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Genesis of this Proceedings Issue:  
A Foreword from the Editor

Since its formation, the Legal Writing Institute has held biennial conferences for those who teach legal reasoning, research, and writing. At the first conference held at the University of Puget Sound in 1984, the focus was on sharing approaches to teaching first year law students the rudiments of research and writing. At that time, legal writing instructors were expected to teach for only a few years; each succeeding generation of instructors operated in a vacuum, reinventing the wheel before they passed on to other more lucrative careers. The first conference was designed to transfer wisdom from one generation to the next. What transpired exceeded the most optimistic expectations. Not only did the participants share a wealth of experience, but they began to view themselves as pioneers in a new discipline. Many of those who attended the first conference are still leading voices in the field of legal reasoning, research, and writing.

Since 1984, the conferences have evolved with the discipline. Although some sessions are always devoted to basic information for new legal writing faculty members, there are also presentations on theoretical topics, new teaching methods and technologies, status issues, and original scholarship in the field. The theme of the 1996 Conference was “Learning From Other Disciplines”: philosophy, composition theory, and education. Over three hundred people attended the conference at Seattle University, July 17 - 20, 1996; nearly one hundred legal writing and other professionals presented. We hope through this Proceedings Issue to provide a sample of this wealth of expertise and ideas; due to space limitations, it is only a sample. This issue includes articles from the four keynote speakers: Sam Wineburg, Peter Suber, Anne Ruggles Gere, and Justice Rosalie Wahl. The other pieces range from the theoretical to the decidedly practical. We end in the Political Corner.

This proceedings issue differs from a regular issue of the journal in two respects. First, each of the articles printed here was originally an oral presentation, and as such, it maintains much of the original informality and character of a speech. Second, this issue represents the efforts of many more people than have ever before worked on the journal. It was only possible because of the dedication of the authors, editors, and assistant editors. My thanks to each of them.

Diana Pratt  
Wayne State University Law School
This is a story with at least two parts. In the first part, Sam Wineburg, a Professor of Educational Psychology at the University of Washington, tells his story, the story of instruction in the United States, beginning with one revolution, the scientific revolution, and ending with another, the cognitive revolution. In the second part, Laurel Oates, the Director of Legal Writing at Seattle University School of Law, tells our story, the story of legal education and, in particular, legal writing, and how both have been affected by these revolutions.

SAM'S STORY

Not too long ago, I asked eight high schools seniors and eight historians to verbalize their thoughts as they read aloud a series of historical documents, including diary entries and excerpts from an autobiography, a formal deposition, a newspaper report, a letter of protest, a selection from a historical novel, and an excerpt from a high school textbook. Now the students whom I asked to do this task were not ordinary kids. They were some of the best and the brightest. All had GPAs above 3.5, and all had received high scores on the SAT. Similarly, the historians were a prestigious group. Four of the eight were Americanists, and four were “non-Americanists” who specialized in other areas.

In analyzing the students' and historians' protocols, I discovered three things. First, the students and historians rated the trustworthiness of the items very differently. While three of the eight students gave the excerpt from a high school textbook the highest rating, all of the historians gave it the lowest. Why? Because the textbook contradicted a point made in both British and Colonial documents and, when eyewitnesses who are adver-

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saries agree, that's a pretty good indication that something did happen that way. But what about the students? Of those giving it the highest rating, one called it “straight information,” and another said it was an “objective account.” For these students, the textbook and not the eyewitness accounts emerged as the “primary source.”

Second, even when the students and historians had the same scores on a pretest and gave documents the same ratings, they did so for very different reasons. Consider, for example, the explanations that Jan, a historian, and Darryl, a student, gave in selecting a 1859 depiction of Lexington Green as the most accurate representation of what really happened.

Jan's explanation:

You get the idea from all of the descriptions, whether American or British, that the British soldiers . . . couldn't control themselves. It was a riot—you've heard of the Chicago police riot, well this was a redcoat riot. In all these [other paintings] the British have maintained their lines, and you get the idea that they did not maintain their lines from the accounts . . . . The thing is that none of these [paintings] tell us how the battle started . . . . It's possible that [the 1859 depiction] is the most accurate because they seem to be firing from a building and there was some indication they would be firing from buildings. However, that was only from the British side . . . . Now given the fact that there are quite a few women in this, and no women are mentioned in the document, that is something of a problem, but it also implies that it's kind of a citizenry army, and so that may be accurate.

Darryl's explanation:

[The 1859 depiction is most accurate] because it gives sort of . . . an advantageous position, where they are sort of on a hill and I presume somewhere over here is a wall I guess . . . . The minutemen are going to be all scrambled, going to be hiding behind the poles and everything, rather than staying out here facing them . . . . You know there's got to be like a hill, and they're thinking they got to hide behind something, get at a place where they can't be shot besides being on low ground, and being ready to kill. Their mentalities would be ludicrous if they were going to stand,
like, here in [the 1775 depiction], ready to be shot.²

While in her explanation Jan refers to the written documents five times, trying to reconcile what she has read with what she sees in the picture, Darryl makes no references to the written documents. His only reference is to another picture. In addition, while Jan was troubled by the fact that the picture contained details not mentioned in the written documents, Darryl based his decision on a detail, the presence of the hill, that had not been mentioned or alluded to in any of the written documents. Thus, while Jan’s selection seems to have been based on specific details about the battle as presented in the written documents, Darryl’s seems to be have based on his own 20th century notions of battlefield encounters.

Finally, the historians and students handled not knowing very differently. Thrown into unfamiliar territory, the historians could find routes and pathways because they knew how to use the disciplinary equivalent of a compass. Their expertise lay not in what they knew, but in what they were able to do when they did not know. They could cope with confusion while the students, in the absence of a clear answer, floundered.

The question, of course, is why the students did not do better than they did. Why is it that they rated secondary sources as more reliable than primary sources? That they based their decisions on their personal experiences rather than the documents before them? That they couldn’t handle problems that didn’t have clear answers?

* * *

We begin our search for answers with a brief historical excursion, going back to the early part of this century to discuss E.L. Thorndike, the father of the modern field of educational psychology and testing, continuing to his disciple, B. F. Skinner, and then talking about how the traditional views of behaviorism have been challenged by what has been called the “cognitive revolution.”

Writing in 1910, Thorndike sought to establish a science of human learning that

. . . would allow us to tell every fact about everyone’s intellect and character and behavior, would tell the cause of every change in human nature, would tell the result which every educational force would have. It would aid us to use

² Id. at 79.
human beings for the world's welfare with the same surety of the result that we now have when we use falling bodies or chemical elements.\textsuperscript{3}

If you wanted to study learning in 1910, you started not with students in classrooms, but with animals. Now other people had studied animal learning and had described how animals, in facing a problem, reacted in many of the same ways that humans react: they look at what confronts them, sometimes they resort to trial and error, but at other times, a bright cat or dog will sit back and — well — think!

Nonsense, said Thorndike, animals have insights as frequently as do rocks. What we call “insight” is nothing more than the outcome of a behavior that has been stamped in. To prove this, Thorndike took a group of five cats and placed them in a “problem box” where, if they happened to press on a lever, they would be released from the box and rewarded with a little piece of fish. How did learning go on? It was a slow but predictable process. Listen to Thorndike’s description:

When put into the box the cat shows evident signs of discomfort and of the impulse to escape from confinement. It tries to squeeze through any opening, it claws and bites at the wire; it thrusts its paws out through any opening and claws at everything it reaches. It does not pay very much attention to the food outside but seems simply to strive instinctively to escape from confinement. The cat that is clawing all over the box in her impulsive struggle will probably claw the string or loop or button so as to open the door. And gradually all the other unsuccessful impulses will be stamped out and the particular impulse leading to the successful act will be stamped in by the resulting pleasure (the piece of fish), until after many trials, the cat will when put in the box immediately claw the button or loop in a definite way.\textsuperscript{4}

The cat would paw everything in the cage and then, by chance, hit the lever and be released to a place where the fish awaited. When placed back into the cage, some cats put two and two together. Press the lever, door opens, and voilà: smoked

\textsuperscript{3} E. L. Thorndike, \textit{The Contribution of Psychology to Education}, 1 J. Ed. Pscyh. 5, 5 (1910).

salmon. For other cats, the dumb ones, it took 10 or 12 trials before they got the trick. But regardless of how “smart” the cats were, the process was simple and wonderfully flexible: Simply create stimulus-response bonds through practice and rewards. And if the process was good enough for cats—and could produce scientifically demonstrable results—why was it not good enough for children?

So this is what learning in school became. Reading was no longer a process of partially understanding difficult texts, of reading in a one-room schoolhouse with a more able peer something that one couldn’t master on one’s own. No, this was an age of Frederick Taylor’s scientific management when the number of steps a custodian took in sweeping two rooms and the number of hand motions per sweep could be charted with a stopwatch, graphed, predicted, and controlled. Thorndikianism and Taylorism were a stimulus-response bond made in heaven. Learning to read became a process like any other: start with letters, then progress to words, then sentences, then paragraphs, then chapters, then books. It was like building a brick wall. Each stimulus-response bond was a brick, which was fitted together with other stimulus-response bricks, layer by layer, until the wall was built.

Having as their motto, “Substitute science for the rule of thumb, substitute science for tradition, substitute science for philosophy,” Thorndike’s disciples sought precise measurements of every school task imaginable, from spelling to penmanship, from reading to writing, from math to science, breaking each task into its smallest constituent parts. From Thorndike’s office at Columbia University’s Teachers College, an army of freshly minted Ph.D’s bent on reforming a tradition-bound educational system established laboratories of statistics and psychological measurement in universities, “efficiency bureaus” in state departments of education, and research bureaus in city school districts. And then there were the curriculum developers and the test developers. Curricula were redesigned and textbooks rewritten to present material in carefully sequenced gradations. The

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5 For a more detailed description of these experiments and Thorndike’s views, see Chapter 2 in THEORIES OF LEARNING (Gordon H. Bower & Ernest R. Hilgard eds., 5th ed. 1981)


7 Clifford, supra note 4.
Adventures of Huckleberry Finn in the 6th grade? No. We know that it is an 8th grade book!

From the 1920s to the 1950s, Thorndike's behaviorism provided the lens through which we viewed education in this country. To be sure, there were dissenting voices—for example, the Gestaltists and some humanistic psychologists— but the folks who made our tests and developed the scope and sequence charts for our reading programs were largely Thorndikians. But where were the shining results? If our way of educating was so right, why were the Russians the ones launching a satellite to orbit the earth? Why did Sputnik bear a hammer and sickle and not the stars and stripes?

But you see, this was the wrong way to think about it. It was not, the university psychologists told us, that our theories of learning were wrong. The problem was that we were not applying those theories correctly. If we, the teachers in classrooms, would only listen, we could turn schools around in an instant. If researchers, using the principles of behaviorism could teach pigeons—yes pigeons, birds whose only claim to intelligence is that they know when we have just finished washing and waxing our cars—to play Ping-Pong, then teachers should be able to use the same principles to teach children to read, to write, and to do math.

Yes, it was we, the teachers, who were lagging behind. Listen to B.F. Skinner, writing in the late 1950s. After describing his research with pigeons, Skinner says:

From this exciting prospect of an advancing science of learning, it is a great shock to turn to that branch of technology which is most directly concerned with the learning process—education.

If, by following a linear, rational process of breaking each task into its component parts, teaching each part in turn, and not progressing until the previous part had been mastered, pigeons could be taught to do things that no one would have imagined, why should it be any different, said Skinner, for "rats, dogs, monkeys, and human children and most recently human

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8 See, e.g., Max Wertheimer, Productive Thinking (1945).
9 Arthur Bestor, Educational Wastelands (1953).
Skinner was a practical visionary. Teaching was not the “one-on-one” shaping and reinforcing that you can do in a carefully controlled laboratory setting. The complexity of shaping 35 breathing, pulsating, perspiring children was mind boggling.

Since the pupil is usually dependent upon the teacher for being right and since many pupils are usually dependent upon the same teacher, the total number of contingencies which may be arranged during, say the first four years of instruction, is of the order of only a few thousand. But a very rough estimate suggests that efficient mathematical behavior requires something of the order of 25,000 contingencies. In the frame of this reference, the daily assignment in mathematics seems pitifully meager.12

What to do? Recall that the “contingencies” Skinner speaks of, 25,000 of them, are Thorndike’s pieces of fish: rewards that you need to produce an error-free performance. How were teachers to run around the room simultaneously giving out gold stars and good girl/good boy stamps to cement every single bond that needed to be cemented? There was only one answer. Replace the teacher with “teaching machines,” that is,

[d]evices that present carefully designed material in which one problem can depend upon the answer to the preceding and where the most efficient progress to an eventually complex repertoire can be made.13

These devices, crude hand-cranked boxes with moving paper “programs,” would do the ultimate to error: they would be so exact, so precise in their apportioning of subject matter, that error would be programmed out of existence. Listen again to Skinner’s words—a proclamation of an end to the reign of error:

Additional steps can be inserted where pupils tend to have trouble, and ultimately the material will reach a point at which the answers of the average child will almost always be right.14

Almost always being right! Now this was no ordinary theory. This was an incredibly practical theory. Not only did it tell us

11 *Id.* at 89.
12 *Id.* at 91.
13 *Id.* at 95.
14 *Id.* at 95. (Emphasis added)
how a child learned, but it also told us how we should teach: State clear objectives, break down complex behaviors into their constituent parts, and make guided practice a part of every lesson. In addition, with its emphasis on error reduction, Skinner’s theory even told us where we should pitch our questions: make them easy, but not ludicrously easy. Strive, the researchers told us, for about an 83% success rate. And, even if we didn’t have teaching machines, we could still adapt. There were programmed instruction booklets: go at your own pace, do a frame, look at the answer, and move on, brick by brick, layer by layer.

At first, few seemed concerned by the cracks in the system. Those who criticized the behaviorist model were considered naysayers, “romantics” who saw teaching as an art, something ineffable, unable to be spoken about except in poetry or song. But the questions these critics asked weren’t being answered. For example, the behaviorists had a difficult time responding to Noam Chomsky’s 1959 review of Skinner’s book, *Verbal Behavior.* How did we learn language according to the behaviorists? By trial and error, just like Thorndike’s cat. The baby begins to make a sound, not quite knowing what that sound means: ah ahp ahp. The mother hears, “APPPPPP”? Could that be my precocious one-year-old telling me that she wants. . .yes, that’s what it is, AHP, yes, an APPLE! And, before the child knows what is happening, the delicious red thing is thrust into her hand, and, lo and behold, a stimulus-response has been formed. Say AHP, and you get this juicy fruit. The bond is stamped in just as mightily as the lever/fish connection was for Thorndike’s cats. But wait, Chomsky said, if this were true, if language was a behavior that resulted from our direct confrontation with the environment, thousands upon thousands of individual bonds built up by experience, how is that we can comprehend language we have never heard before, how can we comprehend words that are not even words?

To prove his case, Chomsky turned to Lewis Carrol’s “Jabarwacky.”

Twas brillig and the slithy toves did gyre and gimble.

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Now what does this mean? We have never heard the word “tove” before, and we can’t find it in a dictionary. But one thing is certain. We would never think about kissing a tove, or even getting near one. The reason? They’re “slithy,” another word that appears in no dictionary.

Chomsky said we have a deep structure for learning language, that the essence of knowing is not in knowing all the parts, but in having an understanding of the whole. Think about our four-year-olds. Their vocabulary is, to say the least, limited. And yet, they can make linguistic transformations so sophisticated that we’ve yet been able to program a computer to make them.19

Moreover, think about how we learn our first language. Our parents talk to us not with single words, but in sentences. As children, our understanding is a mix of both things we know and don’t know. It is anything but the careful, stepwise progression that we have in ALM Second Language. And yet, though few of us ever learn a second language, we all learn our first one.

OK, say the behaviorists, maybe there is a little problem with language. But the theory works with other types of learning. If you want children to learn to read and write, teach them the behaviors step-by-step. But then we began to notice other leaks in the dike and pretty soon there were too many to ignore. No longer was it a particular application of behaviorism that was being challenged, but its core. From Thorndike to Skinner, and from programmed instruction to the basals and workbooks that we have today, the basic premise was that any complex behavior could be broken down into a very large number of very small steps. We could then create a “learning hierarchy,” help kids master each of the steps, and, when had they mastered all of them, it would all “snap together.”20 But would it? That’s what the German psychologist Max Wertheimer, who came to the United States before the war but only published his findings in 1945, wanted to find out.

Take a moment and try one of Wertheimer’s most famous problems, given to fifth graders in dozens of American elementary schools.21 Wertheimer told children to do the following three

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21 Wertheimer, supra note 8 at 41.
division problems: $321 + 671 + 35$ divided by $5$; $540 + 689 + 390$ divided by $6$; and finally $213 + 213 + 213$ divided by $3$.

What Wertheimer found was that children dutifully executed the appropriate routines for multiplication and division, right down to the last problem, for which they carefully added up $213$ three times ($639$), drew a long division bracket, divided $639$ by $3$, and, lo and behold, got the answer of $213$. The children could multiply and add correctly. Each brick was structurally sound. The problem was that the children could not use the brick to build a wall let alone a house or a castle. What do I mean? The children saw $213 + 213 + 213$ and proceeded to put it into three columns, three plus three equals six, three more is nine; one plus one is two and one more three; two four six, okay, now draw the brackets. $639$ and then divide by $3$, and wow, look! $213$? No? Really? How did that happen? Neat! What a coincidence. The problem was that it is no coincidence. If you understand the core relationships between the four operations, multiplication as repeated addition, the reciprocal relationship between multiplication and division, you needed to do no computation. You saw it. It was there as plain as day. It was a deep understanding—not magic, not a coincidence—but the way the structure of knowledge worked. Unfortunately, it was only the odd fifth-grader, and for that matter, the odd adult, who saw this relationship. For most, the bricks of knowledge never “snapped into place.”

Let's not go overboard. Behaviorism did have its successes. In teaching basic skills, for example, decoding in reading and basic computational skills in arithmetic, it achieved stunning successes, often with children for whom little success was expected. But it faltered in taking kids beyond the basics to those ways of thinking and knowing that are increasingly demanded of a work force that has virtually eliminated the assembly line in favor of the “work team.” Kids could often do the basics, as the following famous, or should I say infamous, bus test question on a 1987 National Assessment of Education Project (NAEP) exam showed.22

An army bus holds 36 soldiers. If 1128 soldiers are being bused to their training site, how may buses are needed?

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22 For a different version of the same critique, see JEROME BRUNER, THE PROCESS OF EDUCATION (1962).
Seventy percent of the students who worked this problem did the long division accurately. However, the most common answer among 17-year-olds, 29% of the kids who sat for the test, was 31 remainder 12. As commanders of this unit, they would order 31 remainder 12 buses. Only 23% gave the correct answer: 32 buses. Now there are many plausible explanations to why this is so, but the larger issue is clear. Kids who can do all the parts, solve all the tiny bits, have a tough time putting it all together. Although school is supposed to “add up,” it doesn’t—not only for our kids but also for ourselves. How many of us are like the students math educator Marilyn Burns interviewed who, when asked about why they used a particular procedure, answered “that’s how we did it last year.”

The essence of learning was in its rules: knowing meant knowing a rule. Unfortunately, though, our knowledge wasn't flexible. If we knew the rule, we could solve the problem. However, if we didn’t know the rule, we were lost. We could do the problems in our workbooks but not the ones that we confronted in our own lives.

And the problem wasn’t just in math, but in other subjects as well. In the video, “A Private Universe,” a National Science Foundation researcher asked 21 Harvard undergraduates and professors why it is warmer in the summer than it is in the winter, a question that is discussed at at least three different points in the typical elementary and secondary curriculum and that is covered in most college physics courses. Despite this instruction, most of the undergraduates and professors answered the question incorrectly, discussing the distance between the Earth and the sun and other factors rather than discussing the way light hits the Earth.

As the leaks in the system became harder and harder to ignore, people began to think about learning in very different ways. Instead of talking about learning in terms of behaviors, researchers began talking about it in terms of cognition. Gone were the references to stimulus-response bonds, learning hierarchies, and the elimination of error. Researchers were now talking about schemata, mental models, and the construction of meaning.

24 See also, Alan M. Schoenfeld, When "Good" Teaching Leads to Bad Results, Educ. Psychologist (1985).
25 A Private Universe (Pyramid Film and Video 1986).
It is this new way of thinking about learning that we are referring to when we talk about the cognitive revolution.\textsuperscript{26} And it has been a revolution both in the sense that it asks us to think about things in an entirely new way and in the sense that the old structures were not dismantled in an orderly manner. In addition, the revolution is not yet complete. There are still many institutions and individuals who are fighting actively against the cognitivist approach. But the national initiatives we hear about, NCME, NBPTS, HOLMES, NEW STANDARDS, have embraced it.

So what exactly is it that these national initiatives are embracing? At one level, it is a change in what we mean by “knowing.” In behaviorism, knowing meant knowing the rule. But in cognitive psychology the essence of knowing is understanding. Because it is impossible to learn a rule for every problem and situation that we will encounter, we need to develop schemata or mental models that allow us to go beyond the information given. Learning must prepare us to be flexible, teach us how to bend, prepare us to make do when we don’t have all the pieces. It must prepare us to speculate, not guess; to estimate, not randomly choose.

Thus, we are in search of a new metaphor. If learning is not as Skinner or Gagné would have it, a wall made up of millions of subskills, what is it? What if, instead of a wall built brick by brick, learning is more like a picture that comes slowly into focus? Instead of starting with the pieces, we start with the whole, seeing first its general shape, then the primary lines, and then the details.

If we use this metaphor, our notions of knowledge change dramatically. No longer are the connections linear; they are associative. The cognitive connections that we create are less like the nice, ordered connections of a scope and sequence chart and more like a Faulknerian novel, where connections are made sideways and forward, jumping ahead and circling behind, and where, to finally achieve some understanding of the whole, we must live through moments of utter confusion with only our faith that perseverance will finally pay off. Knowledge is not simple or one dimensional. It is complicated, looping and somersaulting, associating and connecting in ways that not even the most sophisticated computer program can duplicate.

\textsuperscript{26} For a more complete history of cognitive science, see Howard Gardner, The Mind's New Science (1984).
And what if learning comes about not by doing something once, but by doing it over and over as we reflect carefully on it? If this is true, the essence of learning would not be what we can do in the single-timed essay test for 40 minutes, a cultural form still used in statewide writing assessments and college classrooms, but our ability to take that good but flawed first draft written in 40 minutes, and stick with it, through multiple drafts, stick with it, even when we hate it, and taking that first draft through a process that will make it a finished piece. If this is the case, then our response to error cannot be quick, we cannot be hasty, quick get the eraser — put an end to that sentence; no, error is the clue to success. Error, when we detect it, cannot be dismissed until it discloses its lesson to us. This, I would assert, is the essence of the reforms. It is an invitation to think about what it means to err. To err and go on. To err and invite that error to stay around and be one's teacher.

If we see these reforms as just the latest brainchild of someone with a pocket panacea, if we think about the call for reform as just another set of techniques, for example, requiring the use of portfolios instead of multiple choice tests or performance assessments instead of true/false tests, we miss an opportunity to rethink what knowledge is.

If we have been brought up to think of knowledge as fixed and known, where do we learn to cope with the uncertainty that I am advocating? This whole approach, designing large, challenging tasks for youngsters and teaching them not to recoil from error and confusion but to work through it, will not be easy; this is not a "throw away your crutches in the one-day workshop" way to teach. In changing our role from an error detector to hinter, from arbiter of right and wrong to endower of skills and thoughtfulness, from a test grader to a diviner of signs, we lose our old and trusted supports. The tests that come with the multiple choice unit reviews, all of these come to look a bit less adequate than they did before.

It means that we give assignments in our English classes, our social studies classes, and our science classes that ask students to reflect on the first draft of work they handed in. What was good about it and why? And what would they want to fix? What risks did they take? What did they try that they weren't sure they could do? Students "self assessment" should not be an

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add on or “extra credit.” We should give as much weight to our students’ “reflections” as we do to the math assignments, the essays, and the document evaluations. If we don’t, students will simply dismiss them. We don’t just “pick up” how to reflect on our work. It is a highly refined, deeply practiced skill. When we take risks, we are bound to err. That is the price we pay. But there is an alternative to denying error. Instead of blotting it out, instead of running from it, we can look at it, we can confront it, we can—strange as it may seem—celebrate it. When a risk we take ends up in a botched activity, we can say to our students, “Look, this is what I wanted to happen. This is the risk I took. And it bombed. How could I do it differently? What advice could you give to me?” In treating error this way, we model for students a lesson in intellectual courage.

**OUR STORY:**

Our students are Sam’s students, only a few years older. They are, most of us would agree, the brightest of the bright. Not only do they have high high school GPAs and SAT scores, but they also have high undergraduate GPAs and LSATs. They are, however, also products of the behaviorist legacy. Whether they are in their twenties, thirties, or forties, most of them were taught not only reading and math but also English, science, and history one brick, one layer, one wall at a time. Knowledge, even in college, was knowing the rule, coming up with the correct answer.

So what happens when these students come to law school? Are they simply asked to do more of the same? To learn, rule by rule, the rules of law? Or, are we asking them to do something different? Do we mean it when we tell them that law school will teach them not the law but how to think like a lawyer?

Like behaviorism, the case method of legal education has its roots in the “scientific revolution” of the late 1800s. Dissatisfied with the lecture method and eager to bring more prestige to the study of law, Christopher Columbus Langdell believed that lawyers should be trained in the same way as biologists, chemists, and physicists. Instead of reading textbooks or sitting through lectures, they should study the discipline’s “corpus.” Thus, while biology students studied plants and animals, identifying, analyzing, and classifying them, law students studied judicial
opinions.\textsuperscript{28}

Unlike behaviorism, though, the case method did not, at least on the surface, have as its focus the development of bonds between stimuli and responses or an obsession with the elimination of error. While practices varied from classroom to classroom, most law professors were not so concerned with teaching rules as they were with teaching students to read carefully, to extract the rules and key facts, and to make arguments. As Steven Friedland found in his recent study, most professors have as their goal improving their students' thinking.\textsuperscript{29} Professors want their students, when confronted with a new case, to be able to make sense of it, when confronted with a new fact situation, to be able to make each side's arguments. To use Sam's language, they want to give their students a disciplinary compass.

"Ah ha," you say, "so law schools have been using the 'new' cognitivist model all along." Like every thing else in law, the answer is yes and no. Yes, law schools do view knowledge as more than just knowing the rule and, yes, they do try to help students develop new schemata. How do you identify the legally significant facts? How might you frame the question before the court and its holding? What are the policies underlying the court's decision? The schemata that law schools help their students develop are, however, extremely limited. Although students learn schemata for reading cases for class, they do not, for the most part, learn schemata for reading cases as advocates. Although they develop schemata for answering exam questions, they do not develop schemata for answering questions posed by clients or courts. We give our students compasses, but these compasses work in only limited types of terrain.

In addition, at least in some courses, the approach is more like that of the behaviorists than the cognitivists. For example, in some civil procedure and evidence courses, students learn the rules but not how and when to apply them. Similarly, in some upper division courses, students learn doctrines but not how to manipulate them. And then there is the way in which some professors manage their classrooms. While they may be on the right track in seeking to bring their students, through classroom


questioning, into the “discourse community,” the community that they present is often an extremely hostile one.

So what about the teaching of legal writing? Have those of us who teach legal writing adopted the behaviorist model or have we, like the other law school professors, leaned more towards the cognitivist model? The answer is that, at least in the seventies, we tended to favor the behaviorist approach. In most of the early research and writing courses, research and writing was broken down into its component parts and each part was taught separately. Thus, legal research was taught separately from legal analysis, and legal analysis was taught separately from “legal writing.” In addition, in teaching each of these parts, our emphasis was on the decontextualized transmittal of information. For example, in teaching legal research, we emphasized the names of sources, what type of information was contained in each, and how one used and updated each source and not how a lawyer researches a familiar or unfamiliar area of law or questions and evaluates the sources that he or she locates. Similarly, in teaching legal writing, we emphasized the format of various types of legal writing, for instance, objective memoranda and appellate briefs, and the “rules of good writing” rather than the processes used by expert attorneys in thinking and writing about a legal issue. Our teaching methods also mirrored those being used by the behaviorists. We tended to favor well-organized lectures over more free flowing discussions, exercises that had “right answers” over more realistic, and more complex, problems.

It wasn’t long, however, before those of us who were teaching legal writing realized that there were serious problems with our approach. Like the math students who could do the math problems in their math books but who could not figure our how many buses were needed, our legal writing students could tell us what type of information was contained in a particular book, the format for a question presented, and how to fix a comma splice, but they couldn’t write a good memorandum or brief.

In an attempt to stop these “cracks,” in the eighties most of us adopted the “process model” for teaching writing. At a minimum, we described the four steps in the writing process—prewriting, drafting, revising, and editing—and encouraged our students, instead of writing their papers the night before, to go through each of these steps in sequence. In addition, many of us began to get actively involved in the process. Instead of simply assigning a project and then grading the final product, we began
adding prewriting exercises and requiring first and sometimes even second and third drafts, which we critiqued and then returned to our students for revision.

At this point, it is important to point out that our extra efforts helped. The final drafts of the memoranda and briefs were better than they were before. They were better researched, better organized, and better written. In addition, our more able students were able to take what they had learned in our classes and use it to write high quality memoranda and briefs for their employers.

The problem was, however, that not all of our students were so “able.” Even some of the students who had done well in our legal writing classes seemed to have difficulty “transferring” what we had taught them to the world of practice. We began to hear complaints from librarians that students lacked basic research skills, from clinicians that students couldn’t develop a theory of the case, and from judges that students couldn’t write tight, well-structured arguments.30

The question, of course, is why. One possible answer is that they simply forgot what we had taught them. Although they may have known how to write a good memorandum or brief during their first year, they forgot how to do so by their third year. Another possible answer is that they simply did not get enough practice applying what we taught them. In a typical first-year legal writing program, students research and write only two or three memoranda and one brief, hardly enough practice to master a difficult task. Another answer is, however, that we are still not teaching our students everything that they need to know. Although we need to transmit information to our students and we need to teach them writing processes, we also need to carry through on the promise that we make to them on the first day of school: we need to teach them how to think like lawyers. For, until they know how to think like a lawyer, they can’t write like one.

But how do we teach our students to think and write as lawyers? The bad news is that, at this point, no one knows for sure. Just as law schools are struggling to find ways to better teach their students, so are medical schools, business schools,

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30 For a general discussion of transfer, that is, the ability to apply knowledge and strategies to new situations, see R.J. Spiro et al, Knowledge Acquisition for Application: Cognitive Flexibility and Transfer in Complex Domains, in Executive Control Processes (B.C. Britton ed. 1987)
and graduate programs in history, psychology, and engineering. First, we need to rethink our notions of knowledge, learning, and error. We need to abandon the brick and wall metaphor of knowledge with its linear connections and replace it with a picture that, with repeated and varied exposures and the help of teachers and peers, slowly comes into focus. In addition, we need to abandon the view of learning that values the product but not one’s reflections on the process that created the product. Finally, we need to abandon view that error is bad, adopting instead a view that allows us to use error as an opportunity for teaching.

Second, we need to study how expert lawyers think and write, using protocol analyses to look at, among other things, the types of information that these experts have, how they organize that information, how they acquire new information and incorporate it into their existing knowledge structures, how they evaluate authority, and how they make decisions. 31

Third, we need to look at the ways in which expert lawyers became experts. What types of instruction and experiences did they have? What type of mentoring or scaffolding seemed most effective? How long did the process take? Finally, we need to think about the ways in which we might structure our curricula to help our students develop such expertise. Do we simply need to tinker with our curricula or is a wholesale revision necessary?

The bottom line is that we, as some of the most interested members of the profession, need to advocate for, support, and participate in an open debate on the nature learning and conduct research designed to study how law students become expert lawyers. We then need to revise our curricula and teaching accordingly, looking for ways not only to transmit information to our students but also to help them develop ways of thinking and writing as lawyers.

A Final Note

In closing, we would like to turn to our title. What is education’s promise? Is it simply to transmit information, without error, from one generation of privileged students to the next? Or is it much more? Can we as educators—as teachers and mentors—help our students develop the connections and strategies that will allow them to use that information in the real world?

31 For a discussion of using protocols, see Michael Pressley and Peter Afflerbach, Verbal Protocols of Reading (1995).
For example, can we help elementary school students learn how to use addition, subtraction, multiplication, and division to solve everyday problems, high school students how to evaluate historical documents as historians evaluate them, and law school students how to write effective memoranda and briefs not just for us but for real clients with real questions and problems?

In addition, can we as educators keep our promise to more students than just those who would "get it" with or without us? Can we develop curricula and teaching methods that educate those who are less able and those, who although very able, come from less privileged backgrounds?

We can, we believe, keep these promises. However, if we are going to do so, we must take chances. We need to learn how to reflect on what has and has not worked and then take the time to engage in such reflection. In addition, we must be willing to discard some of our own rules—the rules of teaching that don't seem to be working with the students in our classes. We must be willing to throw away our crutches, the syllabi and teaching methods that we have used for years, and construct new models, new approaches to teaching. In short, instead of running from our own errors in curriculum design and teaching, we need to see those errors as opportunities for learning.
Legal Reasoning After Post-Modern Critiques of Reason

Peter Suber*

I. INTRODUCTION

A series of critiques of reason beginning roughly with David Hume in the Eighteenth Century have raised doubts about the validity and authority of reasoning. If they are not answered, they tend to undermine the practices used to justify conclusions in every field, including law.

These critiques and the ways of thinking made possible in their wake tend to be called post-modern, a term that is vague and even a little irritating. It would be more precise and descriptive to speak instead of post-Enlightenment critiques of reason. Hume is arguably the first post-Enlightenment thinker, and after Hume these critiques of reason developed further in Hegel, Marx, Kierkegaard, and Nietzsche, and were then taken up by many lesser, 20th century thinkers. If the Enlightenment was the age in which human reason in the form of argument and evidence superseded authority in the form of church and state, in the grounding of scientific, philosophical, moral, and political claims, then the critiques of reason I want to talk about are all post-Enlightenment.

After spelling out nine of these post-Enlightenment critiques, I argue that some of their general tendencies are supported, not refuted, by the hard-won sophistication of twentieth century formal logic. This is only one reason why a general refutation of these tendencies may be unattainable. However, a general capitulation is equally unwise, as shown by the naivete and inconsistency of some increasingly popular attitudes toward argument, and by some prominent examples of sophistical legal

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1 This article is a slightly revised version of the keynote address at the legal reasoning section of the July 1996 conference of the Legal Writing Institute. I was invited to speak as a philosopher on the subject of legal reasoning. In most of its disciplinary markings, therefore, it belongs more to philosophy than to law. By moving to this journal largely intact, it occupies a place normally held by works of legal scholarship, an indulgence of the editors for which I am grateful.
reasoning. I argue that reasoning from given premises and rules of inference can be rigorous in just the ways established by contemporary logic, but that the justification of our ultimate premises and rules may be ideological or question-begging in just the ways pointed out by the post-Enlightenment critiques. Consequently, when we ask about the trustworthiness or authority of reasoning, we might be asking about its rigor locally to some system or paradigm, or globally in its effort to establish one system over all others. The former sort of reasoning is capable of scientific formulation, testing, and criticism; the latter is not. The reasoning of litigators tends to fall into the former sort, while that used by delegates to a constitutional conventions falls into the latter. The reasoning of judges and legislators falls somewhere in between. Before concluding, I sketch what I take to be the strongest form of global reason compatible with the post-Enlightenment critiques of reason.

II. NINE CRITIQUES OF REASON

What are some of these post-Enlightenment critiques of reason? Here is a quick summary of nine that I find important to the problem of legal reasoning. Afterwards I’ll slow down, look at a few of them more closely, and examine their effect on legal reasoning.

Remarkably, these nine critiques of reason can be organized into a nine-tier argument in the alternative. A defense lawyer might argue: “My client never laid eyes on the victim of this horrible crime; but even if he did, he was not at the scene of the murder at the time of the killing; but even if he was, he’s not the shooter; but even if he was, he was insane; and if he wasn’t, then it was clearly self-defense.” Similarly, a critic of reason might argue as follows:

1. The word “reason” is meaningless but laudatory. It is now only a catchword, and to say that your position is supported by reason is just a conclusory and question-begging way of saying that it’s true.
2. But even if the word “reason” does mean something, the faculty it points to does not exist as advertised. For it is claimed that reason is transcendent, objective, gender-neutral, class-neutral, culture-neutral, century-neutral, emotionless, independent of the body, and disinterested, yet on close examination it turns out that no form of thinking bears this description.
3. But even if it does exist, it cannot be justified without reasoning, hence without vicious circularity. But if circular justifications are adequate, then many other would-be authorities are suddenly on a par with reason. Why not appeal to majority rule instead of reason, since the majority favors it, or wealth, since the wealthy favor it? Of course, the proponents of reason claim it is really justified, while the others are just pretenders. But how would we know this? Through reasoning?

4. But even if it can be justified, it is a merely instrumental tool, malleable to human will. For it may draw valid inferences, but only from given premises; and it may discern efficient means, but only to given ends. The conclusions it supports may be false and the ends it serves may be wicked; that only makes the point that every proposition can be supported by valid reasoning and every end can be pursued efficiently.

5. But even if it does have a principle, its principle is empty and procedural. For it advises nothing more than be careful, proceed slowly, check everything twice, and keep everything open to criticism. This, however, is simple caution which does not deserve the glory (eternity, transcendence, objectivity) imputed to reason.

6. But even if its principle is substantive and not merely procedural, its principle is false. For it demands identity without difference, when reality is fluid and dialectical. Or it demands static, eternal truths, when truth is dynamic. Or it demands argument and evidence, when important affirmations are and must be sheer, groundless choices.

7. But even if reason is not false, then at least it is rare. For our judgment is usually distorted by emotion, fear, wish, anger, cruelty, spite, habit, convention, authority, ideology, or interest. We repress and deny truths, avoid facing evidence squarely or weighing it fairly, mistake irrelevant for relevant evidence, mistake insufficient for sufficient evidence, hold inconsistent beliefs, hold beliefs unreflectively, insulate our beliefs from the effects of criticism and experience, and settle our disagreements through violence.

8. But even if not rare, reason is weak and insufficient. For it is of little or no use in attaining what is most important in life, whether we decide that that is love, friendship, community, wisdom, serenity, justice, courage, faith, salvation, art, or even knowledge.
9. But even if reason is strong, it has a dark side. For if we isolate reason and use it without the correcting influence of the other parts of the human being, then it can make weapons of mass destruction or make an industry out of exterminating Jews. Because reason is one-sided, taken alone it is dehumanizing.

III. TWENTIETH CENTURY LOGIC

The twentieth century has been the greatest century for progress in logic since the century of Aristotle. At first sight, then, this vastly extended and polished logic appears to stand as a bulwark against the post-Enlightenment critiques of reason. Ironically, however, logic’s unprecedented progress was made possible by adopting a model of reason that supports these critiques far more than it undermines them.

Twentieth century logic took enormous strides when logicians discovered, or decided, that the subject-matter of logic is not truth but validity. Previously, we might axiomatize geometry, arithmetic, or logic itself, and the chief question would be whether the axioms were true. The long history of attempts to prove Euclid’s parallel postulate illustrate this preoccupation. In our century the right question to ask of an axiom system became not whether its axioms are true, but whether its theorems are well-derived from them according to explicit rules of inference. For many scientific purposes, we want the axioms to be true and the rules of inference to be plausible; but for the purposes of logic, both could be eccentric. It was the scrupulosity with which we derived theorems from the axioms according to the rules that mattered from the logical point of view. This meant that axiom systems like Euclid’s could themselves become specimens for logical study, and for this purpose their axioms could even be false. Similarly, to axiomatize an existing branch of mathematics, like arithmetic or set theory, one need only find axioms that suffice to entail all the important results of that field, but that entail no false statements and no contradictions. This is far from easy, but it is easier than finding axioms that meet this condition and are self-evident truths.

To study the validity of inference, twentieth century logic abstracts from the content of the propositions involved and from their truth, leaving only their logical form or syntax. A meaningful and perhaps true proposition will be reduced to a string of symbols for the purpose of analysis. Whether another proposition can validly be inferred from it depends on whether the first
string of symbols can be transformed into the second string by virtue of stipulated string-transformation rules. What conclusion is proved depends only on what strings of symbols we choose for input, and what rules we choose for conducting the transformation.

For this reason, one of the deep truths of twentieth century logic is that proof is computation. To "prove" a proposition from certain premises using certain rules is nothing more than to generate it as output from certain input using certain programming procedures. Axioms and premises correspond to input. Theorems and conclusions correspond to output. Rules of inference correspond to program functions. Limits on what is provable, for example as shown by Gödel's first incompleteness theorem, translate into limits on what is computable, as shown by Turing's halting theorem.

This new approach made especially clear that every proposition can be the conclusion of a valid argument. It depends on which premises and rules we stipulate. Gödel's incompleteness theorem showed only that some propositions were undecidable in certain axiom systems; but no proposition is absolutely undecidable. We can always derive it validly from some premises, at least from itself. But if every proposition can be the conclusion of a valid argument, then logical reason is indifferent to the truth of conclusions. It can as easily prove that evolution is superior to creationism as that creationism is superior to evolution.

In this sense, twentieth century logic owes its enormous progress to an instrumental conception of reason. On this model, reason is the rule-following faculty—as opposed to the rule-picking or the rule-judging faculty. Logical reason can follow any rule, just as a computer can run any program. Not only are the premises of an argument unproved in an act of inference, the rules of inference are also unproved. Not only are the premises and rules unproved, they may as well be, as lawyers say, arbitrary and capricious.

Classical rationalists might rejoice that yes, there are valid inferences from stipulated premises according to stipulated rules, and these are not relative to gender, language, class, culture, or century. This is true. But—the post-Enlightenment logicians point out—these valid inferences depend on their premises and rules, and the acceptability of these premises and rules cannot be established by drawing valid inferences from stipulated premises according to stipulated rules.
Twentieth century logic has also discovered that there are non-standard logics which are to standard logics as non-Euclidean geometries are to Euclidean geometry: equally consistent but negating at least one fundamental tenet. For example, standard logic upholds the principle of excluded middle asserting that between two contradictory propositions, A and not-A, one must be true; it cannot be that neither is true. However, there are several consistent non-standard logics which deny the principle of excluded middle. Since logicians study validity, not truth, the question which of these logics is the “true logic” does not arise among them. Logicians are much less interested in the question whether the principle is really true than in what follows from the principle, and what follows from its denial. But the question of truth does arise for philosophers; and for philosophers it is a most difficult question, for the type of reasoning they use in analyzing the issues is invariably one of those in contention, making any philosophical conclusion self-contradictory or question-begging. (For example, in adjudicating the issues between these rival logics, may we use the principle of excluded middle?) The philosopher’s reasoning, regardless of its type, is a party to the suit, and subject to judgment, not an impartial judge.

If logicians don’t ask which logic is the true logic, do they at least ask whether there is a “logic to logic” that underlies the proliferation of non-standard logics? I’ll return to this question shortly. For now, note that if there is no logic to logic, then we are left adrift in a post-Enlightenment fog of relativity; and if there is, then we return to the “brooding omnipresence” of reason, against which many fields, including law, revolted long ago.

IV. INSTRUMENTAL REASON IN ETHICS

Instrumental reason in ethics is what Kant called prudence. If you want to drive from Chicago to New York, save a child trapped in a crushed car, or become a millionaire, reason can help you sort the prudent and efficient means to those ends from the imprudent and inefficient means. However, if reason is only prudent or instrumental, if, as Hume put it, reason “is and ought to be the slave of the passions”, then it can work for any

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2 "The common law is not a brooding omnipresence in the sky...,” Oliver Wendell Holmes in Southern Pacific v. Jensen, 244 U.S. 205, 222 (1917).
master. It can work to red-line city neighborhoods for discriminatory investment, contrive arguments in support of a theory of Hell, or manufacture thumbscrews, nuclear bombs, and gas chambers. As G.K. Chesterton put it, the madman is not one who has lost his reason; the madman is the one who has lost everything except his reason.

Kant knew this and insisted that reason is not merely instrumental, that is, it can rule on ends and not just means. To contemporary philosophers it hardly matters whether Kant's argument was good; it is dated. It is part of the Enlightenment. One of the fundamental doctrines of the post-Enlightenment era holds that when we say that some ends are good and others bad or indifferent, we are not following reason but desire or interest or socialization. We may say we are following reason, but that is either a meaningless decoration of our desire or a rhetorical bludgeon to intimidate our opponents. Reason is merely instrumental, says this critique of reason, even in ethics, and even if this fact is tragic.

