?

5. What was the least effective quality of this instructor's critiquing style? Why?
6. Additional comments about the instructor's critique?

7. Comments about the evaluation sheet you are using or the evaluation process?
Appendix B:

Example of End Comments
Your brief is very poor. As an appellate judge, I don't know if I would have continued reading past the table of contents. Your cover incorrectly states that this brief supports a petition for discretionarily review, a misstatement that dramatically affects your credibility with the reader. That error, combined with the very complicated table of contents, makes your brief uninviting to read. Likewise, your assignments of error and issue statements just continued to put a bad taste in the reader's mouth. Instead of simplifying and focusing the reader's attention, your issues made the case seem more complicated than it really is. As a result, the reader feels burdened, not enlightened.

Your statement of the case omits legally significant facts and also misstates the facts on p. 5. While you chose an effective point of view from which to begin the fact summary, your omissions and lack of an effective organization interferred with reader understanding. Even though you presented some factual details well, your statement needed revision for completeness and accuracy.

Thus, as I have already mentioned, I don't know if a judge would have continued reading much farther. If not, you have totally missed the opportunity to argue your client's case because of a lack of attentiveness to detail. Moreover, even if the judge is generous and continues reading, your credibility is shot!

As for the argument, you needed to work on using thesis and topic sentences and transitions to ties your argument together. You do not effectively introduce each section and explain how it fits within the larger picture. On the silence issue, you tried to address the state's arguments, but your points were largely unsupported. Your assertions were merely opinion and carried little weight. Many times the thrust of your argument was diminished or lost because of poor sentence structure. Keeping your subject and verb closer together makes it easier for the reader to quickly comprehend what's going on; more difficult sentences mean that the reader must spend valuable energy dissecting the sentence structure rather than concentrating on what you're saying.

While my overall impression is that you understood the law and had some very good arguments to make, the presentation was ineffective, so the points were lost. Little things, like graphics, can make or break the reader's perception of your credibility and thus the believability of your points. Moreover, you did not choose an effective organization; as I have already mentioned, the sheer number of subdivisions adversely affected understandin.

The brief needed revision to catch numerous surface errors and to simplify the presentation and to tie the issues together. You alluded to the second issue when your discussed harmless error re. the first issue, but the connection needed to be much more explicit to really impress the reader and persuade the judge that your client did not receive a fair trial.
The first part of your brief is quite good. Your tables are good, your assignments of error and issue statements are good, and you did a nice job on your statement of the case: you included all of the legally significant facts, and you presented those facts quite persuasively. I also thought that the first part of your argument section was quite good. Your research was good, your arguments were sound, and, for the most part, your presentation was persuasive. I did, however, have substantial problems with your discussion of the second issue. Although it is important to establish that there was an error, this case will be won or lost on the discussion of the exceptions. You should, therefore, have discussed them at length.

My more specific criticisms follow:

Content:

In writing briefs as a practitioner, there are a couple of things that you need to work on. First, and most importantly, make sure that you discuss all of the issues. (In this case, your failure to discuss the exceptions to Doyle was fatal.) Second, make sure that you organize around "arguments" and not case. Set out a legal argument and then use the cases to back up/support that argument. Do not use the "book report" method of setting out one case, comparing that case to ours and then setting out a second case and comparing it to ours.

Organization:

I have two pieces of advice. First, make sure that you set out your strongest argument first. For example, in this case, you should have set out your silence argument before your suppression argument. Second, do not overuse summaries. Although summaries and roadmaps are useful, if you overuse them your writing becomes repetitive and the judge stops reading. (In this case, by shortening the summaries and combining the two "prejudice" arguments, you could have stayed within the page limit.)

Persuasiveness:

Although you used the persuasive devices that we discussed in class in writing your statement of the facts, you did not use enough of them in your argument section. For example, in the future, try to start each section and subsection with either a positive assertion or a rule that clearly favors your client and try to state the rules in the light most favorable to your client.
Writing Style:

On the whole your writing is good. In the future, you should, however, continue working on paragraph coherence and transitions.