There may be strong arguments to defend ethics from this outcome, but they will not come from twentieth-century logic, which has already capitulated to instrumentalism on its own front. At least we ought to note, then, that logicians are among the leaders of the post-Enlightenment critique of reason. Two conclusions follow from this observation. First, if we are classical rationalists at heart, but if we don't know much about contemporary logic, then we should awaken from our dogmatic slumber and not rest too cheerfully on the assumption that logic supports us against the barbarians. Second, we should not mistake post-Enlightenment thinkers for enemies of logic and reasoning, although the movement is broad enough to contain its share of contra-logicians and anti-intellectuals.

When we say that in the Enlightenment, reason replaced authority we mean that it replaced the *ex cathedra* statements of powerful human beings who represented powerful institutions—and sometimes powerless individuals, like scholars in garrets, who thought they were interpreting God. But replaced them as what? It replaced them as the authority for human judgments. Reason did not overturn authority, *per se*, but became authority. In pre-Enlightenment thinkers, such as Aquinas, reason had au-

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3 Nor can we any longer simply exhort our students to "be logical", least of all our students who are sophisticated in logic. For they will say (if they are smart), "According to which logic?"
authority only because it was supported by God. In Enlightenment thinkers, such as Leibniz, God had authority only because she was supported by reason.\textsuperscript{4}

Another important strand of the post-Enlightenment critique, therefore, asserts simply that reason is no longer an authority. As a sociological claim, this critique gathers new evidence every year. As an epistemological claim, it means that once reason is questioned, it cannot defend itself except by circular appeals to reason and rational argument.

This objection is dangerously two-edged, however. All nine of the critiques of reason, in fact, suffer from being reasoned arguments. If critics object that reason cannot defend its own validity except through a vicious circle, then not only do they uphold a standard of good reasoning (namely, non-circular reasoning), they support their objection with a reasoned argument. They reason that self-justified authorities are not authoritative, for example because there are many self-justified authorities which contradict one another. But this reliance on reasoning is a disturbing inconsistency in a critique of reason. The post-Enlightenment critique, therefore, faces a dilemma: either argue the critique, and thereby rely on reasoning and court self-refutation, or leave the critique unargued and offer no reason to accept it.

But even if the critiques are torn asunder on the horns of this dilemma, life is not any easier for the classical reason which is the target of the critique. It faces a dilemma of its own. If it argues for its objectivity, transcendence, and authority, then it shows a question-begging reliance on its own validity. But if it does not argue, then it offers no reason to accept its validity.

We may be tempted to conclude that it is equally paradoxical to enthrone and dethrone reason. And this conclusion may in fact be true. But to say so tends to play into the hands of post-Enlightenment critics, for it is a natural step then to stop playing the game of either enthroning or dethroning reason, and those who do neither fall into an even more corrosive cynicism.\textsuperscript{5}

\textsuperscript{4} And in many religious post-Enlightenment thinkers, like Kierkegaard, reason does not support God and God does not support reason.

\textsuperscript{5} To paraphrase Pascal: to remain neutral between reason and its critiques is above all to be a skeptic. Ties always go to the skeptic. (Pascal spoke of dogmatism and skepticism, not reason and its critiques.) \textit{Pense\`es}, Trans. A.J. Krailsheimer, Penguin Books, 1966, §131, pp. 63-64.
V. THE THREAT OF LOGICAL NIHILISM

These post-Enlightenment critiques of reason have trickled down into popular culture to such an extent that many Americans believe that "legal reasoning" is a comical contradiction in terms—or perhaps an ominous one. Some of my students, for example, seem to think that the primary lawyering skill is cleverness, and that cleverness can argue any thesis persuasively. If one argument is stronger than another, it is not a sign that the conclusion is more likely to be true, or that the evidence favors one side, but a sign that one advocate is cleverer than the other. It follows that the best lawyer always wins in court, regardless of the law and evidence; and it follows from this that the rich who can afford the best lawyers always win in court. Sometimes I think these students show an understandable cynicism about lawyers given the mass-media stereotypes of lawyers which comprise their knowledge. Other times I think they are clueless about epistemology.

I know that this is an attitude about reasoning, and not just about lawyers, because about 90% of the students who hold this belief about lawyers hold a similar belief about philosophers, and about 90% of them hold a similar belief about scientists. The view is roughly that the world of ideas has no grain, and that the constraints on argument all arise from the limitations of the arguer, none from the subject matter. While most of the lawyers I know would like to be considered clever, they would not appreciate being seen as practicing a profession in which nothing counts—not facts, not law, not justice—except cleverness.

Let me call this view logical nihilism. Even though I think logical nihilism is modern, even post-modern, it is not new. It is essentially the view held by the Greek sophists. For example, according to Seneca,6

Protagoras declares that one can take either side on any question and debate it with equal success—even on this very question, whether every subject can be debated from either point of view.

I should add that some lawyers hold the same view and some law schools seem to teach it. In the culture at large this

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view disappeared under the weight of the Socratic critique of the Sophists —until the post-Enlightenment critiques of Socratic rationalism revived it. Nowadays, it is fed in part by the same epistemological rebelliousness we saw in the Greek Sophists, by some headliner cases of legal sophistry, and by a cultural suspicion about reason aroused by excessive claims made on reason's behalf in centuries past.

This cynicism about reasoning in some of my students is of a piece with their diluted notion of toleration. For many of them, to tolerate ideas is either inconsistently to agree with them all or passively to receive them all with acquiescence. For these students, it is a virtue to hear all opinions without selection, and to refrain from evaluating or judging any of them; it may even be an obligation of world citizenship. There is nothing here of Mill's position that we can tolerate an idea we deplore, or that tolerated ideas might still have a hard life in general circulation when they come up against dissenters and counter-evidence. On the contrary, my students are quick to infer intolerance from challenge and disagreement. Consequently, for many of them, reasoning is suspect as an agent of intolerance. Indeed, to have a conclusion is the seed of intolerance, for these students, because it leads one to deny positions inconsistent with it.

After talking to such students for 15 years, I'm fairly sure that most of them are simply mistaking disagreement for intolerance. Why they do this is an interesting question. Perhaps they have never had tolerant, even courteous and friendly, disagreement modeled for them by parents, teachers, priests, or politicians. The reason I suspect simple mistake is that the same students do hold views, often strongly, and they debate them vigorously with their friends. They wouldn't call this activity intolerant, except in artificially formal settings, like a classroom, where they impose upon themselves artificially formal standards of intellectual etiquette. They will disagree with authors in public, and with friends in private, but only rarely with classmates in public—as if disagreement were a kind of roughhousing they feel free to undertake only with the consenting.

Student attitudes of this kind are both a cause and an effect of the contemporary ascendancy of post-Enlightenment critiques of reason. By their standards, it is difficult or impossible to distinguish argument as reasoning from argument as intolerant quarreling, or even to distinguish sound from unsound reasoning. To call some reasoning unsound is simply to reveal some-
thing about oneself and one's biases and intolerance. But again, students who hold these opinions are among the first to criticize some reasoning, especially legal reasoning, as slimy. I will argue shortly that there is a kernel of truth in the post-Enlightenment critiques which we ought to concede. But giving up the distinction between sound and unsound reasoning is not that concession.

VI. CONTEMPORARY LEGAL SOPHISTRY

Here are some examples of contemporary legal sophistry almost at random, selected only in order to show that legal reasoning sometimes reveals the effects of the post-Enlightenment critiques of reason, and sometimes goes beyond them to logical nihilism.

O.J. Simpson's criminal defense lawyers had some good arguments, but they certainly had some bad ones. One of the worst was the abuse of the word "maybe". Maybe the police planted a bloody glove in O.J.'s back yard. Maybe the police planted Ron Goldman's blood in O.J.'s car. Maybe DNA evidence is worthless. Is there any evidence that the police planted evidence? Well, one cop was a racist. We know that some racist cops plant evidence against some black defendants. Is there any evidence that this racist cop did so against this black defendant? No, but maybe he did anyway.

Yes, maybe. The trouble here is that "maybes" are irrefutable. In student papers over the years I've had such claims as these: Maybe if the colonists had talked longer with the British, the American revolution could have been avoided. Maybe the Jews could have escaped from the death camps, if they had all worked together. Maybe a miraculous discovery tomorrow will cure the patient in a persistent vegetative state today, so we should stop talking about pulling the plug.

"Maybe"-reasoning frees students from all the hard work of unearthing the facts, understanding them, and assessing their weight as evidence. It does the same for lawyers. "Maybes" are irresistible because they are irrefutable. But they ought to be resisted, at least in a criminal trial, because they introduce precisely the kind of doubt that is not reasonable. Yes, maybe the cops planted the glove. But maybe they didn't. If we have no evidence to nudge our judgement closer to one of these positions than the other, then we are playing a game, not creating reasonable doubt.
One student of mine in a seminar on skepticism wrote at the end of his final paper: I know this paper seems pathetically weak, but for all you know alien beings are beaming a special ray into your brain which only makes it seem weak; you can't prove that this isn't happening. This was his way of showing that even though his paper was pathetically weak, he had still learned something about skepticism. I replied: Maybe I really gave this paper a high grade.

A related trend is the abuse of the phrase “in one sense” or “in some sense”. In one sense, people are good. In one sense, people are just animals. In one sense, racism is in decline. In one sense, women and men are not equals. What is ironic about this form of thinking is that when used properly, it aids precision, and yet when abused it is deeply misleading and slovenly. There are many senses of equality, for example, and many relations between the sexes. To start to sort them out is to take steps toward precision and deeper understanding. But to rest on one of the many possible one-sided assertions is to give it deceptive prominence or exclusivity. One trait shared by good lawyers and good philosophers is that they relish the task of saying in what sense something is the case and in what sense it is not; they relish articulation and precision, indeed sometimes for its own sake. Lazy lawyers and philosophers, or maybe cunning and dishonest lawyers and philosophers, stop short with one perspective and omit its complementary negations.

When people are clever enough to see that in one sense this, and in another sense that, then they are clever enough for sophisticated inquiry. But cleverness and interest can join forces to produce sophistry. In the April 18, 1994 issue of the Wall Street Journal, we read that some highly paid professionals who had been charged with income tax evasion were considering offering the defense that they suffer from “an overall inability to act in [their] own interest” (quoting an article from the New York Law Journal). A professor of psychiatry says this form of anxiety afflicts “highly ambitious, hypercritical, detail-oriented people.” We could call this the incompetency defense for competent people.

It is fairly common in our legal culture for competent adults to see that certain excuses are accepted for the incompetent, and to argue their own incompetency with all the force they can muster. A North Carolina police office named Bernard Bagley shot and killed his wife with his service revolver, and then sued his police department for three million dollars, claiming that it
should not have issued a gun to a person with his anxieties.\footnote{Durham Herald-Sun, July 28, 1994.} A University of Idaho student named Jason Wilkins climbed a radiator next to a third story dorm window in order to moon a group students on the ground below. He fell out of the window, injured himself badly, and then sued the university for $940,000 for failing to post warnings.\footnote{San Luis Obispo Telegram-Tribune, August 23, 1994.} I believe both these plaintiffs lost, but I am not sure. However, when lawyer Paul Ebbs was appointed to a patronage job by the Canadian Parliament at an annual salary of $70,000, he took his salary for three years, performed no function, and then sued Parliament for "wrongful hiring" and won an undisclosed amount.\footnote{Reuters, January 1, 1995.} In this case, I hope, he only won anything because the Canadian Parliament was too ashamed to defend itself in court.

Plaintiffs with like arguments win their lawsuits often enough to feed public cynicism about law. But most are told that if they voluntarily perform an act, then they may not later claim that it was involuntary when this convenient change of position works to the detriment of another person.

At the same time, our legal system allows defendants to claim certain excuses, and it is officially and patiently willing to listen to any defendant's story. This is clearly a harmless and praiseworthy combination. But when we add human weakness of will to the mix, we find that the combination invites excuse-making sophistry. Our weakness of will leads us to argue excuses which we do not deserve, and our legal system willingly listens, and even provides us with a menu of possible excuses in case we didn't know why we were innocent. In the heart of the Enlightenment, Kant was already bemoaning the temptation to be legally incompetent. "It is so easy not to be of age," he wrote in his 1784 essay, \textit{What is Enlightenment?}\footnote{Immanuel Kant, "What Is Enlightenment?" trans. Lewis White Beck, in Beck (ed.), \textit{Kant On History}, Bobbs-Merrill, 1963, p. 3.}

Our legal system is not inconsistent for blocking this sort of sophistry on the one hand, and inviting it on the other through its recognition of excuses and willingness to listen to everybody's excuse-making.
story. Our ability to argue in favor of excuses from one side of the table, and against them from the other, does not show an inconsistency either. In fact, it may be a point of wisdom that our legal system supports both arguments so that the fact-finder may hear both sides before coming to a resolution.

However, this point of wisdom is a very grown-up sort of wisdom, easily abused by the weak of will. This grown-up wisdom acknowledges the unavoidability of perspective, and therefore demands that we listen to the defendant even after the prosecutor has amassed evidence of guilt. This grown-up wisdom also acknowledges the complexity of responsibility, and therefore demands that we hear novel excuses even after the prosecutor has proved that the defendant’s act was the sort prohibited by the legislature. When we must acquit ourselves, or a client, then we exploit and corrupt this wisdom, turning it into an invitation to dissimulation and bad faith.

Our adversary system invites two well-argued stories in every case, as if every case could support two well-argued stories. Even if it is objectionable in other ways, the adversary system rests on this grown-up wisdom here, and has no trouble coping with dissimulation and bad faith. The fact-finder listens to both stories and makes a decision. And afterwards, in theory anyway, not even the dissimulators can pretend that they were not heard.

My brother, a former litigator, called certain of his cases “brown-bag” cases. A brown-bag case is one in which he wished to be wearing a brown bag over his head in court as he made his argument. In brown-bag cases, lawyers are dissimulating — but from obligation. Their client, who might be the state, deserves its day in court, and the private reservations of the advocate are not relevant to a fair and lawful verdict. If the brown-bag argument is made professionally, then judge and jury have what they need to decide the case in light the strongest arguments on each side.

Lawyers and law students rightly wonder whether our duty to represent the client is not sometimes superseded by a higher duty not to dissimulate, or not to violate our own consciences as advocates, or, in short, not to take brown-bag cases. I won’t enter this debate here. But I would note that the grown-up wisdom of the adversary system, to hear both sides whether we can sympathize with both sides or not, requires us (or at least someone) to take the brown-bag cases.
The post-Enlightenment critique asserting that reason is malleable and can be made to serve any passion or cause has strong support in our adversary system of justice. Our adversary system builds on this malleability by assuming that there is always a reasoned case to be made on each side. At the same time, it exploits this malleability by inviting the rationalization of interest.

What is remarkable is that in our legal system most cases do support well-argued stories on both sides. We ought to pause a moment and ask why this should be so. After all, it is not the case that the physical universe supports well-argued stories on both sides of arbitrary propositions of physical chemistry. But not only does this happen in law, we are so confident in its regularity that we put lawyers under a professional obligation of zealous representation without even asking whether the client's case has a leg for zeal to stand on. Why do most legal cases support well-argued stories on both sides? Is it due to the nature of human conduct? Is it due to the ambiguity of virtue and responsibility? Is it due to the flexibility of interpretation? Is every deed somehow intrinsically subject to morally polar interpretations? Or is it due to the content of our laws? Is it due to the ways that deeds, interpretations, and laws interact?

I don't know the answer. But try this thought-experiment. Imagine a leaner and meaner legal system that prohibited only a few acts and permitted the rest. For simplicity let us limit ourselves to the criminal law. Imagine that it allowed no excuses to be offered in mitigation of guilt. Imagine that it described the prohibited acts briefly, and arranged burdens of proof so that in doubtful cases it simply convicted. It seems clear that such a system would not, nearly as often as ours, support well-argued stories on both sides of a case.

Yet virtue and responsibility would be as complex or ambiguous under that system as in ours—at least morally. And human cleverness in interpretation would be as extensive in that system as in ours. Consequently, what the thought-experiment proves is that at least one decisive part of the reason why most cases in our legal system do support well-argued stories on both sides is that the content of our laws gives support to all these parties. It can do so through breadth, through

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11 Some other time it would be interesting to spell out what else the thought-experiment proves. For example, if virtue and responsibility were very complex, ambiguous, or obscure, then not much interpretive flexibility would be needed by lawyers for
vagueness, or through inconsistency, or some combination of these. But we cannot say that the whole answer is human cleverness, and therefore we need not concede that point to the post-Enlightenment critiques.

VII. THE PRIMACY OF PREMISES

When we have a conclusion in mind, as in ordinary litigation and brief-writing, we can usually find strong arguments to support it. The reason is not that bad arguments serve as well as good ones, or that the validity of arguments is somehow relative. The reason is that our legal system is so abundantly endowed with premises in the form of constitutional provisions, statutes, regulations, and case holdings, that we can usually find a set of premises that supports our conclusion using only impeccable inferences. This is one conclusion of our thought experiment.

If we want to argue for sexual privacy, we appeal to precedents like Eisenstadt v. Baird and Roe v. Wade. If we want to argue against sexual privacy, we appeal to precedents like Webster v. Reproductive Health Services and Bowers v. Hardwick. If we want to argue for excuses, we look to excuse-recognizing precedents. If we want to argue against them, we look to the precedents that reject them and hold fast to assumption of risk or a low floor for competency. It is this super-abundance of legal premises that makes distinguishing one of the central arts of civil litigation.

I say we can usually find the premises we need. I won't stick my neck out and say that we can always find them if we are sufficiently diligent. I don't know how we could ever decide that question. But I am not embarrassed by the possibility that my thesis implies that our legal system contains inconsistent premises. There is a school of thought holding that all apparent contradictions in law are merely apparent, but I have argued elsewhere that this is wishful thinking and mistakes a logical ideal for an historical fact.¹²

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¹² I consider these issues in The Paradox of Self-Amendment, Peter Lang Publishing,
Finding the premises we need is partly a matter of hard work, partly cleverness in exploiting novel analogies, and partly erudition. If you lack the erudition, you can at least nose out where to look for helpful premises almost *a priori*. One place where lawyers get their premises is the “in one sense / in another sense” horn of plenty. In one sense the constitution protects privacy. In another sense, it doesn’t. We needn’t know much law to suspect that this duality will be supported by the case law. Then here we are: premises, or pointers to premises, for opposing briefs in a new privacy case.

Lawyers who cannot find the premises they need may be forced to argue their conclusions invalidly from the premises they can find. Of course this invalidity needn’t be deliberate. But most lawyers most of the time are free from forced invalidity, and can argue validly from *bona fide* principles of law. The abundance of premises in our legal system means that slimy lawyers need not use slimy reasoning; they need only dig a little deeper for the premises needed to support their cause.\(^\text{13}\) Only in a lean and mean legal system would slimy reasoning be necessary.

If I’m right, then litigators have an easier job than scientists in composing the arguments that fill their professional lives. Litigators may draw their premises from a vast domain of premises, so vast that it runs over in the sense that it contains inconsistent propositions. Scientists may draw their premises from a domain that is definitely vast, but not so vast that it runs over with inconsistencies.\(^\text{14}\) Scientists cannot support a random theory with evidence, except through the cleverness which is the mainstay of logical nihilism. Litigators, however, are paid to champion the random causes of their clients and can usually (again, not necessarily always) find ways to do so which are logically valid even if not legally compelling.\(^\text{15}\)

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\(^{13}\) If “slimy reasoning” means invalid reasoning, then it is usually unnecessary. If it means insincere reasoning—as in brown-bag cases—then it may be necessary more often.

\(^{14}\) Nicholas Rescher and Robert Brandom, in their book *The Logic of Inconsistency*, Rowman and Littlefield, 1979, argue that consistent logics can describe inconsistent worlds. If the physical universe is a consistent world, the legal universe seems to be an inconsistent one. In Rescher and Brandom’s terms, the legal universe would be “overdetermined” but not “impossible” (pp. 3-5).

\(^{15}\) Litigators have the advantage that virtually all their premises are already expressed in English, in books which are present in any law library, books which are better and better indexed every year. Scientists have the converse advantage that their
The pursuit of relevant and sufficient premises is something like a game. The stakes may be high, but the pursuit is an intellectual challenge, circumscribed by formal and informal rules, with a fairly well-defined notion of success. (Success is not necessarily to win; it is to produce what lawyers call a colorable argument.) It is worth repeating that the game is not to bend logic as elegantly and persuasively as possible; it is to support one's conclusion with relevant legal premises without bending logic at all. If logical rigor were not part of the game, or if we could infer anything from anything with equal validity, then there would be neither art nor science to legal reasoning. The game is not cramped by logical rigor so much as constituted by it, just as sonnet-writing is constituted by certain metrical constraints, not impeded by them.

It feels less like a game when we change roles from brief-writer to brief-reader, or from litigators who hunt for useful premises to judges who must finally choose between the competing premises found by the litigators. Our legal reasoning is more game-like the more we simply borrow our premises from the storehouse of law, and use them because they serve our ends. It is less game-like the more we are put upon to use only those premises we can accept and live with. In this sense the seriousness of legal reasoning is closer to the surface in adjudication than in litigation, and even more in legislative debate, and most of all in the debates of a constitutional convention.

And it is no accident that this is when the critiques of reason are also most serious. These critiques assert, for example, that judges, legislators, and convention delegates have little to reason from except interest and ideology. Their premises may be widely shared in their communities, but that is a political fact, not a glimmer of their intrinsic rationality. These critiques assert that reason is still utterly instrumental, and equally ready to work for the opposition.

The Legal Realists of the 1920's, and the contemporary Critical Legal Studies movement, both press the post-Enlightenment critique which asserts that the reasoning of judges and legis-
tors is largely the rationalization of interest and ideology. This charge is backed by a disturbing amount of empirical evidence. For example, in a 1961 study, Republican judges were found significantly more likely than Democrat judges to oppose

the defense in criminal cases . . . administrative agencies in business regulation cases . . . the claimant in unemployment compensation cases . . . the finding of constitutional violation in criminal cases . . . the government in tax cases . . . the tenant in landlord-tenant disputes . . . the consumer in sales of goods cases . . . the injured party in motor vehicle accident cases, and the employee in injury cases. 17

There are two quite different ways to interpret data like these. First, we may say that there are fairly firm standards in law, but we are doing a poor job of getting judges of different political persuasions to enforce those standards in the same way. This may be a tractable political problem in the way we make judicial appointments, or it may be the intractable epistemological problem of politically constituted perception and judgment. Second, the data might mean that there really are not firm standards in law. Legal scholars may debate these two readings of the data intramurally, but for our purposes here we need not decide between them. The first says essentially that, because the law has fairly firm standards, to win at the game of building a bridge of plausible inferences from bona fide legal premises to one's favorite conclusions takes a good deal of cleverness or erudition; the other says it takes less.

VIII. NORMAL AND REVOLUTIONARY LEGAL REASONING

I think you understand what I mean by "game" here. But the term, even if illuminating, is only metaphorical. We can be more precise if we use the terms introduced by Thomas Kuhn when describing physical science. Legal reasoning is not so much a "game" as it is "puzzle-solving". For Kuhn, scientific research that mops up a paradigm is "normal" science. Research that works to topple an old paradigm, establish a new one, or decide between competing paradigms, is "revolutionary" science. Normal science consists of puzzle-solving. Revolutionary science creates the frameworks within which puzzles and puzzle-

solutions exist. Normal science starts from the assumption that the existing paradigm can answer all questions that arise in the field; the challenge is to work out just how.

The game I've been talking about could be called "normal" legal reasoning. It works within a particular legal paradigm — for example, the view that the constitution protects privacy. It starts from the assumption that the paradigm has consequences for the case at hand, and works out those consequences. It builds the bridge between the ultimate premises of the paradigm and the conclusion sought in the litigation. The bridge is built of rigorous, or plausible, inferences. 18

It helps to recall that for Kuhn physical science has small as well as large paradigms, and some paradigms nest inside others. 19 Applying this theory to law, then, means that a paradigm need not be limited to grand orienting visions, like the common law as opposed to the Napoleonic code, or federalism as opposed to nationalism, but can be a smaller vision inside a larger one, such as the view that the constitution protects sexual privacy — and the view that it doesn't.

Kuhn does not use the distinction between normal and revolutionary science to favor one type over the other, and I intend no disrespect for normal legal reasoning by importing the distinction to law. Most scientists most of the time are engaged in normal science, just as most lawyers most of the time are engaged in normal, not revolutionary, legal reasoning. Fields where normal, puzzle-solving reasoning is comparatively rare, and revolutionary thinking comparatively common — I think philosophy may be such a field — never have the luxury of taking deep methodological and metaphysical assumptions for granted so that their consequences can be worked out to a fine level of detail. In general, it is only the precision and coherence of those details, the rigor and mutual compatibility of the puzzle solutions, that justify us in calling a field a discipline.

Litigators who must champion the random causes that walk in the door must shift from one paradigm to another to suit their purposes. So I don't mean that legal paradigms are defined by the acceptance of all those who use them professionally. Litigators can succeed most of the time in representing random cli-

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18 I do not mean to suggest that all these inferences are deductive. Some of the most important are analogical.

ents, without constructing invalid arguments, because they can choose their premises at will from the storehouse of law. This freedom to choose premises, or to jump from one small legal paradigm to another within the larger paradigms of our legal system, is an essential part of the legal reasoning of litigators, and a critical difference from the reasoning of, say, chemists or astronomers. If the freedom of litigators to choose premises is constrained, at least it is not constrained by logic or by law or by physical evidence.

The judge who must choose between two well-written briefs, or two well-argued precedents, is forced to decide between two paradigms and to that extent operates one large step beyond "normal" legal reasoning toward "revolutionary" legal reasoning. But the judge is still working within a legal paradigm, still choosing premises from within the system, and in that sense is not fully revolutionary. (Insofar as we fear judicial usurpation of the legislative function, we wouldn't want it any other way.)

Let us say that reasoning inside a paradigm is "local" to that paradigm, and that reasoning about the adequacy of a paradigm is "global". Litigators use strictly local reasoning. Indeed, they are anxious to show that their client's argument falls entirely within the four corners of an existing, legitimate paradigm of the law. Delegates to a constitutional convention transcend these constraints, and reason globally with respect to legal paradigms, although perhaps locally with respect to moral and political paradigms. Judges and legislators are somewhere in between.

Similarly, if a formal system consists of axioms and rules of inference, then mathematicians who deduce theorems from axioms according to rules are reasoning locally to that formal system. Mathematicians who inquire into the adequacy of certain axiom sets or rule sets are reasoning globally with respect to those formal systems, although perhaps locally to larger systems yet to be formulated or locally to paradigms in physics or philosophy.

With the distinction between local and global reasoning, we are now in a position to judge some of the post-Enlightenment critiques of reason and their manifestations in law. Classical reason had global pretensions, and the post-Enlightenment critiques are united in insisting that its authority or validity is merely local to this or that system, paradigm, language-game, gender, culture, class, or historical period. The post-Enlightenment critiques are a valuable corrective here. Much, perhaps
most, of our reasoning is local and we tend to forget this. The reminder humbles us.

But if the critiques take a step further and hold that no reasoning is global, and if they argue this claim, then they become self-refuting, for that would be a global claim. If all reasoning is local, then we cannot produce an argument for any global claim, including claims about "all reasoning" or "reasoning per se" regardless of paradigm.20

So we cannot say without self-refutation that all rationality is local. Apart from self-refutation, such a bald claim overstates the case; it must be qualified by the case to be made for an appropriately qualified and modest global rationality—which I will try to sketch in just a moment. But we can say without paradox or implausibility that much rationality is local, and that local rationality is rigorous, as rigorous and authoritative within that locality or paradigm as classical global rationality pretended to be globally. For example, give me Newton's Principia and I can rigorously compute to many decimal places the force that the Earth exerts on the moon. Give me Euclid's axioms and rules of inference, and I can infer the Pythagorean theorem with the utmost of rigor and rationality. Give me the constitution, statutes, and case law of any mature legal system, and I can reason about their consequences for a novel case with the kind of rigor and rationality appropriate to law, which we should never confuse with those available in mathematics. But ask me whether I ought to accept Euclid's axioms or Lobachevsky's, and my puzzle-solving mathematical rationality is suddenly at a loss. Ask me which constitution I ought to approve, and my puzzle-solving legal rationality has no answer.21

Locally, there is rigor and rationality. That is the kernel of truth in classical or Enlightenment rationalism. It is also Thomas Kuhn's great insight. Globally, there may be something

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20 I should add here that Kuhn himself makes global claims about paradigms even though some of his most plausible theses require him to speak only locally to some paradigm or other. In this sense he does not present an adequate theory of global rationality, only a strong invitation to make one to accompany his compelling theory of local rationality.

21 Mathematicians do have ways of evaluating axiom sets; these are sometimes called metamathematical. Lawyers and citizens have ways of judging constitutions, which are sometimes called jurisprudential, as opposed to the narrowly legal. But these global ways of thinking are not the sorts taught in most mathematics or law courses. The standard curriculum concentrates on reasoning locally to paradigms widely accepted in the discipline. Resting in that way on the assumptions of the paradigm, the local reasoning can be rigorous, detailed, and technical.
deserving the name of rationality, but it will not be the same kind we know and use locally to some system or other. On the other hand, globally, there may be nothing but interest and ideology, or choice and policy. In any case, global reasoning will not manifest the sort of rigor which belongs to local reasoning. That is the insight of the post-Enlightenment critiques.

Paradigms provide standards for building arguments and using evidence that bind all those who use that paradigm. We may say that these standards transcend the individuals using that paradigm and are in that sense ‘objective’ standards. Or we may say that they are nevertheless relative to the paradigm, and so only ‘locally objective’. These two predicates are not inconsistent, and I want to assert both. It is important to me to assert both because I want to show the consistent simultaneous truth of appropriately pruned and modest variations on classical reason and the post-Enlightenment critiques of reason.

An important technique in the post-Enlightenment deconstruction of excessively grand or global claims is (in Karl Mannheim’s term) to “particularize” the claims by showing to which system or paradigm they are local.\(^{22}\) Let this work proceed; it can only help us understand the nature and strength of our claims. On the other hand, efforts to particularize other people’s claims are themselves local to some system or paradigm or other, subject to particularization. So we should beware of the tendency of some legal deconstruction and Critical Legal Studies proponents to think they are more knowing than their opponents, or to delight in unmasking or deconstructing as if they had a privileged standpoint, or to charge naive interest-driven reasoning as if they were objective. Much of the deconstructionist literature avoids this problem by avoiding the pretense of objectivity, but of course this is a high price to pay. But the remaining literature naively particularizes the opponent without looking over its own shoulder; it implies a kind of relativism and has no idea how to avoid self-refutation.\(^{23}\)


\(^{23}\) I am here ignoring, as beyond my topic, those attempts to diagnose the ideological delusions of others while claiming something like classical objectivity for themselves. We see such attempts in dialectical materialism, psychoanalysis, the sociology of knowledge, and critical theory. Only the latter two movements show a proper appreciation of the self-referential difficulties of the problem, and both, in my view, cope with those difficulties in the end by disclaiming true, global objectivity.
IX. THE CALL FOR A BROODING OMNIPRESENCE

The claims made on behalf of classical, Enlightenment reason were so often excessive and obscure that a post-Enlightenment of corrective counter-claims was inevitable and justified. However, the post-Enlightenment counter-claims have also been excessive and obscure. While we cannot return to the Enlightenment’s naive confidence in a transcendent faculty called reason possessed of superhuman authority, neither can we follow its incautious critiques into self-refutation.

When we try to discern what is legitimate in the critiques of reason, we find, perhaps ironically, that the most significant of them are supported by the experience of twentieth century formal logic. In the twentieth century, logic has progressed by becoming syntactical. Axioms have been demoted from self-evident truths to stipulated strings of syntax. We cannot favor one set of axioms over another on the ground of self-evident truth, but only on the ground of productivity in relation to theorems we desire, and this is to take a strictly instrumental view of logical reason. Modern mathematics in pursuit of rigor has adopted a formalism that has purchased certainty at the expense of truth, syntactic rigor and computability at the expense of semantic content and truth.

The proliferation of non-standard logics has relativized what it means to “be logical”. If there are many logics, traditionalists want to ask, is there a “logic to logic”? Are the logics that include the principle of excluded middle (as an axiom or theorem) somehow better, or worse, than those that do not? Or are they like chocolate and vanilla, equally present as options to serve the tastes of people with different tastes? If there are chocolate and vanilla logics, then why do we call them logics? Does it make sense any longer to ask whether there is a logic that ought to constrain all sound thinking? Or are there just formal models of various ways of thinking that seemed worth formalizing for some purpose (usually technical mathematical purposes) to some professor somewhere? Do the various incompatible systems of logic compete for truth, or are they just formal toys, specimens in a mathematical bestiary?

Note how we’ve stumbled on to the problem of the brooding omnipresence of reason, a problem that is virtually identical in logic, philosophy, and law. What Holmes called the brooding omnipresence of reason I am calling global rationality. When I survey the profusion of non-standard logics, I wonder why they are
all called “logics” and sense that there is a commonality there waiting to be explicated. But this sense may not be an incipient observation so much as a demand that logic not be relativized and left to the judgment of different users with different standards and purposes. When we survey the empirical data on how Republican and Democrat judges decide cases, we sense that they disagree not only with each other, but that they disagree on the law, which suggests a standard by which they might both be willing to be judged. But again, this may be less an observation on our part than a demand that there not be separate Republican and Democrat laws with no legal basis for choosing between them.

Since the early nineteenth century, our legal culture has turned increasingly away from natural law toward the positivism that holds law to be an utterly human artifact. This view is profoundly incompatible with the brooding omnipresence of reason, at least as it was conceived in the natural law tradition as a criterion of law. For positivists, law is what human lawmakers make, and therefore is relative to times and places where lawmakers have different standards and purposes. But when two lawmakers in the same time and place (in the same nation and generation) have different standards and purposes, then the relativism of legal standards moves within legal systems, from its previous position between and among legal systems. At that point the positivist principle joins the post-Enlightenment critiques of reason. For proponents of the Critical Legal Studies movement, this is the moment of truth, when the ultimacy of interest and ideology is exposed. But for more traditional positivists, it is the dialectical turn which makes them see the point of the ancient talk of the brooding omnipresence of reason.

Positivism, legal realism, and Critical Legal Studies all try in their own ways to live without the brooding omnipresence, or global rationality, and try to uphold the principle that all rationality is local. But in doing so they run up against the global character of that claim and its self-referential inconsistency.

We can believe that all rationality is local without converting the belief into a principle with global pretensions. There are probably many ways to do this, but two of the most common are to do it by default of never having thought about global objectivity, and to do it by default of never having found a convincing method for attaining global objectivity. This is more a mood than a philosophical position. In this mood we sense the pervasiveness of ideological division and illusion, and we see no stan-
standard for adjudicating our differences or correcting our biases — perhaps because we are not looking. We admit that all or most of our beliefs are systematically distorted (perhaps including this belief), and we have given up hope of attaining classical objectivity — if we ever had that hope. Peter Sloterdijk in The Critique of Cynical Reason, makes three illuminating claims about this mood. First, he calls it cynicism. Second, he says it is the characteristic mood of recent times, immediately making him the most specific writer who has tried to characterize what the post-modern sensibility might be. Third, he defines cynicism with wonderful conciseness as enlightened false consciousness.24

It is enlightened false consciousness that I detect in my students who believe that all positions should be received with acquiescence and without judgment. To enlightened false consciousness, proof and certainty are simply occasions for intolerance, and argumentation reduces to cleverness and manipulation. It doesn’t matter much whether an argument is good or bad anyway, since to be persuaded of anything is simply to trade in one “bias” for another. It is an essential part of enlightened false consciousness to find bias inescapable — again, not necessarily as the result of any serious inquiry. If bias is inescapable and certainty undesirable, then reasoning is comical for attempting the impossible and contemptible for cultivating intolerance. Teachers are ideological drones who force students to attempt the impossible and then reward them for pretending to play along.

In the last analysis, the mistake these students are making is to assume that the critiques of global reason apply to local reason, or to assume that what they see as the fall of classical global reason implies that local reason is similarly obscure, circular, malleable, or ideological. But this is clearly an error, one that the local/global distinction helps us state and avoid. If we are unsure how to choose between Euclidean and non-Euclidean geometry, or if we think that rigorous mathematics alone will not enable us to choose, it does not follow that Euclidean geometry is not, locally to its own axioms, the consistent, compelling, and logically rigorous mathematical theory it seemed to be before non-Euclidean theories ever came on the scene.

X. THE CASE FOR GLOBAL REASON

Can we ask any more what is the criterion of good, global reasoning, as opposed to reasoning that is local to this or that theory, system, or paradigm? I don't think we are stuck in logical nihilism or enlightened false consciousness, although I think the post-Enlightenment critiques of reason, by their nature, will justify doubts about any solution we might propose. I think the critiques of reason I have outlined make classical claims to objectivity impossible to support except on faith, which, of course, contradicts the classical claims. Nevertheless there is a path from the swamp to the high ground, and we can take at least a few steps along it. Here is my attempt to sketch the strongest form of global reason that is compatible with the concessions we owe to the post-Enlightenment critiques of reason.

I would like to suggest that global reason is ultimately nothing more than the dialogue of free people over time. The left wing version of this idea today is associated with Paul Feyerabend, the right wing version with Karl Popper, and a moderately liberal version with Jürgen Habermas. But in my view, all three versions derive from John Stuart Mill's 1859 book, On Liberty. On this view, reason is not a faculty created by God, or a transcendental source of authority. It is the disputatious and passionate dialogue of free people. What view does reason favor? To find out, don't merely introspect or meditate. Let free people publish their divergent views; let them criticize each other's views mercilessly; let the debate continue as long as there are partisans who care to continue it. Reason favors the view, if any, that emerges from this dialogue as the consensus view.

This model of reason is compatible with the post-Enlightenment critiques because it posits no transcendent authority, and it conceives human beings, including their intellectual labor, as entirely products of history and nature. It is a model of reason, not merely of chaotic quarreling, because it sees in this dialogue a filter that tends over time to discard ideas that cannot answer objections and to preserve ideas that can. It is a filter just as peer review is a filter, and an appropriate one if there is no standard beyond the informed judgment of the community of other fallible human beings engaged in the same enterprise.

This filter or criterion is more effective in free societies than in unfree societies. Free societies maximize the probability that a good solution to a puzzle will be published without inquisito-
rial impediments or distortion, and the chances that a decisive
objection to a prevailing solution will be published even where
dissent is stigmatized. We are here using the diversity in a free
population to advantage. Dissent and disagreement are the fuel
of this engine, not obstructing grit or signs of failure. Only when
an idea can answer dissenters from whatever quarter they may
arise, and answer them by the standards of the same diverse
marketplace of thinkers, have we created a milieu in which false
ideas are more likely to be falsified by criticism than supported
by ideology, and hence a milieu in which long-term survivors
are more likely to be true than false. 25

How do we know what the verdict of the dialogue of free
people is? For example, is it more rational to hold that the con­
stitution protects sexual privacy or that it does not? Or to take
just one example beyond law, is it more rational to believe in
evolution or creationism? In each of these examples, both sides
are living strands of the contemporary dialogue. This duality
means that consensus has not been reached, not that reason
cannot be a dialogue. The proper verdict of the public discussion
is itself one of the topics of public discussion, perhaps a topic on
which there is strong disagreement. Consensus may take a long
time, or it may never come. The kind of objectivity possible on
this model is asymptotic: we approximate it more and more
closely the longer an idea withstands criticism in a free society.
But it is never perfect; that is its concession to the problem of
ideology.

XI. CONCLUSION

I have tried to vindicate an appropriately trimmed and
modest classical reason in two senses. First, there is rigor lo­
cally. Second, there is something deserving the name of global

25 Before Feyerabend, Popper, Habermas, and Mill, this position was anticipated by
Thomas Aquinas. Aquinas wanted to argue that custom could be law, but this conclusion
apparently contradicted his view that law is a pronouncement of reason. His solution
was to propose that custom is the pronouncement of reason in actions rather than in
words. But then, realizing what post-modern thinkers call the problem of ideology, he
qualified his claim. The customs of free people are the pronouncements of reason in ac­tion,
for the customs of unfree people may reflect the teachings, interests, or commands
of a tyrant more than reason. See the Summa Theologica, First Part of the Second Part,
Treatise on Law, Question 97, Third Article.

It is no objection to point out that the dialogue requires free people as participants,
and that the dialogue is one of the major forces at work in the creation of free people. In
a forthcoming essay, I defend this bootstrapping model of liberation as non-paradoxical.
reason, namely, the free public dialogue. But conversely, this is to vindicate the post-Enlightenment critiques of reason in two corresponding ways. First, local rigor is only local. It can always be particularized. Second, the dialogical global reason is slow, uncertain, and imprecise —lacking in rigor—, asymptotic at best, and not at all transcendental, less a resolution of our disagreements than a vector of them.26

What does this conclusion mean for the day-to-day legal reasoning of litigators? It does not pull the ground out from under them, nor does it require a new model of sound and unsound reasoning. In fact, it should confirm what most litigators already know from experience, that you are most persuasive in court when you argue within the paradigm shared with the judge or jury. The only new element I would insist on is that we recognize that the validity of this reasoning is only local.

If the criterion of reason is long-term, free public dialogue, then no individual possesses this criterion. Hence, as Oliver Wendell Holmes put it, certitude is not certainty. Or as we might say: local proof is not global proof. You may be ever so free of doubt, passionate, and self-righteous, but unless your arguments can survive the scrutiny and criticism of public discussion, they are not to be trusted.27

The criteria of truth and certainty, therefore, are not individual but public, even institutional. Law is clearly a product of reason in this sense, that is, a product of long-term, free public dialogue. But just as clearly, law is a producer of reason, one among many cultural forms that preserve the institution of long-term, free public dialogue. In short, law is both a cause and effect of reason—at least among a free people.

The ultimate criticism of sophistical legal reasoning is that it diminishes respect for legal reasoning and thereby affects the “state of the dialogue” that is reason. It is a local failure, for the argument is unlikely to be persuasive; but it is also a global injury to reason, though perhaps a small one, insofar as it makes the free public dialogue a less effective filter or criterion.

26 Another way to see that this model of global reason has made concessions to the post-Enlightenment critiques is to point out that critique #5 in the opening section applies directly to this model.

27 Quakers have found a way to make religion rational in this sense. They believe that individuals carry a divine presence within them, but can still err. Individuals can tell when they are right and when they are wrong, not through the intensity of private certitude, but only through a process of seeking consensus with others, a process that is essentially a free public dialogue governed by respect and not rules.
We ought to criticize and correct our students when they reason badly because, locally, they are violating the norms of the paradigm in which they are striving to excel, and because, globally, they are weakening one of the institutions that preserves the public dialogue that constitutes reason itself. Although it has taken us a while to get here, this not a terribly subtle point. It is just what the airlines do when they prohibit smoking as well as tampering with the smoke detectors — trying in one act to preserve a clean environment and an uncorrupted channel of correction.
Anthropologists use the term “mythical charter” to designate the narratives that groups of people develop to explain their worlds at a particular time in history. Malinowski, who developed the term, described stories told by the Trobriand Islanders which recount how the four main clans came from a hole in the ground, showing that the order of their emergence provided a rationale for the hierarchical relationships prominent in Trobriand society.

Such accounts are not limited, of course, to the Trobriand Islanders. We all have mythical charters to explain how our religious, national, and professional groups came to operate in certain ways. These accounts represent identity and meaning as well as provide a rationale for the way things are. Those of us in Composition Studies have our own set of mythical charters that tell us who we are as scholars and teachers, provide an understanding of what the field means, and explain both the position occupied by Composition Studies in the academy of the 1990s and its relationship with other areas within English studies.

In this article I will recount several of the narratives or mythical charters that currently circulate within Composition Studies. To make these narratives more visible, I will juxtapose them with accounts of family reunions. I do this because family reunions have so much in common with professional meetings. Both types of gatherings bring together individuals from various parts of the country who have something—either a great grandmother or an intellectual interest—in common. Facilitated by airplanes, shuttle buses, or long car drives, people who do not see one another frequently spend a few intense days together. My experience of both family reunions and professional meet-

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1 Anne Ruggles Gere is Professor of English and Professor of Education at the University of Michigan where she directs the Joint Ph.D. Program in English and Education. A former chair of the Conference on College Composition and Communication, she has published widely in composition studies. Her books include WRITING GROUPS: HISTORY, THEORY, AND IMPLICATIONS (1987), INTO THE FIELD: SITES OF COMPOSITION STUDIES (1993) and INTIMATE PRACTICES: LITERACY AND CULTURAL WORK IN U.S. WOMEN'S CLUBS 1880-1920. (1997).
ings is that we eat better and drink more than we do at home, that we put on our company manners and do our best to cope with the difficult members of our family or professional group, and that we stay up late exchanging ideas and insights. Most importantly, at both reunions and conferences we tell stories. We tell stories about our past experiences and our current thinking, we tell stories about our plans and hopes for the future, and in telling these stories we affirm our connections with one another.

Bad Old Days To Good New Days

In Composition Studies these narratives or mythical characters cluster around several common themes. One of these is what I call the "bad old days to good new days" story of composition. It has an analog in the bad old days to good new days of family reunions. In the bad old days of the last time our family got together to celebrate the birthday of a senior member of the clan, it was a very formal affair where everyone had assigned seats at dinner and people, including the smallest children, had to wear dress-up clothes. The conversation operated at an adult level, and small boys in jackets and ties sat kicking their heels against the legs of chairs. In the good new days of a more recent reunion, we all sat wherever we wanted at tables in a tent, and children wore T-shirts and shorts as they jumped up to play volleyball or croquet.

The bad old days to good new days story of composition goes this way. Once upon a time in the bad old days of writing instruction teachers merely assigned writing; they didn't actually teach it. On Monday they would write an assignment on the board, and on Friday they would collect what students had written. They would leave the classroom on Friday afternoon carrying a box of student themes and would spend all weekend grading them. Their grading consisted mostly of writing things like AWK in the margins next to sentences they didn't like, circling misspelled words, and writing the word TRANSITION between certain paragraphs. Students would usually ignore all the things written in the margins and glance quickly at the grade before crumpling the paper up and throwing it in the trash. The cycle would begin again on the next Monday with a new assignment. This was called the product approach to teaching writing, and everyone disliked it. In these bad old days everyone was miserable. Teachers were unhappy about spending every weekend grading papers, and it made them cranky. Students didn't
like the assignments their teachers gave, and they didn’t think they learned anything about writing. Things went on like this for a long time.

Then one day a hero came along and rescued both students and teachers from the product approach. Here the story has variations. Sometimes the hero is called Janet Emig because she was the first person to do case study research on the ways individual students actually write.\(^2\) Sometimes the hero is called Peter Elbow because he talked about ways students could interact with each other in the absence of their teachers—writing without teachers he called it.\(^3\) And sometimes the hero is called Donald Murray because he gave writers permission to focus on what mattered to them, even if it was their grandmother.\(^4\) Whoever the hero is, this person—the hero—caused a dramatic change in writing instruction. Teachers began to do more than just assign writing; they would help students develop ideas that they might be interested in writing about. This process, usually called prewriting, helped students generate materials for compositions and led them to be more interested in their topics.\(^5\) Teachers also began to encourage students to produce a rough draft rather than move straight to the finished paper. Sometimes teachers would conference with students about their drafts and sometimes students would meet to discuss their drafts with other students. One way or another, students received the ideas and inspiration that helped them write revisions. After they completed their revising, they edited their writing to produce polished final versions. This is called the process approach to

\(^2\) **Janet Emig**, *The Composing Processes of Twelfth Graders* (1971), conducted interviews with students, examined samples of their writing, and asked them to reflect on the ways they wrote. Emig is frequently heralded as a pioneer or hero of the field because her work opened the way for more qualitative research in composition at the same time that it articulated the processes by which writers compose their texts.

\(^3\) **Peter Elbow**, *Writing Without Teachers* (1973), offered, as the title suggests, approaches to peer response that encouraged writers to become better editors of their own and others’ writing. Despite the title, Elbow’s book has been used regularly by teachers in college classrooms.

\(^4\) **Donald Murray**, *A Writer Teaches Writing* (1968), draws on the author’s experiences as a prize-winning journalist. In addition to offering pedagogical approaches that emphasize process approaches to writing, Murray, both in this and subsequent publications, encourages writers to explore topics that have special meaning for them.

\(^5\) Originally defined as including techniques such as metaphorical thinking, journal writing, and meditation, prewriting has been extended to include a variety of strategies for generating ideas for writing. Sabrina Thorne Johnson, *The Ant and the Grasshopper: Some Reflections on Prewriting*, 43 *College English* 232-41 (1981), contrasts “intuitional” prewriting approaches with the heuristic procedures of classical invention.
writing, and in these good new days everyone is very happy. Teachers don't just assign writing. They actually teach it by responding to drafts. They write interested and helpful responses to student writing instead of words like AWK or TRANSITION in the margins, and they aren't cranky because they don't have to spend every weekend grading boring papers since students are writing about such interesting topics. Students are happy because they write about topics that engage them, they are motivated to revise their work because of the responses they get to their drafts, and they feel as if they are becoming real writers. In the good new days of the process approach, both students and teachers of composition are living happily ever after.

The bad old days to good new days account of composition makes a good story, but like any narrative it has limitations. One of the things it leaves out is the problem of taking a generic model of writing and making it a singular orthodoxy. In some classrooms, the stages of the writing process—prewriting, drafting, revising, and editing—become a lockstep series of stages that students MUST go through in a predetermined and rigid fashion even if it is not appropriate to their writing project. This story leaves out the fact that there are many writing processes, not just one. It also leaves out the fact that writing processes can be adapted to a variety of theoretical positions and can look very different and lead to diverse results, depending upon the perspective of the person doing the implementing. In the hands of an instructor who takes an expressivist approach, for example, writing processes emphasize the development of individual voice and personal investment in topics, while in the hands of more rhetorically oriented instructor, writing processes focus on attention to audiences and purposes for writing. Finally, of course, this story fails to answer a crucial question: If the process approach to writing brings us into the good new days of composition instruction, why aren't all of our students writing elegant and flawless prose?

6 Evaluation of writing can be divided into formative and summative types; responding to drafts falls into the former category. A response pedagogy assumes that teachers should intervene in the processes of student writing rather than simply wait to offer summative (usually grades) evaluation. John Clifford, Composing in Stages: The Effects of a Collaborative Pedagogy, 15 RESEARCH IN THE TEACHING OF ENGLISH 37-53 (1981), studies the effect of formative responses to writing.

7 James Berlin, Rhetoric and Ideology in the Writing Class, 50 COLLEGE ENGLISH 477-94 (1988), delineates approaches such as expressivist, cognitive rhetoric, and social epistemic rhetorical, explaining the political assumptions and consequences of each.
Good Old Days and Bad New Days

One response to this question leads to another set of stories in composition. These fit under what I call the “good old days and bad new days” account. The analog in the family reunion is the story, nearly always initiated by an older member of the gathering, which begins, “I just don’t understand...” and continues with a lament about the length of hair, the clothing, or the lifestyle choices of some younger relative. These stories nearly always set up a comparison with the older relative’s early life, and include lines such as “when I was your age” or “in my day.”

The compositionist version of the good old days to bad new days story proceeds along similar lines, and it goes like this. Once upon a time in the good old days students came to college or to law school well prepared to write. They had received excellent instruction from their previous instructors and were well versed in the conventions of standard written English. They knew how to use the semicolon and the quotation mark. They knew how to spell correctly, and they could handle complex syntax. Because they had written frequently, they were ready to begin immediately at an advanced level, and instructors could move them quickly into complex writing tasks.

Sometime in the past, and here the story varies, something occurred to disrupt this idyllic state. In some versions of the story, television is the villain, in others it is open admissions at colleges, and in still others it is the poor preparation of the teachers at the level below the one occupied by the speaker. Regardless of the identity of the villain, the account of the good old days to bad new days story proceeds by explaining the problems with current students. They don’t know how to use semicolons or quotation marks, their syntax is irregular, and they are often unpracticed writers. They have not written enough to have any real facility with language, and they require extensive tutelage in the more basic dimensions of writing. In these bad new days, composition instructors have to take too much time teaching basic skills that students should already know, and it is difficult to get on to the more complex issues of writing. The good old days to bad new days story provides one answer to why writing processes have not produced students who are writing elegant and flawless prose. The problem does not lie with what we are or are not doing in our classrooms; the problem lies in the underprepared or less intelligent students.
This version of the story may make us feel better and provide a momentary respite from concerns about why instruction based on writing processes is not more completely effective, but it also leaves things out. It does not acknowledge that there has always been a hearkening back to the elusive good old days in American education. One can look at articles written in the 1890s and find expressions of the same concerns about the quality of students as appear in the 1990s. Then as now, literacy was described in the language of crisis, and instructors worried in print about the declining skills of their students. In 1897, for example, E.L. Godkin wrote an article titled “The Illiteracy of American Boys” in which he lamented the growing illiteracy of those entering college. The good old days to bad new days story of composition also leaves out the continually rising floor of expectations for writing. As our society becomes more complex, the kinds of literacies required of students become correspondingly more demanding. If ability to sign one’s name counted as literacy during the Colonial period, and if capacity to write letters or keep a diary marked one as literate in the nineteenth century, the definition of literacy has become considerably more complicated at the end of the twentieth century. The information revolution, like the industrial revolution before it, has changed and complicated the ways we communicate with one another.

Most importantly, the good old days to bad new days story of composition leaves out the implications for us of describing our students as deficient or underdeveloped. As Susan Miller has explained, the subjectivity or identity assigned to students has direct implications for the way composition instructors are seen, both as individuals and as a profession.8 If composition students are conceptualized as presexual, preeconomic, prepolitical beings who have no valuable prior experience as writers, those who teach them cannot enjoy much status in the academy. Instructors are, after all, categorized in certain ways by those whom they teach, as the lower status of professors who teach exclusively introductory courses compared to those who offer graduate seminars demonstrates. The graduate instructor is nearly always assigned higher standing on the basis of teaching more sophisticated students.

To assign students the identity of the uninitiated also overlooks the dimension of writing I call the extracurriculum. My

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own research on self-sponsored writers outside classrooms indicates that there are many individuals who produce and sometimes even publish a considerable amount of writing. Women in the Tenderloin district of San Francisco, farmers in Iowa, some of my neighbors in Farmington Hills, Michigan—people from all walks of life who represent a wide range of ages write for their own reasons. Often, these are people whom formal education has written off or discarded. The identity most frequently constructed for composition students makes it impossible to see, much less value the self-sponsored writing that occurs outside classroom walls.

We're All In It Together

This view of students leads to still another story about composition studies. I call this one the “we’re all in it together” story. At the family reunion this story usually takes the form of emphasizing the connections of kinship, rehearsing exactly how we come to be second cousins once removed. Despite all of this emphasis on relationships and commonalities, the reunion also contains generational groups clustering together in solidarity to define themselves as different from another generational group.

At many family reunions there are three distinct generational groups that could be most easily identified by the way they handle money. The oldest group, usually including those past retirement age, belong to the check writing group. Although they own and do use credit cards, their preferred mode of transferring funds is to write a check, preferably with a fountain pen in a rather elegant hand. The next group, to which I belong, is the credit card cluster. While we do write checks, our chief means of dealing with money is to swipe the plastic through the machine, collecting frequent flyer miles along the way. The youngest group is the ATM crowd. They have checking accounts, of course, along with credit cards, but their preferred mode of financial transfer is to line up at the ATM machine to withdraw cash. Although each group understands and can use the dominant modes of the other, it sees the non-preferred methods as a bit alien, and this perspective carries over to other areas of life so that the check-writing group looks a bit askance at some of the decisions of the credit card group, and they, in turn, shake their heads at the ways of the ATM folk. Even though we are all in the same family and affirm our relationships to one another, we have our own ways of doing things.
The compositionist version of this story follows a similar line. We are, of course, all in the composition business together. Regardless of where we teach, we share common problems and goals. Composition teaching is always difficult to do well; indeed, it is probably one of the most difficult kinds of teaching there is. We share the problems of large classes, small salaries, and high expectations. The designation of "service course" greets us frequently, despite our best efforts to underscore the intellectual content of our work. We join hands around the shrine of professionalism, sharing a common goal of gaining full academic endorsement for composition within the academy. Embracing guidelines for the working conditions of professional writing instructors, we agree on tactics and procedures for attempting to gain them. We all seek ways to create better assignments or what have been called invitations to writing, and we all look for more effective forms of evaluating the prose our students produce. We take notice of discussions of portfolio evaluation, paying particular attention to the reflective qualities it fosters in our students.\(^9\) When we meet at our professional conferences, when we write for journals in the field, or when we talk in the halls, we frequently tell one another stories of solidarity, emphasizing the things we hold in common.

Despite all these similarities, despite all of our stories of how we are in this together, we, like the check-writing, credit card and ATM groups at the family reunion, still harbor significant differences underneath our apparent similarities. You who teach legal writing know well the special conventions that guide your work, the particular problems that are unique to your situation, and the expectations of the discourse communities in which your students move. Despite all the things we hold in common, your students and your contexts are quite different from my students and my context for teaching writing.

How We Differ

The current debates surrounding the writing across the curriculum movement offer another instance of how we differ. As we debate about who is best qualified to teach writing in various disciplines—whether the compositionist who becomes moder-

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ately familiar with the specific field or the specialist in the field who becomes moderately familiar with composition instruction—we reinscribe the differing ways of defining our field. Similarly, our debates about what it means to enter a given discourse community play out, yet again, the differences among us. As Jessie Grearson says, it would be easy for legal writing teachers to casually adopt theories of teaching writing without interrogating their implications for the law school context. But the differences in context dictate continued questioning rather than easy adoption. In particular, as Grearson points out, instructors in legal writing need to continually and critically examine how and why the practices and conventions of legal writing came into being.10

One of the most powerful illustrations of and challenges to the socially constructed nature of legal writing comes from Patricia Williams, the law professor who wrote *The Alchemy of Race and Rights*. Williams writes, “I am interested in the way in which legal language flattens and confines in absolutes the complexity of meaning inherent in any given problem. Legal writing presumes a methodology that is highly stylized, precedential, and based on deductive reasoning” (p. 7). She continues, “Most scholarship in law is rather like the ‘old math’: static, stable, formal—rationalism walled against chaos.” Williams explains, “My writing is an intentional departure from that. I use a model of inductive empiricism, borrowed from—and parodying—systems analysis, in order to enliven thought about complex social problems. I am trying to challenge the usual limits of commercial discourse by using an intentionally double-voiced and relational, rather than a traditionally legal black-letter, vocabulary” (6 and 7). Even though I can appreciate and enjoy Williams’ challenge to the limits of legal discourse with accounts of polar bears, sausage and Benetton’s, I know that her language means something different to those of you in this room than it does to me. We are all in this composition business together, but we also owe allegiance to our individual subgroups.

Same Old Same Old, Or Is It?

The continuing struggles within the field remind me of another story common to reunions and composition conferences. I call this one the “same old same old” story. At a recent family

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10 Jessie Grearson, *Telling the Truth About the Paper Chase*, 4 LEGAL WRITING, in press.
reunion I was most forcefully reminded of it when I asked one cousin about her life during the past couple of years. She responded by replying that she really hadn't been doing anything. Looking at her two active and very articulate young children, I knew that wasn't true, but when I pressed, she explained that she felt much of her life is one repetitive activity after another—"I rearrange all the tupperware in the cupboard so that I can arrange it again; I empty the dishwasher so that I can refill and empty it again tomorrow; I make the beds over and over. Nothing seems to be going anywhere," she explained. Many of the stories told at composition conferences, particularly by those who have been teaching a decade or more, echo this theme of same old, same old. Despite occasional bursts of inspiration or recognition, we find ourselves doing the same kinds of teaching year after year. Our students begin to look alike and take on stereotypical qualities that we recognize even before we know their names. This one is the conscientious Cathy who will sit in the front of the class and smile at everything I say whether it makes sense or not, that one is the challenging Calvin who sits with his arms folded in the back of the room making it clear that he is just barely enduring this class, and over there is the creative Chris who doesn't really belong in this class but managed to sneak in somehow. We have developed our comfortable routines for engaging students, and we do a creditable job of challenging and cajoling them toward better prose, but we begin to feel that there is really nothing new in teaching writing.

I confront this feeling from those outside Composition Studies as well as within it. Not long ago, when I was talking with a lawyer friend, I explained that I had addressed the Legal Writing Institute. His first response was to ask: But is there really anything new to say about writing? Didn't Aristotle's *Rhetoric* pretty well cover things? As I sputtered through a response, I heard echoes of same old, same old. Since that encounter, I have had time to collect my thoughts, and now I can say with full assurance that yes, there is indeed a good deal new in the teaching of writing. The challenge is to know how to look for it.

One of the best ways to look for the novel dimensions in teaching writing is to make the familiar strange. When I taught at the University of Washington, I had a colleague who helped me understand ways of making the familiar strange. He was not an anthropologist but an English professor who had never before attended a symphony concert. When he returned from his first visit to the Seattle Symphony, I asked him if he had en-
joyed it, and he said that he had, but, he went on to say, “It was the weirdest thing. When the orchestra first came on stage, the first thing they did was make the ugliest sounds, scratching and tooting their instruments almost at random. It really didn’t set the tone for a pleasant experience.” As one who had attended many concerts, I had become completely unaware of how unattractive the tuning sounds at the beginning of a concert can be. My colleague, who went to the symphony with a fresh perspective helped me see how the familiar sounds of tuning could seem very strange. When we compositionists tell the same old, same old story, it seems to me that we have lost our capacity to look with fresh eyes at what we are doing.

Our colleagues in secondary schools have a good deal to teach us about making the familiar strange. The teacher research movement has led instructors to look at their classrooms in new ways. As Ruth Hubbard puts it, “teacher-researchers are a wonderful new breed of artists-in-residence who use their own classrooms as laboratories and their students as collaborators. They are changing the way they work with students as they look at their classrooms systematically through research.”¹¹ Teacher research is not, of course, limited to secondary school, and many instructors in higher education are also becoming researchers in their own classrooms. The procedures they follow include keeping a classroom journal in which they record their ongoing observations, scanning these journals to identify themes and begin to formulate questions, deciding which information is relevant, collecting and analyzing information, learning more about the field through reviewing the literature and writing about what they find. Through these processes the same old, same old story becomes transformed into one of discovery and new ideas.

Let Me Tell You About This Book

New ideas are, of course, one of the things that we seek at both reunions and professional conferences, and one of the chief sources for these ideas is reading. Not surprisingly, then, another of the stories thatcirculates in both settings is what I call the “let me tell you about this book” story. During a recent family reunion I happened to eavesdrop on a very interesting ex-

change between a ninety-year-old aunt and a much younger cousin as they discussed their common interests in biography and historical fiction. What I found particularly fascinating were Dorothy's recommendations for books written in the 1920s and 1930s and the way young Paul wrote them enthusiastically in his notebook. This exchange reminded me that new ideas do not necessarily come from new books. As I discovered when I began investigating writing groups, strategies and procedures that may seem highly innovative often have a long history. Writing groups, for example, can be traced back to Benjamin Franklin's junto, a peer response group that met during the colonial period, and instructors have been publishing articles about writing groups in classrooms since at least 1880. The "let me tell you about this book" story for compositionists, then, can often include rediscoveries of books that have been around for a while as well as recent publications.

Mina Shaughnessy's *Errors and Expectations*, for example, even though it was published in 1977, is a book that I still find useful today because of the perspective it gives me on evaluating writing. I reread Shaughnessy to remind myself of the need to look systematically at problems in student writing as well as to remember that she who looks for error will generally find it. I know that I read student writing with different expectations than I read a column in the *The New Yorker* because I read the first with anticipation of finding something to "correct" while I read the second without that expectation.

Another text that I return to again and again is Aristotle's *Rhetoric*, even though it was published long before the field of composition studies emerged. Aristotle continually reminds me of the need to think carefully about the audience for writing as well as the many ways I can think of something to say about a topic. Even though I don't rely solely on Aristotle's strategies of invention, they serve as a continuing reminder that I don't need to simply wait for inspiration. Thanks to Aristotle, I know that there are a whole range of questions one can ask to generate ideas about a given subject. There are, of course, a number of more recent books that I have found very useful. Susan Miller's *Textual Carnivals* has given me a very useful perspective on the political and gendered position of composition in the academy. Whenever I find myself on the receiving end of a slighting re-

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mark about composition from one of my colleagues in literature, I recall both Miller’s delineation of the relationship between these two branches of English studies, and I also remind myself of Miller’s claim that composition is a very large operation, with $40 million spent annually on textbooks and more than $50 million spent on the salaries of composition instructors.

Lester Faigley’s *Fragments of Rationality*, which looks at composition studies in terms of postmodernism, has been very helpful to my thinking about the multiple roles students play and the futility of trying to think of students in terms of a single and entirely stable identity. Faigley’s work also offers very useful perspectives on how computers can change the way we teach. Still another recent book that I find useful is Kathleen McCormick’s *The Culture of Reading* because it offers new ways to think about the relationship of reading to writing.

Another conversation I had at a recent family reunion reminded me of another variation on the “let me tell you about this book” story. It occurred as I was discussing the similarities and differences between *Nancy Drew* and *The Hardy Boys* with a young niece. As we talked, I was struck by how much our conversation resembled those I have with my university students. This reminded me of how much I value reading across levels in composition. For example, Nancy Atwell’s book *In the Middle* describes a middle school classroom, but I find it very useful in thinking about ways to modify my own classrooms to include more reading-writing workshops. Similarly, Maureen Barbieri’s book *Sounds from the Heart* is about the struggles of adolescent girls, but I have found it very helpful in working with some of my female university students who face condescension or hostility or harassment in the academy.

Here’s Where We Go Next

Consideration of new ideas leads to a futuristic perspective, and another story that is heard at both reunions and professional meetings is what I call the “here’s where we go next” story. In both contexts discussions on the final day usually include considerations of where and when members will next gather. Families debate about whether to meet in Kansas City to celebrate cousin Chip’s 40th or in San Francisco for sister Judith’s 60th. Within the composition community the “here’s where we go next” story takes the form of predictions about what will be important to the field in the coming years. Recent versions of this have focused on several things including portfo-
lieto assessment, the blurred genres of writing, and the relationship between reading and writing.

At the University of Michigan we now require a portfolio from every matriculating undergraduate, and readings of these portfolios place students in a writing workshop or first year composition or exempt them from these requirements. These portfolios, which contain at least three pieces of writing, are prefaced by a reflection in which the student discusses each selection as well as his or her own experiences as a writer. In addition to providing a much better means of placing students appropriately, these portfolios offer a helpful pedagogical tool for instructors in first year writing courses because they create a kind of baseline against which course writing can be compared. Portfolios are also used by many instructors to evaluate the work in the composition course itself because this form of assessment invites students to take a much more active role in their own learning.

When Composition Studies is not looking to portfolio evaluation, it is likely to be focusing on the blurring of genres and how changes in form affect the teaching of writing. For some time now, the traditional modes of writing—narration, description, exposition, and argument—have been called into question. Articles with titles such as "the rise and fall of the modes of discourse" have argued that modes do not offer useful ways of describing the writing people actually do. In addition to authors like Patricia Williams, who deliberately merge personal and legal writing, we can point to contemporary writers ranging from literary theorist Jacques Derrida to anthropologist Dennis Tedlock to literary journalist Tom Wolfe who break out of categories and push against the boundaries of the modes of discourse.

Still another "where we go next" story concerns the relationship between writing and reading. One of the legacies of the writing across the disciplines or WAC movement has been to put composition instruction in a variety of new contexts ranging from sociology to art history to geology. This has meant, among other things, that writing and reading come into new relationship. Writing processes involve, as we know, considerable reading. Students read and reread their own texts as they move from drafts through revisions to finished pieces of prose. Writing

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to learn or to show learning about a field such as sociology involves still more reading. I have recently begun to think that reading processes are getting short shrift in these transactions. Stories about the bad old days of composition instruction emphasize how teachers used to simply assign but not teach writing, and it seems to me that we have a similar situation with reading. Few of the courses I'm aware of give any explicit attention to reading. They simply assume that the reading will be done. Just as students have benefited from extended attention to the processes of composing, so they could benefit from a more direct consideration of the processes of reading, particularly as it relates to writing.

Conclusion

The stories we tell ourselves, both at reunions and within Composition Studies go on. But these accounts of the bad old days to good new days; of the good old days to the bad new days; of we're all in this together; of same old, same old; and of here's where we go next illuminate some of the common themes. They function as mythical charters that help explain the perspectives and social arrangements of Composition Studies. No one of these stories gives a full accounting, and each has its limitations. In fact some of these may be stories we don't want to hear anymore. But narratives like these help us understand our field. After all, the word narrative comes from the Latin gnarus which means to know, and we know composition studies through the stories we tell one another.

Works Cited


E. L. GODKIN, THE ILLITERACY OF AMERICAN BOYS, 8 EDUC. REV. 1-9 (1897).


It is an honor and a privilege to be with you this last day of the Seventh Biennial Conference of the Legal Writing Institute - now 1,800 members strong - and to share with you some thoughts.

When I was a girl growing up in the 1930s, living with my grandmother in the old stone house on my family’s ancestral 40-acre homestead in Birch Creek, Chautauqua County, Kansas, I read and re-read every book I could lay my hands on. I didn’t walk three miles to borrow *The Life of Washington* as Abe Lincoln did, but I did walk two miles to the Houser’s home on the edge of the hills for a copy of *Dick Prescott’s Fourth Year at West Point*. That could explain why Lincoln became president and I only ended up on the Minnesota Supreme Court.

I fell in love with language and saw my way into worlds that language opened up. Not only did I love poetry and history and stories of adventure - even Horatio Alger - I also loved jokes, for I had a “funny bone” even then and it has stood me in good stead. Every week, when the *Capper’s Weekly* came, I would read and cut out - clip, we’d say now - the jokes. One joke in particular sticks in my mind. It was about a Midwest family - in my mind a Kansas farm family - who had gone west to Seattle - in August probably, for by then the crops are laid by and fall crops planted - to visit relatives. Now visiting relatives “out west” was more than a possibility to me, for every family in my community had some relatives “out west.” Around the turn of the century, in the first decade of this century almost gone, there was a migration to the Northwest from Kansas and other Midwest states to settle and develop the states of the Pacific Northwest. The graves of my grandmother’s parents and brothers and sisters dot the cemeteries of Montana, Idaho, and Washington. Anyway, in this joke, a Midwest family was visiting relatives in Seattle. Every day the relatives would say, “Maybe
today the clouds will lift and you can see Mount Rainier.” This went on for two weeks. The time for the visitors’ departure came and the clouds still hadn’t lifted. “Well,” said the old Kansas farmer, “We don’t have much scenery back home, but what we have you can see!”

So, I am wondering if, after two and a half days of conference, of learning from disciplines, you have seen Mount Rainier yet. Have you seen the Mount Rainier of your dreams for legal reasoning and research and writing - the vantage point from which you can see what has been, what can be, and what will be? Maybe yes. Maybe no.

Let’s say you not only have seen Mount Rainier but we’re standing together on its summit here and spread out below is the world which is the stage on which you act, on which you teach, on which you struggle for recognition and status. Superimposed on that world is the world which is the page, the page on which you write and have writ large, the glory of the language which molds the thought of legal discourse, the thought which creates and molds the language by which we communicate that thought.

Looking inland, we see the way over which we have come: the desert places, the steep, dry ascent, the springs of water and inspiration in the dusty land which have nourished our growth.

Looking outward we see - how did Pete Seeger put it? - “one ocean lapping all our shores.” We recall the lines of Emily Dickinson:¹

Exultation is the going
of an inland soul to sea,
past the houses - past the headlands -
into deep eternity -
Bred as we, among the mountains,
can the sailor understand
the divine intoxication
of the first league out from land?

Past the houses of grammar we go, where we must continue to spend time, past the headlands of legal format on which we will still build, out into the deep and changing sea of legal education and scholarship the practice of law in the twenty-first century will require. A part of the “divine intoxication” we feel is the

sure knowledge that the analysis, research and writing we teach and the introduction to legal discourse we provide are essential to legal curricula and must be integrated with all courses.

We know, as an article of faith, that legal writing is intricately entwined with legal reasoning and legal analysis - if they are not one and the same - and that we cannot focus on the process of one without also focusing on the process of the other. We also know, as Professor Ramsfield has put it directly and perceptively in her article on “Legal Writing in the Twenty-First Century” as imaged through the survey of legal research and writing programs this institute did in 1990, “Future scholars and practitioners should receive an integrated, institutional message: The most brilliant legal analysis is useful only if it is accurate and can be communicated effectively. Accuracy comes through mastery of sound legal thinking and research strategies; effective communication comes through steady, conscious practice of legal writing processes and techniques.” Indeed, the socio-linguistic family of legal writing used in legal writing programs today to train lawyers to think and communicate well requires, and I quote Professor Ramsfield, “approaches and techniques unique to thinking, researching and translating that require consistent practice, reinforcement, supervision and criticism.” This requirement of consistent practice, reinforcement, supervision and, particularly, of criticism-feedback was one of the reasons for the establishment of the separate legal research and writing programs in which you are involved, because traditional law faculty have traditionally opted out of the heavy workload that commenting on individual papers entails. As legal writing professionals, commenting on individual papers and conferring with students face to face is your burden and your glory.

Even in the early 1960s, when legal research and writing were peripheral to the core curriculum in most law schools, it was this critical, one-on-one relationship which impressed my novice, 40-some-year-old, non-traditional soul when I was a law student. The law librarian, our only woman faculty member, handled the few weeks of research assignments early in law

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4 Id. note 70 at 136.
5 Id. note 48.
school. Later, moot court required the preparation of a cursory pleading and the preparation and delivery of an oral appellate argument.

But the long paper required of me and my classmates was under the supervision and instruction of Mr. Danforth, our demanding and scholarly civil procedure professor. I have only to close my eyes to find myself sitting again on a chair in the library stacks outside Mr. Danforth’s office door waiting with trepidation for my second or third rewrite conference on a paper I was doing on the jurisdiction of child custody before the adoption of uniform laws in this subject area. You can imagine, then, my satisfaction and delight many years later when I - now a member of the Minnesota Supreme Court - received a note from a then-retired, but still demanding, Mr. Danforth, expressing his unconditional approval of an opinion I had written for the court in a difficult zoning case. This is the influence you have on the lives your teaching touches in a personal way when the spark is struck between a love of the language and even a fumbling analysis of a legal problem which casts some light on the direction in which the law might grow.

Between those student years and my 17 years on the Minnesota Supreme Court, I was an appellate advocate before that court for indigent criminal defendant clients of the Office of the State Public Defender in over 100 felony appeals. In 1973, William Mitchell College of Law - the law school that had given me both knowledge and love of the law and the tools with which to shape it - called me back to establish there a criminal clinical program that included a course I taught on appellate advocacy. The students in that course served in teams of two as my student lawyer associates on felony appeals I was still handling for the State Public Defender. The students researched the issues and wrote the briefs under my supervision. Together we strategized and discussed the ethical as well as the legal issues. Side by side we scrutinized both reasoning and writing. These were students in their last year of law school. None of them up to that time had ever worked so closely with a law school professor or had such feedback on their work. Professional responsibility came alive: our obligation of zealous representation of the client within the perimeters of the facts and the law; our duty not only to the client but to the court; the absolute integrity of the facts; the need to research and present to the court all relevant case law, even that against our position; the professional
courtesy shown opposing lawyers and the court; thorough preparation of the case with the best possible work product.

Why do you make this statement? Is there a better way to frame the issue? What is the rationale for this argument? What is the argument we need to refute? How do we handle this precedent holding squarely against our position? Is there any authority in other states we might use to persuade the court to change the rule or ameliorate its harshness? Was justice done here? Then, again, and more than once, "This brief is good enough for a grade but it's not good enough for the court. Rewrite it!"

So it goes with you, I expect, more or less. Your 1990 survey indicates that 80 percent of the programs in the 130 law schools responding provide for written feedback on more than four assignments per year. In 88 percent of those law schools, commenting is done by the legal research and writing professionals who also hold numerous face-to-face conferences with the students individually.

How do you do it, you who are underpaid and overworked? Maybe the harder question is "why do you do it?" Your 1990 survey showed that most of the schools responding had a high student-faculty ratio, with over half showing a ratio of 50 students to one legal research and writing professional, most of whom earned between $20,000 and $30,000 a year and worked under one-year contracts. The combination of heavy workload, low pay, and low status has led, predictably, to a high turnover of legal research and writing professionals. If it isn't burnout, it's the cap many law schools put on the time legal research and writing professionals can stay - two years, five years - which force these seasoned teachers to leave, to the detriment of the creative, innovative legal writing, analysis and research programs they have worked so hard to develop.

This is the way law schools recognize and reward the teachers whose teaching of the lawyer's primary skills of written and oral communication in their legal writing, reasoning and research programs lies at the heart of legal education. After all, many of you are full-time staff and your salaries, in the words of one dean, "Fall within the acceptable range of disparity that

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6 See, supra, note 3, 129.
7 Id.
8 See, supra, note 3, 126.
9 Id.
exists between tenured faculty and legal writing instructor salaries." As Theresa of Avila is alleged to have said to God after a particularly trying period of her life, "If this is the way you treat your friends, no wonder you have so few." 10

Yet here you are, 300 strong, at the dynamic seventh biennial conference of the Legal Writing Institute. Through your conferences and Journal and newsletter you have promoted the exchange of information and ideas about legal writing. Your research and scholarship about legal analysis and legal writing, your pedagogy, is becoming increasingly sophisticated. The atmosphere in your presence is yeasty and exciting. Every year you are making the case clearer and clearer for your acceptance by, and your inclusion as full members in, the law faculties of your respective law schools.

And yet the cry that goes up from the heart of you here is "What can we do to gain the respect, the status, the remuneration commensurate with the quality, the quantity and the importance of our contribution to legal education and the students' ability to practice law?" I have heard such a cry before; It arose from the hearts and throats of clinical legal educators at a significant ABA national conference on professional skills and legal education in Albuquerque, New Mexico, in 1987, the year I chaired the ABA Section on Legal Education and Admissions to the Bar. ABA presidents and former presidents, judges, members of the bar, law school deans, administrators, and faculty members, primarily clinical faculty members, had gathered to assess the progress and acceptance of clinical legal education in the law school world. At that time, every ABA-approved law school had a skills training program, and there was much diversity among those programs. Many of the programs were on exhibit at the conference in a great sharing of theory, techniques and practice. Idealism, excitement, exhaustion - all were there; but what touched me most of all was the underlying sense of sadness and frustration, the sense of second-class citizenship of these talented legal educators.

It might be useful to trace some of the similarities between the struggles of clinical legal educators and legal research and writing professionals for recognition, respect, remuneration, and status on law school faculties. Reform of law school curricula is notoriously slow because those on law school faculties who bene-

fit from present allocations of power and resources are unwilling to change. Clinicians have sought to use the ABA Standards of Approval of Law Schools and their interpretations to effect change. Those standards and interpretations, if not the battleground, at least have been the field of action on which the Section of Legal Education and Admissions to the Bar and the ABA House of Delegates are hammering out recognition by the profession - the academy, the bench, and the practicing bar - that clinical legal education, with its emphasis on lawyering skills and values, with all its pedagogical and philosophical ramifications, is an essential, integral, legitimate part of legal education. Legal writing and research are also essential, integral, legitimate parts of legal education.

Before examining the standards developed to move clinical education - and that could move legal research, analysis, and writing - into the mainstream of legal education, I would note the chronological milestones that have marked and stimulated the growth of clinical legal education over the last three decades. Legal writing and research have been implicated and advanced by some of these developments but have not been a main focus.

1) Beginning in 1967, The Ford Foundation infused $10 million through the Council on Legal Education for Professional Responsibility (CLEPR) into clinical programs in law schools, encouraging law faculties, through grants, to offer training in lawyering skills which the bench decried as lacking in law graduates, and funding national conferences on legal education. Money has always been the key!

2) In 1979, the Section’s Crampton report on the role of law schools in lawyering competency urged the improvement of lawyering skills through legal education.

3) The 1980 Guidelines for Clinical Legal Education, the report of the AALS/ABA Committee on Guidelines for Clinical Education, chaired by Robert McKay, gave the first comprehensive analysis of clinical legal training and was part of the struggle that led to the enactment of Standard 405(e). The report contained this conclusion: “While the Committee believes that each law school must determine its own curriculum, the Committee believes that each law school has a responsibility to provide students with the opportunity to gain an understanding of the basic competencies required by lawyers in order to function in the attorney-client relationship.” What those competencies are, and how and where they should be taught, continues to be
debated. Certainly legal writing and research are among those competencies. Some members of the bar and some members of the House of Delegates believe that certain of the MacCrate recommendations regarding skills training should be mandated by the Standards. Law school deans generally oppose such a mandate. Flexibility and diversity of clinical programming have been important in the development of those programs as they have been in the development of legal writing programs.

4) The 1987 ABA National Conference on Professional Skills and Legal Education in Albuquerque, mentioned earlier, was a mountain-top experience out of which grew the creation of the MacCrate Task Force.

5) The MacCrate Task Force issued its report in 1992 on Law Schools and the Profession: Narrowing the Gap. The report recognized the growth of the skills-training curriculum as the most significant development in the post-World War II legal education era and launched a great dialogue in the law schools and in the bar about fundamental lawyering skills and professional values. Legal writing and research are recognized in the report as fundamental lawyering skills.

The ABA Standards of Approval of Law Schools provide the basic tools for needed change. Standard 301 sets out the broad objectives required of a program of legal education. Standard 301(a), as adopted in 1973, required that "a law school shall maintain an educational program that is designed to qualify its graduates for admission to the bar." As a result of the MacCrate Task Force recommendations, the House of Delegates in 1993 added the phrase "and to prepare them to participate effectively in the legal profession."

Standard 301(b) requires that: "the educational program of a law school shall be designed to prepare the students to deal with both current and anticipated legal problems." The Commission to Review the Substance and Process of the ABA Accreditation of American Law Schools and the Section's Standards Review Committee have proposed enforcing this mandate in the Recodification Draft of the Standards, which will be voted on by the House of Delegates at the ABA annual meeting in August by requiring that the written self-study required of the dean and faculty of a law school by Standard 202(a) shall in new Standard 202(b): "address and describe how the law school's pro-

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gram of legal education conforms to the requirements of 301(a) and (b)." In other words, how is the program preparing students to “participate effectively in the legal profession” and to “deal with both current and anticipated legal problems”? Standard 302 of the Proposed Recodification Draft on curriculum contains some significant additions. Standard 302(a) reads as follows:12

(a) a law school shall offer to all students:

(1) instruction in those subjects generally regarded as the core of the law school curriculum;

(This is the bailiwick of the traditional law school faculty).

(2) an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving, and oral and written communication;

(This is NEW. It is your special area of expertise. Get it passed by the House. Take it and run).

(3) at least one rigorous writing experience;

(This can be a part of the educational program required in (2) but it is not the only mandate you can claim).

and

(4) adequate opportunities for instruction in professional skills:

(Formerly law schools were not required to offer such opportunities TO ALL STUDENTS.)

Standard 302(b), formerly 302(a)(iv), continues to require instruction of all law students in the history, goals, structure, duties, values and responsibilities of the legal profession and its members. Every assignment you give provides opportunities for instruction in the professional and ethical values necessary in the solution of the problem. Standard 302(d), which is new, provides that “a law school should offer live-client or other real-life practice experience for credit . . . through clinics or internships . . . .” Standard 302(e), also new, provides that “a law

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12 Justice Wahl’s interjected comments are printed in italics and enclosed in parentheses. (Eds.)
school should encourage its students to participate in pro bono activities and provide opportunities for them to do so.”

Standard 404 on Faculty Responsibilities similarly provides that a law school shall establish policies with respect to a faculty member’s responsibilities in teaching, scholarship, service to the law school community, and professional activities outside the law school, which address, among other things, the faculty member’s “(5) obligations to the public, including participation in pro bono activities.” (NEW).

One of your programs today was on “Teaching Legal Research Through Pro Bono Programs.” Writing and analysis would, of necessity, also be involved in such programs. Beyond that, programs involving pro bono service or even emphasis in your own teaching could bring the understanding to students that the law is for everyone, not just to protect the rights of those who can afford counsel - and the best legal counsel available. Every person - regardless of race, gender, class, status, or means - should have access to our system of justice to claim the protection and vindication of the rights the law has given them. And the law, the courts, and the judicial system, recognizing its/our bent for bias, should do justice for all.

It is not enough that state court systems should study, as have the Minnesota Supreme Court and the Washington Supreme Court, among others, through task forces, gender and race bias in their judicial systems and work to eradicate it. It is not enough that state bar associations should urge diversity training in CLE courses and join with the women’s bar in assaulting the glass ceiling. We must start in the law schools where our students, our future lawyers, first come. Those students bring with them the biases of the society from which they come and unconsciously use those biases in their analysis and application of the law, and in their treatment of others different from themselves.

We must not confirm what Roger Crampton identified as another bias deeply ingrained in many law students: that law school is a training ground for technicians who want to function efficiently within the status quo.13 Rather, we must make law school a training ground for professional lawyers, defined by the Section’s Professionalism Committee as “experts in law pursuing

13 Section of Legal Education and Admissions to the Bar, American Bar Association, Report and Recommendations of the Task Force on Lawyer Competency: The Role of the Law Schools (Chicago, 1979).
a learned art in the spirit of public service as part of a common calling to promote justice and public good. You cannot underestimate the importance you have as role models for the law students, who, in your case, are in a one-to-one relationship with you. Your actions in and out of the classroom can enhance or undermine ethical messages about good lawyering, which involves responsibility to and for others.

With regard to professional security and status for legal writing and research professionals, clinical educators have used Standard 405(e), which was adopted by the House of Delegates in 1984 after years of debate. Standard 405(e) provides in part that "a law school should afford its full-time faculty members whose primary responsibilities are in its professional skills program a form of security similar to tenure, and non-compensatory perquisites reasonably similar to those provided to other full-time faculty members."

The Recodification Draft of what is now 405(c) replaces should with shall, but does not include legal writing directors. A recommendation of the Illinois State Bar Association urges the addition of language to “include legal writing directors” along with full-time clinical faculty members. The Illinois Bar recommendation further urges language that “a law school employing full-time writing instructors should provide terms of employment and working conditions sufficient to attract well-qualified teachers and to permit and encourage them to develop their expertise.”

You can mobilize your strength to lobby, through your state delegates, the adoption of these provisions in the House of Delegates. If approved, these provisions would be sent to the Council of the Section for Legal Education and Admissions to the Bar for action, hearing, and comment. There is strong pressure out there to count as full-time equivalent teachers in the student/faculty ratio all full-time clinicians and writing instructors not on tenure track and regardless of terms of employment and working conditions. This would remove the pressure on deans to improve those conditions. You will prevail, though your progress seems painfully slow. Make coalitions with clinicians and other members of your faculties who understand the imperative of integrating skills training and legal writing, analysis, and research into the whole curriculum. Work with your deans and all.

14 Section of Legal Education and Admissions to the Bar, Teaching and Learning Professionalism 6 (1996).
members of the bar who understand the necessity of training true lawyers—true professionals.

In the meantime, and at all times, you must take care of yourselves. I had not been a week in law school when I realized, to my dismay, that there was no poetry in the law and that the law would kill that part of me if it could. You must remember, and remind your students, that the law, left-brain and rational though it mostly is, cannot survive without the imagination of the right-brain to shift your frame of reference and to spark the creative legal solutions to the problems of our day. With that imagination, perhaps you, too, like Laurence Tribe, can prevail in 15 of the 23 cases you argue before the Supreme Court. Nourish that part of yourselves. Pick up Mary Oliver and read *Wild Geese*, which closes with these lines:

> Whoever you are, no matter how lonely,  
> the world offers itself to your imagination,  
> calls to you like the wild geese, harsh and exciting -  
> over and over announcing your place  
> in the family of things.

You do have a place in the family of things and in the family of legal educators, a place worthy of dignity and respect and reward.

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Using Composition Theory and Scholarship To Teach Legal Writing More Effectively

Nancy Soonpaa

As teachers of a specialized kind of writing, legal writing professionals sometimes forget that others not only teach writing, but consider themselves its primary educational providers. The research on composition and writing theory from English scholars can provide perspective and understanding for those teaching legal writing as the legal writing field develops its own theory and scholarship.