If you would like help with any of the items, please feel free to come see me. Even though you have finished Legal Writing II, the writing faculty is still available to help you with your writing.
LWII  
Student 06  
Assignment: Final draft: Memorandum of Points & Authorities  

Comments:  

Organization  
Good.  

Road maps & Signposts  
Your use of road maps & signposts is reasonably good, although you do a better job of providing signposts than road maps. As noted on the memo, there are a couple sub-issues that were not sufficiently "previewed" in a road map, and, as a result, the appearance of these sub-issues came as a surprise. Also, in the introduction to "I." you started a roadmap but didn't finish it.  

Analysis  
You make some good arguments, cite some relevant cases, and do a reasonably good job of comparing & contrasting analogous cases.  

The principal shortcoming I see is a lack of specificity in some of your analysis. (See, e.g., discussion of the differences in appearance among lineup participants; discussion of discrepancies between witnesses' descriptions and Wilkerson's actual appearance.) The lack of specificity makes your analysis sound conclusory at times. (See, e.g., discussion of Clipse's lack of reliability.)  

Persuasiveness  
Overall, your memo is moderately persuasive.  

The Statement of the Case is fairly good, though it would benefit from simpler, more direct and vivid language. What it lacks now is a sense of immediacy (especially important for the defendant).  

Both the point headings and the issue statements require greater specificity to be persuasive. Unless you include some specific facts to support your propositions, your point headings and issue statements will be unlikely to incline the court in your favor. See comments on memo.  

"Style"  
I detect no serious stylistic problems. Your style would benefit, however, if you would eliminate some wordy phrasing (e.g., "is due to the fact that," "it is evident that," "it
Appendix C:

A Representative Page of Instructor 3's Critiques
and objected strongly that no other individual in the line-up looked like Mr. Wilkerson. (RP 38)

Mr. Kellogg also stated that he considered it to be one of the poorest line-ups that he had ever seen. (RP 38)

Not surprisingly, Ms. Komonics and Mr. Glaes identified Mr. Wilkerson at the line-up. (RP 63.92)

d. Prosecutor's Comments At Trial

The State elicited evidence of Mr. Wilkerson's post-Miranda silence during its direct examination of Officer Moffat (RP 112) and during its cross-examination of Mr. Wilkerson. (RP 142) The State also made remarks concerning Mr. Wilkerson's post-Miranda silence in its closing argument. (RP 166) (Additional facts concerning this issue are included in the argument section.)

C. Argument

I. THE TRIAL COURT COMMITTED PREJUDICIAL CONSTITUTIONAL ERROR BY ALLOWING THE STATE TO SUGGEST TO THE JURY THAT AN INFEERENCE OF GUILT SHOULD BE DRAWN FROM MR. WILKERSON'S POST-ARREST SILENCE.

Mr. Wilkerson's rights to due process were violated when the trial court allowed the State to use evidence of Mr. Wilkerson's post-arrest silence to suggest to the jury that an unfavorable inference should be drawn as to the truth of his trial testimony. The State, during its cross-examination of the defendant, may not use a defendant's post-Miranda silence for impeachment purposes because that silence is "insolubly ambiguous." Dove v. Ohio, 426 U.S. 610, 617, 49 L. Ed. 2d 91, 96 S. Ct. 2240, 2244 (1976) (Washington has adopted and extended the holding in Dove to also prohibit the impeachment and substantive use of a defendant's post-arrest silence made during the State's case-in-chief and closing argument. State v. Fricks, 91 Wn.2d 391, 396,
Appendix D:

Final Comments from the Students
Tom

"I don't know how you can teach someone to write. If there is one thing I would recommend is to have students write more."

"I think lawyers learn more about writing on the job than they do in legal writing classes. Perhaps the best way to teach legal writing would be to have students out in the field working and bringing in what they are writing for real clients, real judges, and real bosses and have legal writing instructors work with them on that."

Sarah

"Sit down as a group and develop standards for critiquing. Students compare their critiques and often find that there is little consistency among them. Each instructor seems to have his or her own biases and style. If there is one thing I could say to legal writing faculty from around the country, it would be to develop clearer guidelines and clearer expectations."