This article shows how scholarly work in composition is both applicable and helpful in understanding and thus more effectively teaching law students who are learning a new kind of writing. Three broad categories provide a useful overview:

I. What Teachers Should Know: Composition Theory
II. What Students Do: Explaining Product and Attitudes Towards the Writing Process
III. When the Two Meet: Commenting on Student Papers

Each of these sections is followed by some practical ideas about applying the theory or scholarship in the legal writing classroom.

INTRODUCTION

One reason that composition scholarship is so useful is its reassuring effect. Students everywhere follow patterns and make choices that their teachers never imagined, let alone encouraged or endorsed. Taking student failures and struggles personally can drive teachers to frustration, despair, and burnout. For teachers (and consequently for their students), the explanations provided by much of the scholarly work help to make the classroom and the students more understandable and more manageable. Understanding and applying that scholarship

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makes the classroom experience and the students' writing more effective. In short, everyone wins.

I. WHAT TEACHERS SHOULD KNOW

The last thirty-five years have seen a significant shift in orientation of composition courses and in the focus of scholarly journals. While writing courses were traditionally prescriptive and product-oriented, that focus began to change for several reasons: First, the "New Education" movement of the early to mid-1960s heralded an interest in questioning and restructuring traditional methods of instruction. Second, a perceived decrease in the quality of students' product led to an increased interest in their composing process. Third, an increase in the number of students going to college, as well as the number of non-traditional students, led to increased workloads for writing professionals, who began to question the effectiveness of their teaching methods for classrooms of students with disparate writing competencies. Thus researchers began to question the prod-

2 Patricia Bizzell, Composing Process: An Overview, in The Teaching of Writing 71, 72-73 (Anthony Petrosky & David Bartholomae eds., 1986). In fact, most research on the composing process dates back no earlier than 1970. Id. at 73. Janet Emig's landmark study of students composing processes, published in 1971, has been acknowledged as fundamental in the shift to "the consciousness of writing as process that prevails in today's composition theory and pedagogy." Ralph F. Voss, Janet Emig's The Composing Processes of Twelfth Graders: A Reassessment, 34 C. Composition and Comm. 278 (1983). By 1967, a prominent journal had published an article rather sarcastically questioning whether anyone could still think that teaching grammar was the key to good writing. See Bernard Baum, Some Thoughts on Teaching Grammar to Improve Writing, 18 C. Composition and Comm. 2 (1967).


4 Bizzell, supra note 2, at 72.


6 An interesting parallel exists between those early composition scholars and legal writing professionals. The rest of the academy viewed them with something less than respect. They were frequently graduate students or those on the low end of the faculty totem pole—perhaps even part-time teachers (cf. adjunct), and they produced little "serious scholarly work." But these little-respected pioneers changed the focus of freshman writing from grammar drills to process, and in doing so, changed writing courses everywhere. See Bizzell, supra note 2, at 73. Another scholar noted the common (but erroneous) "assumption [] that anyone with a Ph.D. in English is an expert writing teacher[,]" Hairston, supra note 5, at 79, an attitude certainly parallel with the one that any law school graduate could competently teach legal writing. Furthermore, the same perceived skills/theory dichotomy and its resultant disproportionate distribution of professional respect exists in both English departments and law schools with respect to those teaching writing and those teaching "substantive" courses. See id.
uct-oriented composition course, began to teach their classes with a student-centered focus, and began a new age in teaching writing at the college level.

The introduction of the theory of transformational grammar (which looks at the rules of language generation) signalled a willingness to look anew at assumptions about rhetoric, production of text, and the process, rather than the product, of writing. In the mid-1960s, the stage-model theory became the new interest of composition researchers; it sets out the familiar linear process that is used in many writing courses: pre-writing —> writing —> re-writing. By examining and emphasizing process rather than product, an early theorist argued, teachers could shift focus to creation from recognition, to method from content, to thought from meaninglessness. While the three-part model has been criticized as too linear, with other models showing how recursiveness should modify the lineality of their model, the basic scheme is still commonly used today.

Through the 1970s, the tension became apparent between the traditional interventionist pedagogy and the student-centered maturationist pedagogy. Coupled with an increased emphasis on process and the worth of process as an object of study, classroom dynamics and the student/teacher relationship changed significantly, becoming less formal. The suggested shift in emphasis—from attempting to get students’ texts to match some ideal to examining the relationship between what

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7 Hairston, supra note 5, at 81.
9 See Rohman, supra note 8, at 106-07; see also Connors & Glenn, supra note 3, at 102.
10 Bizzell, supra note 2, at 78; Connors & Glenn, supra note 3, at 103, 104-05; Nancy L. Sommers, The Need for Theory in Composition Research, 30 C. Composition and Comm. 46, 47 (1979); Sondra Perl, Understanding Composing, 31 C. Composition and Comm. 363, 364 (1980) (exploring the idea of recursiveness in eloquent detail).
11 See, e.g., Laurel Currie Oates et al., The Legal Writing Handbook 89-250 (1993) (organizing the objective memorandum writing task into prewriting, drafting, revising, and editing stages, while noting that the basic process is not linear, but recursive).
13 Bizzell, supra note 2, at 75; see Lil Brannon & C. H. Knoblauch, On Students’ Rights to Their Own Texts: A Model of Teacher Response, 33 C. Composition and Comm. 157, 161 (1982).
the writer intended to say and what the text actually conveyed—required a recognition (and perhaps increased respect for the fact) that even "inexperienced writers operate with a sense of logic and purpose that may not appear on the page but that nonetheless guides their choices."  

A developmental perspective on teaching composition, interactionism, sought to unify the field by drawing on aspects of both the traditional product-oriented and new process-oriented approaches to teaching composition. Interactionism views development "as a dynamic interaction between individual and environment, between internal and external influences." Its attraction as a theory for teaching composition is in its refusal to view the classroom as an "either-or" choice between product and process, recognizing that both skills and confidence are needed to improve writing.

The late 1970s and 1980s also welcomed other new areas of research into composition theory, including cognitive analysis of composing and examination of social and cultural contexts of composing.

In developing their well-known cognitive approach, Flower and Hayes attempted to address the inadequacies of the stage model by focusing on the stages of mental processes that occur during composing, rather than the stages of the written product. By having students talk aloud while completing a task ("protocol analysis"), they were able to divide the composing process into a model with three separate components: the task environment, the writer's long-term memory, and the larger writing process, which encompasses several subprocesses.

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14 Brannon & Knoblauch, supra note 13, at 161. They note the dangers of a teacher's having an "Ideal Text" in mind that makes it difficult to give authority and control over to students to say what they want to say in their own writing. Id.

15 Kroll, supra note 12, at 748.

16 Id. Kroll relies on Piaget's interactive theory of development for the basis of his model. Id.

17 See id. at 750-51. Kroll explains that the interactionist approach emphasizes writing as communication, with special attention paid to audience and purpose. Id. at 751.

18 Linda Flower & John R. Hayes, A Cognitive Process Theory of Writing, 32 C. Composition and Comm. 365, 367 (1981); see Bizzell, supra note 2, at 77-78; Connors & Glenn, supra note 3, at 116.

19 A technique criticized in a 1983 article reassessing Emig's study. Voss, supra note 2.

20 Flower & Hayes, supra note 18, at 369-70. As Flower and Hayes explain their model:

The task environment includes all those things outside the writer's skin, starting with the rhetorical problem or assignment and eventually including the
Their model, recursive and hierarchical,\textsuperscript{21} met the challenge of another researcher who had demanded a model that described process rather than product and operations rather than stages.\textsuperscript{22} While their model demonstrates the potentially overwhelming number of tasks that a successful writer must control,\textsuperscript{23} creating a network of smaller goals can help less-experienced writers to prevent overload and avoid omissions that would weaken their writing.\textsuperscript{24} Building on Flower and Hayes’s research by using their protocol method, later research has suggested that the model be expanded to recognize writers’ use of pre-text, “a ‘trial locution’ that is produced in the mind, stored in the writer’s memory, and sometimes manipulated mentally prior to being transcribed as written text.”\textsuperscript{25} 

Other cognitive theorists examined basic writers’ writing for error patterns on the theory that errors are indicative of the mental processes occurring during writing. This cognitive approach suggests a fundamental shift in the way that writing teachers can view error—not as carelessness or ignorance but as an opportunity to understand how a student thinks—and the attendant opportunity for instruction.\textsuperscript{26} The two-part inquiry requires first investigating the error to determine how the students made the mistake and then applying that insight to help move the students toward a more appropriate choice.\textsuperscript{27} Teaching strategies can be tailored to redirecting the thinking leading to error, rather than at some other thinking or at an assumption growing text itself. The second element is the writer’s long-term memory in which the writer has stored knowledge, not only of the topic, but of the audience and of various writing plans. The third element in our model contains writing processes themselves, specifically the basic processes of Planning, Translating, and Reviewing, which are under the control of a Monitor.

\textit{Id.} at 369 (emphasis omitted).

\begin{itemize}
\item \textsuperscript{21} Flower & Hayes, \textit{supra} note 18, at 375-76; Connors & Glenn, \textit{supra} note 3, at 117, 118.
\item \textsuperscript{22} Nancy L. Sommers, \textit{The Need for Theory in Composition Research}, 30 C. Composition and Comm. 46, 47 (1979).
\item \textsuperscript{23} Connors & Glenn, \textit{supra} note 3, at 119.
\item \textsuperscript{24} \textit{Id.}, at 120.
\item \textsuperscript{25} Stephen P. Witte, \textit{Pre-Text and Composing}, 38 C. Composition and Comm. 397, 397 (1987).
\item \textsuperscript{26} Barry M. Kroll & John C. Schafer, \textit{Error-Analysis and the Teaching of Composition}, 29 C. Composition and Comm. 242, 242-44 (1978); Connors & Glenn, \textit{supra} note 3, at 114-115.
\item \textsuperscript{27} Kroll & Schafer, \textit{supra} note 26, at 244. Kroll and Schafer provide examples based in part upon their experiences with ESL students and focus on grammatical errors. See \textit{id.} at 244-46.
\end{itemize}
that the error was based on simple ignorance. This approach also helps foster a respect for students: an error based on thinking, however misdirected, is infinitely preferable to an error based on carelessness or irrationality.

Somewhat analogously, working with college-age students who may not have reached full cognitive development can pose challenges when teachers ask them to perform tasks that require forming abstractions or conceptions. While errors related purely to cognitive development are not quite like those of the basic writers whose application of their own rules leads to unconventional results, a similar inquiry can work as well. A student who does not understand the concept of synthesis needs different help than does a student who understands synthesis but not the underlying subject matter.

While the cognitive approach can be characterized as inner-directed, social constructivism and related theories can be seen as outer-directed models for the development of language and thought. Simply put, social construction theory asserts "that entities we normally call reality, knowledge, thought, facts, texts, selves, and so on are constructs generated by communities of like-minded peers." As a composition theory, social constructionism sees writing as primarily a social act, for a writer's lan-

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28 See id. at 247.
29 See Mina P. Shaughnessy, Errors and Expectations: A Guide for the Teacher of Basic Writing 105 (1977). This classic book proposed a whole new approach to error in writing by examining errors for patterns that could be related to erroneous assumptions about rules or self-generated rules, rather than simply a random or careless action. Another researcher, Donald Bartholomae, also examined Basic Writers' errors for evidence of intentional choices, trying to identify and look for patterns in that grammar or dialect that the student was purposefully, if not standardly, using. Donald Bartholomae, The Study of Error, 31 C. Composition and Comm. 253 (1980). He categorized three types of errors: 1. evidence of an intermediate system—being stuck with an idea that the writing works or being unable to see the error, 2. true accidents that the student can self-correct, and 3. dialect interference between the student's natural language and the academic one. Id. at 257-58. Written language is everyone's second language; its acquisition is visual, not aural, and has more interference in the form of the writing process itself, conventions, and error avoidance patterns. Id. at 324.
30 See Andrea Lunsford, Cognitive Development and the Basic Writer, 41 C. English 38 (1979). Lunsford draws on the research of psychologist Lev Vygotsky, who posits that concept formation occurs in three phases; the final stage, true concept formation, may occur well into post-adolescence (mid-20s). Id. at 39.
31 Patricia Bizzell, Academic Discourse and Critical Consciousness 76-82 (1992). Bizzell particularly criticizes Flower and Hayes's model because it describes how the writing process occurs as if that also explains why the writer makes certain choices at certain times. Id. at 84.
guage grows from his or her community; language is used primarily to join new communities and to cement membership in old ones. Outer-directed theorists examine the social context that conditions thinking and language and look at discourse conventions as occurring within the context of a particular community, rather than as being universally held. Only when writers understand a new discourse community, such as the academic or professional discourse community, can they set operational goals that will allow them to meet the conventions of that new kind of writing.

Along with the more complex writing-process theories came other ideas about the nature of writing, at the same time infinitely simpler, yet grander in scope: the notion that regardless of how it occurs and in whatever stages, writing exists as a unique mode of learning. While writing, one deploys all three modes of dealing with actuality: enactive (by doing), iconic (by depiction in an image), and symbolic (by restatement in words). Writing is organic, functional: it uses both sides of the brain. Writing provides immediate feedback on process by generating product, writing fosters learning by keeping pace with it, and writing "connects the three major tenses of our experi-

33 Id. at 784.
34 Bizzell, supra note 31, at 79.
35 Id. at 92. Ann Berthoff says that people use language to make sense of themselves and the world, and carefully "assisted invitations" could encourage students into the composing process. Bizzell, supra note 2, at 81-82. Shaughnessy saw the process emphasis of composing as a socialization process into the academic world, and she thought that a teacher's pedagogy should mediate a student's introduction to the academic world while respecting what the student has brought to it. Id. at 82, citing Shaughnessy, supra note 29. Overall, though, basic writers are most affected and challenged by the academic context. The more disparate their home community's standards and the academic community's standards, the more difficult their initiation process. One method of easing them into their new academic world is through the use of student tutors and peers. Id. at 84. The related technique of collaborative learning, although predating the social constructivism theory, is associated with it in composition pedagogy. Connors & Glenn, supra note 3, at 127.
36 Janet Emig, Writing as a Mode of Learning, 28 C. Composition and Comm. 122 (1977). Compare this thesis with the observation that when deciding when to move away from legal research to writing, "Writing tells you when you have enough because writing determines what you need." Richard K. Neumann, Jr., Legal Reasoning and Legal Writing 116 (2d ed. 1994); see also Linda S. Flower and John R. Hayes, Problem-Solving Strategies and the Writing Process, 39 C. English 449, 457 (1977). And this: "An essential part of the writing process is explaining the matter to oneself—and that is a highly idiosyncratic affair." Britton et al., supra note 8, at 28 (emphasis omitted).
37 Emig, supra note 36, at 124, employing the ideas of Jerome Bruner.
38 Id. at 125.
ence to make meaning."

Understanding how views about the composing process and the nature of writing have developed since the 1960s can help legal writing educators anticipate the attitudes toward writing and the skill levels that their students bring to the legal writing classroom. Some practical implications suggested by the research include the following ideas:

1. The writing background the students bring to the legal writing classroom can provide great insight into their present attitudes about writing, as well as explain their written product. Teachers can distribute student information sheets, get LSAT scores and GPAs from the admissions office, and talk to the students. Do they like to write? What kind of writing experience have they had? Are they comfortable with being in a professional school? Early assignments can provide a basis for assessment purposes. During orientation or on the first day of class, students could write about an experience that they have had with the legal system or the three most important lessons they want to learn in law school (choosing a topic that is not naturally chronological is useful in assessing organizational skills). When teachers know about their students' writing backgrounds, they can make the classroom into an effective teaching and learning environment.

2. Teachers can read about teaching writing and learn the language and techniques that professionals use and how they "translate" that knowledge for their students.

3. Depending upon students' previous writing education, concerns such as structure, argument development, and organization may initially be secondary for them. They may have come from an undergraduate composition background that emphasized a personal-style pedagogy, or grammar drills, or the five-paragraph theme, or exploration of personal experience. They may not have forgotten how to write in an organized fashion; rather, they may never have learned about it. They may not have trouble developing a legal analysis because of the complexity of the law, but rather because they had never written any kind of structured and supported argumentation before the first law school assignment.

39 Id. at 125-27.
4. Students who have significant trouble with concepts and abstractions may be operating at a lower cognitive level (very young law students, for example, may be struggling simply because true concept formation is a relatively recently or not-yet-mastered skill). Modified exercises may be a help to them. For instance, writing exercises can help students to practice inferential reasoning better than attempts to teach them by drills or rote memorization of rules.  

II. WHAT STUDENTS DO

The difficulty of researching and analyzing writers in the process of writing is that the features of turning thought into written word are hidden in each writer's mind. While one may identify a process leading to thought, followed by a post-thought analysis, one struggles to describe the actual moment of thought's genesis. Hence, research on the act of writing—not what leads to it, not what follows it, not how scholars comment on and analyze it—tends to focus on identifying real-life processes, examining product, facilitating production, and drawing inferences from those activities.

In contrast to the complex and increasingly refined theories about the intricate, multi-level process of writing is the reality of how college students actually write. In a study that sought to determine students' actual writing process rather than some idealized writing process, researchers found that most students not only followed a strictly linear process, but demonstrated one with severely truncated pre-writing and re-writing stages. Students tended to perform minimal research, re-copy and make mechanical corrections rather than re-write, and fail to consider their audience as other than the teacher. Other studies have found similar patterns and group writers into two variously named categories that generally correlate with those writers who follow something like the idealized writing process model.

40 Lunsford, supra note 30, at 41-46.
41 While thinking-aloud protocols arguably capture the details of writing itself, they have been criticized as interrupting the normal writing process, an interference exacerbated by the artificiality of the assigned writing situation. See, e.g., Lester Faigley & Stephen Witte, Analyzing Revision, 32 C. Composition and Comm. 400 (1981).
43 Id. Personal anecdotal evidence from reading hundreds of freshman compositions (and from the ensuing student conferences) and from mentoring new graduate teaching assistants supports Crowley's study.
(Experienced Writers, Reader-based Writers) and those who follow something akin to the students' process mentioned above (Basic Writers, Writer-based Writers).\(^44\)

Why might students write this way? Perhaps because basic teaching techniques have not changed since the seventeenth century: Teachers 1) describe the characteristics of writing in a particular rhetorical situation, 2) provide good examples (usually professionally written) and bad examples (usually student-written), and 3) encourage the student to emulate the style and conventions of the group for which the student is writing.\(^45\) Students are not told, however, how to go about the activity of production, such as negotiating trouble spots or generating alternative strategies when the first (or second, or third) does not work.\(^46\) The classroom setting hides the stark reality that the writing experience can be a terrifying and messy process.

Without help in the process of writing, inexperienced writers tend to see only three strategies for writing: prescription (how the text says it is done), inspiration (how the writing muse causes it to occur), and writer's block (what is employed if the first two options fail).\(^47\) Using problem-solving strategies emphasizes writing as thinking, rather than writing as arranging, and helps inexperienced writers to expand their thinking techniques in order to write more effectively.\(^48\) By conceptualizing thinking as occurring in two levels—first-order and second-order thinking—and constructing strategies to maximize each kind of thinking, teachers can help students to reap the benefits of both creative, exploratory writing and careful, critical revision.\(^49\) But those students whose \textit{modus scribendi} is to churn it out the night before tend to turn in assignments that have capitalized on only one level of thought. Either their work is creative—a

\(^{44}\) See, e.g., Linda S. Flower, \textit{Writer-Based Prose: A Cognitive Basis for Problems in Writing}, 41 C. English 19 (1979); Shaughnessy, \textit{supra} note 29.

\(^{45}\) Flower & Hayes, \textit{supra} note 36, at 449.

\(^{46}\) \textit{Id.}

\(^{47}\) \textit{See id.}

\(^{48}\) \textit{See id.} at 450-51. For example, Flower and Hayes demonstrate heuristics in three categories: Planning, Generating Ideas in Words, and Constructing for an Audience. \textit{Id.} at 453-60. In each category, they narratively explain a specific goal/purpose of that category and then suggestions and techniques to enable the student to meet that goal in writing. \textit{Id.} Peter Elbow suggests a fundamental shift in attitude towards the idea of writing: "not as a way to transmit a message but as a way to grow and cook a message. Writing is a way to end up thinking something you couldn't have started out thinking." Peter Elbow, Writing Without Teachers 15 (1973).

\(^{49}\) Peter Elbow, \textit{Embracing Contraries: Explorations in Learning and Teaching} 55-63 (1986).
mishmash of bits of ideas, creative insights, and direct lan­
guage—or disciplined—connected, developed, and controlled, but
not both.50

The difference in approach between the inexperienced
writer and the experienced writer is captured in theory that be­
gins with characteristics of each group's product. In writing,
what one means does not always translate into a communication
of the same idea to a reader.51 Recognizing that truth, effective
writers do not merely express, but transform their ideas to meet
the needs of their audience.52 The distinction between writer­
based writing and reader-based writing develops from this
premise.53

Writer-based prose is characterized as undertransformed
verbal expression, with its focus of expression on the process of
thought.54 Writer-based prose in a legal memorandum, for exam­
ple, may lecture the reader on basic legal analysis or hierarchy

50 Id. Elbow also explains how writing enhances the thinking that occurs at both
levels and suggests that the rhythm of generating (first-order thinking) followed by criti­
cizing (second-order thinking) in a decreasingly recursive pattern is an effective strategy
to inculcate. See id. at 61-62.

51 Flower, supra note 44, at 19. Rohman writes that an essential activity for the
writer in the formative stages of writing is a conversion of event into experience, first
for oneself, then for others to take as their own. Rohman, supra note 8, at 108 (building
on Dorothy Sayers, Towards a Christian Aesthetic, in The New Orpheus: Essays To­
wards a Christian Poetic 14-15 (Nathan A. Scott ed., 1964)). To the extent that one can­
not convert experience past oneself, then, one would be writer-based.

52 Flower, supra note 44, at 19.

53 See generally Id. Flower's ideas find their genesis in the research of Jean Piaget
and Lev Vygotsky, whose research examined the inner speech and egocentric character­
istics of young children. Young children's oral monologues are a precursor to adult
mental speech and demonstrate these characteristics:
1. being elliptical,
2. dealing with the sense of words, rather than their specific meanings, and
3. having an absence of logical and causal relationships. Children use "complexes"
that relate objects, not "concepts" that relate abstract ideas.

Id. at 21. Flower notes that "the ability to move from complexes of egocentric speech to
formal relations of conceptual thought is critical to most expository writing," so Flowers
analogizes the adult writer-based prose as the adult written analogue of egocentric
speech that draws on a natural phase of development but is not presently appropriate.

Id. at 22.

54 Id. at 19-20, 26-32. Writer-based prose has these characteristics:
1. function—written to, for, and by the writer, this prose is egocentric.
2. structure—following the writer's narrative path of his/her own confrontation with
the subject matter, this prose often has a survey or idea/source structure. The
writer simply copies the structure of information without considering whether it is
appropriate to or needs adaptation to the reader's needs or the writer's intent.
3. language—with privately loaded terms and a shifting context, this prose may be
cryptic for the reader.
of authority—a concept that the student writer may have needed to think through, but that a practicing attorney long since would have internalized. Reader-based prose, however, is a deliberate attempt to communicate to a reader, with its focus of expression on the purpose of the thought or idea.

Writer-based prose, then, is not without logic and structure, nor without function. However, that logic and structure are tied to a writer’s efforts in thinking about a new or complex subject. It serves as a problem-solving medium for thinking and allows the writer to manipulate stored information into acceptable patterns of meaning.

The implications of writer-based prose begin by an understanding that it does not simply indicate a problematic piece of writing, but rather a functional stage in the composing process and a powerful intermediate, though not end, strategy. But while experienced writers are able to transform and constantly re-examine their writing to fit the demands of the writing situation, inexperienced writers get stuck. Poor planning, an inability to view writing from the audience’s perspective, and sometimes simple confusion about what the writing situation demands stymie inexperienced writers from sorting wheat from

55 See Neumann, supra note 36, at 112.
56 Flower, supra note 44, at 20. Reader-based prose has these characteristics:
   1. function—written to a reader to convey an idea, this prose is other-oriented.
   2. structure—with an issue-centered rhetorical context, rather than a replay of the writer’s discovery process, this prose conveys more than just facts—it also conveys concepts.
   3. language—when the writer creates a shared language and shared context between the writer and reader, the language used is vigorous and appropriate.

Id.
57 Id. at 26.
58 Id. at 27.
59 Id. at 28. The characteristic structure of writer-based writing is a narrative or survey style, either of which is easier than developing a hierarchy, causal relationship, or proved or even developed ideas. Such a use of an original organizational scheme seldom results in a focused piece of analytical writing that fits the writer’s needs. While this is, however, a good initial step for a writer trying to manage a significant amount of information, it is bad for the reader, who may well abstract and create a hierarchy other than the one intended by the writer. Id.
60 Id. at 34. Because the act of writing places tremendous demands on short-term memory, writer-based prose often uses a listing style to generate information. Id. at 35-36. It also eliminates the constraint of holding someone else’s knowledge network as the writer composes. Id. at 36.
61 Id. at 291; Faigley & Witte, supra note 41, at 411. For those who get stuck because their cognitive development makes analysis and synthesis difficult, guided classroom activities and assignments that help them to work in analytic and synthetic modes can be helpful. Lunsford, supra note 30, at 41.
chaff. But rather than approaching a draft as a hopeless mess, teachers can help students to find the "good parts" in their drafts and then build on them, thereby boosting confidence.

Teachers should also recognize that students vary their composing processes to accommodate the type of writing that they are doing. A common distinction separates self-oriented writing from other-oriented writing. As a form of self-oriented writing, "reflexive" or "expressive" writing is generally characterized as more creative and revealing of the writer, an exploration for meaning, with self as main audience and characteristics of informal talk; students tended to both prewrite/plan and reformulate (correct, revise, rewrite) at least some of the time. Student writing processes are least successful and the most truncated with other-oriented "transactional" or "extensive" writing, in which the student seeks to convey information or argue for a position in an interaction of writer with environment, with teacher as main audience. Therefore, to foster writing development, teachers should first emphasize types of writing in which students are most successful, to stimulate learning and eventually lead to more difficult types. Moreover, teachers should be active writers themselves. As writers developing their own writing, teachers can model for students their writing processes and thus foster students' awareness of their own process—as well as the teachers' greater awareness of process.

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62 See Flower, supra note 44, at 290-91; Faigley & Witte, supra note 41, at 411. For writing to actually "work," a student must be able to fit the new writing task into the hierarchical complex of all skills previously acquired, thus making sense of it in order to write effectively in a new rhetorical situation. Britton et al., supra note 8, at 22-25.

63 See Flower, supra note 44, at 291; Lunsford, supra note 30, at 40 (citing Gilbert Ryle, The Concept of Mind 59-60 (1949): "Misunderstanding is a by-product of knowing how . . . Mistakes are exercises of competences.").

64 Bizzell, supra note 2, at 77; see generally Janet Emig, The Composing Processes of Twelfth Graders (1971).

65 See Emig, supra note 64, at 91; see Britton et al., supra note 8, at 140-41.

66 Bizzell, supra note 2, at 77; Emig, supra note 64, at 91; see Britton et al., supra note 8, at 146.

67 Britton et al., supra note 8, at 82-83 (suggesting that building on a basis of expressive speech will allow the learner to become a mature writer who can then successfully write in all three major categories of writing: transactional, expressive, and poetic); Bizzell, supra note 2, at 77.

68 Emig, supra note 64, at 98-99; Connors & Glenn, supra note 3, at 106; Hairston, supra note 5, at 84 (discussing the Bay Area Writing Project's push to have writing teachers be active writers). Emig points to the result of teachers' not being active writers: underconceptualizing, oversimplifying, and truncating the process of composing, resulting in a loss at both the prewriting and rewriting ends of the process. Emig, supra note 64, at 98-99.
Seeing that process through, though, can be difficult for student writers, for it requires revision. Not only are inexperienced writers uncomfortable with the idea of revision; the very term "revising" is distasteful.\textsuperscript{69} Their changes are mostly surface level: they eliminate repetition, improve word choice, and copy-edit.\textsuperscript{70}

Experienced writers see revision as a recursive process with different emphases in different revision cycles.\textsuperscript{71} They use revision to rework content, including finding the shape or form of an argument; they reassess and revise in light of their audience's needs.\textsuperscript{72} While these strategies are part of discovering meaning for experienced writers,\textsuperscript{73} basic writers redefine meaning, and if they alter their drafts at all, they alter them to match that meaning.\textsuperscript{74} The essential difference is that inexperienced writers do not see writing as discovery, but as reporting, and revision not as "just begun," but "almost done." This is not to say that all experienced writers revise similarly or revise copiously;\textsuperscript{75} however, unlike inexperienced writers' alterations, their revisions do tend to improve their texts.\textsuperscript{76}

Several strategies can help students to begin to revise their work more effectively. In Flower's terminology, this effective revision would transform writer-based prose into reader-based prose.\textsuperscript{77} She advises assisting students to do the following tasks:

1. Take the reader into account, and do so in a thoughtful manner. Experienced writers develop and think through the needs of their audience to a much higher level of detail

\textsuperscript{69} Nancy I. Sommers, \textit{Revision Strategies of Student Writers and Experienced Adult Writers}, 31 C. Composition and Comm. 378, 380 (1980). Student writers in her study tended to use almost any term other than revise to describe what they did after the first draft. See \textit{id}.

\textsuperscript{70} See Sommers, \textit{supra} note 69, at 381-82 (she notes that inexperienced writers cling to the notion that "inspired" writing needs little revision); Crowley, \textit{supra} note 42; Faigley & Witte, \textit{supra} note 41, at 407.

\textsuperscript{71} Sommers, \textit{supra} note 69, at 386-87.

\textsuperscript{72} Id. at 384-85; Faigley & Witte, \textit{supra} note 41, at 407.

\textsuperscript{73} Sommers, \textit{supra} note 69, at 385.

\textsuperscript{74} Id. at 385-86.

\textsuperscript{75} See Faigley & Witte, \textit{supra} note 41, at 409, 410. Apparently, "[s]ome expert writers are able to develop a text in their minds and to perform revision operations mentally before committing a text to paper." \textit{Id.} at 409. Therefore, some of the expert writers revised less than some advanced student writers. \textit{Id.} However, both groups made more meaning changes than did inexperienced student writers, \textit{id.} at 407, and both groups continued to revise past a second draft, at which point the inexperienced students had mostly quit, \textit{id.} at 409.

\textsuperscript{76} Id. at 411.

than basic writers. This task is a concrete and time-consuming development of audience characteristics, not a simple labelling process.\textsuperscript{78} Audience-based heuristics (strategies, exercises, and techniques) can help students to focus on audience.\textsuperscript{79}

2. Strive for an issue-centered structure of ideas with some hierarchical organization. Student writers need guidance in isolating key points or controlling ideas within their work.\textsuperscript{80}

These steps are easier to accomplish by developing assignments with specific, real-world purposes and a realistic audience; by setting up a mutual goal for the reader and the writer; and by asking students to simulate a reader's response to a piece.\textsuperscript{81}

Research that analyzes how writers actually write and what messages can be gleaned from their written product can be directly translated into useful classroom strategies. Implications for the legal writing classroom include the following ideas:

1. Flower identifies two major writing goals: understand the audience and organize the message effectively. Law students often have a poor understanding of who a senior partner is, what a judge might do with a brief, and why one would write to a client about legal issues. A teacher could start by describing the audience for a particular writing assignment, then having students role-play that audience.

Even when students understand audience, they often do not understand their own power to manipulate and reorganize information to meet the goals of their writing project and the understanding of their audience. Teachers can guide classroom discussion to help students explore the relationship between and among ideas and practice developing a hierarchical structure of ideas.

\textsuperscript{78} Id. at 65. However, some studies have shown that basic writers don't consider audience because they don't even understand the assignment or the underlying material or they are afraid to deviate from the survey structure (relying on the underlying structure of the material) or are suffering from a cognitive overload. Their needs are concerns are literally more basic than assessing audience—they either don't understand purpose or are intellectually overwhelmed by the writing task. See id. at 66.

\textsuperscript{79} Carol Berkenkotter, \textit{Understanding a Writer's Awareness of Audience}, 32 C. Composition and Comm. 388, 396-97 (1981); see also Flower and Hayes, \textit{supra} note 36, at 453-60 (offering heuristics to assist student writers construct writing for an audience).

\textsuperscript{80} Flower, \textit{supra} note 77, at 67.

\textsuperscript{81} Id. at 68-70; see Berkenkotter, \textit{supra} note 79, at 396 (commendng a case-based approach to writing assignments used in law schools).
2. The theory of writer-based writing can be a lifesaver in and out of the classroom. It describes the stage of many first drafts, and it explains how they came to look as they do. Even more useful is this theory's accessibility in the classroom. Students understand the notion of a transformative process, and they can use that knowledge to improve their own writing. A teacher can easily either generate or find within student writing myriad samples of writer-based writing, and group work in the classroom can help students begin to recognize its characteristics and then to revise it into reader-based writing.

3. Given that true revision—seeing and assessing anew a piece of extant writing—may be an unfamiliar skill for students, a teacher might decide to model revision for them. After providing students with a draft, the teacher could then discuss or show them (using an overhead projector or computer display) how to revise it. Distinguishing editing for error from revision can help students to do more substantive revision of their own work.

III. WHEN THE TWO MEET

Writing teachers spend so much time on an activity that is little understood: what is thoughtful commentary and what comments actually help.82 By viewing errors as occasions for learning,83 teachers can start to develop effective methods of responding. The generally accepted viewpoint on how to comment on writing began its shift slightly before the composition-course focus began to shift from product to process.84 This shift in commenting led away from the practice of simply rating or correcting comments to rhetorical comments.85 One way to

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82 Nancy I. Sommers, Responding to Student Writing, 33 C. Composition and Comm. 148, 148 (1982).
84 Robert J. Connors & Andrea A. Lunsford, Teachers’ Rhetorical Comments on Student Papers, 44 C. Composition and Comm. 200, 204-05 (1993).
85 Id. at 204; see Emig, supra note 64, at 93 (in her 1971 text, she noted, “Most of the criteria by which students’ school-sponsored writing is evaluated concerns the accidents rather than the essences of discourse—that is, spelling, punctuation, penmanship, and length rather than thematic development, rhetorical and syntactic sophistication,
distinguish comments is to divide them into two categories, formative and summative evaluation, which serve two different functions.\textsuperscript{86} Formative evaluation tries to assist in improvement of writing.\textsuperscript{87} It identifies problems and possibilities; its focus is ongoing and developing.\textsuperscript{88} Such comments help to create motivation for revision\textsuperscript{89} and fit in nicely with a process-oriented method of teaching.\textsuperscript{90} Summative evaluation measures ranking, grading, measuring up to expectations.\textsuperscript{91} It looks at text as a final product and assesses the writer's skills at a specific point in time.\textsuperscript{92}

Formative responses can be grouped into seven categories: correcting, emoting, describing, suggesting, questioning, reminding, and assigning.\textsuperscript{93} The importance, however, is not so much in specific labels as it is in a writing teacher's thoughtful analysis of what a comment does towards helping students to improve their own writing.

These categories suggest that teachers' roles change with different types of commentary. For instance, a teacher as commentator may variously fill the roles of editor, average reader, more experienced writer, summative evaluator, and motivator/friend.\textsuperscript{94} Knowing which role one is trying to fill with a particular assignment, drafting stage, or student helps to focus the job of commenting and to make the comments on a particular paper more consistent. Responding to text as in-process helps students to follow the behavior of skilled writers.

Research indicates that students respond with varying degrees of enthusiasm towards different types of comments; re-
gardless of the amount of time teachers spend commenting, students find some comments helpful—and others, not helpful at all.

While some commenting styles may be unique to a particular teacher or to a particular assignment, one study showed that most comments are essentially interchangeable from one paper to another (e.g., "good statement of issue" or "argument needs development"). But teachers should comment just as they ask students to write: clearly, specifically, with an audience orientation. A later study advocates a student-based analysis of comments' effectiveness, starting with the premise that the standard for effective comments should be based on the recipient's evaluation of them, not the drafter-professor's. And those student-recipients like text-specificity—comments related to a specific assignment, rather than fungible writing comments. They also like student-specificity—comments that are both specific and directed to that particular writer, not simply the group of writers with similar problems. They like clear explanations, not just labels, codes, or descriptive comments. (e.g., "gd ts" or "this topic sentence works well to set up your paragraph" is less well received than "this topic sentence is effective because it clearly explains the relationship between the two analogous cases that you go on to discuss in this paragraph."). Effective comments should also have "transfer value," the utility to help the student's writing beyond the boundaries of a particular assignment. So while comments should be specific to the written work being evaluated, they should also advance the student's

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95 Sommers, supra note 82, at 152.
97 Sommers, supra note 82, at 153.
98 Enquist, supra note 96, at 155; see Emig, supra note 64, at 99 (noting that only some unusually able high school students could translate the abstract comment "Be concise" into a set of concrete writing options to improve their work). However, this conclusion seems somewhat contrary to the advice of another researcher, who advocates a system of "minimal marking" for surface errors. See Richard H. Haswell, Minimal Marking, 45 C. English 600 (1983). Haswell advocates simple checkmarks in the margin to indicate all surface error; the student must then correct the error(s) and return the paper before a final grade is recorded. Id. at 601.
99 Horvath, supra note 83, at 210 (citing Richard L. Larson, Training New Teachers of Composition in the Writing of Comments on Themes, 17 C. Composition and Comm. 152 (1966)).
100 Lees, supra note 93, at 373: She notes that covering a paper with comments is not the same as teaching students to successfully revise—a crucial distinction.
understanding of how to write effectively in order to foster improvement in the next piece of writing.

In addition, the commentator should have a clear hierarchy of importance in mind going into the critique of the paper. That hierarchy would ideally have global concerns, such as organization, purpose, idea development, near the top of the list. Otherwise, the student may fix everything marked, yet still have a poor final product. Margin notes tend to work best for the lower-hierarchy concerns, while the end comment usually works better for the global concerns. The hierarchy also helps to control over-commenting; a student whose paper bleeds red ink may be too overwhelmed to even begin to revise.

Some of the worst commenting sins include these: failing to comment (a lone comment of “C “ is not very helpful if the goal is to help a student understand what works in a piece of writing); offering misleading comments (“This is a good draft that needs a couple of changes” when a teacher really means “If you don’t completely revise this, you’ll get a D”); and substituting personal attacks for appropriate content-based critique (“You obviously put little time into this draft. Your behavior is unacceptable. I’m not only returning this paper without comments, but I will reduce the grade on your final draft by 2/3 . . . ”).

One study of rhetorical comments offered this sobering statistic: twenty-three percent of the papers reviewed contained only negative comments (which one researcher reported had no effect on a student’s writing, but a significant effect on a stu-

101 See Sommers, supra note 82, at 151; Lees, supra note 93, at 370 (“As an infinite number of lines can be passed through a given point, so in the marking of papers, the fact that an infinite number of comments can touch upon what appears in a paper may not be sufficient grounds for writing them in the margin.”).

102 See Enquist, supra note 96, at 156-60. Of Enquist’s seven main findings, two related to end comments: they are extremely important to students; therefore, teachers should be careful to save sufficient commenting energy for the end of the paper. Id. at 155, 156-60, 173-77, 188-89.

103 Lees has concluded that of her seven types of comments, most emoting, correcting, and describing comments are simply useless. Lees, supra note 93, at 373. Overcommenting has other unfortunate side effects: It harms the “full student-teacher dialogue” by embittering the teacher through too much work and too little result, and it frustrates both parties because being too judgmental unbalances the learning relationship away from the student, who should be doing most of the work. Haswell, supra note 98, at 603-04 (discussing the work of Knoblauch and Brannon); see Enquist, supra note 96, at 173-76 (citing Terri LeClercq and Muriel Harris).

104 Horvath, supra note 83, at 211-212; Connors & Lunsford, supra note 84, at 215; see Enquist, supra note 96, at 158.
dent's attitude towards writing\textsuperscript{105}).\textsuperscript{106} Forty-two percent showed a common response structure of positive comments changing to critical (sometimes labelled “constructive”) comments.\textsuperscript{107} As for global commentary, usually end comments, the most common went to supporting details and overall organization.\textsuperscript{108} The rarest were comments about audience and purpose.\textsuperscript{109} Most end comments served to justify a grade, rather than to help a student to become a more effective writer.\textsuperscript{110}

A narrow and particularly problematic type of commenting involves marking “correctness”—punctuation, usage, and grammar. A persuasive argument can be made that teachers see such sentence-level error only because they are looking for it; they do not truly read as the audience they try to persuade their students that their work is written for—readers for content—but rather, as readers for error.\textsuperscript{111} One approach is to shift the focus from identifying isolated items of error to inquiring whether those errors evidence a flawed transaction between a reader and a writer.\textsuperscript{112} When surface errors “shift the reader’s attention from where he is going (meaning) to how he is getting there (code),” they require persistence in finding meaning that a reader may not be willing to expend.\textsuperscript{113}

Determining which sentence-level errors actually require persistence on the reader’s part to overcome their interference with message is not an easy task; in order to effectively comment on correctness, one must first have some basis or hierarchy for determining both what error is and whether any particu-

\textsuperscript{105} Connors & Lunsford, \textit{supra} note 84, at 210 (citing George Hillocks, \textit{Research on Written Composition: New Directions for Teaching} (1986)).

\textsuperscript{106} Id.

\textsuperscript{107} Id. at 210-11.

\textsuperscript{108} Id. at 212.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 213.

\textsuperscript{111} See Joseph Williams, \textit{The Phenomenology of Error}, 32 C. Composition and Comm. 152 (1981). In examining errors in texts by authors such as E.B. White, he demonstrates that even those who write about error often commit the very mistakes that they decry in other parts of their text. See id.; see also Maxine Hairston, \textit{Not All Errors Are Created Equal: Nonacademic Readers in the Professions Respond to Lapses in Usage}, 43 C. English 794, 798 (1981).

\textsuperscript{112} Williams, \textit{supra} note 111, at 153. He concludes that we can discuss error in two ways: by isolating it and separating objective text from the role of uniting the subjective and objective, reader and text, or by considering error only in the context of an ordinary reading of the piece. \textit{Id.} at 158-59.

\textsuperscript{113} Shaughnessy, \textit{supra} note 29, at 12.
lar error truly matters. One of the few broad-based studies attempting to analyze error found the following:

1. Teachers' ideas about what is error varies widely, even for the same teacher.
2. On average, only 43% of the most serious errors were marked.
3. The reasons for marking or not depended on a) the seriousness/annoyance level of error for both teacher and student and b) the difficulty of explaining or marking the error. Perhaps not coincidentally, the most commonly marked errors were spelling errors.
4. Error patterns are shifting; errors show a diminished familiarity with the visual look of the written page—spelling, wrong words, prepositions, its/it's, inflected endings (in other words, students are increasingly less text-wise).
5. The absolute number of errors has not changed from the studies from the 1930s.

The question then becomes, with little evidence that pointing out correctness errors in student writing leads to elimination of those errors in later work, how much time should teachers spend on what may well be an exercise in futility?

To make the case for commenting even weaker, a small contingent of composition scholars asserts that written commentary of any kind—and particularly praise—is simply not useful and does not improve student writing. Those who do not offer a wholesale condemnation of commenting may still relegate comments' effects as a rather small part of the larger context in

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115 See also Shaughnessy, supra note 29, at 80. In addition, Shaughnessy reported that the basic writers in her study, students who entered college in the early 1970s when the CUNY system opened admission to any city resident with a high-school diploma, had written so infrequently that handwriting, spelling, and punctuation provided paralyzing barriers to students who, as a result, had difficulty actually accessing thought through writing. Id. at 14-15.

116 Connors & Lunsford, supra note 114, at 402-07. Viewing the discussion about error and correctness from a historical perspective, Connors and Lunsford compared patterns of error in college papers against studies from the last 50 years. See generally id.

117 Emig, supra note 64, at 99. But see Shaughnessy, supra note 29, at 276 (noting that basic writers can markedly decrease surface error within a semester with classroom or conference help).

118 Horvath, supra note 83, at 212.
which writing is taught. Rather, the atmosphere of motivation and support may be the most significant way that teachers can help students to write more effectively. That supportive atmosphere is also much more than just assigning and evaluating. Students get responses from many other sources: conferences, class discussions, small group work, written peer evaluation, tutors in writing labs, and computer software. These activities should be mutually reinforcing of comments, and vice-versa.