Kathy

"Constructive criticism goes a long way, but destructive criticism goes an even longer way. By that I mean, students carry destructive criticism with them for years. Once someone destroys your self-confidence as a writer, it is almost impossible to write well.

Be sensitive. People are open to criticism, but watch how you give it. Lace it with enough encouragement so that the students still feel you are rooting for them.

Mark

"Consider having your students critique their critiques, at least once. I learned a lot from participating in this study, and I think other students would too. For one thing, I started thinking more about how I wanted to be taught. The more responsibility I took for the process, the more involved I got in the process, and the more I got out of the critiques."

All that I would add is what I would call the Golden Rule of Legal Writing--critique as you would like to be critiqued."
Reviews

Legal Writing
The Journal of the
Legal Writing Institute
Commenting on *The Language of Judges*  
by Lawrence M. Solan  

*Craig Hoffman*

The importance of Lawrence M. Solan’s book, *The Language of Judges*, cannot be challenged. After completing his Ph.D in linguistics, Solan left his life as a linguist and headed for law school. Solan begins his book, *The Language of Judges*, by sharing with his readers some advice he received from lawyers who counseled him about his transition from linguistics to the law:

[So] much of the law is simply a matter of linguistics that the transition from thinking about linguistic theory to thinking about legal matters should be a natural one. Furthermore, they encouraged, my background in linguistics should give me an advantage over those colleagues who have never studied linguistics.¹

Solan’s authoritative and fluid linguistic analyses of knotty statutory construction problems proves his counselors correct — knowing about language can make one a better lawyer.

Solan begins his book with an excellent introduction to contemporary linguistic theory. He then devotes successive chapters to showing how judges disingenuously employ linguistic analyses to mask what he contends to be their result-driven legal arguments. Solan creatively applies current linguistic theory to current issues of statutory interpretation and, along the way, gives some insight into what we as lawyers and speakers of English might be thinking when we analyze text. The major strength of Solan’s book is its contribution to the raising of the collective consciousness of its readers about grammar-based legal arguments. The major flaw in Solan’s approach is his trying to reach two audiences simultaneously — lawyers who know very little about linguistics and linguists who know very little about the law; in this bifurcation, his

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² Solan, at 10.
message loses some of its impact. On the one hand, Solan is trying to convince lawyers that judges are disingenuous (or at least inept) when they engage in linguistically based arguments; concomitantly, he attempts to assure linguists that their insights into human language are valuable beyond the walls of the academy.

To linguists who know nothing about the critical legal studies movement, the validity of which Solan assumes without argument, the overall legal thesis that judges are intentionally duplicitous in exercising their vast power over the masses seems moving and compelling; to lawyers who are well-aware of the pitfalls of critical theory, the legal thesis may seem jejune and somewhat naive. Similarly, to the lawyers who know little about generative linguistic theory, which Solan also assumes without argument, the overview of recent linguistic theory Solan gives throughout the book seems fresh and inspiring; to linguists who have sweated through the various upheavals in linguistic theory over the last thirty years, Solan’s pronouncements may seem a little facile. Speaking to two groups of readers simultaneously has made comprehension difficult for both of them.

Solan is at his best when he demonstrates his skills as a linguist in his critiques of judges’ uses of grammar-based arguments. In his second chapter, “The Judge as Linguist,” Solan looks at examples of linguistic rules that courts have applied in interpreting statutes and documents. One such rule is “the last antecedent rule.” Stated simply, this rule requires that a modifying clause is to be interpreted as applying to the phrase closest to it.

Solan’s message that judges intentionally misuse linguistic argument to further a disingenuous social agenda seems unconvincing. Judges’ ham-handedness in making syntactic argument could more plausibly be related to their relative unfamiliarity with current linguistic theory. This point is made convincingly in another recent review of The Language of Judges: New Dress, Old Hat. The Language of Judges by Lawrence M. Solan. 107 Harv. L. Rev. 1795 (1994). In this review, the author gives a full critique of Solan’s critical legal studies approach to judges’ motives.