If even thoughtful comments are potentially pointless, thoughtless comments are even more harmful because they can distract students from their own purposes as writers and mistakenly focus attention on the teacher's purpose in commentary. The student, in an attempt to please the teacher, may shift from the revision mode of "this is the message that I was trying to convey" to "this is what the teacher told me to do." So, for example, when teachers focus on correctness before substance, they may receive a technically strong paper with no developed argument or purpose, because the teacher said to watch punctuation and spelling, which the student obediently did. Contradictory comments, some broad and some narrow, similarly may confuse a student who is at a critical stage of development of an idea. When a teacher offers the chance to fix error—a mechanical process—or make meaning—a chaotic and intellectually challenging process, the student may well select the simpler but ultimately less productive path.

Research into the characteristics of commentary and the effectiveness of different kinds of commentary provides some useful guidelines to make a time-consuming activity more productive. Those implications include the following:

119 Id.
120 Id.
121 Id. at 213.
122 Sommers, supra note 82, at 155; Lees, supra note 93, at 372 ("[W]hen what has been said in class reappears in comments on papers, students come to recognize a coherence among parts of the course.").
123 Sommers, supra note 82, at 149-50; see generally Lees, supra note 93.
124 Sommers, supra note 82, at 150; see Lees, supra note 93, at 373. Interestingly enough, the students in Enquist's study tended to favor "comments that actually revised and edited the student[s'] writing," Enquist, supra note 96, at 178, raising the question again of what standard one should use to determine the efficacy of comments.
125 Sommers, supra note 82, at 150-51.
126 See id. at 156. Multidraft writing provides a good opportunity to move away from an error orientation to a focus on improving the effectiveness of the intended communication. Knoblauch & Brannon, supra note 13, at 162.
1. Teachers need to consider audience as they comment on student papers. Relevant inquiries include asking question such as these: What will the student understand? What are the limits of the student's revision potential at that stage? What is the likely reaction that an overly critical comment might elicit? Is that productive? Teachers need to be as sensitive to the needs of their readers—students—as they exhort students to be.

2. Teachers need to identify goals for their students at every stage of the writing process. If they are focusing on large-scale organization or analysis, then commenting on sentence-level concerns might be counter-productive. And teachers should identify their role in a particular classroom or with a particular assignment: Senior partner, writing coach, grammar maven? The inquiry continues: Are the teacher's comments consistent with that role, is that role appropriate, and are the students aware of that role?

3. When deciding how to address correctness, teachers should first look at student work to determine whether the problem is surface error in otherwise decent prose, structural error, a jumble of correct and incorrect usages that seems to follow a mysterious pattern, etc. If student papers consistently demonstrate high levels of surface error in otherwise good writing, a teacher could develop a hierarchy of error—what is important to that teacher (or to the students' primary audience) in that writing assignment, what is not, and what techniques would effectively convey those skills to the students? If the error is structural, what writing background does that student bring to the legal writing

127 "Correctness cop" carries its own set of research and debate—to what extent can teachers affect grammar, punctuation, and usage of students at the college level or beyond? Is commenting on those kinds of errors helpful or fruitless? Who (in the "real" world) actually cares about correctness? Aren't students today truly abysmal in their grasp of correctness? A number of articles attempt to answer these questions.

One study assessed the significance of error from the perspective of a professional (non-academic) audience. See Hairston, supra note 111. Errors that served as status markers ("brung," "We was," "has went") drew strong and negative reactions from her respondents. Mechanical mistakes constituted the next-most-remarked-upon category (sentence fragments, run-on sentences, and lack of subject-verb agreement). Comma errors got medium to low responses, and usage got the lowest responses of any type of error. The respondents did report their biggest concern as content, especially clarity and economy. Id. at 796-98.

Williams criticizes survey methods such as Hairston's as ineffective because people respond more conservatively to such questionnaires, which misrepresent our own talking and writing. Williams, supra note 111, at 154.
classroom? Does that student display the same problems in non-legal writing, so cognitive overload might be the culprit? Does the student make consistent and perhaps personally logical choices that are non-standard?

4. At all times, a writing teacher must remember who owns the piece of writing that the teacher has temporary custody of for commenting purposes. Ultimately, the owner/writer has responsibility for revising and improving the written work. The teacher's responsibility is to provide the tools and techniques that enable the student to carry out a writer's responsibility and privilege.

CONCLUSION

This overview of composition theory and scholarship demonstrates the wealth of information that is easily transferrable from the composition classroom to the legal writing classroom. Rather than reinventing the wheel in trying to understand why their students write and respond as they do in the legal writing classroom, legal writing professionals should welcome the research that already exists and adapt it for their own use—to benefit themselves and to benefit their students.

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128 See Lees, supra note 93, at 373.
Logical Reasoning “Obviously”\footnote{1}

*Anita Schnee*

**INTRODUCTION**

I have often wanted a dollar for every time a first-year student writer quotes a rule, recites the facts from the assignment memo, and then confidently asserts that the desired result is “obvious.” How rich I would be, for every time I have to read this kind of thing:

The Fourth Amendment clearly protects a reasonable expectation of privacy. Obviously, this defendant’s expectation was reasonable. He was hiding drugs!! Therefore, it is self-evident that the police absolutely and patently violated defendant’s clear Fourth Amendment rights.\footnote{2}

But our jobs as Legal Writing professors require that we do many things for inadequate or no pay, so, to forestall the endless marginal notes of “Analyze, you must analyze the facts!!,” I have found the deductive syllogism an exceptionally useful tool.\footnote{3}

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1 I dedicate this article to the brothers Hon. Richard and Morris Arnold, of the United States Circuit Court of Appeals for the Eighth Circuit — legal writers and voices of reason. I am also greatly indebted to Hon. Ruggero J. Aldisert, Senior Chief Judge, United States Circuit Court of Appeals for the Third Circuit; Professor James A. Gardner, Western New England College School of Law; Professor Jonathan Gordon, Case Western Reserve University; Professor Thomas H. Seymour, University of Michigan Law School; my father Edward C. Schnee, who would have been a good lawyer; my brother Daniel J. Schnee, who is a good one; and Shane P. Raley, who will be.

2 In case anybody needs prompting about what we wish we would get from our students instead, a desirable rewrite would delete “clear” and “clearly,” “obviously,” “self-evident,” “absolutely,” and “patently.” Instead, the writer would include the express language of the Fourth Amendment, the gloss on reasonable expectation of privacy, examples from the precedent cases to demonstrate reasonableness, selected facts from the problem at hand to demonstrate similarities to or differences from the prior cases, and, only then, the conclusion that the police violated the defendant’s rights.

3 Actually, my colleague Michael J. Lynch, at the University of Toledo Law School, found for me James A. Gardner’s *Legal Argument: The Structure and Language of Effective Advocacy* (1993), and thus began my adventure into logic. Without this text, I doubt I would have had the fortitude to tackle the subject. Gardner’s book is invaluable: short, simple, clear, and practically grounded. Until I write my own textbook, I will re-
Deductive reasoning, however, is not the whole story. It has a near-mirror image, which is the inductive process. The two work in unison, to create the singular tongue of advocacy. Both can help smoke out the necessary law and facts, to yield the essential, pared-down selectivity that is the hallmark of clean, crisp reasoning and writing. The inductive inquiry encompasses rule development and choice, and the principles and policies that contribute to development of law. The deductive inquiry applies that law, focusing on facts and cutting down on the thicket that can result when first-years, not knowing which are the important facts, throw them all in. So I decided that this presentation would be incomplete without a treatment of both induction and deduction.

THE DEDUCTIVE PROCESS

The nomenclature of formal logic can be chilling, but competent lawyers eventually learn to follow the underlying principles, even if they are not aware that that is what they are doing. For example, “IRAC” is just another way of saying “the deductive syllogistic process.” The following is a schematic representation of a deductive syllogism.

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quire Gardner for all first- and second-year students, academic support and otherwise.

4 This is not the only way to look at legal analysis. It is one way that my students and I have found particularly illuminating because of its unified, inclusive character. It explains a lot, but it is only one of a host of paradigms. See, e.g., the “rule proof” paradigm expounded by Richard Neumann. RICHARD K. NEUMANN, JR., LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE 83-98 (2d ed. 1994).

5 IRAC is the acronym many of us were taught in our first days of law school: Issue, Rule, Application, Conclusion.

6 Thanks to Laurie Schacherbauer and Tracy Reynolds, devoted staff members at the University of Arkansas School of Law, without whose kind help the diagrams would have been hand-done and cheesy.
The inverted triangle, with its broad base at the top, represents the deductive movement from the general to the specific. Deduction begins with a broad statement of general applicability, a “rule.” The thinker then studies how the rule should apply to specific situations, looking back at carefully selected facts of precedent cases, to judge and then to illustrate how the rule should bear on the particular situation at hand. This is the use of precedent that is so familiar to us yet so elusive to our students, in which the thinker ferrets out similarities or differences in the facts of the case at hand, to determine and explain whether the result of the prior cases should apply or not apply.

Whether the nomenclature you use is “major premise,” “general rule,” or “statutory provision”—whether you call deductive elements the “minor premise,” the “application of the rule,” or “the facts section”—the exercise is aimed at the same goal. Emphasizing the logical process, however, makes the thing come so much clearer in the end.

In a seminal textbook on the subject, Professor Gardner begins with the simplest classical syllogism to “prove” that Socrates is mortal. There, the thinker takes up the prior-established rule that all humans are mortal, applies it to Socrates’s case, includes the particular individual within the general category of human, and concludes that Socrates will therefore die.

The key is what Gardner calls “transitivity.” I call it “equivalency.” Whatever you call it, it is essential that “all terms must match.”

\[
\begin{align*}
A &= B & \text{a. All HUMANS are mortal.}^{10} \\
C &= B & \text{b. Socrates is a HUMAN.} \\
A &= C & \text{c. Therefore, Socrates is mortal.}
\end{align*}
\]

7 Logicians protest that in pure logic, it is also possible to deduce from the particular to the particular, the general to the general, and variations in between. In legal reasoning, however, we deduce from the general to the specific and induce from the specific to the general. Landau notes that it is “often” induction that involves the particular-to-general sequence of reasoning. Jack K. Landau, Logic for Lawyers, 13 Pac. L.J. 59, 68 n.39 (1981). Similarly, Judge Aldisert insists that we should “stick to [our] provincial guns” here. Letter from Hon. Ruggero J. Aldisert, Senior Circuit Judge, United States Court of Appeals for the Third Circuit, to author 1 (Oct. 21, 1996) (on file with author).

8 Gardner, supra note 3.

9 Gardner, supra note 3, at 27-33. Since I am a visual learner, the diagrams, arrows, and variations in type font are my contribution to the classical canon. Alternatively, the more-familiar Venn diagrams are also useful to illustrate similar concepts.

10 This proposition has been so thoroughly tested, infra, text accompanying note 28,
Similarly, Gardner offers an example that is more recognizably "legal" reasoning:

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a. Major premise (general rule):
   \[ A = B \]
   \[ \text{FIXTURES are included in the purchase price of a house. A FIXTURE is a "LARGE, BULKY OBJECT" that is "PHYSICALLY CONNECTED" to the structure.} \]

b. Minor premise:
   \[ C = B \]
   \[ \text{A wood stove is a "LARGE, BULKY OBJECT" "PHYSICALLY CONNECTED" to the structure.} \]

c. Therefore, the stove must be included within the purchase price of the house.

The "wood stove" syllogism, expanded below to include precedent cases12 — and their facts — looks like this:

that it has become self-evident. Obvious, even. In contrast, instead of self-evident propositions, law uses propositions from statutes or cases, which must have been "proved" elsewhere. *Infra* note 13. Moreover, legal questions are always more complex than this. See examples following *infra* note 14; see also text accompanying notes 54-56.

Come to think of it, everything else is more equivocal too, excepting death and taxes. Leaving aside those two infelicities, any other time I encounter the word "obvious," I want to grab my wallet. Things generally are about as simple and "obvious" as the twenty-eight-word creed was at the time Jefferson wrote it: "We hold these truths to be self-evident . . . . " *The DECLARATION OF INDEPENDENCE* para. 2 (U.S. 1776) (emphasis added).

11 GARDNER, supra note 3, § 1.5.

12 Strictly speaking, the precedent cases are not part of the syllogism, but they become necessary because the exactitude that equivalency requires rarely, if ever, exists. Or, if it did, there would be no issue to litigate. In the classical mode, a comparable situation would look something like this: The known rule is that all Macedonians are human. Socrates, an Athenian, is not Macedonian, but Athenians are enough like Macedonians in all important characteristics so as to make no difference. Therefore, since Macedonians are mortal, and Athenians are like them in all salient characteristics, Athenians must be mortal too. Since Socrates is Athenian, he is mortal. Sorry, Socrates, judgment to the Reaper. And then the next time the question arises as to Athenians, the law's settled, there's no need to litigate, and the judges are now free to consider the case of the Spartans. Maybe those Spartans were different enough from the Athenians . . . .

Perhaps the analogical recourse to case law may be conceived of as ammunition against a contrary proposition. In the wood stove example, the chandelier and the carpet from the case law (following) are proof against the contrary argument that a wood stove is not bulky and not attached. "Oh yes it is," the advocate says, "it's enough like the chandelier and the carpet; these were fixed and bulky enough for the prior judges and they should be fixed and bulky enough here too." *See also infra* note 26.

In any event, if advocates must take recourse to analogy, and we usually must, the syllogism loses something of its absolute, compulsive force, but it is still extraordinarily powerful.
a. Major premise (general rule):
\[ A = B \]
FIXTUREs are included in the purchase price of a house. A FIXTURE is defined as a "LARGE, BULKY OBJECT" that is "PHYSICALLY CONNECTED" to the structure.

b. Factual examples from cases, as transitions to minor premise:
For example, in Allen, the court held that a large, ornate chandelier hanging in the front entry was a FIXTURE. The result was the same in Charles, in which the FIXTURE was wall-to-wall carpeting. ¹³

c. Minor premise, linking caselaw facts to facts at hand:
Like the chandelier in Allen and the carpeting in Charles, the wood stove in this case is a "LARGE, BULKY OBJECT" "PHYSICALLY CONNECTED" to the structure.

d. Thus, the stove must be included within the purchase price of the house. ¹⁴

In the deductive model, if the terms of the syllogism are "transitive" or "equivalent," and if you accept the major premise, the conclusion is irresistible. ¹⁵ The syllogism is, thus, a powerful advocacy tool. ¹⁶

¹³ These are "proved" propositions, e.g. by previously adduced evidence that the chandelier weighed a lot and was connected to the structure by rivets and wiring (testimony of lighting contractor); the carpet was glued and nailed down (testimony of finish contractor); the stove, thus, is similarly bulky and connected (testimony of Sears salesperson and opinion of expert witness construction engineer).

¹⁴ Subsequent syllogisms would establish that an item included in the purchase price becomes the property of the buyer after title to the house passes. Whoever takes the property of another must pay damages. Thus, if the facts show that the seller removed the stove after title passed, then he took the buyer's property and he is liable.

¹⁵ But see supra note 12.

¹⁶ It is especially so because there usually is a great deal of play in the manner in which the facts can be conceived and emphasized. For example, consider a hypothetical Fourth Amendment question that could arise in connection with a seizure and search of a trash bag, on garbage collection day, that a homeowner left briefly by the side of his car, in an open carport; the trash collector spotted the bag, took it, and turned it over to police. The U.S. Supreme Court has held that there is no reasonable expectation of privacy in trash. California v. Greenwood, 486 U.S. 35 (1988). In the hypo, prosecutors would emphasize that the bag was left in plain view, under circumstances making it objectively reasonable to assume that the bag's contents were unprotected trash. Defendants, on the other hand, would argue that the bag concealed its contents and that be-
In the following, there's nothing wrong with the analytical structure; it is a valid, logically consistent syllogism, taken from the law as it once was.\(^\text{17}\)

1. Major premise:
A husband has a right to maintain his authority by inflicting bodily injury on his wife, provided that the circumstances justify it. The circumstances justify a beating if the wife accuses the husband of being a liar and refuses to back down even on repeated warnings.

2. Minor premise:
This wife accused and refused.

3. Conclusion:
Therefore, the beating was justified and may not be held grounds for a divorce.\(^\text{18}\)

Judge Aldisert further notes that even thirty-odd years after this case was decided, it was thought that "[o]bviously\(^\text{19}\) a principle, if sound, ought to be applied wherever it logically leads, without reference to ulterior results."\(^\text{20}\)

cause it was in close proximity to a private car and home — within the curtilage — it was objectively reasonable to insist on constitutional protection. See United States v. 987 Fisher Road, 719 F. Supp. 1396 (E.D. Mich. 1989) (expectation of privacy found when search extended behind house); see also text accompanying notes 36-41.

\(^\text{17}\) Joyner v. Joyner, 59 N.C. 322, 324-26 (1862), quoted in RUGGERO J. ALDISERT, LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING 6-19-20 (1992). The Aldisert text is the mirror image of Gardner, supra note 3, and is similarly valuable in the inductive area. It is full of examples, many taken from Judge Aldisert's own opinions, and these are well worth reading. Aldisert also explores logical fallacies in some detail, but I generally don't get that far; I feel I will have done plenty if I communicate the structure of sound reasoning only. I don't require this book, but I draw from it myself, to understand and to teach the inductive aspects of the process.

\(^\text{18}\) At least the author of Joyner was shamed enough to add: "[T]his is not an agreeable subject, and we are not inclined, unnecessarily, to draw upon ourselves the charge of a want of proper respect for the weaker sex." Joyner, 59 N.C. 322, quoted in ALDISERT, supra note 17, at 6-19. Heaven forbid!

\(^\text{19}\) That word again. It doesn't help that our students study law by immersing themselves in judicial decisions, which frequently do everything we beg our students not to do. Judges can call things "obvious" because their word is law, but this is not so for our students, nor for lawyers, nor for us, alas.

\(^\text{20}\) Gluck v. Baltimore, 32 A. 515, 517 (Md. 1895), quoted in ALDISERT, supra note 17, at 2-9. "Ulterior" means further, more distant, beyond, coming at a subsequent point; lying beyond what is openly stated, avowed, or evident [again!]; or intentionally concealed. Oxford English Dictionary 815 (2d ed. 1989). Even if the Gluck author meant "ulterior" in its most benign sense, something's still not quite right here. Surely if reasoning is valid but it leads to "ulterior" results, then the principle can no longer be "sound," at
others' contribution was to object that blind adherence to formalism — insisting on the inevitability of deductive outcomes and disregarding the consequences — can produce extreme and unfair results and must, under those circumstances, yield.  

It is the major premise that must yield. The question in the common law process is how to do this, with due regard for stability, predictability, and the avoidance of arbitrariness. The answer can be found by studying how Cardozo applied the inductive process. Unlike Archimedes, who merely wished for a leverage point from which he could move the world, Cardozo actually did create a place of common ground in the otherwise-contrary precedent, from which he shifted entire bodies of law.

As noted, the inductive process is the mirror image of the deductive process. The deductive process works from the general to the specific; the inductive process works from the specific to the general. The deductive process deploys equivalencies; the inductive process deploys inductive generalization, in which the terms of the premises match in a more general sense, in that they can be “induced” into unity within a harmonizing generality. In this kind of logical sequence, the conclusion may fol-

least under the particular circumstances in question.

21 Hynes v. New York Cent. Ry. Co., 131 N.E. 898, 900 (N.Y. 1921) (Cardozo, J.), discussed in AL scal, supra note 17 at 2-9. Aldisert quotes Cardozo as describing this process as an “extension of a maxim or a definition with relentless disregard of consequences to ‘a dryly logical extreme.’ The approximate and relative become the definite and absolute.” Id., quoted in ALDIS, supra note 17 at 2-9. Professor Gardner points out, however, that the formalism deduction can engender is not a defect in the deductive process. Rather, “[d]eduction is strict, but it is also blind; or, to use a different metaphor, garbage in, garbage out. The formalism that Aldisert condemns is [not inherently too rigid;] rather, it is] a blind obedience to received rules of legal relevance given by some arbitrarily conceived taxonomy of legal categories.” Letter from James A. Gardner, Professor of Law, Western New England College School of Law, to author (Oct. 30, 1996) (on file with author). See also infra text accompanying notes 34-42.

22 Supra note 10.

23 Introduction supra.

24 See supra note 7.

25 Supra text accompanying note 9.

26 Judge Aldisert notes that [in legal reasoning, when we move from [the] many to the general, we call it “induced generalization” by enumeration of instances. When we move from a particular to a particular, we call it “analogy.” In analogy we compare the resemblances in the facts. The reasoning process is the same. In induced generalization we depend on the quantity of instances; in analogy, the quality of the resemblences in the particulars compared. And sometimes we use both methods of induction.

Aldisert letter, supra note 7, at 1.
low from the premises, but not necessarily.\textsuperscript{27}

To mirror the deductive inverted triangle, the inductive process can be symbolized as numerous upright triangles, sharing the same base:

\begin{center}
\begin{tikzpicture}
\draw (0,0) -- (4,4) -- (8,0) -- (0,0);
\draw (4,4) -- (2,2) -- (6,0) -- (4,4);
\draw (2,2) -- (1,1) -- (3,0) -- (2,2);
\draw (3,0) -- (2,1) -- (4,0) -- (3,0);
\end{tikzpicture}
\end{center}

\textbf{GENERAL RULE}

Induction focusses on the "rule" component ("all humans are mortal"). Again, this is the inverse of deduction, which focusses on the rule's application. Induction examines enough particulars, which are similar enough, to begin to generalize a new rule out of them, \textit{e.g.:}:

\begin{itemize}
\item[(i.)] Moses was a human and he died.
\item[(ii.)] Eric the Red. Joan of Arc. Attila the Hun. Ramses II. Boadicea. Both my grandmothers. All these have died. Pompeii; graveyards everywhere, full of deceased persons. No living humans over 150 years old.\textsuperscript{28}
\item[(iii.)] Probably true that all humans are mortal.
\end{itemize}

\begin{itemize}
\item[(iv.)] So, since Socrates is a human, he is mortal.
\end{itemize}

Induction can rectify the situation when a prior-established rule, if applied without regard to context or changed social circumstances, yields "ulterior" results.\textsuperscript{29} Aldisert offers Cardozo as induction's prototype. In \textit{Hynes v. New York Central Railroad}

\textsuperscript{27} See supra, note 26; see infra, Chart.
\textsuperscript{28} See supra, note 10.
\textsuperscript{29} Supra note 20. See generally ALDISERT, supra note 17 at 2-1-16.
Company, a boy was killed when railroad power lines struck him as he stood on a makeshift diving board that was fixed to railroad-owned land and that extended out over a public waterway. The trial judge held the railroad to a lower standard of care, because the boy had climbed onto the board from the railroad's private land. If, on the other hand, the boy had climbed up from the public river instead, the rule would have directed the railroad to have been held to the ordinary care standard.

Cardozo considered the context and widened the focus. He emphasized that the old rule would lead to an absurd result if, for example, the wires had killed two boys, one on the board and one in the water — possible liability for the latter but not the former. Cardozo thus developed a new rule, which stated, roughly, that where private and public lands are contiguous, the owner of private lands has constructive notice of public use and therefore must satisfy the higher standard of care.

That was Cardozo at a resting heart rate. He must have broken into a gentle sweat in MacPherson v. Buick Motors, in which he rejected a rigid privity-of-contract analysis and, instead, found General Motors liable for a collapsed wheel that had caused injury to the auto's owner. Cardozo considered the varying results of sixteen products liability cases, as different as mislabeled poison and a vicious horse; to come up with a new rule that remains essentially good to this day. He reorganized the cases, identified the significant unifying principles and differences, and rerouted the river of law into a different channel that centered around the common theme of "invitation":

The contractor who builds the scaffold invites the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer invites the dealer's customers to use it. The invitation is addressed in the one case to determinate persons and in the other to an indeterminate class, but in each case it is equally plain, and in each its consequences must be the same.

The "invitation" may have been "equally plain" — i.e., "obvious" — to Cardozo, maybe, but it was not so obvious to anyone

31 111 N.E. 1050 (N.Y. 1916), cited in ALDISERT, supra note 17, at 5-3, 6-9-11.
32 MacPherson, 111 N.E. at 1054, cited in ALDISERT, supra note 17, at 5-3-6, 6-9-11 (emphasis added).
else until he enlightened us all.\textsuperscript{33}

It is an oversimplification, however, to assert that Cardozo applied induction alone. Before working induction’s “magic,” it is necessary to establish a field of relevant cases in which to exert the “magic.” Cardozo remains controversial to this day because we may describe what he was up to in at least two ambivalent ways. One is to say, in suitably hushed and reverential tones, that he established a carefully conceived taxonomy of legal categories and then reorganized them — induced them — into a new and more functional order. Or, we may accuse him of having manipulated the set of relevant decisions until he reached the result he wanted all along.\textsuperscript{34}

Still, even if we admire Cardozo only reluctantly or not at all,\textsuperscript{35} we should use him to teach the process by which legal decision makers choose the category of cases from which to extract a rule. Cardozo could do in one opinion what it takes panels of lesser souls, and split decisions, to accomplish. We can all recog-

\textsuperscript{33} Well, maybe not always enlightened. Cardozo is awesome to contemplate, but he can also be maddening. See generally Alfred S. Konefsky, \textit{How To Read, Or At Least Not Misread, Cardozo in the Allegheny College Case}, 36 BUFF. L. REV. 645 (1987). In a thoroughly entertaining analysis of what some say was Cardozo’s “oscillation” in \textit{Allegheny College}, in the “shadow world” of the law of contracts and the consideration doctrine, Konefsky calls up the evocative image of a “Thaumatrope”:

[an] ingenious and philosophical toy . . . in which two objects are painted on opposite sides of a card — for instance, a man and a horse, [or] — a bird and a cage; the card is fitted into a frame with a handle, and the two objects are, “by a sort of rapid whirl [of the handle], presented to the mind as combined in one picture — the man on the horse’s back, the bird in the cage.”

\textit{Id.} at 653, quoting Leon Lipson, \textit{The Allegheny College Case}, 23 YALE L. REP. 8, 11 (1977). Konefsky notes, “[s]ome lawyers think that what emerge[d] instead [in \textit{Allegheny College}] is a picture of a bird on the horse’s back.” \textit{Id.} Or maybe that was really a man in a cage on horseback.

Konefsky calls Cardozo’s fluency “legerdemain” or “magic” and notes that while he greatly admires Cardozo for “[knowing] exactly what he was doing,” “every once in a while, Cardozo gets under my skin, and I may momentarily lapse into cynicism or sarcasm, though I quickly recover and reclaim the high road.” Konefsky, \textit{How to Read Cardozo}, 36 BUFF. L. REV. at 654.

\textsuperscript{34} I am indebted to Professor Gardner for these observations. Gardner letter, supra note 21, at 1-2.

\textsuperscript{35} Judge Aldisert notes that Cardozo’s work is a “prototype” and “apologia” for decision making based on sociologically oriented judicial concepts of public policy. The philosophical underpinnings of what Cardozo described as the sociological method of jurisprudence run counter to the widely held notion that public policy should be formulated and promulgated only by the legislative branch of government. When judges utilize this organon, laymen and lawyers label them “activists,” “liberals,” “loose constructionists,” and host of other epithets, gentle and otherwise.

\textit{ALDISERT, supra} note 17, at 2-9.
nize the disorientation that results, even without Cardozo's mischievous offices, when we let ourselves be convinced by a majority decision and then a dissent makes an equally powerful case for the opposite result, based on an altogether-different taxonomy of cases.

An example of this is the Greenwood hypothetical, noted earlier. The federal and some state courts follow the standard announced in the Greenwood majority opinion: There is no privacy expectation in trash left curbside for collection. The judiciary of a few other states, however, interpreting their own constitutions, have chosen instead to follow the "container" line of precedent cited in the Greenwood dissent. The unstated reasoning of the Greenwood majority is that police are entitled to assume that containers hold trash when the circumstances justify that assumption — i.e., the containers look like those commonly containing trash and they are left curbside on garbage collection day. This reasoning permits the Court to rely on the "set" of cases finding no privacy in items that have been discarded or exposed in a place or manner that is readily accessible to the world. In contrast, the reasoning of the dissent and progeny is that containers shield their contents from view and therefore should establish a privacy interest. Thus, Greenwood jurisprudence here serves as an example of how judges can

39 486 U.S. at 48-49, 53 (Brennan, J., dissenting); see Robbins v. California, 453 U.S. 420, 426-27 (1981) (quoted in Greenwood, 486 U.S. at 47) ("[w]hat one person may put into a suitcase, another may put into a paper bag ... And ... no court, no constable, no citizen, can sensibly be asked to distinguish the relative 'privacy interests' in a closed suitcase, briefcase, portfolio, duffelbag, or box.").
40 E.g., Smith v. Maryland, 422 U.S. 735 (1979) (exposure of telephone numbers on pen registers); United States v. Reicherter, 647 F.2d 397, 399 (3rd Cir. 1981) (garbage discarded in an area "particularly suited for public inspection and ... consumption"). Or, as the Indiana Supreme Court has noted, "if you do not want others to know what you drink, don't put empties in the trash." Moran v. State, 644 N.E.2d 536, 541 (Ind. 1994) (no privacy interest in trash).
41 Evidently personal experience makes a difference. Chief Justice Shepard of the Indiana Supreme Court recused himself from a trash case after his own trash had been searched by a colleague, writing that "[f]or the moment at least, I do not feel dispassionate on the subject ... ." Moran, 644 N.E.2d at 543. However, a majority of his brethren justices (including the searcher?), under no such taint of personal experience, decided against finding a privacy expectation. See also the public outcry and personal distress when members of the tabloid press searched then-Secretary of State Henry Kissinger's trash. Greenwood, 486 U.S. at 40 n.4, 51-52.
reach opposite results depending on which line of cases they choose as the relevant "set" from which to derive the applicable rule of law. As noted, this can be a disorienting experience.

Our students feel this disorientation many times over. Thus, to help them negotiate their way through what can seem like chaos, we should teach them to spot the underlying decisional assumptions of relevancy, the strong "sway" that the often-unexplained prior choice of a class of cases exerts on the result.42

If we teach them in this manner, we also honor a duty that I think we owe to the judiciary, now and future. After all, the common law demands of judges that they understand and apply the process of spotting, choosing, and explaining the sets of applicable cases. Yet when they exercise the inductive power and, thereby, do no more than that which the common law process asks them to do in the first instance, they are called names.43 Let others grumble that judges are irresponsible, unaccountable loose cannons wreaking havoc on our tripartite governmental institutions. We should teach the tools of the trade, properly employed with due self-restraint, as part of the legitimate role the judiciary occupies in the process of law-making. If we fail to do so, we do a disservice to all parties concerned, especially our students.

In sum, we should be teaching the sequences of logical reasoning. We should make plain the process by which induction works, its underlying allocations of "relevancy," its inducement of newly revealed rules, and, thus, induction's prior contribution to the complementary process of deduction. Induction loosens the belt of hitherto-established rules, when the demands of an increasing press of circumstances strain the rules's competency. Induction is a more approximate process than deduction, because it reaches wider and includes more. It is therefore vulnerable to criticism and revision because of its indeterminate character,44 but it is nevertheless an essential part of the law's growing process.

42 Thanks again to Professor Gardner, who further notes that if we want our students to be Cardozos and Aldiserts, we must "show them how to spot their underlying assumptions, and to experiment with relaxing or justifying them." Gardner letter, supra note 21, at 2.
43 See supra note 35.
44 Supra text accompanying note 27.
Two Ears, To Speak With One Tongue

In the ever-shifting process that is judicial jurisprudence, then, both induction and deduction work together. Induction is needed when there is no rule, or when there is a choice between rules, or when the neat categories on which deduction relies have become eroded, or when social circumstances change. Deduction is the method of choice when the question is not which or what kind of rule should apply, but how a given rule should apply to a new set of facts and circumstances. Induction creates and evolves rules; deduction applies them.

The two mirror each other and, together, create a kind of pulsation: Induction's reach is wide and open, deduction's reach is narrow and precise. Deductive precision works until it doesn't any more; induction's expansiveness is then called in to remedy rigidity. This essentially living interaction can be schematized as follows:

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46 Supra note 21 and text accompanying notes 30-32.
The end point of this diagram may, in time, become just one more case for future induction:
Similarly, the relationship between the two processes can be charted (roughly) as follows:

<table>
<thead>
<tr>
<th>DEDUCTIVE</th>
<th>INDUCTIVE</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Situation</strong></td>
<td><strong>Rule's shot.</strong></td>
</tr>
<tr>
<td>Rule's OK.</td>
<td>Rule applied to facts.</td>
</tr>
<tr>
<td><strong>B. Locale; Function</strong></td>
<td><strong>Development of rule.</strong></td>
</tr>
<tr>
<td>Minor premise.</td>
<td>Major premise.</td>
</tr>
<tr>
<td><strong>C. Elements of Choice; Result</strong></td>
<td><strong>Principles and policies.</strong></td>
</tr>
<tr>
<td>Choice of facts.</td>
<td>Specific, compelled result.</td>
</tr>
<tr>
<td><strong>D. Movement</strong></td>
<td><strong>Broadly fair, durable result.</strong></td>
</tr>
<tr>
<td>General to particular.</td>
<td>Particular to general.</td>
</tr>
<tr>
<td><strong>E. Scale</strong></td>
<td><strong>Small-scale; case at hand.</strong></td>
</tr>
<tr>
<td>Small-scale; case at hand.</td>
<td>Large-scale; greater and greater inclusiveness; larger number of variable cases harmonized under same rule.</td>
</tr>
<tr>
<td><strong>F. Nature of internal relationships</strong></td>
<td><strong>Connections are similar</strong></td>
</tr>
<tr>
<td>Connections are equivalent, the same (transitivity); result is compelled.</td>
<td>Connections are similar enough that rule will probably be good.</td>
</tr>
<tr>
<td><strong>G. Advantages</strong></td>
<td><strong>Stability, reckonability, predictability; citizenry can conform conduct to law or face expected consequences.</strong></td>
</tr>
<tr>
<td>Stability, reckonability, predictability; citizenry can conform conduct to law or face expected consequences.</td>
<td>Law must not stand still, especially where old rule produces absurd result.</td>
</tr>
</tbody>
</table>

A Unified Pedagogy

Law school pedagogy seems to have evolved in this rough fashion: The doctrinal professors focus on the inductive process. They explore the approximate, shifting challenge of doctrinal evolution, which underlies the Socratic method, appellate dialectic, and the entire common law tradition. Conversely, we LRW types contribute by working the deductive process, developing the focus, sensitivity, and precision necessary for skillful reading and use of the particular cases.\(^47\) LRW problems, especially in

\(^{47}\) Distinguished Professor Mort Gitelman, a colleague of mine at the University of
the first semester, are designed to get our students started on the simplest rule application. Doctrinal classes are designed to delve into rule evolution. The two work together; the key for students seems to be to establish the right balance between the narrow, razor-like analysis of deductive reasoning and the more intuitive, global inquiry of the inductive process.

And not just the key for the students. It seems that we teachers may also have lost sight of the interaction between induction and deduction. There is a vigorous debate, for example, as to the usefulness of the IRAC model, which, as noted, is an acronym that roughly stands for the deductive process. 48 The November 1995 issue of the Legal Writing Institute’s The Second Draft 49 was devoted to the pros and cons of IRAC. An anti-IRAC writer protested that he had re-read Cardozo opinions and found not a trace of IRAC. He commented that he hoped Cardozo would have received good grades on law school exams, noting how unsatisfactory it would have been to ram Cardozo into the IRAC mold. 50

But the “pro” or “con” schism is no longer necessary once you appreciate that IRAC is but a partial formulation, encompassing deduction only. And deduction is simply the obverse — the complement, but not the antagonist — of the inductive process, of which Cardozo was the acknowledged master.

Moreover, the decisions Cardozo wrote that are still studied today are the ones in which he made new law — using induction. I wonder: For every great inductive blue-blooded leap Cardozo made, how many deductive workhorse decisions did he have to write?

Some call deduction “IRAC.” Some call it TRAAC or CRAC; Jill Ramsfield wittily calls it extinct (“Iracassaurus Wrecks”). 51 Richard Neumann calls the thing “rule proof” and application and points out that the IRAC form, useful for exam-taking but not memorandum-writing, simply omits the “proof” component. 52 The variations and the debate seem endless.

Shakespeare wrote, “What’s in a name? that which we call a

Arkansas, quips that we teach our students to be “master manipulators of the minor premise.”

48 Supra note 5.
49 10 SECOND DRAFT 1, Nov. 1995.
50 Id. at 16-17.
51 Id. at 18-19.
52 NEUMANN, supra note 4, at 83-86, 229-31.
rose, By any other name would smell as sweet." Whether we call the thing "IRAC" or "deduction," the same fragrance seems to linger, but with one important difference: Unpacking and explaining to our students the deductive process on which IRAC is based, instead of merely labelling it, emphasizes the active, evolving nature of the inquiry. Teach deduction and you will be teaching the students why it is important to choose from a wide variety of facts and how to go about doing it. You will be teaching a verb instead of a noun.

Ultimately, of course, the deductive inquiry deploys the same strategy no matter what you call it: Movement from the general — the rule — to the specific — the facts. How quickly our students come to that understanding, however, makes all the difference in their (and our) experience.

There should be no doubt whatsoever about the LRW challenge. The deductive process is far from obvious to our students. They have difficulty with even "simple" cases such as, e.g., the one Helene Shapo offers in the first fifty pages of her basic legal writing text. There, Shapo identifies the holding — the major and minor premises combined — of a prisoner's diversity action as

[a] prisoner may rebut the presumption that he retains his pre-incarceration domicile, but he does not allege facts sufficient to raise a substantial question of his intent to change his domicile to the state of incarceration if he maintains property and a business in the state of his original domicile, and alleges no supportive facts.

This statement, however, is an end product. To arrive at it, the students must first have grasped as many as six subsyllogisms. They are:

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53 WILLIAM SHAKESPEARE, ROMEO AND JULIET act 2, sc. 2 (Juliet, wondering wherefore Romeo art).


55 SHAPO, supra note 54, at 31.

56 Gardner calls these "nested" syllogisms. GARDNER, supra note 3, at 42-46.
A. Background Facts

Jones lived in Missouri before he was convicted of a federal offense. He is incarcerated in the federal penitentiary in Kansas. He wants to sue his lawyer, Hadican, a Missouri resident, for malpractice, under federal diversity jurisdiction in Kansas.

B. Plaintiff Jones's Side

1. Desired end syllogism:
   a. Major Premise:
      Diversity jurisdiction permits Jones to sue Hadican in federal court if Jones is domiciled anywhere but in Missouri.
   b. Minor Premise:
      Jones is domiciled in Kansas.
   c. Conclusion:
      Jones can sue Hadican in federal court.

2. First syllogism:
   a. Major Premise:
      A prisoner's domicile is presumed to be where he lived before incarceration.
   b. Minor Premise:
      Before incarceration, Jones lived in Missouri—same as Hadican.
   c. Conclusion:
      Uh-oh, Jones’s domicile would be presumed to be Missouri, not Kansas, and he will have failed to show diversity if that is the end of the inquiry.

3. Second syllogism:
   a. Major Premise:
      If prisoners can show a bona fide intent to remain in the place of incarceration on release, they can rebut the presumption that they will return to their prior home state.
   b. Minor Premise:
      It would help if Jones could show that his family has moved to Kansas to be near him.
   c. Conclusion:
      If so, Jones might rebut the presumption that he will return to Missouri.
4. Third syllogism:
   a. Major Premise:
      Prisoners can show a *bona fide* intent to remain in
      the place of incarceration if their families have
      moved to join them in that place.
   b. Minor Premise:
      Uh-oh, Jones's marriage has irrevocably
defeated. That might be some evidence to show
      that his ties to Missouri have been severed — but
      his family certainly isn't about to move to Kansas
      to be near him there.
   c. Conclusion:
      Therefore, Jones's marital situation does not help
      much to show *bona fide* intent to remain in
      Kansas. All that's left seems to be Jones's
      unsupported assertion of intent.

C. Defendant Hadican's Rejoinder

1. Desired end syllogism:
   a. Major Premise:
      A prisoner's showing of *bona fide* intent to remain
      in the place in which he is incarcerated may be
      defeated if he maintains significant ties to the
      preincarceration domicile.
   b. Minor Premise:
      Jones has maintained significant ties to Missouri,
      his preincarceration domicile.
   c. Conclusion:
      Hadican has defeated Jones's showing of *bona fide*
      intent to remain in Kansas.

2. First syllogism:
   a. Major Premise:
      Ownership of real property and a business in the
      preincarceration domicile are significant ties,
sufficient to trigger the presumption that the
      prisoner will return there.
   b. Minor Premise:
      Jones has retained ownership of real property and
      a business in Missouri.
c. Conclusion:
Therefore, Jones's retention of significant ties to Missouri defeats his showing of *bona fide* intent to remain in Kansas; Jones will be presumed to return to Missouri; Jones, like Hadican, is a “resident” of Missouri, not Kansas; and thus Jones may not sue Hadican in federal court because Jones has failed to establish diversity jurisdiction.

We experienced lawyers can arrive at the final step of this analysis with (relative) ease — but often with little awareness of how we got there. My own experience with this very case, when I began my syllogism work, makes my point. I had reconfigured Shapo's brief into the syllogism format, initially writing:

1. **Major Premise:**
To establish diversity of citizenship necessary for federal jurisdiction, prisoners may rebut the presumption that they retain their prior domicile by showing facts sufficient to raise a substantial question as to whether, on release, they possess a *bona fide* intent to remain in the place of incarceration. However, the contrary presumption that they will return to their original domicile will remain in force nevertheless, if prisoners retain significant ties to the preincarceration domicile.

2. **Minor Premise:**
The only fact in support of the prisoner's asserted intention to stay in Kansas seems to be his irrevocably deteriorated marriage in Missouri. Most importantly and adversely, he has retained ownership of a business and real property in Missouri, and these have been deemed sufficiently substantial ties to the preincarceration domicile to defeat federal diversity jurisdiction. So the prisoner, despite being currently incarcerated in Kansas, is still a “resident” of Missouri.

3. **Conclusion:**
Since the putative defendant is also a resident of Missouri, federal case dismissed.

I proudly showed my work to my colleague Mike Lynch, and it was he who pointed out how complex the analysis really was. I think this underlying, unrecognized complexity may account for that baffled feeling many LRW teachers, myself in-
cluded, might recognize: Why aren’t they getting this? It’s so obvious!

LOGIC: FRIEND, NOT ENEMY, OF CREATIVITY

In sum, the process of teaching law should be essentially interactive: Induction has to do with rule evolution and is largely in the domain of the “doctrinal” professors. Deduction tends to be the focus of many LRW problems. Both areas are extraordinarily challenging and demanding. Both should command equal respect. At a minimum, if our students understand the nature of the differences, they may be less inclined to mix hemlock cocktails for their Socratic professors. Similarly, the students will respect what we do in LRW.

Induction works to open our minds; deduction can be said to keep our brains from falling out. Both processes work together, to free our students from the vise-like grasp of doctrinaire certainty. Yet this point is not generally appreciated. The eighteenth-century English statesman and orator Edmund Burke remarked that a legal education sharpens the mind by narrowing it. In the same vein, when a prospective law student reportedly asked law professor and civil rights leader Eleanor Holmes Norton whether going to law school was a good idea, Holmes Norton asked in return whether the student thought of herself as creative. When the student replied “yes,” Holmes Norton’s counsel was “don’t go.”

In the short-term, narrow view, Holmes Norton is difficult to refute. In the longer-term, I think she’s dead wrong. To paraphrase Professor Robert Bone, creativity springs from an intimate familiarity with the law, an understanding of its workings at a deep and structural level, so that new ideas will become born of themselves. The law is too complex and demanding an enterprise for most of us to expect our students to become creative thinkers in the short span of three to five years of legal education. For many, creativity does not visit in a lifetime. But if it comes at all, as Professor Bone intimates, it must come from a strong base of foundational understanding.

I believe the framework of logic provides the necessary structural understanding — the vine — on which creativity can

57 Daniel J. Schnee, quoting Rabbi Joe Weizenbaum of Tucson, Arizona.
58 Quoted in Steven Keeva, Opening the Mind’s Eye, ABA Journal, June 1996, at 50.
59 Id.
60 Id. at 53.
eventually flower. Or, to switch metaphors and quote Judge Aldisert: "[I]t's great to play the piano without being able to read music, but unless you're Irving Berlin, you're not going to reach your full potential by merely memorizing tunes that you've heard somewhere before."\(^{61}\)

To push this image, it seems to me that the discipline of logic is the sheet music. Creativity and inspiration can come later — but with one important proviso: that both constraint and inspiration are explained, nourished, and encouraged, simultaneously. Professor Gardner writes: "In law, as in jazz, you should feel free to be creative, but whatever you play must always be recognizable as the underlying tune."\(^{62}\) In the music world, Irving Berlin may not have needed to be taught to write songs; being born was enough. The rest of us need to be taught.

In the end, this seems obvious to me.

\(^{61}\) ALDISERT, supra note 17, at 1-3.

\(^{62}\) Gardner letter, supra note 21, at 3.
Overcoming Challenges in the Global Classroom: Teaching Legal Research and Writing to International Law Students and Law Graduates

Mark E. Wojcik
Diane Penneys Edelman

In the past few years, American law schools have seen an increase in the number of international students. There has been an increase in the recruitment of undergraduate law students from other countries, and many schools have developed special master's programs for foreign lawyers. International students in undergraduate and graduate law programs enrich the cultural diversity of the campus and provide special educational opportunities and challenges. Yet, as schools increase the enrollment of these international students in J.D. and LL.M. programs, problems emerge in addressing their special educational needs.

1 This article developed from a panel presentation at the 1996 Legal Writing Institute Summer Conference at Seattle University School of Law. Also on the panel were Darcy Kirk, Law Librarian at the University of Connecticut School of Law, and Craig Hoffman and Kristen Konrad Robbins, Instructors in Legal Research and Writing at Georgetown University Law Center. The authors thank Professor Jessie Grearson for sharing the results of her research with the authors, and Professors Mary Beth Beazley and Nancy Soonpaa for their helpful editorial suggestions. In addition, the authors thank Dr. Myra Goldschmidt, Lecturer in the English Department and Director of the ESL Program at Villanova University, and Debra Parker and Jeff Gore at The John Marshall Law School, who reviewed this article and provided valuable insights into the ESL needs of graduate level students. The authors also thank the Deans of their respective schools, who provided grants for the authors’ attendance at this conference and research support.


3 Visiting Instructor of Legal Writing, Villanova University School of Law. A.B., Princeton University; J.D., Brooklyn Law School.

4 Since the 1970s, there has been debate as to whether “foreign students” or “international students” is a better term to describe students from other nations. Rather than resolve the debate here, we will only note its existence. See, e.g., "Foreign" vs. "International": Can "International Man" Be Stopped? in GARY ALTHEN, THE HANDBOOK FOR FOREIGN STUDENT ADVISING 140 (Intercultural Press, Inc. 1983). In this article, we have chosen to use the terms “international students” and “international lawyers,” recognizing that there may be some confusion with the study or practice of international law.
needs, such as the need to develop oral and written communication skills. American law students are now regularly exposed to multiple semesters of classes in legal writing, but for some reason the needs of students from other countries have often been overlooked. Additionally, although there are some materials available to introduce American law and jurisprudence to international students, most materials ignore the needs of foreign audiences, and there are few courses and scant materials available to teach legal research, analysis, and writing to international students of law.

Where courses in legal research and writing for international students have been available, there has been great interest from the students in improving their research and communication skills as they increase their knowledge of the law. To be successful, law students whose first language is not English must become competent in reading, listening, speaking, and note-taking in English and must be familiar with American legal terms and legal research. These students need intensive support for their studies, and teachers of legal research and

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5 There are books available to teach introductory courses in American law and jurisprudence, but these usually omit materials that would help students improve their writing skills. These books are also often designed for multiple audiences, so that there will not always be a focus on the language difficulties faced by students whose first language is not English. See, e.g., William Burnham, Introduction to the Law and Legal System of the United States v (1995) (identifying three primary groups for an introductory book on the law and legal system of the United States as (1) "law students, lawyers and legal scholars from foreign countries," (2) "U.S. graduate and undergraduate college students," and (3) "members of the general reading public in the United States"); Anthony D'Amato, Introduction to Law and Legal Thinking vii (1996) (predicting that "[a] foreign student coming to this country to spend a year or more in law school wants to have a preview of the underlying philosophy of American law"). See also Dennis Campbell and Winifred Hepperle, The U.S. Legal System: A Practice Handbook (1983); David S. Clark and Tugrul Ansay, Introduction to the Law of the United States (1992); Peter Hay, An Introduction to U.S. Law (2d ed. 1992)

6 See, e.g., Howard Abadinsky, Law and Justice: An Introduction to the American Legal System ix (3d ed. 1985) (identifying itself as an interdisciplinary text rather than one for an international audience); James V. Calvi and Susan Coleman, American Law and Legal Systems xi (2d ed. 1989) (complaining that law books written by lawyers were "too legalistic in their approach"); Lawrence M. Friedman, American Law xi (1984) (characterizing itself as a book for laymen rather than for an international audience); Samuel Mermin, Law and the Legal System: An Introduction xvii (2d ed. 1982) (decrying books that are "so simplified as to have substantial utility only for those (e.g., foreigners) quite unfamiliar with our legal institutions"); Martin Weinstein, Summary of American Law v (1989) (describing its intended audience as "lawyers, legal assistants, and students"); Art Wolfe et al., Understanding the Law: Principles, Problems, and Potentials of the American Legal System xxiii (1995) (describing itself as a textbook "for the nonprofessional study of law").
writing must adjust their teaching to serve these needs. Part of that support must include attention to and explication of American legal conventions. Without such a context, American legal texts will make little sense to international students. In fact, as Jessie Grearson, Professor of Writing and Director of the Writing Resource Center at The John Marshall Law School in Chicago, has pointed out:

It's easy to forget that even values such as clarity, directness, and reader-friendly prose are not universal writing truths but very Western, perhaps even particularly American, writing values.

* * *

International students can remind us to explain not just what our conventions are, but why we have these conventions, and how they fit within the context of our American legal system.

Although these students must take the Test of English as a Foreign Language (TOEFL) exam as a condition of admission to various programs in a law school, a high score on that exam does not necessarily guarantee that the student will have sufficient practice in listening, speaking, and writing English to succeed in law school classes.

Moreover, although some schools are starting to develop programs that teach not only research but also attempt to improve student writing, most schools that teach skills to international students seem to focus more on teaching research. This focus may be due to the (usually) accurate perception that it is easier to teach research skills than to improve the writing of non-native English speakers. Still other schools have avoided research and writing programs such as these, perhaps out of a sense of frustration in dealing with the labor-intensive aspects of teaching writing to students whose first language is not English.

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7 Law school reading falls into the category of "technical" reading, a type of reading where students must learn how to develop reading skills to understand complex and difficult material rather than general reading material. See Lee Gunderson, ESL LITERACY INSTRUCTION: A GUIDEBOOK TO THEORY AND PRACTICE 30 (1991).

8 Jessie Grearson, CULTURAL INFLUENCES ON LEARNING: INSIGHTS FROM INTERNATIONAL STUDENTS, THE SECOND DRAFT (Legal Writing Inst., c/o Boston College Law School, Newton, MA) 1996, no. 1 at 8.

9 This perception may be amplified in teachers who have no training in teaching English as a Second Language (ESL).
To meet these special needs, American law schools must identify and understand the needs of their international students. Only then can they design special research and writing courses for international lawyers or adapt existing programs to accommodate the needs of those students.

IDENTIFYING THE NEEDS OF INTERNATIONAL STUDENTS

Toward the end of understanding how legal writing professors can best address the needs of international students, Professor Grearson conducted an informal survey of various Chicago-area programs that teach English as a Second Language (ESL) to non-law students. The ESL experts with whom she spoke suggested that the bottom line for any successful program for international law students includes 1) consistent, systematic, individual attention and 2) instruction specifically tailored to the special purposes of legal writing.¹⁰

With these pedagogic goals in mind, and given the increasing number of international students and lawyers enrolling in U.S. law schools each year, there is no question that American law schools should create special legal research and writing courses for international students or enhance existing courses to meet the needs of these students. The reasons presented here are not the only ones that would justify the creation of a special course for international students, nor are the proposed solutions the only possible ones. The following reasons are not ranked in any way, nor can they be. There are too many variables in the needs of individual students because of the students' different countries of origin, the students' previous experiences in other cultures, the students' experiences in the academic culture of institutions in other nations, the students' prior training in law and exposure to the English language, and other factors individual to each student.

The reasons presented here also overlap, and many considerations behind one reason will support other reasons as well. Nevertheless, these reasons highlight the need for increased recognition of and response to the needs of international students by American law schools. The considerations made here about

¹⁰ ESL specialists may not have experience in the particular context of legal writing. The John Marshall Law School has recently hired as writing advisors one ESL expert and another writing instructor with ESL experience. Their experience working with law students reveals that the general principles of teaching ESL also apply to the particular context of teaching ESL to law students.
special courses for international students apply to schools that have a sufficient number of non-native English speaking students in an undergraduate or graduate law course. 11

1. Acknowledgement of Special Needs. American law schools in general, and legal writing professors in particular, must recognize the special needs of international students that arise as these students develop their writing skills. 12 International students attending a “normal” or “traditional” course in writing often feel that they are at a tremendous disadvantage because their classmates are native speakers of the language. Professors must encourage these students to be involved in class discussions rather than to sit silently and pretend to understand things, or worse, to abandon any hope of understanding. In courses where papers are required, professors’ comments on student written work must provide appropriate feedback for their needs at each stage of the writing process, 13 with special attention to avoiding the shorthand that professors typically use when commenting on the written work of native speakers. In graded courses (rather than those taken as “pass/fail”), professors should make appropriate adjustments to grading standards that are typically calibrated to native speakers. 14 Recognizing an

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11 At The John Marshall Law School, for example, there are international students in the J.D. program and in the LL.M. program in International and Comparative Legal Studies. At other law schools, such as Villanova University School of Law, there is neither an LL.M. program in comparative or American law nor any other program enrolling a significant number of law students or lawyers from other countries. However, like many other schools, Villanova has a small but steady stream of international law graduates and students who have special learning needs when it comes to legal research and writing. With an entering class of approximately 220 to 240 students, Villanova has only about six to ten students each year who fall into this group.

12 Whether a law school has a large or small number of international students, it can identify the needs of those students by using diagnostic tests, questionnaires, and individual conferences. A sample questionnaire appears in Appendix 1. Information should also be culled from the admissions documents, if those are not regularly seen by the particular instructor. In a large-scale program, international students may also be encouraged to share information about their backgrounds in class with less self-consciousness than they might have in a small-scale program where they represent a minority of the class.

13 For further consideration of this point in a non-ESL setting, see Elizabeth Fajans and Mary R. Falk, Comments Worth Making: Supervising Scholarly Writing in Law School, 46 J. LEGAL EDUC. 342, 345 (1996)(citing Nancy Sommers, Responding to Student Writing, 33 C. COMPOSITION & COMM. 148, 155 (1982)).

14 Professors (and, in some cases, other students) may have differing opinions about the “fairness” of making such adjustments. For example, some professors may consider the effort and progress made by an international student in mastering terminology and writing style as well as content, although the same consideration need not be made for native English speaking students. Other professors believe that such adjustment may
international student's special needs may also involve recognizing that the student will be in the United States for only a limited time. It is certainly impossible to master everything, so students must develop the ability to work quickly and efficiently in a new culture and in a new language.

2. Academic Culture Shock. International students may also have problems in communication that arise not only from questions of proficiency in English, but from an unfamiliarity with American academic culture generally and with law school culture specifically. Many of these students are very serious about their studies; they are eager to feel comfortable in the American law school setting and to perform at the same level as their American classmates. In fact, they have a seriousness that other students should emulate. They also have had experiences that can greatly enrich our experiences as faculty as well as those of their classmates. However, these students can also be extremely self-conscious about participating in class, and about sharing information about themselves. International students may have a different sense of privacy and concern about their abilities to communicate in English.

These problems may manifest themselves in unusual ways. On an examination or final term paper, for example, a professor who observes that a student "needs work in grammar" may be observing a variation of "academic culture shock" as opposed to basic technical grammar deficiencies. Similarly, a student may not speak in class simply because the student's previous academic training was entirely by lecture, as is the case in many civil law countries, or else the system may have taught the student not to question authority. From the experiences of one of the authors teaching in Asia and the Pacific, for example, it became evident that the academic culture strongly discourages the asking of questions in class because such a practice might suggest a challenge to the authority of the professor. The students would, however, ask many questions outside the formal setting

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16 See Gunderson, supra note 7, at 30.

17 See Reid, supra note 15, at 221-22.
of the classroom, or they might ask questions of fellow students or teaching assistants to avoid asking the professor directly.

To ease the students’ transition to American law school, professors in large-scale programs can include some writing component in an “Introduction to U.S. Law” course. The professor can also devote class time to topics as specific as grammar, legal terminology, and court structure, and as broad as law school life. Professors in small programs (and those in large programs but with more limited class time) can address the same topics by means of periodic extracurricular meetings. Students may be best helped by scheduling extra individual conferences to make sure that they understand their assignments and are on track. The professor also benefits from the extra opportunities to get to know these interesting students on a deeper level. More important, if it is the professor who requires the international student to meet for more frequent conferences, this alleviates the students’ often culturally-based reluctance to seek needed additional help or instruction.

3. Skills Training — Following Class Conversations. International students need training in listening to spoken English. Professors usually will not slow down their rate of speech if most of the audience is comprised of native speakers. Additionally, many students who can otherwise understand a single native speaker may become frustrated when they try to follow the conversations of two or more native speakers. The ideas discussed in many classrooms are complex even for native English speakers. International students are frustrated not only by these difficult ideas, but by unfamiliar legal words, terms of art, clichés, in-jokes, unfamiliar cultural or geographic references, and variations in American speech that likely differ from familiar or expected pronunciation.

18 While there are no current texts designed to help international students develop listening skills specifically for law school classes, students may benefit from general ESL texts on this subject. See, e.g., PATRICIA DUNKEL AND FRANK PIALORSI, ADVANCED LISTENING COMPREHENSION: DEVELOPING LISTENING AND NOTE-TAKING SKILLS (1982) (book and cassettes).

19 International students generally exhibit a variety of difficulties in their legal writing classes, including problems with use of definite and indefinite articles, spelling, and general and legal vocabulary. A favorite anecdote of one of the authors involves a lawyer from another country who had practiced corporate and criminal law in her home country and had even helped to draft her country’s new constitution. This was a student from whom the students and faculty could learn much, but who was quite intimidated by being a first-year student in an American law school. In her contracts class, for example, the students read a case involving a bridge game. The student spent hours trying to fig-
come these difficulties in listening, but without training, it may take the entire year (the length of a typical LL.M. program) and will necessarily compromise the students' assimilation of the difficult substantive material.

To address these concerns, professors in either large- or small-scale programs should make efforts to ensure that the international students understand their assignments, feel capable of doing their work, and do not get lost in the crowd. They can do this by meeting with these students at a greater frequency throughout the year, either individually or in small groups. International students may also wish to meet frequently with student mentors and with specialists in a writing center, if available.

4. Skills Training — Preparing for Class. Graduate law students from civil law countries must develop new skills in reading American judicial decisions (which are unlike most international decisions) and in reading American casebooks. Their prior civil law training is unlikely to prepare them adequately for the dramatic shift in the nature of cases and other materials used in American law schools. Students need training in how to read cases from casebooks and how to brief cases adequately in class and use cases later, in practice. Law schools should offer training or counselling in technical reading to facilitate this skill development.

5. Skills Training — Taking Notes in Class. International students need training in taking notes for their law school clas-
ses. Although students may take notes effectively in their first language, many legal terms and concepts are incapable of easy translation. Students may miss the main points of a lecture or classroom discussion as they struggle to take notes. Their struggle with these issues may also lead to frustration which, in turn, may reduce the quantity and quality of participation in the class.

6. Legal Context. International graduate students are generally unfamiliar with common American legal documents. This unfamiliarity may compromise the students' understanding of cases and other course materials. Not only must these students learn new legal terms in English, they must also learn about various legal documents and the legal system that uses those documents. This learning encompasses not only knowledge of the complex federal and state court systems, but a full working appreciation of the judicial, legislative, and executive branches of the federal government and their state counterparts. Training would also be helpful in the particular uses of certain legal documents in alternative dispute resolution.

7. Research Skills — Domestic Sources. International lawyers are familiar with the sources of law in their home countries, but they presently receive no formal training in the primary or secondary legal research sources available in English. The students are in a bind when they research and write papers for their substantive courses. It is as if they are being taught to swim by being thrown into the deep end of the swimming pool without a lifeguard. It is a challenge to teach students to use the wide variety of primary and secondary sources, especially when the legal research sources available in the students' home countries may be vastly different. The pedagogical problem is exacerbated by the proliferation of new media for legal research, and the considerations that must be given to which sources students can access outside the United States and which accessible sources will be useful. Consequently, while we could teach graduate students simply to use WESTLAW© and LEXIS© for their research, these tools may not be available to students when they return to their home countries. There is a proliferation of legal databases on the Internet, but with these as well,

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22 For example, some "secondary" sources such as the Restatements of Law developed by the American Law Institute have been incorporated as the primary law of at least one country.
students must still learn whether the sources they find electronically are still "good law."

8. Research Skills — International and Foreign Law. Learning the effective use of American legal materials is especially important for international lawyers who come to this country for study. While international lawyers will generally be familiar with the sources of international law available in their home countries, international students who are earning their first law degree here may not. The effective use of international legal materials is usually omitted from other lawyering skills courses. These materials, however, are often useful, if not critical, to practicing lawyers in other countries. The materials would include general sources of international law, common American sources of international law, and easily available international legal sources. In addition to some of the standard research texts already familiar to many teachers,23 an increasing number of guides are available on the topic of international legal research.24 When students return to work in their home countries, whether in the public sector, the private sector, or in academia, their work will usually involve these types of materials. The students must learn where to find these materials and know how to use them.

MEETING STUDENT NEEDS

Having identified several reasons to create support programs and specialized courses for international lawyers, we encourage American law schools to ensure that those courses are effective and useful. Adjustments must be made not only in the


teaching style and academic support available to students, but in the materials used and in the nature of assignments. For example, international students may benefit from having more frequent assignments of shorter length rather than the traditional memoranda assignments given as closed\(^{25}\) or open\(^{26}\) universe problems. Assignments may be as simple as, for example, writing a client retainer letter.\(^{27}\)

We believe that international students should also receive assignments and training that encourage them to write while recognizing their specific rhetorical problems.\(^{28}\) Assignments may be better geared for communication with native English-speaking American lawyers, for example, rather than creation of a court pleading or client memorandum.\(^{29}\) Research assignments

25. In a “closed universe” memorandum, a student will typically receive a large packet of materials containing a writing problem, controlling statutes, cases that may be used as sources of rules and as examples that will support arguments to be made by both sides of a dispute, and some background reading (such as an excerpt from a legal encyclopedia), when appropriate. Because students are usually discouraged from doing any additional research when everything they need has already been given to them, the students’ energies should presumably focus on assimilating the material and developing strong writing skills.

26. In an “open memorandum” problem, the students must conduct most, if not all, of the research for a particular problem. Students may delay the writing process to devote more time to research. As a result, some students write their papers shortly before they are due because they have spent “too much” time searching (and researching) for elusive cases that may squarely resolve the legal issue. Wise students will begin the writing process earlier and conduct it concurrently with any additional research that needs to be done. It is also noteworthy that many successful ESL students attribute their success to their work with writing advisors. If students wait until the “night before” to begin writing, they will be unable to consult their writing advisors for assistance.

27. Such an exercise may be helpful to American law students as well. See, e.g., Thomas E. Kane and Tammy A. Linn, Letters for Lawyers: Essential Communications for Clients, Prospects, and Others (1996).


29. One assignment, for example, asked students to draft a client advice letter on the proper tariff classification of Matrushka dolls based on previous interpretations of the word “doll” under the Tariff Schedules of the United States. If the articles were imported as “dolls,” the articles would not be subject to duty under the new Harmonized Tariff Schedules of the United States. If the articles were imported as “art, executed entirely by hand,” the articles might also be imported without payment of customs duties. If the articles were imported as “statuettes and other ornaments of wood,” however, the importers would have to pay duties at the rate of 4.3 percent ad valorem. See Hasbro Indus., Inc. v. United States, 703 F. Supp. 941, 945-46 (Ct. Int’l Trade 1988) (finding that a “G.I. Joe Action Figure” is a doll under the tariff schedules), aff’d, 879 F.2d 838 (Fed. Cir. 1989); see also U.S. Customs Serv., Letter DD887319 (June 21, 1993) (letter ruling on the tariff classification of nesting dolls from China); William Lutz, The New Doublespeak: Why No One Knows What Anyone’s Saying Anymore 7 (1996) (describing the G.I. Joe litigation as an example of the distinction between law and reality, but stating incorrectly that the G.I. Joe dolls “are now subject to the import tariffs on dolls”).
can also be tailored, for example, by having students find legal information on their own countries or regions as a starting exercise.\textsuperscript{30}

When a law school is part of a university with an appreciable number of international students, the international law students may be invited to participate in university-wide international student and multi-cultural events. Still, law students are generally too busy to take advantage of these programs, and these programs do not address the intellectual skills that the students must master in law school. There is also a danger that students who interact exclusively with students from their home countries will have more difficulties in mastering English. To deal with the ever-increasing globalization of the American law school,\textsuperscript{31} our law schools should expend the effort to integrate international students intellectually as well as socially. Legal Writing and Legal Research courses offer excellent fora for doing so.

CONCLUSION

We believe that law schools should begin to create special courses for international law students. Where there is an insufficient number of international students to make an additional course feasible, existing courses should be adapted or supplemented for foreign students to meet their special educational needs. Law teachers of international students should document

This assignment, initially given to a students from Russia, Lithuania, Norway, and Croatia, allowed the students: (1) to develop skills in using a court decision as authority for an argument, rather than merely interpreting the text of a tariff statute; (2) to construe the current statute found in the Harmonized Tariff Schedules of the United States (HTS), which replaced the United States Tariff Schedules (TSUS); (3) to learn about the procedure of requesting a tariff classification ruling from the U.S. Customs Service, and thus learn some practical skills of dealing with an administrative agency that may be useful in later practice; (4) to develop factual information about production of the product; (5) to consider the types of supporting documentation that may be submitted in conjunction with a customs ruling letter, and thus consider the types of evidence that may be marshalled in proving a case; (6) to make predictions for an importer or exporter as to the likely tariff classification of an imported article; and (7) for the students from Eastern Europe and the former Soviet Union, to connect with the familiar culture of their home regions.

\textsuperscript{30} A common issue, for example, might involve a description of business structures available in the student's home country. Research assignments can focus on specific needs and interests of the students. For example, students who will return to their home countries at the conclusion of their studies will have vastly different needs than students who will remain in the United States.

and evaluate\textsuperscript{32} their experiences in teaching foreign students, share materials that they develop for international students, and advance the scholarship of legal writing by contributing to this new field of legal education.\textsuperscript{33} In addition, Legal Writing and Legal Research professors should coordinate efforts with international students' programs, writing centers, writing or academic support specialists, and other legal writing professionals who teach international students.\textsuperscript{34}

To permit international students and lawyers to pass through our legal education system without adequate attention to their special needs deprives these talented individuals of the full benefit of an American legal education — and deprives our law school communities of the enrichment that these students can share with us. By taking steps to innovate and to adapt our curricula, American law schools in general, and professors of Legal Writing and Legal Research in particular, will confirm that there is much to gain — by students, faculty, the law school community and the legal community — from providing adequate academic and extracurricular support for international law students and law graduates.

\textsuperscript{32} A sample survey appears in Appendix 2.

\textsuperscript{33} Networking is an excellent way to stay current in this fast-growing area of legal education. Consider, for example, Professor Jill R. Ramsfield's thorough bibliography of materials for teaching ESL law students, in Is "Logic" Culturally Based? A Contrastive, International Approach to the American Law Classroom (forthcoming), which was distributed at the presentation of this panel.

\textsuperscript{34} Following this panel's presentation, in fact, Professor Jan Levine of Temple University School of Law facilitated this effort by setting up an electronic "listserv" for the exchange of ideas and techniques for teaching law students whose first language is not English. To subscribe to this list, ESL-LAW, one should send a message "subscribe ESL-LAW" to listserv@vm.temple.edu. To date, this list has more than sixty subscribers.
APPENDIX 1

INTERNATIONAL LAW STUDENT AND LAW GRADUATE SURVEY

Each year, [name of law school] admits students like you who have come from other countries or obtained a law degree abroad. To enhance your experience, the legal writing instructors would like you to complete the following survey. Your completion of the survey will help your instructors get to know you better and learn how best to familiarize you with American legal research and writing styles. This survey also gives you the opportunity to tell us about any issues or concerns you may have regarding the English language and the American legal system. Completion of this survey is optional. Your cooperation is greatly appreciated.

I. Educational Background

A. Please list all the colleges, universities and graduate programs that you attended.
B. Please list any courses you have had about the American legal system or other comparative law classes.

II. Legal Experience Background

A. Please list any law firms or offices for which you have worked.
B. What kind of work did you do in this office?
C. Did your responsibilities include writing in English?

III. Language Skills

A. For how many years have you studied English?
B. How fluent are you in English? Please circle the appropriate category.

<table>
<thead>
<tr>
<th>Reading</th>
<th>Writing</th>
<th>Speaking</th>
</tr>
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<tr>
<td>Fluent</td>
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<td>Fluent</td>
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<td>Conversational</td>
<td>Conversational</td>
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<td>Some difficulty</td>
<td>Some difficulty</td>
<td>Some difficulty</td>
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C. Do you have a substantial understanding of American colloquialisms and grammar?
D. What other languages do you speak or read?

35 Where information on a student's educational background is available in the student's admission file, this question may be modified or eliminated.
IV. Goals and career plans

What are your career plans or goals? For example, after completing law school, do you plan to work here in the United States or in another country?

V. Other questions

A. Please describe any concerns or curiosities you have about coming to the United States and studying law in the United States.

B. If it were offered, would you be interested in attending an additional class to become more familiar with American legal terminology, grammar, etc.?
APPENDIX 2
SAMPLE QUESTIONNAIRE FOR INTERNATIONAL LAW STUDENTS

Name          Year J.D. Awarded/Anticipated

Please answer the following questions on a separate sheet.

1. How many years have you studied English?

2. Have you studied law outside the United States? What degree(s) did you earn?

3. Did you take courses on U.S. law? If so, what courses did you take?

4. Did you take courses on the law of other common law countries?

5. Do you have any particular concerns about studying Legal Writing or Legal Research?

6. What do you find difficult about writing? Why?

7. What do you find easy about writing? Why?

8. What do you find difficult about legal research? Why?

9. What do you most enjoy about legal research? Why?

10. Please describe any special language training you have had in this country, such as English as a second language.

11. Do you have any suggestions to improve the teaching of legal writing or legal research for students whose first language is not English (e.g., additional class time, additional conferences with professor, special orientation programs)?

12. Are there any anecdotes or stories about your experiences with legal writing or legal research that you would like to share?
Rule Based Legal Writing Problems: A Pedagogical Approach*

Gail Anne Kintzer**, Maureen Straub Kordesh,*** and C. Ann Sheehan,****

I. INTRODUCTION

Instruction in legal research, legal analysis, and legal writing varies considerably from school to school,¹ not only in name,² but in focus, content, and required texts.³ Nevertheless, all Legal Methods courses have one thing in common: designing or se-

* This article is based on a presentation given on July 19, 1996, at the Legal Writing Institute's Conference at Seattle University. The authors would like to thank Steven Kropp for helpful comments on our article.

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² Besides Legal Research and Writing, these courses “may be called ‘Legal Process,’ ‘Legal Method,’ ‘Lawyering Skills,’ or ‘Legal Skills.’ While it seems intuitive that the course name should reflect the course’s pedagogical philosophy, this is not universally true.” Lucia Ann Silecchia, supra note 1, at 250 n.15. This article refers to all such courses as Legal Methods because this title more accurately reflects their modern content. This article refers to all Legal Methods teachers as professors.

³ In the early 1980’s, only a few texts devoted to legal research, writing, and analysis were available. Two popular early texts were JOHN C. DERNBACH & RICHARD V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD (1981), and MARJORIE DICK ROMBAUER & LINNE B. SQUIRES, LEGAL WRITING IN A NUTSHELL (1982). Today, the field has exploded with available texts, each containing its own pedagogy, whether defined or implicit. See infra note 16.
lecting writing problems for first-year law students. Legal Methods professors should select writing problems with a pedagogy in mind, rather than picking problems merely because professors intuitively think they will "work" or that the students may find them interesting.

This article presents a pedagogy based on progressing from simple to complex, utilizing various rule structures, and building skills in a logical way. Part II explains the pedagogy underlying problem selection. Part III presents the authors' progression model in detail. Part IV provides illustrations of problems based on this progression paradigm. Part V concludes the article.

II. THE PEDAGOGY UNDERLYING PROBLEM DESIGN

Legal Methods is thought of in the legal academic community as a "skills course," in contrast to "doctrinal" or "substantive" courses. Legal Methods does, however, teach the same skills taught in doctrinal courses. It does so within the context of many doctrinal areas, and adds a writing component.

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4 Writing courses do not teach only writing and research, style and mechanics. We do have to teach those things, certainly, but in addition, the legal writing courses are the only courses in which legal analysis is systematically taught. We have to teach, in the writing courses, the structure of analysis: how to analyze cases, how to connect one case to the other, and how to apply them by deduction or analogy to a client's problem, a client's story. Joseph Kimble, On Legal-Writing Programs, 2 PERSP. 1, 2 (1994) (quoted in Lucia Ann Silecchia, supra note 1, at 255 n.35 (1996)). See also Lewis D. Solomon, Perspectives on Curriculum Reform in Law Schools: A Critical Assessment, 24 U. Tol. L. REV. 1, 38 (1992) (expressing hope that legal educators will "perceive that theory and practice are not polar opposites (dichotomies), but rather complement each other...[and] will choose to strike [an appropriate] balance...").

5 By doctrinal education, I mean this:
the law student should acquire a capacity to use cases, statutes, and other legal texts. This person is also skilled at interpretation: the reading of a case or statute, or a mass of case law, or a complex regulatory scheme. Finally, this person can communicate the interpretive understanding, both orally and in writing. The Hon. Harry T. Edwards, The Growing Disjunction Between Legal Education and the Legal Profession, 91 MICH. L. REV. 34, 57 (1992).

6 The more serious problem in legal writing, however, is what I would call a lack of depth and precision in legal analysis. For example, too many lawyers demonstrate a lack of familiarity with or understanding of controlling or analogous precedent. Too many advocates are unable to focus an argument, so as to highlight and concentrate on the principal issue(s); and too many attorneys fail to assess how an action in a particular case may affect future cases or future developments in the law. These failings, I think, are attributable in no small measure to failings in "doctrinal education."

Id. at 64-65.
The advantage that Legal Methods has over doctrinal courses is the ability to teach legal analysis through a highly structured progression. Because they are not tied to the cases and concepts that drive doctrinal courses, methods professors can teach the component parts of legal analysis in incremental steps, incorporate writing assignments designed to reinforce those steps, and can do so in a progression from simple to complex. With such a progression, the student can self-correct before advancing to more complex steps. Additionally, the professor can aid a students' learning by providing highly structured oral and written instruction before each step, as well as feedback on each student's execution of those steps. Once the students have a full office memorandum as a graded assignment, then the professor assesses the student's grasp of the entire process by grading. Subsequent assignments introduce analytical complexity and writing sophistication in a gradual build-up.

III. The Progression Model—Teaching Skills

A. The First Skill: reading cases and recognizing rules—a three-step process

The first skill required of a student in all first-year courses is rule recognition. Indeed, doctrinal courses utilizing the case book method, as well as Legal Methods problems, require con-
stant briefing of cases to recognize legal rules. The purpose behind briefing cases is to understand what the legal rule is from a case (issue, rule), why the court arrived at that particular rule (rationale and policy), and how the court applied that rule to the facts of the case before it (facts, holding, outcome).

Doctrinal professors spend class time extracting rules from assigned cases and exploring their internal and external contours. Briefing cases is essential to this process, but doctrinal professors rarely spend class time instructing the students how to do it. Without the ability to extract the rule of a case and correctly identify its rule structure, a student cannot perform legal analysis in class, on exams, and in memoranda or briefs. Legal Methods must teach rule and rule structure recognition as the beginning step in a writing process that may require coherently restating the rule or synthesizing rules prior to application to the specific facts of a problem.

Legal Methods should incorporate a three-step process for teaching rule recognition and application. The first step is to teach a comprehensive case briefing system that works for both doctrinal courses and Legal Methods. The second step is to introduce and systematically examine the different rule structures that students will encounter in the cases and statutes read throughout law school. The third step is to actively engage the students in applying the first two steps: they brief a case with

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12 The internal contour of a rule (or statute) is its structure as an element, category, balancing, or factor test. A rule's external contour describes the gamut of possible applications of the rule. Professors generally explore these contours through Socratic questioning and offering oral hypotheticals for analysis. See Saunders & Levine, supra note 9, at 128-29.

13 Of course, by the trial and error method of being called upon in doctrinal classes or mentally answering questions asked of others, a student supposedly figures out how to brief. Unfortunately, this method often fails students who could be better prepared for class with early and systematic instruction on that formidable task. Many writing texts devote space to this skill, see infra, note 16.

14 These rule structures, often known as “tests,” include elements, exceptions, categories, factors, and balancing. See infra text accompanying notes 22-25. Because statutes incorporate the same rule structures as common-law rules, statutory analysis can be taught concurrent with common-law analysis. Thus, students will see the similarities and differences between common-law analysis and statutory analysis. However, a systematic explanation of the methods peculiar to statutory interpretation, including canons of construction, could be included at some logical point in the Legal Methods program.

15 Ideally, this case should come from a West reporter, which includes a syllabus and key numbered headnotes, unlike some official reporters. This case provides an op-
a complicated rule structure.

1. The First Step—Instruction on How to Brief a Case

Legal Methods professors usually give instruction on how to brief a case and explain the sections of a brief and how to read a case to find them. Providing the students with a comprehensive listing of the briefing categories is essential. Because most cases that students encounter in both doctrinal courses and Legal Methods problems are appellate cases that change previously enunciated legal rules, the brief's rule section should have two parts: the “old rule” being reviewed by the appellate court and the “new rule,” which is the appellate court's revision of the old rule. Such a separation better guides the students for doctrinal discussions, and at the same time instructs them on the courts’ common-law role as law-makers. As part of the process of learning brief categories, a simple case can be done as an oral or written exercise.


A comprehensive listing might include the following: case name, description of the parties, procedural posture, standard of review, issue(s), disposition (technical holding), facts, parties' arguments, rule(s), and rationale. Compare, DERNBACH, supra note 8 (listing the components as facts, issue, rule, holding, and rationale); ALAN L. Dworsky, The Little Book on Legal Writing (2d ed. 1992) (listing facts, issue, holding, and rationale).

See LINDA H. EDWARDS, LEGAL WRITING - PROCESS, ANALYSIS, AND ORGANIZATION 39-41 (1996) (employing a similar separation, explaining that "inherited rule" means the "rule of law the opinion inherits from prior authorities" and "processed rule" means "the complete rule as it appears when the opinion concludes").

Students may find, after this discussion or several doctrinal classes, that including more categories than their doctrinal professors requested will aid them during class discussions, especially the “old rule” and “new rule” categories.

Legal Methods texts often print a simplified case for this purpose. See, e.g., DERNBACH, supra note 16, at 31.
2. The Second Step—Instruction on Rule Structures

Methods professors also should provide students with a thorough explanation of the various structures of rules. In Legal Methods, students often are required to hand in a brief of a case as an ungraded written assignment. Because this is typically done early in the students' first semester, a case containing a simple rule is often used for this assignment.

For the purpose of our "progression" model, students should continue refining the skill of rule extraction by receiving instruction on the types of rule structures in a straightforward way. Students need to be taught and shown illustrations of these structures, including: 1) rules that have elements that must be satisfied, the traditional "and" rule structure; 2) rules that have exceptions, the traditional "unless" structure; 3) rules that consist of categories, only one of which must be satisfied, the traditional "or" rule structure; 4) rules that consist of factors to be considered; 5) balancing tests; and 6) rules that employ factors and an explicit context in which to balance or weigh those factors.

3. The Third Step—Integrating the First Two Steps by Briefing a Complex Case

After these different rule structures are introduced, the next Legal Methods written assignment would be to assign the students to brief a case with a more complex rule, such as one

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21 Systematic instruction on rule structures enhances a student's ability to recognize a complex rule that an opinion does not clearly label and divide into logical parts. Courses such as torts, contracts, and property often start with extremely old cases, with archaic legal jargon and writing style. It is hard enough for some first-year students to find rules in these cases and see how rules change over time, much less deduce the rule structure as well.

22 Reviewing elements rules from different subject areas shows students that legal rules have similar constructions. Statutes containing elements can also be included. The next step is to show students some statutory rules and common-law rules and have the students break these rules into elements.

23 Two illustrations of legal rules that fit this structure are the four categories of ex post facto laws from Calder v. Bull, 3 U.S. 386, 390 (1798) (reduced to three categories by Beazell v. Ohio, 269 U.S. 167 (1925) and Collins v. Youngblood, 497 U.S. 37, 42 and n.3 (1990)), and the three ways to prove a common-law marriage from In re McGrath's Estate, 179 A. 599 (Pa. 1935).

24 For example, review of a denial of substitution of counsel, under the Sixth Amendment right to counsel, employs a factors and balancing test. See infra text accompanying notes 57-58. Another test that balances some factors against other factors is the RESTATEMENT (SECOND) OF CONTRACTS § 178, which sets forth factors to consider when examining whether a contract is unenforceable on public policy grounds.
with several elements or categories, perhaps with at least one of those categories containing several elements. Once the professor explains case briefing and rule structures generally, a student is better able to find one of these structures in a case and structure an analysis around it.25

B. The Second Skill—Applying Rules to Facts

Once students understand the correct rule from the case, a hypothetical is given to them that can be completely analyzed using this case. The analysis is performed as an in-class discussion. The professor, as an illustration of legal analysis and writing, can end this discussion with a verbal summary—a "talk through"—of exactly how a discussion section based on this hypothetical and case should be written, including beginning conclusion or thesis, description of the law (Rule) section, application of the law to the facts of the hypothetical, supported by relevant analogies and distinctions, and ending conclusion.26

C. The Third Skill—Writing a Legal Analysis

At this point, the students are assigned to write the discussion section of a memorandum based on the hypothetical problem used in the prior steps and the in-class discussion. By following this progression, a student's first attempt at writing a discussion section based on a known analysis becomes more of a writing exercise27 than an analytical exercise,28 in which any er-

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25 See OATES, supra note 16, at 170-73 (providing various memorandum organizational plans based around rule structures). This case briefing assignment should involve the type of case that is particularly problematic for students: an opinion that discusses various parts of a rule in various places within the opinion and never pulls these parts together in any comprehensive restatement of the entire rule. Asking students to perform this task is an essential first step toward the skill of restating a properly structured rule without using excessive quotes from a case.

26 The "talk-through" reinforces previous lessons learned regarding drafting a discussion. These lessons may include: writing a beginning conclusion that incorporates the terms of the legal rule, expressing the rule in understandable form with a proper mix of quote and paraphrase, applying the rule to the facts of a hypothetical case, and supporting the application with appropriate analogy or distinction using the known case. The writing of the discussion section after this oral discussion of the components and content reinforces prior lessons, but allows the students to focus on writing rather than analysis at this point.

27 At this point in the semester, students should already have instruction in the elementary aspects of legal writing, including what a conclusion is and how to write one that incorporates the terms of the applicable legal rule, how to "match" the facts of the hypothetical with the relevant parts of a rule, how to make analogies and distinctions to the facts of other cases to conclude that the same or different holding should apply, and
rors can be corrected by the professor or self-corrected by the student before proceeding to the next process.29

D. The Fourth Skill—Independently Integrating the Prior Skills of Rule Recognition, Legal Analysis, and Writing

At this time, the students should progress to an ungraded assignment where they can individually utilize the skills learned to date by briefing a case, extracting the proper rule, and applying the rule to a hypothetical in a written discussion. This assignment should be based on a new hypothetical with an additional case in the same subject area as the last one. However, the case should contain a slightly different rule structure than the last case. Because the case deals with the same subject as the first case, the students will be forced to see how rules change over time or change to meet different circumstances.30 This written assignment requires the students independently to brief the case, to work through a legal analysis of the hypothetical problem, and to express that analysis in a written discussion section.

whatever legal writing style your program teaches, such as IRAC or C-RAC. See Millich, supra note 7, at 34 (citing Paul T. Wangerin, Learning Strategies for Law Students, 52 ALB. L. Rev. 471, 519-22 (1988)). Of course, this article's theory and model advocate that all first-year students should be taught the skills of legal analysis and writing in a process that isolates the skill being taught, builds upon skills previously taught, and does so in a progression that aids the students' overall comprehension of the process.

28 Because the applicable legal rule drives the entire legal analysis and, therefore, the rest of the memorandum, the parts of memos that are written last should be taught last. Therefore, the questions presented, brief answers, statement of facts, and conclusion sections may be taught later in the semester.

29 This last written assignment allows the professor to identify which students have not been following the instruction so far or have not yet understood the amount of effort that is expected in the written assignments. Errors such as employing the wrong rule; inability to follow a discussion format such as C-RAC; or excessive grammatical, punctuation, and proofreading mistakes should denote to the professor the need for an immediate conference to alert the student to problems and help to get the student on track.

30 This case may relate to the first case as follows: 1) further explains the rule, 2) changes the rule, 3) provides an exception to the rule, or 4) provides a different rule because the parties' situation is different. In fact, letting the students use both cases presents them with a choice which encourages them to see for themselves how the rule has changed. Some students may fail to see the change and incorrectly apply the rule, or part of the rule, from the prior case; some students may be unable to identify the correct rule from the second case. These types of mistakes identify students who need further instruction on how to read a case and find the correct rule.
E. The Progression Model Continued—Testing Skills with Graded Problems

After this step by step approach to learning the basic skills of legal analysis and performing these skills on ungraded problems, students should be ready for graded problems. These problems should be set in a known jurisdiction, follow a progression from easy to complex, and utilize a variety of rule structures to both teach and test the students.

Early assignments that use an elements rule structure or a simple category rule structure are often easiest for students. In addition, these structures are often the first they will encounter in their doctrinal courses. Later assignments can employ rule structures that students often find more difficult in written analysis, such as factor tests, especially those set within a specific balancing framework. Varying rule structures gives students an opportunity to stretch written and analytical abilities, whereas constant elements tests soon cease to teach new skills.

Similarly, a Methods course that consistently assigns only common-law problems short-changes students in this world where statutory law is increasingly important. Along the same line, problems should be based on both state and federal law. The last assignment in this progression from simple to complex is often a Methods course's oral advocacy problem. This oral advocacy problem should contain several issues and rule structures and should incorporate alternative arguments and policy arguments. Of course, the oral advocacy problem is often the most difficult for students because it must be a well-balanced problem.

31 This model assumes that students need to learn how to use both mandatory authority and persuasive authority, which can only be done realistically in a known jurisdiction.

32 A problem that is similar to problems in the past simply tests what a student has already learned. A problem that incorporates different rule structures or advances to statutory analysis rather than common-law, reaches into new territory and becomes both a testing and a learning vehicle.

33 Most areas that were once ruled by common law have now become codified, such as civil procedure, evidence, criminal law, and property.

34 As the most complex, the oral advocacy problem should not be a simple choice of rules problem. For example, a case of first impression set on a summary judgment posture often only requires that the students argue what rule the court should adopt and apply, and the facts are undisputed. This type of simple problem is easier than prior problems because students usually merely repeat policy arguments gleaned from existing persuasive opinions. Rather, such a summary judgment problem should also include the alternative issue of whether the plaintiff has sufficient evidence to create a genuine issue of fact that necessitates resolution by trial. This type of problem requires
IV. PROBLEM SELECTION IN ACCORDANCE WITH THE MODEL

Legal Methods professors have the enviable and unenviable task of selecting new problems each semester for their students. The task is enviable because the professor has a wider range of topics from which to choose than a Torts or Contracts professor. It is unenviable because the Methods professor often feels that she or he must rewrite the curriculum each year, in a sense rewriting the casebook. Although the pedagogy suggested here reduces the range of problems available, though not the areas of law, it also reduces the amount of curriculum rewriting that must be done from semester to semester.

New Legal Methods professors often allow the chosen problems to “drive” the curriculum plan. The suggested pedagogy permits the professor's goals to set the framework. It is important to view a detailed problem plan for a whole semester to give insight into the effect that problem selection has on the curriculum.