Solan demonstrates how one California court applied the last antecedent rule to the following insurance policy provision:

Such insurance as is afforded by this policy . . . with respect to the owned automobile applies to the use of a non-owned automobile by the named insured . . . and any other person or organization legally responsible for use by the named insured . . . of an automobile not owned or hired by such person or organization provided that such use is with the permission of the owner or person in the lawful possession of the automobile.

The issue in the case Solan discusses was whether the phrase “such use” in the modifying clause headed by “provided” should be interpreted (1) to refer to each instance of “use” or (2) to refer only to the instance closer to it. The named insured in this case was driving a car she did not own without the owner’s permission and was involved in an accident. She argued that she was covered in all instances, and it did not matter that she did not have the
Solan argues that the mechanical application of linguistic rules, such as the last antecedent rule, can be misleading much in the same way that the mechanical application of canons of construction have been found to be misleading. He points out that “[t]he problem . . . is not the last antecedent rule itself. Rather it is the courts’ presentation of the last antecedent rule as a hard and fast rule of law, instead of a preliminary strategy for helping a judge to interpret a statute (or an insurance policy) appropriately in the context of the dispute he must resolve.”

Solan is at his worst when his thesis devolves into unsupported critical theory-based critique of how judges use grammar-based arguments. He premises his judicial critique on the notion that judges find themselves in a constant dilemma: they must simultaneously make the best decision they can and present their decision to the parties in a manner that seems as fair as possible. Solan views these dual tasks — decision-making and presentation — as presenting particularly thorny problems for judges in hard cases. Solan opines that in easy cases, those with no apparent ambiguity, the presentation often “records the decision-making process and mirrors it.”

In the hard cases, however, Solan suggests that judges are inherently disingenuous. He assumes that, in these cases, judges are unable to reveal their “true” reasons for making their decisions, reasons usually based on duplicitous motives. Solan sets us up to believe that judges constantly cast their nets for some sleight of hand to dress up their unprincipled decision-making processes.

owner’s permission to drive the “non-owned automobile” because the modifying clause, “provided that such use is with the permission of the owner or person in the lawful possession of the automobile,” only applied to the second instance of “use.” Applying the last antecedent rule, the court agreed.


— Solan, at 38.

— Solan states his suspicions about judges’ sincerity early in his book: “their use of linguistic argument as justification is by no means consistent, and is frequently inconsistent and idiosyncratic.” Solan, at 1.

— Solan believes that judges “attempt to mask that a case is hard in the first place.” Solan, note 10, at 208.

— Solan, at 2.

— Solan uses an example of a judge “who has hostility toward insurance companies, and who routinely does what he can to help individuals collect from insurers regardless of the merits of the claim.” Solan, at 3. Solan gives no evidence that these judges actually exist or that they do what he claims they do. (I am reminded of the classic sentence, “When did you stop beating your wife?”) Instead, he pushes his conspiracy theory, impugning these judges (whoever they are) for not admitting their bias in their opinions and instead “relying on cases, statutes, and various statements about the law.” Id.
Solan pushes his judges-use-linguistic-argument-disingenuously thesis throughout the rest of the book. With lawyers as his intended audience, Solan uses a discussion of California insurance cases to demonstrate that judges unfairly favor claimants against insurers. While discussing these same cases, Solan also appeals to linguists. Solan offers a logical form representation of the two possible interpretations of the “to pay” clause in an automobile insurance policy:

(1) For every x, if x is a member of i (the class of insured individuals), and x does not equal y, then the company will pay . . . all sums which x shall become obligated to pay [to] y.
(2) For every x, if x is a member of i (the class of insured individuals), and for every y, if y is not a member of i, then the company will pay . . . all sums which x shall become legally obligated to pay [to] y.

By expressing the ambiguity in logical form, Solan reveals the ambiguity of the term “other persons” in the “to pay” clause: “It can mean either a person other than the one making the claim, as reflected in (1), or a person not a member of the class of insured individuals, as reflected in (2).” Although the court wrestled with this ambiguity, Solan’s explanation in logical form makes the am-

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11 Solan refers early in his book to the judge “who has hostility toward insurance companies, and who routinely does what he can to help individuals collect from insurers regardless of the merits of the claim.” Solan, at 3. He assumes his assertions to be true and never offers evidence that such judges exist or that they do what he says they do.