A. First Illustration of Problems Consistent with the Model

This section will describe examples of the “build-up” pedagogy in using a common-law problem, a statutory problem, and a constitutional law problem. The constitutional law problem was not successful, but the other two worked well.

Common-law problems work well for initial build-up because each case usually analyzes one small component of the rule; hence, an early problem can focus on a small part of a rule. The professor can organize the fact pattern around that one small component, while anticipating that the next cases will bring greater rule complexity into the analysis. For example, a nuisance problem could focus on whether the conduct was intentional, that is, whether the defendant intended to do whatever ultimately caused the injury, even if he did not intend the injury. Nuisance is an elements test, and one element is whether the conduct was intentional.

The complication in the second assignment utilizing nuisance law involved the common enemy doctrine. This doctrine is a special exception to the nuisance doctrine, saved especially for neighbor-to-neighbor flooding. The common enemy doctrine allows flooding between neighbors for virtually any reason except an extensive factual record, complete with a complaint; answer; and various discovery documents, such as interrogatory answers, admissions, depositions, and affidavits.
malice. The exception to the common enemy doctrine is that the defendant may not "collect water and cast it in a body on to the land of his neighbor." Students will now have to work through a doctrine, then through the special circumstance of neighbor-to-neighbor flooding (generally no relief is available), then finally to the exception to the exception. This exercise requires one standard nuisance case, *Argyelan v. Haviland*, and then two or three cases that allow the student to explore the question of whether the water was "cast in a body." It is an excellent common-law vehicle for teaching the basic skills of rule recognition, extraction, and application.

Statutory problems often make good rule-recognition problems, and they, too, lend themselves to gradual complication. These qualities make them good candidates for build-up problems. They often have the advantage of orderliness (if chosen well) over common-law cases. To a student, a short, well-written statute can look much less intimidating than a common-law opinion.

For example, a problem involving a claim of familial status discrimination would start with the Fair Housing Act. The statutory provision, of course, proscribes discrimination on the basis of family status. The one-case analysis used a case that clearly set out the test for determining whether there has been familial-status discrimination.

A Legal Methods professor can complicate a statutory problem by adding conflicting or refining opinions from sister courts, by adding superior authority, or by starting with a statute that is changed in a later assignment. The language preventing discrimination based on familial status was added in 1988: the problem could easily start with the earlier statute and a case involving a family, and then move on to the amended statute and a case like *United States v. Lepore*.

Statutory problems, while apparently giving students "rules" that are comparatively easy to extract, are not easy problems. They do add a layer of complexity in that students must read statutes together with cases to determine what the statutes mean; statutes are more abstract than cases because they have no stories attached to them; and a simple, well-drafted statute can lull a student into a false sense of security that rule recognition and extraction are simpler skills than they

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35 435 N.E.2d 973 (Ind. 1982).
really are. Statutory problems do have the distinct advantage of balancing an otherwise lopsided curriculum that, in some schools, virtually ignores the legislative branch in the first year.

The third kind of problem that can be used in building up skills for analysis is the constitutional problem. Constitutional problems can be more fun to teach and to work on, but they pose serious problems in trying to teach basic skills. The constitutional problem described here was a Fourth Amendment protective search. The one-case analysis used a state court case, *Connecticut v. Trine*.

Connecticut adhered to a standard that is more protective of defendants' rights than is required by the Federal Constitution.

The difficulty in using a constitutional problem became apparent during the case-briefing portion of the class. The students do not really understand the relationship between the state and federal governments at this point in their education (if some do, it gives them an advantage that is not rightfully part of the evaluation of their competence in Legal Methods). The concept of a “more protective” standard is rather confusing, and constitutional cases include more historical background and comparison with other state and federal jurisdictions than do cases involving state statutory or common law. Thus, rule recognition and extraction become much more difficult for the student and the professor is required to spend precious time away from rule application.

The idea of the build-up for this case was to introduce a different standard, the *Minnesota v. Dickerson* standard as adopted by the Illinois Appellate Court in *Illinois v. Henderson*, where the “plain view” doctrine of *Terry v. Ohio* was expanded to include the “plain feel” doctrine of *Dickerson*.

The weakness of such an exercise is, in retrospect, evident. Constitutional analysis requires much more policy analysis and much less application-type analysis. The problem was written to dictate the same outcome regardless of the test applied, but that did not help the students to master the fundamental skill of applying a rule to facts. The constitutional analysis presented some of the difficulty of the statutory problem described above because constitutional provisions are more abstract: if anything,

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40 392 U.S. 1 (1968).
their meaning is less evident than the meaning of a statute. Constitutional provisions also invite a level of philosophical exegesis absent even in statutory problems, and this makes them even more difficult for students to decipher.

Once the students have mastered basic rule recognition, extraction, and application, the professor may branch out into various complexities in other graded assignments. Again, the watchword is careful planning. The professor may have chosen to begin the semester with a controlled problem involving a common-law elements test, and then move to an exception complication of the test. He might then complete the build-up with a category test within the exception. The next problem should move to the next level of complexity, for example, a statutory elements test in which one of the elements has an "or" test, and another of which has a balancing test.

For example, one problem asked whether a defendant was subject to federal court jurisdiction under the Major Crimes Act. The problem required the students to find 18 U.S.C § 1153 and to determine the elements of federal jurisdiction: whether the defendant was an Indian; whether the crime was committed in Indian Country; whether the federal government had ceded jurisdiction to the state; and whether the crime was one of the enumerated offenses. The major rule, the statute, is an elements test. Whether the crime was committed in Indian Country is an elements test. Whether the crime was committed by an Indian is a factor test. Whether the crime committed was an enumerated offense ultimately requires the student to consider possible permutations that move off into state substantive criminal law.

The problem works well if the students have had the gradual build-up that teaches them to look for different kinds of tests. They then have the confidence to try various approaches to rule extraction when they encounter the cases that indicate that the question of whether a defendant is an Indian is governed by a rule whose structure is different from the rule about what constitutes Indian country.

B. Second illustration of problems consistent with the model

A first common-law case briefing assignment involved the validity of a pre-nuptial agreement in Pennsylvania from In re Estate of Gelb.41 The Gelb rule used the traditional category

41 228 A.2d 367 (Pa. 1967).
test, requiring either a reasonable provision for the contesting spouse or, in its absence, a full and fair disclosure of the defending spouse's financial worth.42 The determination of the reasonable provision category involved the court's consideration of five factors. Because the Gelb court found neither full and fair disclosure nor a reasonable provision for the contesting spouse, these five factors were left to a footnote in the majority opinion. The dissenting judge, however, applied the five factors and found that a reasonable provision had been made for the contesting spouse.43

The professor had to be sure, during the in-class discussion of this case, that the students found the correct rule. Then students needed to recognize that the rule involved a category test, with the first category having five factors and the second category having two elements.

Next, the students analyzed a hypothetical set of facts that questioned only whether full and fair disclosure of the defending spouse's assets had been made. Students were told not to address the reasonableness of any provision for the contesting spouse. The hypothetical's facts were structured so that full and fair disclosure of assets had been made at the time of the agreement. Thus, with this first analysis, students only had to find and articulate that full and fair disclosure had been made, despite monetary inflation in the intervening time between the signing of the agreement and the time it was contested.

The application of the rule to the hypothetical was extensively discussed during class.44 After this class discussion, each student submitted the written discussion section of an office memorandum and received extensive feedback from the professor.

42 Id. at 370. To find the rule on the prenuptial agreement issue, the students first had to understand that several evidentiary questions were not relevant for their purposes and thus had to avoid confusion by the Court's discussion of parol evidence and the Dead Man's Statute. The case also provided an opportunity to reinforce the students' understanding of the standard of appellate review: the Pennsylvania Supreme Court reviewed the case after it had already been heard by an auditing judge then followed by an en banc review by the Orphan's Court of Philadelphia.

43 The five factors were: a) the financial worth of the husband; b) the financial status of the wife; (c) the age of the parties and the number of children each has; (d) the intelligence of the parties; and (e) whether or not the wife aided in the accumulation of the wealth. This case also provided an opportunity to discuss the place in American jurisprudence of dissenting opinions. See id. at 372-73.

44 See supra text accompanying notes 26-29.
At this time, the students were ready for a more complex rule application assignment. For this assignment, the students were given "recently discovered" affidavits that put into question the full and fair disclosure as well as two of the factors of the reasonableness provision for the contesting spouse: the contesting spouse conceived the idea for her husband's patented invention that made him a million dollars and she only had an eighth grade education. Again, the students' written discussions of this new problem gave them a chance to rewrite and correct any problems with their first discussion's full and fair disclosure analysis and also to apply two factors of the reasonableness test.

The class was now ready to write a closed memorandum for their first course grade. For this assignment, the students stayed in the same jurisdiction, Pennsylvania, and the hypothetical's facts were largely the same: the two factors of the reasonableness analysis remained in question, and the full and fair disclosure analysis was made more complex with the addition of evidence that there had been material misrepresentation of the defending spouse's assets at the time of the signing of the agreement.

For this first graded closed memorandum the only authority available was the case of *Simeone v. Simeone*.\(^{45}\) The *Simeone* case changed the Pennsylvania rules on the validity of prenuptial agreements. The *Simeone* court, in reexamining and clarifying the law of these agreements, determined that courts should not be evaluating the reasonableness of a prenuptial agreement; the court retained only the full and fair disclosure requirement.\(^{46}\) The use of the *Simeone* case, along with the same fact pattern from the previous problem that was analyzed under *In re Estate of Gelb*, clearly changed the result of their analysis. Students had to recognize that the entire reasonableness analysis was no longer part of the discussion. The only question remaining was whether there was material misrepresentation of the defending spouse's assets, a new wrinkle on their first full and fair disclosure analysis. This problem also demonstrated

\(^{45}\) 581 A.2d 162 (Pa. 1990).

\(^{46}\) The court pointed out that prenuptial agreements are contracts and must be evaluated under the general principles of contract law, a point not made in *Gelb*. While still requiring full and fair disclosure of the financial positions of the parties, rebuttable only by proving fraud or misrepresentation with clear and convincing evidence, the court's decision reflected the changes in the status of women during the twenty years before 1990. The court noted that paternalistic presumptions and protection were no longer valid. *Id.* at 165-67.
how rules can change over time. This assignment provided the professor an opportunity for early intervention with any student who had not recognized that an analysis of the reasonableness of the defending spouse’s provision for the other spouse was no longer part of the law.

This last problem made a good first graded assignment because it built upon a prior progression that gave the students experience in recognizing rules and applying those rules to the facts. The graded problem exposed them to a case in a familiar legal area, with at least one of the rules the same, but with an opportunity for a completely fresh analysis.

The next assignment involved statutory interpretation and application of Title VII. This problem tested the students’ recognition and application of an elements rule structure, but the analysis was complicated by the Title VII proof models set in a summary judgment posture. The problem asked whether specified actions by a male supervisor toward a male subordinate constituted sexual harassment. First, students needed to determine whether the plaintiff had a cause of action when the harassment was from a member of the same sex. This determination involved recognizing that the statutory language had no requirement that the action be between members of the opposite sex. If students found the harassment actionable or possibly actionable, they next needed to find and apply the five elements of a hostile work environment sexual harassment claim.47

This proved to be an excellent research problem, as well as a complicated writing problem for the last graded assignment of the year. Virtually all United States Court of Appeals have extensive case law on hostile environment sexual harassment. Nevertheless, the professor had the opportunity of setting the problem in a circuit that had not yet addressed the question of same-sex harassment.48

47 Those five elements are: 1) that the plaintiff was a member of a protected group; 2) that he or she was subjected to unwelcome sexual harassment; 3) that this harassment was based upon sex; 4) that the harassment affected a term, condition, or privilege of employment; and 5) that the company knew or should have known of the harassment but failed to take remedial action. These elements can be found in many recent Title VII cases. See, e.g., Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993); Jensen v. Eveleth Taconite, Co., 824 F. Supp. 847 (D. Minn. 1993).

48 This problem involved two basic issues for the students to analyze. The first addressed whether Title VII applied to same-sex harassment, an issue of law. The second, an alternative issue assuming that Title VII did apply, addressed whether the plaintiff had enough evidence to withstand the defendant’s motion for summary judgment, an issue of fact. The professor provided an extensive discovery record and the students had
C. Third illustration of problems consistent with the model

Common-law marriage in Pennsylvania worked well as the basis for a series of ungraded exercises that follow the skills building sequence described in Part III. After instruction on briefing cases and an introduction to rule structures, students were assigned to brief In re McGrath's Estate.\textsuperscript{49} The clearly written and numbered trial court's four ways of proving common-law marriage (a category test) was altered by the appellate court into three categories, but these categories were unnumbered and difficult to recognize and extract from the opinion.

After briefing the case, class discussion clarified the three categories of proof,\textsuperscript{50} and the outcome of the McGrath petitioner's case under those three categories. Once the case was fully understood, students were given a hypothetical in which only one category of proof applied (cohabitation and reputation as husband and wife, which raised a presumption of a common-law marriage). The application of the proper category of proof to the hypothetical facts was completely discussed in class.\textsuperscript{51} At this point, the students completed a written discussion section of an office memorandum based on the hypothetical, the McGrath case, and class discussion. This assignment was purely a writing exercise because a complete oral analysis, using the C-RAC writing model, was given to them in the class discussion.

Next, the students received another case, In re Garges,\textsuperscript{52} and a hypothetical, and submitted a written discussion section the opportunity for oral argument on the summary judgment motion. See infra, note 34.

\textsuperscript{49} 179 A. 599 (Pa. 1935).

\textsuperscript{50} Before class discussion, many students, being unable or unwilling to follow the train of thought in the opinion, put down the trial court's four categories of proof as the "rule" from the case. Correcting this early failure to follow the court's discussion of the trial court's four categories as they related to the petitioner's case gave the students an invaluable lesson in how to read a case thoroughly, "word by word." This case also demonstrated the necessity of using a variation of the "old rule" and "new rule" brief categories. See text supra at note 18.

\textsuperscript{51} This discussion included an oral "talk-through" of a written analysis, including a beginning conclusion or thesis, a clear and concise paraphrase of the rule from McGrath, and a discussion of how to support the conclusion that the petitioner in the hypothetical could prove the two elements of the applicable category (cohabitation and reputation). The class discussed analogies that could be made to the McGrath petitioner's proof of cohabitation to support the conclusion that the petitioner in the hypothetical could prove cohabitation. Based on the McGrath petitioner's failure to prove reputation, distinctions were discussed. One of the facts in the hypothetical was ambiguous, which led to a discussion of how to handle an ambiguity by explaining the two possible inferences and analyzing which was the stronger by using other facts in the hypothetical.

\textsuperscript{52} 378 A.2d 307 (Pa. 1977).
based solely on their own efforts. The *Garges* case rejected the cohabitation and reputation presumption of marriage rule in situations where one party was incapable of contracting marriage due to an already existing marriage. The court stated that despite cohabitation and reputation, the parties would be presumed to be unmarried unless unequivocal evidence of a post-divorce agreement to enter into the legal relationship of marriage at the present time could be shown.\textsuperscript{53} The hypothetical problem contained several facts that needed to be analyzed to see if the agreement element of this rule was satisfied.\textsuperscript{54}

An in-class follow-up provided positive feedback to those students who understood the common law marriage rules correctly. As a group exercise, the students were given a hypothetical involving three children’s petition for social security benefits based on their deceased father’s earnings. The hypothetical contained the fact that the hearing officer, the Secretary of Health, Education, and Welfare, and the federal district court all concluded that the petitioners were not entitled to benefits because their parents had not formed a common-law marriage. No rationale for this conclusion was given to the students, however. The students were asked to evaluate the conclusion that the petitioners were not entitled to benefits because they were not the legitimate children of the wage earner.\textsuperscript{55} The students properly rejected the conclusion, after applying the rules of common-law marriage from the two cases they studied.\textsuperscript{56}

\textsuperscript{53} Getting the right rule from this case was problematic for some students still unable to follow the court’s expressions and use footnotes to help them. These students could potentially get the rule wrong in several ways, along a continuum from using the rule from *McGrath* by misunderstanding the change in presumptions where a prior marriage existed; giving an incomplete description of the *Garges* rule by leaving out the element of an oral agreement; to thinking that cohabitation and reputation continued as elements, along with the agreement, instead of merely being evidence which could corroborate the existence of what may be the requisite agreement. The place at which a student erred provided an estimate of ability or effort at that point in the semester (third week) and enabled the professor to conference and address the specific skill(s) with which a student had difficulty. Clearly, however, at this point almost no students were having any difficulty following a general C-RAC format, even where they applied the wrong rule.

\textsuperscript{54} In the hypothetical, no agreement could be proved. Giving students an early hypothetical where their client does not have a case helps to illustrate the objective nature of an office memorandum.

\textsuperscript{55} This hypothetical adapted the facts of *Mellon v. Richardson*, 466 F.2d 524 (3d Cir. 1972).

\textsuperscript{56} At the end of the discussion, the professor told them that in the real case on which the hypothetical was based, the Third Circuit had arrived at the same conclusion as the class, and had reversed the prior decisions. This exercise provided the students
A good factor and balancing test application involved the Sixth Amendment qualified right to substitution of counsel. In this test, the right of a trial court to control its docket is balanced against the Sixth Amendment right of the defendant to substitute counsel, as determined by three factors. Because this was a fairly easy factor/balancing test, the problem made a good first graded assignment.

The next assignment on the continuum of difficulty involved whether a defendant could present to the jury a necessity defense to federal prison escape, and was a graded open research memo. This defense has six elements, which were relatively easy to resolve based on the facts of the hypothetical, but the problem involved a difficult synthesis of the six elements from both prison escape cases and general necessity cases in the United States Sixth Circuit. In addition, no case exactly on point existed. Students had to make creative but close analogies to satisfy some of the defense's elements.

A complicated problem for a trial court or appellate brief involving summary judgment is routine for a semester's oral advo-

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57 These factors are the "timeliness of the motion; adequacy of the court's inquiry into the defendant's complaint; and whether the attorney/client conflict was so great that it had resulted in total lack of communication preventing an adequate defense." United States v. Corporan-Cuevas, 35 F.3d 953, 956 (4th Cir. 1994) (quoting United States v. Gallop, 838 F.2d 105, 108 (4th Cir.1988)).

58 In addition, the problem afforded an opportunity to discuss standards of review because the issue assigned was whether the client could obtain a reversal on appeal due to the trial court's denial of her motion for substitution of counsel. The facts of the problem were adapted from United States v. Mullen, 32 F.3d 891 (4th Cir. 1994).

59 18 U.S.C. § 751(a) (1988) required that the government prove that 1) she had been in the custody of the Attorney General, 2) as a result of a conviction, and 3) that she escaped from that custody. See United States v. Bailey, 444 U.S. 394, 407 (1980).

60 In United States v. Singleton, 902 F.2d 471, 472 (6th Cir. 1990), the Sixth Circuit held that duress and necessity defenses have five elements, and referred to both defenses collectively as justification defenses. Specifically in prison escape cases, the Supreme Court has required that a defendant present evidence on at least two elements, see United States v. Bailey, 444 U.S. 394, 410, 413 (1980), both of which are included in some form in the Sixth Circuit's non-prison escape justification cases. See Singleton, 902 F.2d at 472. In addition to the universal five elements of duress or necessity, however, the only Sixth Circuit case addressing the defense in the prison escape context contained a sixth element, that the defendant use no force or violence in the escape. See United States v. McCue, 643 F.2d 394, 396 (6th Cir. 1981). Besides synthesizing the elements of the defense, the students had to discuss the difference between a necessity defense and a duress defense in the context of prison escape.

61 The students' client, a female prisoner, escaped from a federal prison in order to prevent her Egyptian husband from taking their daughter to Egypt where she would be circumcised, also known as female genital mutilation.
cacy problem. Title VII problems work well in this regard, as long as students are provided with a record. In the hypothetical used for a Title VII case, the plaintiff, a member of a racial minority, was fired from his job as the assistant manager of a restaurant. After he was fired, another employee asked the restaurant manager where the plaintiff was, and the manager stated "I finally got rid of that nigger." However, the employer claimed that the employee was fired because he sexually harassed two female employees, one of whom was the manager's girlfriend, and because he had "stolen" food from the restaurant when he charged food under a company policy that had been supposedly eliminated the day before.

The complicated proof model of Title VII, as well as the summary judgment posture, made this a difficult organizational problem for the students. In addition to struggling with the summary judgment standards, the employer's two articulated non-discriminatory reasons for firing the plaintiff required the students to go over the record with a fine-tooth comb to justify their positions.

V. CONCLUSION

Legal Methods faculty occupy the most enviable position of all faculty in the sense that they are empowered to control the curriculum in a way that other faculty are not. There is much untapped potential in problem selection. It can be a source of great teaching opportunity if it is thoughtfully planned and systematically presented.

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62 Ideally, this record should contain a complaint, an answer, interrogatories, employer's records and documents, deposition transcripts, and affidavits. Students grasp civil procedure generally, and summary judgment particularly, when they have to support or oppose a defendant's motion for summary judgment and look closely at the record for sufficient or insufficient evidence. See supra note 34.

63 The facts of this hypothetical were adapted from Carter v. Smithfield's of Morehead, Inc., 1995 U.S. App LEXIS 19681 (4th Cir. July 26, 1995).
Selecting and Designing Effective Legal Writing Problems

Grace Tonner and Diana Pratt

INTRODUCTION

Legal research and writing courses are unlike most substantive first year law school classes in that they teach using the problem method. The success of a legal writing course depends on the quality of the problems. The purpose of this article is to provide some guidance for legal writing professors in designing legal writing problems. The article addresses (1) general considerations in problem design, (2) designing expository problems, (3) designing persuasive problems, and (4) sources of problems. In the first section, we discuss problem design as it relates to the overall goals for teaching the basic forms of legal analysis, legal writing, and research. In the section on designing expository problems, we discuss how to achieve these goals in the predictive section of the course, the section where students will master basic legal research and analysis. The persuasive writing section discusses the options in level of court, choice of jurisdiction, problem structure, and the materials necessary for a successful persuasive problem. Finally, we present a variety of sources for problem issues. The article presumes that the first half of the course is devoted to expository writing and the second half to persuasive writing skills.

GENERAL CONSIDERATIONS IN PROBLEM DESIGN

Legal writing problems are effective only in the context of the overall course design. Begin with the skills you want the students to achieve in research, analysis, organization, predictive writing, and persuasion. In research, students should learn
to use the basic research tools effectively and efficiently, and they should learn to develop effective strategies for choosing the most fruitful approaches to researching individual problems and issues. Consider, too, the timing and sequence of book and electronic research. The analytical goals are numerous. Students must learn to identify issues and break the problem into its smallest analytical components. They need to become adept at defining general principles precisely and accurately, and they need to be able to present cases to set up the analogies and distinctions they will draw in analyzing a legal problem. They will learn inductive reasoning to define general principles from one and later a group of cases. They will learn deductive reasoning and the use of syllogisms to prove their analysis to the reader. The organizational goals include developing judgment about what is most important, learning IRAC and its variations, and learning to arrange issues and arguments. Finally, our students should learn to write precisely and directly in both a predictive and a persuasive mode tuned to the particular audience. The sequence of problems should allow the students to learn the basic skills and master them as they reappear in later and more complicated problems.\(^5\)

Plan the number and type of assignments before you design specific assignments. Because you are building on skills, identify the skills that need to be taught throughout the semester or course and how you can best assist the students in mastering those skills through the use of the problem. For example, if the goal is to teach students to use precedent facts effectively in drawing analogies and distinctions, a short case comparison exercise is an effective introduction. Keep the problem or issues simple at the beginning as students often have difficulty in mastering two tasks at once and, in fact, may even lose some of their skills as they adjust to new law school skills.\(^6\)

Once you have decided on a sequence of skills, you have to decide if you are going to have a series of problems connected to

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the same factual pattern or if each assignment will be based on a different fact pattern. There are pros and cons for both approaches. By using different factual patterns, you have an opportunity to expose your student to a variety of subject areas. However, this approach also means that the students may only develop a cursory understanding of the topic. It can also mean more time and work for the students (and you) as they struggle to learn a number of new topics. By using one factual pattern you are able to simulate what lawyers encounter in dealing with one case and the variety of issues, procedural and substantive, that develop in that case. There is a danger that you and your students may get bored using one factual pattern. You can, however, vary the factual pattern or legal questions in an interesting way. For example, you may assign a sexual harassment memorandum problem and then add a procedural issue, such as the availability of a motion to compel a mental examination. Finally, you could conclude with a memorandum on the feasibility of filing a summary judgment motion. By blending procedural and substantive issues, you give the students a better idea of legal practice and how lawyers develop successful strategies for achieving the best result for their clients. One factual pattern is also useful in creating a bridge between predictive and persuasive writing; an open memorandum problem can form the basis for a later persuasive problem.

When you are designing problems or choosing topics you need to think about rewriting. Your overall course design should include rewriting some or all of the assignments. To make the rewriting particularly effective, have your students rewrite a small portion of the assignment based on the class discussion and your critique of their paper and bring that mini-rewrite to a conference. The focus of the conference is then the student's process of incorporating the critique. This efficient double-rewrite leads to a more successful rewrite of the whole assignment. Or you can have students rewrite a portion of the assignment and then apply what they have learned to a new section(s) of the assignment.

In drafting problems, we must also consider the wider audience. Although students tend to think of us as the audience for their papers, students use their first year writing assignments as writing samples for employment. The memos and briefs should be ones that students can proudly show to perspective employers. With this wider audience in mind, consider the following three things as you design problems. Choose issues that
routinely occur in practice; it will provide prospective employers with material for an interview on a topic where the student has some expertise. Avoid using "cute" names in problem design; they will be distracting to the reader and create an unintended barrier for the student between law school and practice. Finally, avoid topics that may cause a student embarrassment. A problem involving the sexual transmission of AIDS, for example, may be inappropriate if it requires the student to use graphic detail. There are two potential problems. First, the student may be reluctant to use the paper as a writing sample and may not have an alternative. Second, the student may not feel comfortable discussing the paper in an interview. While all lawyers should be able to discuss any issue, the first interview with a perspective employer is not the place to learn.

DESIGNING EXPOSITORY PROBLEMS

Three different types of expository assignments are used in first year legal writing courses: a briefing exercise and analysis memo, a closed universe memorandum, and an open research memorandum. Typically, the analysis memo will involve a fairly simple subject area while the succeeding assignments require increasingly difficult analytical skills. These assignments are usually given in the students' first semester of law school.

An analysis memo usually consists of one, two, or three cases for the students to use in analyzing a simple factual situation. The students are asked to read and brief heavily edited cases, synthesize their holdings, and apply them to the facts. The students are introduced to analytical structure - issue, rule, application, conclusion, and they are asked to use this organization in their memo. Typically the assignment is short, about two pages, and involves only the discussion section of a memo. These problems are fairly easy to design because you choose and edit the cases, there is no research involved for the students, you can choose cases that have slightly different holdings, and you can set the facts so the students must analogize to and distinguish the cases. Some topics that work well are service of process, specific performance, burglary, dog bites, one element of false imprisonment, and one element of negligent infliction of emotional distress.7

7 You can build a peer editing exercise into this assignment as a way of teaching students to edit their own work. The students are paired and critique their partner's
The closed universe memorandum assignment is usually a six to twelve page memorandum that requires the formal structure of an office memorandum. These problems involve either common law or statutory topics with discrete elements. By choosing a subject with elements, you can teach the students the organization of issues. Usually only one of the elements requires extensive use of analogy and distinction, while the others require minor or minimal analysis. This teaches the students to focus on what is important and to weight their treatment of the elements according to their importance. Torts or criminal law issues work the best as the law is fairly simple and because the issues are heavily fact based. Because these problems involve a closed universe, you can create simple problems by omitting cases that might be confusing at this early stage in the student's analytical development. You cannot make these problems too simple because you are asking students to learn a number of new skills at once. If the legal issues are fairly easy for them to understand, they will have time to concentrate on drawing an analogy, working with the organization, and writing clearly and explicitly. Some of the favorite topics are false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, statute of frauds, implied or express warranties, adverse possession, easements, personal jurisdiction, and statutes of limitations.

The open research memorandum assignment is generally a little longer, eight to fifteen pages, and involves the added wrinkle that students must find and select the best authority for analyzing the problem. The research skills should be those the students have already learned and practiced in a variety of library assignments. The analysis at this stage is more complicated. It normally requires identifying and synthesizing rules from a number of cases. It can involve a statute that has been con-

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See, LINDA HALDEMAN EDWARDS, TEACHER'S MANUAL, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION, 38 (1996); OATES, ENQUIST, and KUNSCH at 1-42-44; PRATT at 42-44.

9 It is useful to have your research assistants troubleshoot the problem. As a professional, you are too far removed from the first year experience to anticipate all the blind alleys your students will explore or to accurately predict the time it will take them to conduct the research. Based on your research assistants' experience, you can fine tune the problem to make it more effective and to decrease the level of frustration your students will experience. See, OATES, ENQUIST, and KUNSCH at 1-43.
structured in several ways. It may involve a jurisdictional conflict and require students to evaluate different authorities. It may involve a balancing test or a test with elements where one of the elements has become pivotal to a court's decision. The open memorandum should also develop deeper organizational skills by requiring the students to deal with counter arguments and weaknesses in their case. For this assignment, use a record to present the facts because it helps students to understand fact-gathering. You can include pleadings, depositions excerpts, contracts, and other documents so the students will have to isolate the relevant facts and organize them into a coherent statement of facts.

In designing expository problems of any of these three levels of complexity, it is best to use first year topics. They are more accessible to the students, and your problems can enhance the learning that is occurring in other courses. In choosing the topic, you should meet with the substantive professors in your students' sections to determine the topics that will be covered in their classes and the sequence of those topics. Often the professors will make suggestions about areas they do not intend to cover in detail and that would make good choices for your problems. This collaboration can enhance the relationship between the legal writing and substantive professors; it can also help prevent unintended difficulties. Be careful if you teach students from different sections who have different professors for the same doctrinal courses. If they use different casebooks or treat the topics in a different order, you may create real or perceived advantages for one group. Also you may want to combine two first year topics, such as contracts and torts, in a problem to demonstrate that client problems often involve a number of legal topics.

**DESIGNING PERSUASIVE PROBLEMS**

You can teach persuasive writing and argument formation with a problem set at either the trial or the appellate level. The choice depends on the dictates of your program. Trial level advocacy problems are easier to develop and easier for the student to write because there are fewer formal requirements to distract

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10 *See, Shapo, Walter, and Fajans* at 136.

11 If your law school has an evening program, the evening students will have fewer first year courses in addition to having different professors and possibly different casebooks and sequencing.
the students from the important goals of the assignment. Trial level problems are also more realistic; in real appellate cases, the advocate works with an extensive record from below and studies it to identify potential issues for appeal. Most law school writing courses have neither the time nor the resources to provide this experience for their students. In most legal writing courses the process begins after the issues have been identified.

Although any persuasive problem can be set at the trial level, there are good reasons for choosing an appellate setting. Some law schools have an active student-run moot court program. First year students need the experience of working at the appellate level as preparation for the moot court experience in the second and third years. Other law schools use the first year appellate oral arguments as a way of keeping alumni actively involved in the life of the law school. In these days of strained budgets, alumni support, both financial and in kind, may be essential to the operation of the law school.

A persuasive problem will require students to use the basic forms of legal analysis: inductive reasoning, deductive reasoning, analogies and distinctions. It may require that students use syllogisms to construct their arguments. The analysis required runs on a continuum of difficulty. The easiest problems require students to apply an existing standard to facts lying on a spectrum of cases that reach favorable and unfavorable results. A slightly more difficult problem involving inductive reasoning requires students to synthesize a rule from existing cases and characterize it so it can be applied to achieve a favorable result. A different and slightly more difficult type of problem involves a choice of rule (or test), where the focus is on advocating one rule and distinguishing another. These problems involve primarily legal rather than factual issues. Circuit splits can also


13 There is a series of New Jersey beach cases that illustrates this type of problem. Neptune City v. Avon-By-The-Sea, 61 N.J. 296, 294 A.2d 47 (1972); Van Ness v. Borough of Deal, 78 N.J. 174, 393 A.2d 571 (1978); Matthews v. Bay Head Imp. Ass'n, 95 N.J. 306, 471 A.2d 355 (1984). In each case, a shoreline community wanted to restrict use of the town beaches to residents only. The next logical step in the sequence - to apply the rule to privately owned land - depends on whether the cases are characterized as anti-
form the basis for this type of problem. The most difficult problems require students to persuade the court to create new law. This may require an extension of an existing rule to create a new cause of action or a new remedy. In its most difficult form, students must break new ground either by interpreting a virgin statute or creating a cause of action where none has existed before. Because this involves drawing on other statutes or substantive areas, these problems are probably too difficult for first year students. Most of these problems involve policy as well as legal arguments.

A persuasive problem, like a predictive problem, can be set in a first year course area. This has all the advantages discussed above for predictive problems. By restricting yourself to first year subject areas, however, you may overly limit your options and give your students an unrealistic picture of legal practice. Our law is increasingly statutory, but most first year courses concentrate primarily on the common law. By the second semester, students can handle some other substantive areas. The issues, however, should be readily accessible and fairly straightforward. If the students spend too much time getting up to speed in the area, they will not have time to concentrate on constructing their arguments; neither you nor the students will be pleased with the results. Most constitutional issues are too difficult; “takings” problems, however, work well. Choose an area you love; your enthusiasm will engage the students in the topic, and you will be in a better position to help them focus on the relevant authority.

The design of a persuasive problem depends on the structure of your program, the level of court you are using, and the choice of jurisdiction. The structure of the problem depends on whether your students will all be arguing from the same side or whether they will have opponents. It is easier to design a problem with the students all representing the same client. It is also easier to set up an objective grading system if the students are writing from the same perspective. The briefs, however, are more interesting to read and critique if there are opposing versions. If oral argument is a component of your course, you will need the competitive model; unlike the competition for grades, students enjoy competition in the structure of the problem. If you opt for the competitive model, problems with one issue, two discrimination cases or as cases involving the Public Trust Doctrine.
students are easier to design than the two issue, four student problems used in national moot court competitions. It is extremely difficult to design an equally balanced problem with two issues that require carefully crafted legal and policy arguments on both sides. In addition, two issue, four student problems create unnecessary difficulties for you and your students; you will have difficulty grading the briefs, and the students may encounter unnecessary frustration with work allocation and timing. To keep the students focused on the problem you designed and save yourself for the substance, draft a one or two sided problem.  

Once you have decided on the structure, consider the level of court. If, for the reasons mentioned above, you opt for an appellate court, there are three reasons to prefer an intermediate level appellate court. First, your students will be writing briefs to intermediate level appellate courts sooner and more frequently than they will be writing to the courts of last resort. Second, the format and structure is easier at the intermediate level; your students will spend more time on substance and worry less about form. Third, although generations of first year students have written moot court briefs to the United State Supreme Court, most of the issues are too complex and you will overly limit your choices if you confine yourself to pedagogically viable issues in that forum.

The third choice is that of jurisdiction. Real jurisdictions are better than hypothetical ones. They come with procedure and the students will have to consider the effect of stare decisis. You can control the level of difficulty by selecting a jurisdiction with an appropriate number of cases and that either includes or does not include unique features that add complexity. The terms of the appellate rules may also influence your choice.

You are now ready to draft the problem. For a trial level problem, you have a choice of procedural settings, and the materials required depend on the choice. For a Federal Rule of Civil Procedure 12(b)(6) motion, or its state equivalent, you need at a minimum to draft a complaint and a motion. You can attach affidavits/exhibits as additional sources of facts. For other issues, a motion for summary judgment is more appropriate. In this case the problem can include a complaint, an answer, excerpts from deposition transcripts, exhibits/affidavits, the mo-

14 Pratt at 70-71.
15 Ibid. 71.
16 Ibid. 71.
tion, and its answer. The variety of materials forces students to choose, organize, and give appropriate weight to the facts for the statement of facts. If you choose a motion for summary judgment in which it is alleged that there is no material fact at issue, make sure that the problem does not inadvertently create a factual dispute. Discovery and evidentiary motions work well as introductions to advocacy because they involve discrete issues the students can handle and you can critique in a relatively short time.\textsuperscript{17}

An appellate problem requires an opinion from a lower court. To draft the opinion, you will have to set aside your personal sense of what a well crafted opinion should be. The opinion should provide the issue(s) and the basis for the appeal without giving away all of the arguments and the research. You can allude to the law with a reference to a circuit split while not providing the cites. Structure the procedural setting to eliminate unintended factual disputes and to set up your intended standard of review. You can structure the decision to help balance the problem. The opinion may be one source of the facts. You will probably want to include other sources of fact as well. You can draft a partial transcript of a trial or hearing with lay and expert witnesses from both sides; you can use affidavits and partial deposition transcripts; you can include exhibits: maps, diagrams, contracts, etc. to present the facts in a different style.\textsuperscript{18} Finally, an appellate problem could include the appellate rules from your jurisdiction and a cover sheet with the caption.\textsuperscript{19}

\textbf{Sources of Legal Writing Problems}

Finding a suitable topic for an effective writing problem can sometimes be frustrating. The following is a list of sources we have found fruitful.\textsuperscript{20} For topics based on first year courses, the faculty members who teach the courses can be particularly helpful. Treatises and looseleaf services in your areas of particular interest are a source of recent developments. United States Law Week provides recent and interesting cases you might use as a foundation for a problem. Advance sheets can also provide new issues. On a more popular level, try the news media: newspa-

\begin{itemize}
\item \textsuperscript{17}Ibid. 64-65.
\item \textsuperscript{18}NEUMANN at 181.
\item \textsuperscript{19}PRA'IT at 72.
\item \textsuperscript{20}See, OATES, ENQUIST, and KUNSCH at I-43; PRATT at 48, 71-72; SHAPO, WALTER, and FAJANS at 136.
\end{itemize}
Fellow members of the bar or alumni are excellent sources of problems. Former students who are currently judicial clerks are particularly good resources. If you can obtain copies of the pleadings, discovery or motions in a real lawsuit, students are generally more interested in the problem. Alumni usually enjoy contributing to the law school by offering problems and materials from their practice. Their continued participation in the law school may lead to financial contributions as well.

For the simplest analogy/distinction problem, ALR can be a good tool. ALR annotations are arranged by issue and by cases that illustrate what is sufficient or insufficient to meet the test. The annotations include an outline of the topic and a list of jurisdictions matched to the points in the outline. The case descriptions are usually sufficient to give you a pretty good idea of whether the problem is potentially workable. For simple statutory problems involving torts or crimes, state statutes are a valuable tool.

Finally, you can always engage in an electronic research search where you can find authority with the following search: sy(split/s/authority/jurisdiction/court/circuit) and (date). This method will help you pick up splits of authority in an area which might be useful for problem development.

Whenever you are choosing a topic, you should be interested in or excited about the topic. Discussing and critiquing student papers on topics you do not enjoy will inevitably affect the success of your course. While selecting and designing legal writing problems is often the most difficult part of a legal writing professor's job, it is also one of the most rewarding, because good problems guarantee successful experiences for both the professor and the students.
The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*

Mary Beth Beazley1

If there is anything more difficult than editing another person's writing, it is editing one's own writing. Like all editors, the self-editor may find it difficult to focus on different types of writing problems — substantive, organizational, and mechanical — as he or she reviews page after page of prose. In addition, however, the self-editor often lacks the psychological distance necessary to distinguish between the information on the printed page and the information still inside the writer's head. The "self-graded draft" is one attempt to combat these difficulties.

The self-graded draft is a self-editing exercise that legal writers can use to identify strengths, weaknesses, and omissions in their writing. It is designed to be an "objective," focused, critiquing method that allows little room for the self-delusion that often interferes with self-editing. Essentially, the exercise requires the writer to find, mark, and evaluate individual substantive, organizational, or mechanical elements within each part of the document. The process of finding the elements and of physically marking them — e.g., with a highlighter — forces the writer to focus his or her attention on one element of the document at a time. This focus often helps to provide enough psychological distance to allow the writer to conduct an objective evaluation of his or her writing and, ideally, to improve it.

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1 Director of Legal Writing, the Ohio State University College of Law. This article is based in part on a presentation at the Summer Conference of The Legal Writing Institute in Seattle, Washington, on July 19, 1996. I am grateful to Professor Jacqueline Jones Royster of the English Department at the Ohio State University for her suggestions about creating a self-grading instrument for my students. I also appreciate the insights of the members of the law classes of 1995, 1996, 1997, and 1998 at Ohio State, who have field-tested a variety of self-grading exercises since 1993. Finally, I am indebted to the colleagues and friends who read drafts of this article and commented on it, including Professors Peter Swire, Laura Williams, and Nancy Rapoport of the Ohio State University College of Law, David F. Pillion of the Ohio Attorney General's Office, Professor Cynthia Adams of Indiana University School of Law - Indianapolis, and Professor Grace Tonner of the University of Michigan Law School.
The self-graded draft can also be used effectively by legal writing teachers who want to spend more time focusing on substance and analysis and less time persuading students to include the necessary analytical elements within a document. The exercise was born out of my frustration during teacher-student conferences. A student would be upset with low marks and would insist that he or she had included a required analytical element — for example, an explicit rule. I had not been able to find the element, and almost invariably, the student would be unable to find the element as well. Although, perhaps, the student had articulated the element mentally, the element had not been included in the written product.

Missing elements put teachers in a difficult position while critiquing. Frequently, the teachers are unable to determine why the student failed to include the elements. Was the student a lazy or ineffective writer? Or did the student have such a poor understanding of the substantive law that he or she was simply unable to adequately articulate the elements? At best, documents with missing elements require the teacher to combine a substantive critique with advice about including the necessary elements. At worst, a substantive critique is postponed until after the next draft, when, it is to be hoped, the required elements will finally be included.2

If students complete a self-graded draft, on the other hand, the teacher can begin substantive discussions sooner. Although completing a self-grading exercise will not necessarily ensure that students write a perfect rule, a perfect explanation, or a perfect application, it will ensure that, for better or worse, the writer has articulated the needed elements on paper. If those elements are substantively wrong or otherwise ineffective, the teacher discovers this ineffectiveness right away and can immediately work with the student on the now more apparent substantive problems.

The self-graded draft does not dictate a particular content or organization to the student, although it employs agreed-upon substantive and organizational guidelines for legal documents. It does not require that the student make any particular changes in the document. What the self-graded draft does is focus the revision process.

2 In many courses, the second draft is the final draft, and so the best opportunity for learning is over by the time the teacher discovers what the student really meant to say.
First, the exercise focuses the writer's attention on two types of locations within the document: physical locations, such as beginnings and endings of point heading sections; and “intellectual locations,” such as the articulation of a rule, the application of a rule to facts, or the conclusion to the discussion of a legal issue. Then, while the writer's attention is focused, the exercise asks the writer to consider revision questions that are focused on the same physical or intellectual location. The writer will then be able to make any revision decisions based on an accurate understanding of what the draft actually says, rather than on an inaccurate presumption that the draft says what the writer meant to say.

In this article, I will first explain why the predictability of legal documents, legal writers, and legal readers makes an objective method of self-critique particularly useful in legal writing. I will then discuss how I design self-grading guidelines and explain various methods for incorporating the self-grading process into a legal writing course. Finally, I will address some of the challenges I have faced when assigning the self-graded draft to students, and discuss ways to deal with these challenges. In appendixes, I have included two samples of self-graded draft guidelines for use in a three-draft Memorandum Assignment, as well as a short illustration of the physical marking that the self-graded draft requires. Through the article, I have tried to illustrate the usefulness of the self-graded draft by providing concrete examples of possible self-grading tasks.

I. THE PREDICTABILITY OF LEGAL DOCUMENTS, LEGAL READERS, AND LEGAL WRITERS

An “objective” or focused critiquing method is particularly helpful in legal writing because of the predictable structure of legal documents and the predictable behavior of legal readers and legal writers. Most legal documents have a set format, and they require analytical elements that are usually found at predictable “intellectual locations” within the format. In addition,
legal readers, like all readers, pay peak attention at predictable physical locations in documents. Legal writers, as well, have predictable self-editing problems that focused revision methods can help to combat.

A. Predictability of Legal Documents

As many writing teachers have been trying to tell their students for years, legal documents usually follow prescribed formats. For example, most courts require that appellate briefs contain the following substantive components: a question presented, a statement of the case, a summary of the argument, an argument (divided into point heading sections), and a conclusion. Each of these components usually contains certain agreed-upon analytical elements. For example, when making a legal argument, it is expected that 1) the writer will articulate a rule for the court to apply, 2) the writer will cite to the best possible authority for that rule, 3) the writer will explain any ambiguities in the rule, usually by illustrating how the rule has been applied in the past, and 4) the writer will explain how the rule should be applied in the pending action.