12 “Logical form” is a term of art in linguistic theory that refers to representations of the meaning, as opposed to the syntactic structure, of sentences. See Janet Dean Fodor. Semantics: Theories of Meaning in Generative Grammar 60-61. (1977).

13 State Farm Mutual Automobile Insurance Co. v. Jacober, 10 Cal. 3rd 193, 110 Cal. Rptr. 1 (1973). The owner of the insurance policy discussed in this case is Mr. Jacober. With Mr. Jacober’s permission, Mr. Dell, his friend, was driving the car at the time the insured event occurred. Under the policy, damages for bodily injury to “the insured” are excluded from coverage. State Farm argued that “the insured” must refer to the owner of the policy, Mr. Jacober, the named insured. Because Mr. Jacober is the named insured, any bodily injury to him is necessarily excluded in all cases. The policy language, however, defines “the insured” to be either

(1) the named insured (in this case, a Mr. Jacober) . . . or
(4) any other person while using the owned automobile . . . with the permission of the named insured . . . ”

“Other person” includes anyone except “the insured.” Mr. Jacober’s heirs argued that because “the insured” in this case was Mr. Dell (under definition 4), and because the policy excludes bodily injury only to “the insured,” only Mr. Dell’s injury is excluded. Because Mr. Jacober is not “the insured” in this case, coverage for his injuries should not be excluded. The Supreme Court of California ultimately agreed.

14 Solan, at 83-84.
15 Solan, at 84.
biguity apparent. This contribution is much more valuable and much more interesting than Solan's unsupported view that judges decide cases duplicitously.

Solan also points out that these logical form interpretations reflect a changing "empathy" from the perspective of the speaker. Relying on the work of Susumu Kuno, Solan explains that the court could have reached its conclusion by noting a shift of empathy in its interpretation of "the insured" in Mr. Jacober's policy. That is, the same noun phrase, "the insured," may be interpreted to refer to different individuals in different contexts. It is this shift of interpretation that caused the ambiguity in the Jacober policy. Solan's understanding of Kuno's work allowed him to reveal what the judges might have been doing when they made their decision.

It is Solan's frame of reference as a linguist that makes his work fresh; his frame of reference as a critical legal studies adherent muddies the water. Fortunately, other linguists have taken Solan's cue and have leapt into the legal arena. Understandably, their contributions tend to reflect the linguistic subdiscipline from which they view the law. The more theoretical linguist focuses on structural analyses of statutory language. Sociolinguists have begun to look at the law as an example of how language use affects society. Cognitive scientists and psycholinguists are beginning to explore which legal arguments are pleasing to the human mind.

Despite its mixed message, Solan's work has inspired a broad range of new research. One promising area of interdisciplinary study is legal semantics. The goal in building a legal semantics is to use methodology from formal semantic theory to assign meaning to legal texts. A linguist cannot do this alone. Although linguists have keen intuitions about syntactic and semantic structure, they understandably lack sufficient legal knowledge to determine what phrases in a legal text are salient. Similarly, although lawyers have

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a rich and broad frame of reference about legally significant language, they understandably lack a precise vocabulary to distinguish the relative semantic weight of key phrases.

For example, in looking at a criminal statute, a lawyer knows that the language must express an element of intent with respect to the prohibited acts; without criminal intent, there can be no crime. Lawyers also are aware of various types of procedural or jurisdictional language that, while essential, may have little to do with the interpretation of the criminal elements of the statute. In looking at the same criminal statute, linguists may be able to represent its “grammatical” meaning; however, their representation may lack sensitivity to the relative legal weight of the constituent phrases.

Although Solan’s criticism of judges may be overstated, and his messages to lawyers and linguists might be blurred, *The Language of Judges* has invigorated interdisciplinary scholarship in linguistics and the law. The overall positive effect of his contribution to the field is unquestionable. It is certain that the growing number of contributors to this field will pick up where Solan left off.