These predictable "intellectual locations" within legal documents are the first level of focus in the self-grading exercise. The writers are asked to find, mark, and review the agreed-upon elements within a given document or section of a document. Finding and marking the elements can help in two ways. First, if a writer cannot find an element in order to mark it, the writer knows, objectively, that the document may be incomplete. Second, if the writer can find and mark an element, the

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4 See, e.g., MARY BARNARD RAY & JILL RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 228-29 (2d ed. 1993).

5 Alert readers will recognize these elements as the core of an "IRAC" (Issue-Rule-Application-Conclusion) or "IREXAC" (Issue-Rule-Explanation-Application-Conclusion) analytical structure. As I have noted elsewhere, I believe IREXAC almost always serves as a valid organizational structure for the analysis of a legal issue. See Mary Beth Beazley, Fire, Flood, Famine & IRAC? THE SECOND DRAFT (The Legal Writing Institute), Nov. 1, 1995, at 1. Many of those who do not believe that IRAC is a valid formula still recognize that certain elements — for example, rule, explanation, application — almost always appear in strong legal analysis. See, e.g., Jeffrey Malkan, IRAC: A True Story, THE SECOND DRAFT (The Legal Writing Institute), Nov. 1, 1995, at 18. I do not mean to suggest that IREXAC tells students all they need to know about legal analysis; I do suggest that it provides a basic checklist of items that should almost always be included.

6 I purposely say "may be incomplete" here because I recognize that no formula can perfectly predict what will make a document work. If my students are unable to find certain elements, I ask them to decide whether they have erroneously omitted the element, or whether the element is not needed in their document for some reason — and
writer is now focused on it, and the exercise can help the writer to improve that element by asking questions about the element’s effectiveness. For example, the guidelines can ask the writer to scrutinize each point heading section or sub-section within a brief and highlight the rule that is being discussed and/or applied. If the writer finds a rule, the guidelines can ask whether the rule is 1) so abstract and/or controversial that it needs thorough explanation or illustration or 2) so concrete and/or non-controversial that it needs little explanation or illustration. After finding and marking each element and after answering focused questions about those elements, the writer can make a better-informed assessment of what revision, if any, is needed.

B. Predictability of Legal Readers

The second reason that the self-graded draft can help improve legal writing is that legal readers behave in predictable ways during the reading process. Like most readers, legal readers subconsciously pay more attention to, and thus put more emphasis on, information that appears in particular physical locations within a document. These “natural positions of emphasis” occur before and after a physical break in the document, i.e., wherever there is white space. Thus, natural positions of emphasis include titles and headings, as well as the first and last sentences in document segments (e.g., the Statement of the Case, the Argument), the first and last sentences in point heading sections, and even the first and last sentences in paragraphs. To a lesser degree, information at the beginning or ending of a sentence is also in a position of emphasis. Finally, within the sentence itself, the reader pays more attention to the information expressed in the subject-verb combination, with particular emphasis on the verb.

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8 See, e.g., RAY & RAMSFIELD, supra note 4, at 228; see also OATES, ENQUIST, & KUNSch, supra note 7, at 294.
9 See, e.g., JOSEPH M. WILLIAMS, STYLE: TEN LESSONS IN CLARITY AND GRACE 107-09, 146-51 (5th ed. 1997); see also OATES, ENQUIST, & KUNSch, supra note 7, at 613-17.
10 This point is now a staple for most legal writing teachers. It was most famously
The self-grading exercise can include guidelines that can help the writer to exploit these positions of emphasis. The exercise can require the writer to mark various positions of emphasis within the document and to note what information is contained in these positions. Once attention is focused on the first sentence in each paragraph, for example, a writer frequently discovers that he or she is wasting these sentences on case citations and descriptions of authority case facts instead of exploiting these positions of emphasis by filling them with positive facts, statements of rules, or favorable assertions.

C. Predictability of Legal Writers

Finally, the self-graded draft is a useful editing tool because of the predictable behavior of most legal writers when they edit their own work. First of all, most writers lack focus when they edit. Many writers review their writing by reading and re-reading the document with no definite goal in mind. Some seem to be looking for typographical errors or grammar mistakes, hoping that substantive problems will leap out at them as they read. Essentially, they are reviewing the document and asking themselves, “Is this okay?”

The self-graded draft addresses this lack of focus by concentrating the writer’s attention on various parts of the document and then asking focused questions. For example, instead of looking at a sentence and asking “Is this okay?” the writer completing a self-grading exercise is looking at the application of law to facts within a particular section and asking: “Did I echo the key terms from the rule when I applied law to facts? Did I include the legally significant facts?” This improvement in focus cannot help but improve the writer’s ability to self-edit.

The second, and more difficult, problem self-editors face is the problem of psychological distance. Many writers find it psychologically impossible to really see what they have written.

articulated by Richard Wydick in a law review article that later became a book: RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 23-32 (3d ed. 1994). See also WILLIAMS, supra note 9, at 41-70.

11 When I first required my students to create “private memos” in which they asked for specific guidance about their writing decisions, this lack of focus was dramatically illustrated for me by one of my most memorable students. Her “private memos” occurred after every three or four sentences, when she would write, “IS THIS OKAY???” Obviously, this broad question did not help me overmuch in my quest to provide her with specific guidance. See Kearney & Beazley, supra note 3, at 894-97 (discussing use of the “private memo” in legal writing courses).
Those of us who have reviewed our own writing several weeks, months, or years after "polishing" it have had the experience of discovering glaring mistakes, inconsistencies, or other weaknesses. We are aghast; how could we have missed those mistakes? And yet, the phenomenon is not that surprising.

When writers write, they are, naturally, thinking about their complete message. When they later revise and edit, they see the words they wrote, and these (often inadequate) words remind their short-term memories of the complete message they had in mind when they were writing. The short-term memory then "tells" the brain the complete message, and the writers presume that the words they wrote contained the message. Actually, the short-term memory filled in the blanks: the complete message never made it into the written word. This phenomenon creates an "eclipse of the brain"; the short term memory "passes between" the written document and the writer's brain, "blocking" the writer from seeing and understanding the words that he or she actually wrote.

Self-grading can address this eclipse of the brain by forcing the writer to look at individual elements, sentences, and words, instead of at the document as a whole. The self-grading exercise does not ask the writer whether he or she included an element; it asks the writer to mark the very words that comprise the element. This marking forces the writer to discover for himself or herself what words and ideas actually made it onto the paper, and what words and ideas are still inside the writer's brain. The self-graded draft does not create the message; it simply helps to ensure that the document includes the complete message. If part of the message is not written down, the writer cannot find and mark it during the self-grading. In this way, the writer discovers what pieces of the message are missing, and is in a better position to make revision decisions.

The likelihood of an eclipse of the brain is why the success of the self-graded draft hinges on the physical marking of the elements. Most writing teachers have faced a student, angry about a bad grade, who swears that he or she has included the necessary elements. Yet, when asked in a conference to identify, for example, the place in the document where the law is applied to the facts, the student grows silent, and the teacher tries not

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12 Cf. Williams, supra note 9, at 63.
13 I am grateful to Professor Rapoport for suggesting this term to describe this mental phenomenon.
to smile, while the student flips through page after page, muttering, “I know it’s in here.” Accordingly, the self-graded draft guidelines might simply ask the writer “Did you articulate the rule?” The vast majority of writers, however, would answer “yes” without really scrutinizing their writing, and would deeply believe that they were being truthful. The physical marking of the elements forces the writer to perceive the message that he or she actually wrote, instead of the message that he or she intended to write.

II. DESIGNING SELF-GRADING GUIDELINES

Self-grading guidelines for any document or portion of a document are based on 1) agreed-upon requirements for that type of document or for an element within a type of document, 2) “markers” of good (or bad) examples of that type of document or that element within a document, and 3) focused questions or comments that can serve as guidelines to help the writer improve the document. The self-grading exercise also provides an opportunity for the writer to record, or “memorialize,” what he or she discovered during the self-grading process.

A. Requirements, Markers, and Focused Questions

To identify agreed-upon requirements for a type of document, we need go no further than lecture notes or textbooks. For example, most legal writers agree that when applying law to facts, the writer should repeat the “key words” of the rule — i.e., the words or phrases that are in controversy in the current case.\(^\text{14}\) In my courses, I refer to the “key words” as the “phrase that pays,” and I tell my students that when they apply law to facts, they should expect to write a sentence that translates approximately as “phrase that pays [equals or does not equal] legally significant facts.”\(^\text{15}\) Thus, two “agreed-upon requirements”

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\(^\text{14}\) See, e.g., OATES, ENQUIST, & KUNSCH, supra note 7, at 208-09.

\(^\text{15}\) For example, in the sample memorandum excerpted in Appendix C, infra, one issue is whether a person named Prentice could be considered a “merchant” in his exchange with a person named West. A few “phrases that pay” emerge when reviewing the relevant rule, which defines “merchant” as someone who “deals in goods of the kind” or “holds himself out as having knowledge or skill peculiar to the goods” involved in the transaction. Someone who self-graded this sample memorandum would see the following upon bolding the “phrases that pay” and underlining the facts:

Prentice is a dealer because he is a wheat farmer who sold manufacturers not only his own wheat, but also the wheat of other farmers. He also held himself out as having knowledge relating to the goods, since he has been a wheat farmer for
are 1) phrase that pays and 2) legally significant facts. Coincidentally (this coincidence does not always occur, but it often does), these agreed-upon requirements are also "markers" that identify a good example of application of law to facts. Accordingly, to help identify strong application of law to facts, the self-grading guidelines ask the student to highlight the phrase that pays in one color and legally significant facts in another color. 16

When using this method, the writer can graphically see where he or she talked about the rule language and the facts by reviewing the colors alone. If the two colors are never found close together, the writer can scrutinize the entire section to see if 1) the writer failed to apply the law to the facts, or 2) the writer applied the law to the facts, but did so ineffectively, either by using synonyms instead of the phrase-that-pays, or by completing the application in a conclusory way instead of referring to specific facts. If the two colors do appear close together, the writer can scrutinize those particular sentences to make sure that the intersection between law and facts is clearly explained.

When a reliable marker can be found, self-grading guidelines can also help reveal other weaknesses in legal writing. For example, many legal writers agree that the major discussion of how a rule applies to a set of facts should occur only after the writer has identified and appropriately explained the rule. 17

thirteen years, runs a 3,000 acre farm, and stated to West that he knew more about her business than she did. The self-grading would thus reveal that the writer had probably done a good job of applying the law to the facts, i.e., of showing the reader how the law and the facts intersect. To review the sample memo in its entirety, see HELENE S. SHAPo, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 371-76 (3d ed. 1995) (used with permission).

16 The self-graded draft asks writers to highlight the "phrase that pays" ("PTP") wherever it appears, as a check on the explanation or illustration of the rule. If the PTP is abstract, and/or its application in the case is controversial, writers should expect to highlight the PTP several times, because, in addition to introducing the PTP and applying it to the client's facts, they need to explain how the PTP has been applied in one or more authority cases. If the PTP is concrete and/or its application in the case is not controversial, they should expect to highlight it less often because they may not be illustrating how the PTP was applied in the past. For an example of this method using boldfaced type instead of highlighting (of the PTP or "key terms" only), see OATES, ENQUIST, & KUNSCH, supra note 7, at 208-10.

17 See, e.g., NEUMANN, supra note 7, at 83-85; OATES, ENQUIST, & KUNSCH, supra note 7, at 165, 191-99; CALLEROS, supra note 7, at 211-21, and 304-09; and LINDA HOLDeman EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION 85-86 (1996). Note that I am speaking here of the "major discussion" of the facts. Certainly many strong legal writers might refer briefly to the client's facts in a roadmap paragraph or other intro-
fortunately, however, many legal writers mistakenly — and almost always ineffectively — launch into a long factual discussion/application immediately after the introductory paragraph. After they discuss the facts, they articulate and explain the rule, and then they explain the facts again when they apply the rule to the facts.

Completing a self-grading exercise can help writers to realize when they have applied the rule to the facts before articulating the rule. In the exercise, the writer is asked to highlight all client facts in green and the phrase-that-pays in pink, wherever either appears. If the writer has discussed facts in too much detail too soon, he or she will find large chunks of green highlighting before the numerous pink highlights that indicate identification and explanation of the legal rule. This graphic signal lets the writer know that he or she needs to scrutinize that “chunk of green” to make sure that the application of the rule has not preceded its explanation.

Possible self-grading tasks can cover substantive, organizational, and mechanical writing problems. As has been noted above, self-grading tasks can work on a substantive level by helping the writer to find, and evaluate the effectiveness of, various analytical elements in the document. Substantive and organizational problems can be addressed simultaneously through another self-grading task. Legal writers generally agree that the first sentence of the paragraph should almost always be the “topic sentence,” and that the topic sentence should reveal the organizational structure of the document as well. The self-grading exercise can require writers to highlight and scrutinize the first sentence in each paragraph. The writer can then review the substance of each topic sentence as it relates to that paragraph, and then consider whether the topic sentences as a whole provide an outline of the document. Finally, on a

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18 The phrase “chunks of green” is rather inelegant, but I mention it here because the phrase grabs the students’ attention. I frequently note in a comment, “You have a ‘chunks of green’ problem here.” With students who are more familiar with the self-grading exercise, I sometimes include the phrase in my guideline questions, asking, “Does your draft have ‘chunks of green’ syndrome?” The self-grading guidelines, and the exercise itself, can be tailored to the idiosyncrasies of the course — and the teacher.

19 See, e.g., Shapiro, Walter, & Fajans, supra note 15, at 142; Ray & Ramsfield, supra note 4, at 322.

20 I have also used “topic sentence lists” — asking students to create a list containing the first sentence of each paragraph — for this purpose. JoAnne Durako of Villanova suggested highlighting topic sentences, and noted that this method can also graphically
mechanical level, self-grading can help writers who fail to include "pinpoints" — that is, citations to specific pages — when using long-form citations. When self-grading, writers can be required to review their long form citations and highlight the first page number (i.e., the page number of the first page of the case) in one color and the pinpoint page in another color. This very simple task helps writers to see what information is missing.\textsuperscript{21}

The ideal self-grading exercise is probably a series of exercises, each designed to address the problems that most commonly occur at a particular stage of the writing process, and each focused on the problems common to that particular document. Self-grading exercises for argumentative documents such as briefs, for example, might focus more on whether the writer has exploited positions of emphasis within the document, while a self-grading exercise for an internal memorandum might focus specifically on noting whether the writer articulated each side's best arguments. For any type of document, a "final draft" self-grading exercise could focus less on substantive concerns and more on identifying common mechanical and stylistic problems.\textsuperscript{22} Teachers can and should tailor self-grading exercises to complement their own teaching methods and to focus on the typical problems that occur in different semesters, in different drafts, and with different types of documents.

B. Memorializing Self-Grading Results

For any type of self-grading task, it is vital that the writer have an opportunity to record, or memorialize, what was found during the self-grading process.\textsuperscript{23} Sometimes that might mean

\textsuperscript{21}I find that through highlighting self-grading tasks, I can "persuade" my students to eliminate some of my pet peeves from their drafts. For example, I ask students to highlight "affirm" or "reverse" in the conclusion section of the appellate brief, because I believe that one of those words (as opposed to "uphold" and "strike down") should appear in an effective conclusion.

\textsuperscript{22}For example, because a "to be" verb is usually (but not always) part of a passive voice verb, writers might be asked to highlight all "to be" verbs, identify which of those verbs is part of a passive construction, and change unnecessary passive voice verbs to active voice verbs.

\textsuperscript{23}This requirement may seem strange, but I believe that it is a necessary one. My most disappointing moment with the self-grading exercise came the first semester that I assigned it. I gave the students the exercise to complete with the second draft (of three). I required them to turn in the self-grading when they turned in the draft, because I presumed that they would not do the physical marking — the most important aspect of the exercise — unless they were required to turn it in. Naively, I also presumed that when the students found their errors, they would fix them! Instead, most students worked late
encouraging the writer to write a new topic sentence, or to articulate a rule or a conclusion in the margin on the spot. At other times, the writer might be asked to use a separate comment sheet to note what was found, to note what revisions might be necessary, or to note why revision is not necessary. In addition, the writer should be required to write a “final comment” in which he or she identifies the strengths of the document and articulates plans for revision. In this way, the writer formally recognizes what he or she has learned during the self-grading process and makes sure that this knowledge is not lost or forgotten before the next due date.25

III. INCORPORATING THE SELF-GRADED DRAFT INTO A WRITING COURSE

When incorporating self-grading exercises into the legal writing course, the teacher should be aware of 1) the current status of the document (i.e., first, second, or final draft), 2) the timing of the exercise, and 3) the amount of review and supervision that the teacher will be able to provide.

A self-grading exercise may be assigned at any point in the writing process; the teacher should simply tailor the self-grading tasks to the draft that the students are working on. For example, if the students are writing a first draft, the self-grading tasks should stay focused on “big ticket” items like large-scale organization and use of authority.26 At a later stage in the writing process, the tasks can require the students to focus more on the small-scale concerns of effective legal analysis and sending signals to the reader. Self-grading tasks that are too sophisticated for the writer’s understanding at a particular stage of the writing process sometimes fail because the writer may not un-
derstand the elements that he or she is looking for or why the elements are important.

In addition, the teacher should keep in mind what elements he or she most wants to focus on when critiquing. If the teacher's major concern is strong legal analysis, he or she might require the writer to complete self-grading tasks that focus on analysis: for example, finding and marking the explicit rule within each section, highlighting the phrase-that-pays wherever it appears, marking rule explanations, etc. At a later stage, the teacher might want to require different self-grading tasks, such as scrutinizing citations for completeness or reviewing natural positions of emphasis.

The teacher should budget separate self-grading time into the semester. This budgeted time may be built into the pre-due date assignment time, or it may be scheduled a day or two after the due date. The important factor is making sure that the students know what work is expected of them and when it is expected. If the self-grading is due on the same date as the draft, the tasks should be fairly simple, and the students should be warned to budget time "at the end" for self-grading. For more complex self-grading, the teacher may wish to assign a self-grading due date one or two days after the draft due date or to ask the students to complete the self-grading during class time within a day or two of completing a draft. To decide when to assign self-grading, the teacher should consider the students' ability to work independently and the availability of in-class time for the exercise.

The teacher can follow up the self-grading exercise in various ways. For example, the teacher can review the self-grading before beginning to critique. In this way, the teacher can use the self-grading to identify problems: e.g., a student may have highlighted the holdings from three different authority cases as "rules" within one point heading section without realizing that he or she should have synthesized the three holdings into one rule. This problem is distressing, but at least the teacher has learned that the student needs guidance about how to articulate a legal rule.

On a positive note, the teacher can often follow up the self-graded draft by praising students for their insight. Many students will identify problems with their drafts on the comment

27 See footnote 23, supra, for an anecdotal discussion of the impact of timing problems.
sheet, e.g., "I never found any explanation of my legal rules! I have to put this in!" When this happens, the teacher can help the student with the problem, but praise the student for finding the error. Because one of my goals is to promote independence in my students, I find it gratifying to show students that they have the ability to find problems without a teacher's help.

Another method for using the self-graded draft is to have the student bring the self-graded draft to the conference, report on what he or she found while self-grading, and ask the teacher for guidance. The teacher will have received a clean copy of the paper and will have reviewed it, but will not have handed the paper back to the student. In this way the student feels some responsibility for doing a good job on the self-grading; to the extent that the student fails, however, the teacher's independent critique can fill in the gaps.

I have yet to find the perfect time to incorporate the self-graded draft into a legal writing course. Ideally, the students should write a good draft, self-grade, revise based on self-grading, and let the teacher review the revision. I fear that under this structure, however, many students would see the "revision" as the "real" draft and would conduct the self-grading exercise on an incomplete draft. For optimal effectiveness, the self-grading exercise should be conducted on a complete draft that represents the student's best work at that stage of the writing process.

IV. CHALLENGES

As noted above, the self-graded draft cannot turn bad analysis into good analysis. It can, however, point out which elements of the analysis are missing and give the student guidelines to use to improve the analysis. The self-graded draft can be used most effectively in a legal writing course when the teacher is

28 My instinct is that this follow-up method would be effective for the first of three drafts, but not for the second. For the second draft, I would be loathe to give up the opportunity for detailed teacher feedback that the student reviews before the conference. In any event, this follow-up method might allow some teachers to require three drafts instead of two: if the students take major responsibility for critiquing the first draft, the added draft would not add appreciably to the crushing grading burden that many writing teachers face.

29 I sometimes include a section titled "You may wish to revise if . . . ." after each highlighting task. This section lists problem areas that the student may have found when self-grading and gives generic suggestions for revision, frequently including citations to relevant pages in the textbook.
aware of and deals with the unique challenges the exercise presents to both teachers and students.

Just as some students resent the legal writing class itself, I find that some students resent completing the self-graded draft. I have heard complaints that self-grading is "just a coloring exercise,"\(^\text{30}\) that it "doesn't fit" a student's particular writing assignment, or that self-grading "stifles their creativity." I find that many of these complaints can be avoided by taking time to explain the purpose of the exercise and the reasons for its admittedly unusual requirements. Because actually completing the exercise (as opposed to pretending to complete the exercise) quiets many of the complaints, following up the exercise to ensure compliance with the guidelines is vital.

The self-graded draft is almost always effective when the writer takes the exercise seriously, whether or not the writer agrees that the exercise is valid. If the teacher/student ratio is so high that there is little opportunity for follow-up,\(^\text{31}\) however, many of the students who need the exercise most will simply make random highlights on the page and random notes in the margin, knowing that they will not be "caught." These students, perhaps resentful of the legal writing course and its workload, incorrectly view self-grading as a meaningless exercise that will

\(^{30}\) Teachers who assign a self-graded draft must consider how they plan to critique the colorful documents that students will create with the self-grading exercise. My original self-graded draft required two colors; this semester, my students must use four colors. Inevitably, some of the colors overlap (e.g., the topic sentence of a paragraph may also articulate a rule). To avoid having to interpret the meaning of blended colors, the teacher should tell the students what to do when highlighting with a second color. The second color could be used as an underline; in the alternative, students could draw boxes around some elements instead of highlighting them. It is vital, however, that students be required to mark particular words, rather than make less precise (and thus easier to "fake") marginal notes.

Furthermore, some teachers have a hard time reviewing the vividly colored and annotated drafts that result from self-grading. I always ask for a clean copy to be handed in with the highlighted copy. I frequently find, however, that I end up ignoring the clean copy and commenting on the highlighted copy, because reviewing the highlighted version helps my critique. For example, I may note that the student has not highlighted a conclusion within several point heading sections or that the sentence highlighted as a conclusion (some students will mechanically highlight the last sentence) does not really provide a conclusion to the section. Thus, even if the teacher writes the critique on the clean copy, he or she should consult the highlighted copy for information about the student's understanding of the required elements.

\(^{31}\) Because self-grading presents so many possibilities, it is easy to demand too much of the students and overwhelm them. Like class discussions or written critiques, the self-graded draft is often more effective when it is focused on fewer elements. When there is little opportunity for follow-up, the teacher should narrow the scope of the self-grading exercise.
tell them nothing about their writing. Thus, especially when the teacher has little time for follow-up, it is important to spend class time selling the exercise and its effectiveness so that students will be self-motivated to do a good job or, at least, to do the exercise honestly.

When I assign the self-graded draft, I take class time to explain to my students why I am asking them to do this somewhat bizarre exercise of highlighting different parts of the document. I am candid about explaining the problems of unfocused revision and lack of psychological distance. If the teacher has time, it can be very effective to have the class self-grade a page or two from a strong document and a page or two from a weak document. This technique allows the students to see how self-grading works.

Emphasizing concrete self-grading tasks over abstract ones can also help the exercise's effectiveness. The highlighting — the very task that makes the self-graded draft seem "meaningless" to some students — is the aspect of the exercise that makes it most valuable. If the student is asked to highlight something, that "something" is either there or it is missing; the student can't delude himself or herself about it. When a question is more abstract — e.g., "Is your rule at an appropriate level of abstraction so that it includes the facts of the relevant authority cases and of your client's case?" — it is easy for the student to answer "yes" without scrutinizing the text before answering. That's not to say that the more abstract questions are useless (many students learn from them) but that teachers may wish to spend more time on the concrete tasks than on the abstract tasks.

Some students claim that the self-graded draft guidelines don't fit their assignment. This complaint is usually an attempt to avoid the exercise. Most frequently, students tell me that not every section of their argument (or discussion, in a memorandum) has to have a rule. I confess that I used to agree with this point. I have come to realize, however, that every point heading section in a brief, and every heading or sub-heading section in a memorandum, should address either the applicability of a legal rule (or sub-part of a rule) or the validity of a thesis relevant to the client's case. That is, each section or sub-section must have a focus, whether that focus is a rule or a thesis relevant to a rule. A pair of simple examples illustrates this point.

For example, if one of the issues is whether a court should apply rule A or rule B, some students tell me that there is no
“rule” on this point and thus no “phrase that pays.” This claim is inaccurate; the writer can and should articulate a “rule” about how the court should choose which rule to apply. Does the court usually apply rule A in certain circumstances and rule B in others? Then the articulated rule could say, e.g., “Courts apply rule A when X factors exist,” and “X factors” would be the phrase that pays, because the writer should say at some point, “Because X factors do [or do not] exist, this court should [or should not] apply rule A in this case.” Thus, using the self-graded draft can help students to articulate explicit rules where before the rules had been implicit.

Even if a relevant section is not focused on the applicability of a rule, it should be focused on the validity of a thesis, and the writer should strive to identify a “phrase that pays” from the thesis. In the following hypothetical example, I have bold-faced the phrases-that-pay within a writer’s thesis about a statute’s legislative history: “The legislative history shows that Congress knew that the statute would limit some plaintiffs’ access to the courts.” Throughout the writer’s analysis, the reader should see language from committee reports or floor debates echoing the thesis, that Congressional leaders knew that the statute would limit some litigants’ access to the courts.

Thus, just as every paragraph in a rule-based section should be related to the applicability of that rule, every paragraph in a thesis-based section should be related to the validity and applicability of that thesis. In a thesis-based section, the writer should still use language consistently while explaining the connection between the thesis and the client’s case (or between the thesis and the rule governing the client’s case). Using language consistently helps to show the reader both how the writer arrived at the thesis and how the thesis is relevant to the client’s case. When using self-grading tasks to ensure that a “non-rule” section is focused on a thesis, a writer will often realize that the section has no articulated thesis; the writer will then have the opportunity to make the thesis explicit.32

32 Thus, this type of self-grading exercise can best be used on the smallest analytical “unit”: that is, after the writer has identified all of the relevant rules, sub-rules, and theses, this type of self-grading can ensure that the writer has explicitly analyzed and explained how each rule or thesis relates to the client’s case. See Appendix B, infra, “Micro Draft Self-Grading Guidelines” Nos. 4-8 (which require the writer to identify sections and sub-sections before performing certain self-grading tasks).
Finally, some students who use the self-grading guidelines argue that the guidelines are too rigid and formulaic, allowing no room for creativity. I disagree strongly. Certain minimal elements are required in legal writing; the self-graded draft simply helps the writer make sure that these requirements are included, and included effectively. Legal writers are not “creative” when they fail to articulate a rule, use synonyms in place of key terms,\(^\text{33}\) or use a confusing organizational structure. They are creative when they use vivid analogies to explain relationships between a client’s facts and the applicable legal rules, or when they identify new relationships between a client’s facts and existing legal rules. The self-graded draft does not inhibit this creativity. On the contrary, by helping the writer to overcome common editing weaknesses, it ensures that the reader will better understand those creative arguments.

V. Conclusion

The self-graded draft helps law students and other legal writers face the twin editing problems of lack of psychological distance and lack of focus. The exercise helps students and writers on two levels. First, it forces the writer to include the document’s basic elements. This step gives the document a minimal completeness, which allows the teacher or editor to critique a complete document, rather than spending a draft encouraging the writer to make his or her elemental points “out loud” (i.e., in writing). Second, the self-graded draft can help more sophisticated writers improve their writing independently, without the aid of a teacher, by focusing them on specific elements and asking revision questions that are similarly focused. For these writers, a teacher’s critique can be that much more sophisticated, and can allow that writer to push his or her legal analysis to the next level.

The most brilliant legal arguments do the world no good when writers keep those arguments inside their heads. The self-graded draft gives legal writers specific steps to follow that enable them to identify which elements of the argument failed to complete the journey to the printed page, and objective questions to answer to improve the elements that are on the printed

\(^{33}\) Lynn B. Squires, Marjorie Dick Rombauer, & Katherine See Kennedy, Legal Writing in a Nutshell 102-03 (2d ed. 1996) (“Use the same word to refer to the same thing; use different words to refer to different things”); see also Wydick, supra note 10, at 66 (counseling against “elegant variation”).
page. By forcing writers to acknowledge what is on the page and what is not, the self-graded draft gives legal writers the best opportunity to get their arguments across to a reader.
Appendix A

Macro Draft Self-Grading Guidelines
Office Memo

Please complete this self-grading before turning in the MACRO draft of the Memo. You should complete this exercise early enough to fix the problems that the exercise reveals, and then do the exercise again to label the main elements of the document for my review. As you do the exercise, feel free to write revisions or ideas for revision neatly in the margins or on a separate sheet of paper. You should also record any private memo questions you have at each stage of the exercise.

1. Highlight the first sentence of each paragraph ("topic sentence") in yellow.
   *First, check the sentences for substance, and write a topic sentence in the margin if the sentence is not substantively strong. Typical strong topic sentences in an objective document would be 1) articulations of a rule of law or 2) statements of legal conclusions you predict the court would reach. A typical weak topic sentence would be a sentence describing authority case facts.
   *Second, scan through the document, noticing sentence length (do you see any topic sentences that need to be shorter?) and paragraph length (do you see any paragraphs that need to be shorter or longer?).
   *Finally, read only the highlighted sentences to check your organization. Within each issue or sub-issue, do you see one or more topic sentences about the meaning of the rule (i.e., the explanation) followed by one or more topic sentences about how the rule should be applied to your client's case? Or do you see sentences about each issue scattered throughout the document? This review should tell you the extent to which you need to reorganize (or organize!) the document.

2. Find each rule or sub-rule that you discuss and write "rule" or "sub-rule" in the margin.
   *For these purposes, identify every rule and sub-rule that you can, even if some of them receive only minimal discussion.

3. For each rule or sub-rule that you have identified, write "explanation" in the margin next to the beginning of the explanation of that rule or sub-rule.
   *For each rule or sub-rule, note whether the language at issue is abstract or concrete and whether its application in this case is controversial or non-controversial. (You may need to discuss non-controversial rules, e.g., if there's a 3-part test, and only one
The more abstract and controversial the language or rule at issue is, the more explanation you need to provide for the reader. Explanation usually consists of discussions of past cases in which the rule has been applied.

*When explaining a controversial rule, try to tell the reader about one or more authority cases in which the court has found that the rule DID apply to a particular set of facts and one or more authority cases in which the court has found that the rule DID NOT apply to a particular set of facts. This technique will make your application section easier.

4. For each rule or sub-rule that you have identified, write "app." in the margin next to the paragraph in which you begin the application part of the paradigm for that rule or sub-rule.

*When you apply a rule or sub-rule to the facts and predict whether a court would find that the rule does apply, explain your case in relation to the authority cases that you used to explain the rule, comparing facts as appropriate.

5. For each rule or sub-rule that you have identified, write "conclusion" in the margin next to the paragraph in which you have stated your conclusion as to that rule or sub-rule.

*At the end of your discussion of each rule or sub-rule, you should have explicitly articulated your conclusion about how that rule or sub-rule should apply in this case. Frequently, the language will mirror the language in your rule or sub-rule. Don't worry about being too obvious. Your reader will appreciate the sense of closure that you provide by saying, in essence, "now I'm done talking about this issue or sub-issue." If you have not explicitly stated a conclusion, go ahead and write one in the margin.

6. Highlight each citation in blue.

*First, review the highlighting and note how much authority you have. At the very least, you should cite to one authority for each rule and sub-rule (frequently, you may use the same case as authority for more than one sub-rule). Generally, the more abstract/controversial the rule is, the more explanation (and thus the more authority) you need to provide; if the rule or sub-rule is concrete and/or not controversial, you may need to cite only one case with a parenthetical. As a general guideline, you should always have citations to authority in rule paragraphs and explanation paragraphs; you may have an application/conclusion paragraph without a citation.

*Second, note what type of authority you have. In most cases, your "rule authority" (authorities cited to provide authority for a
rule) should be from the highest court in your jurisdiction. Your "illustrative authority" (authorities cited to illustrate how rules have been applied in the past) may be from lower courts within that jurisdiction. (Note that some rule authorities may also function as illustrative authorities.) Your illustrative authority may include cases from other jurisdictions only when the case cited is very much on point and the case is discussed in light of a rule from your jurisdiction.

*Third, for each citation, note how much description of the authority you’ve provided. For a case that illustrates an abstract, controversial rule, provide a lengthier, in-text case description (legally significant cause of action, facts, holding, reasoning), while for a case illustrating a non-controversial point, or for a secondary case illustrating a controversial point, a parenthetical description may be adequate. (You almost never need both an in-text description and a parenthetical description.) If you use a parenthetical description, make sure to focus it on the point you’re trying to make. For example, to provide authority for the argument that your client’s termination was a “wrongful discharge” because it violated public policy, the following parenthetical would NOT be adequate:

_Name v. Name_, 101 N.E.2d 101, 110 (Ohio 1999) (Plaintiff claimed employer had fired her in retaliation for seeking equal pay).

This parenthetical tells the reader nothing about the how the court decided the case or why the court decided the way it did. Instead, focus the parenthetical on the point at issue:

_Name v. Name_, 101 N.E.2d 101, 110 (Ohio 1999) (firing Plaintiff who had sought equal pay held “wrongful discharge” because existing equal pay legislation shows “identifiable public policy”).

This parenthetical gives reader a succinct picture of the cause of action (wrongful discharge), facts (fired after seeking equal pay), holding (it was wrongful), and reasoning (legislation helps show public policy). Note too, however, that if your parenthetical gets too long, you might as well include an in-text discussion.
Appendix B
Micro Draft Self-Grading Guidelines
Office Memo

Complete this self-grading in conjunction with the MICRO Draft. First, complete the marking for each element, then answer the questions below on your "COMMENT SHEET." For each numbered item, note whether you need revision. If you need to revise, note what type of revision is needed; if you don't need to revise, note how you can be sure that your message is clear. You may also wish to ask private memo questions to help you revise. As you work on the self-grading, feel free to write tentative revisions or additions on the comment sheet or on the draft itself.

1. QUESTION PRESENTED: In each question, draw one box around the core question, another box around the legal context, and a third box around the legally significant facts. Label each in the margin.
* Are all of the elements included? Is the core question a yes-or-no question? Does the question include the facts that are legally significant to that core question? *Have you avoided assuming an element at issue? (e.g., "when the termination violates public policy by . . .") You may wish to revise if you have answered any of these questions "no."

2. BRIEF ANSWER: A. Draw a box around "yes" or "no." B. Draw a box around "because," "since," "thus," or "therefore" (if they occur).

Did you answer the question directly? (It's okay to say "probably.") Did you briefly explain WHY you answered the question the way you did? (e.g., "because Mr. Diamond did not rely . . . ")

Note that not all correct brief answers contain "because" or a synonym, but many good ones do. You may wish to revise if you have answered any of these questions "no."

3. STATEMENT OF FACTS: Write "context" in the margin next to the sentence/paragraph in which you provide context for the statement (e.g., "Mr. Diamond was fired . . . " "Our client wants to know whether . . .").

Did you choose chronological or topical organization? Why? Did you avoid conclusions of law in the statement of the facts? (e.g., "Mr. Diamond did not detrimentally rely on Ms. Benson's statements.")

4. HEADINGS WITHIN DISCUSSION SECTION: Ideally, your headings already indicate where the discussion of each significant rule or
sub-rule begins and ends. (i.e., when the next heading appears, that new heading signals the end of the rule or sub-rule discussed under the previous heading.) Because you should perform steps 5 through 8 below on each heading within the discussion separately, review the headings within your discussion section now, and insert headings as needed so that you can identify when your discussion of each rule and sub-rule begins and ends. Note: If the discussion of a rule consists almost entirely of a discussion of sub-rules pertinent to that “major rule,” you should also include headings to identify each sub-rule discussion so that you can perform items 5 through 8 on those sub-rules. Thus, “relevant headings” are headings that signal the analysis of a rule or sub-rule.

*Perform steps 5 through 8 below separately within each relevant heading as noted in step 4.*

5. Articulation of Rules: A. Within each relevant heading, write “Rule” or “Sub-rule” in the margin next to the sentence/paragraph in which you articulate the rule or sub-rule. B. Within each rule or sub-rule, find each “phrase that pays,” i.e., the words or phrases that are in controversy in this case (e.g., “detrimentally rely”). Highlight each phrase that pays in pink wherever it appears. Note: Some rules or sub-rules have more than one “phrase that pays,” but your goal should be to limit your highlighting to as few words as possible. Doing so will help you to use self-grading to judge the effectiveness of your explanation and application sections.

Are you unable to find an explicit rule? Do you have a hard time finding a “phrase that pays”? Not every rule has a phrase that pays, but most do. If you can’t find one, explain why the case turns on something other than the meaning of words or phrases within the rule. You may wish to revise if you have answered any of the above questions “yes.”

6. Explanation/Illustration of Rules: Within each relevant heading, highlight all citations in blue. Note whether each authority is “rule authority” (cited to provide authority for the existence of a rule), or “illustrative authority” (cited to illustrate how a rule has been applied in the past). Write “explanation” in the margin next to the sentences in which you explain the meaning of the rule (e.g., by illustrating how it has been applied in the past). Note that for some complex rules, the explanation may consist entirely of your discussion of sub-rules within that complex rule. You may ignore step 6 for those complex rules;
you will be marking explanatory authorities within the discussions of the sub-rules.

*Have you cited authorities that illustrate negative and positive applications of each controversial rule to set up parameters for your discussion? For authorities used to illustrate more abstract, controversial rules, have you described the authority in a way that helps the reader to see the connection between the authority case and the client’s case? (E.g., by describing the legally significant cause of action, facts, holding, and reasoning?) Within explanations of abstract, controversial rules, do you see frequent pink highlights, indicating that you have explained how courts in authority cases have analyzed the phrase-that-pays? For some rule authorities, and for all authorities used to illustrate a more concrete, non-controversial rule, have you included at least a parenthetical description of the case focused on the aspect of the case now at issue? You may wish to revise if you have answered any questions “no.”

7. APPLICATION OF LAW TO FACTS: Within each relevant heading, highlight any client facts, or any references to the client’s facts, in green. Write “app.” in the margin next to the sentence/paragraph in which you discuss how the governing rule applies or does not apply to the facts of the client’s case, or in which you discuss alternate applications of the rule.

*You should see green and pink highlighter close together here; that is, ideally, you should have a sentence that says “Phrase that pays equals [or does not equal] client facts because ...” Did you slow reader’s understanding of the application by using synonyms for the phrase-that-pays? Do you have a big chunk of green at the beginning of your discussion of the rule? (i.e., BEFORE you’ve articulated the rule and/or explained the rule?) Note that most readers will not understand the significance of the client’s facts if you have not yet explained the rule. You may wish to revise if you have answered any questions “yes.”

8. MINI-CONCLUSIONS: Within each relevant heading, highlight the conclusion to your discussion of that rule or sub-rule in yellow. Compare your conclusion sentence(s) to the sentence(s) above in which you articulated the rule or sub-rule.

Note that some mini-conclusions will be combined with the application paragraph. Does your conclusion appear at the geographical end of your discussion of that issue or sub-issue? Does the conclusion include language from the rule or sub-rule itself (e.g., a phrase-that-pays) so that the reader can understand the
connection between the rule and the conclusion? You may wish to revise if you have answered any questions “no.”

*Repeat steps 5-8 within each relevant heading in the discussion section as noted in step 4.*

9. Final Comment
Review your comment sheet and write a brief final comment to yourself, identifying 1) The strongest part(s) of the memorandum, and 2) the THREE most important things you think you need to work on for the final draft. 3) Ask any private memo questions you have about what you found or about how to accomplish certain revisions.
Appendix C
Sample Self-Grading: Micro Draft

The self-grading excerpt below is from a sample memorandum that appears in Appendix D of HELENE S. SHAPO, MARILYN R. WALTER, & ELIZABETH FAJANS, WRITING AND ANALYSIS IN THE LAW 373-74 (3d ed. 1995). It is used with permission. It follows the self-grading guidelines that appear in Appendix B: Micro Draft Self-Grading Guidelines, supra. The comment sheet is not included.

Underlined = Green Highlighting (Client Facts)

Bolded Words = Pink Highlighting (“Phrases that Pay” or Key Terms)

Words in Italics = Blue Highlighting (Citations to Authority)

Small Caps = Yellow Highlighting (Conclusion)

Rule The statute itself defines merchant, in part, as “a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction.” Kan. Stat. Ann. § 2-104(1) (1983). One court in Kansas has addressed the question of whether a farmer is a merchant in a case involving the sale of hogs between hog farmers. Musil v. Henrich, 627 P.2d 367 (Kan. App. 1981). The court concluded that the defendant farmer in the hog transaction was a merchant under either definition of the statute. First, as someone who had been in the hog business for thirty years and was selling 50-100 hogs per month, he was a dealer in hogs. Second, he held himself out as having knowledge or skill relating to the goods, since he had equipment and buildings related to hog farming and sold hogs to private individuals, as well as to a slaughterhouse. Id. at 373. Prentice, like the hog farmer in Musil, is a merchant under either definition. Prentice is a dealer because he is a wheat farmer who sold manufacturers not only his own wheat, but also the wheat of other farmers. He also held himself out as having knowledge relating to the goods, since he had been a wheat farmer for thirteen years, runs a 3,000 acre farm, and stated to West that he knew more about her business than she did. PRENTICE IS THEREFORE A

Con. MERCHANT, AND IT IS APPROPRIATE TO APPLY § 2-314.
Using Visual Techniques to Teach Legal Analysis and Synthesis

Angela Passalacqua

I. INTRODUCTION

The Legal Research and Writing Program at Rutgers-Camden incorporates learning theory and other principles used in Academic Support Programs to help students develop legal analysis and synthesis skills. Legal Research and Writing professors can adopt the visual techniques described in this article to teach the legal analysis and synthesis skills that students must develop to succeed in law school.

A common goal of Academic Support Programs is to "[attempt] to improve the students’ learning skills, so that they will..."

1 Director, Legal Research and Writing and Academic Support Programs, Rutgers School of Law at Camden. B.A. with Honors, Rutgers College, 1982; J.D. with Honors, Rutgers School of Law at Camden, 1985. Thanks to Leonard S. Baker and Anne M. Mullan for their encouragement and helpful comments, and to my Academic Support friends for their support in every area.

2 This article is based on a portion of the presentation entitled "Be Creative: Providing Academic Support Without An Academic Support Program," co-presented at the Legal Writing Institute on July 20, 1996 with Professor M. H. (Sam) Jacobson of Willamette School of Law. The title of the presentation does not describe Rutgers School of Law at Camden, where we have an “Academic Success Program” independent of the Legal Research and Writing Program. However, the two Programs have a single Director. One of the benefits of this system is that techniques that have proved successful with Academic Success students can be integrated into the Legal Research and Writing program, and have been, in my experience, helpful to all students. Due to time limitations at the conference, the learning theories that inform the Legal Research and Writing and the Academic Success Programs were not discussed in detail. My portion of the presentation focused on visual techniques that help students understand legal analysis and synthesis.

3 Learning theory has increasingly played a part in the reform of legal writing programs. See, e.g., Bari R. Burke, Legal Writing (Groups) at the University of Montana: Professional Lessons in a Communal Context, 52 MONT. L. REV. 373, 383 (1991) (“At this law school, changing methodology, including our Law Firm Program, is a response to our appreciation of how students learn rather than simply what students learn. Inquiry into how to enable students to perform lawyering tasks competently is best informed not by reference to what lawyers do but by reference to learning theory.”). In Legal Writing: A Revised View, 69 WASH. L. REV. 36, 67-74 (1994), Christopher Rideout and Jill J. Ramsfield discuss how legal writing professors with a better understanding of how students learn can improve their teaching by adopting a greater spectrum of techniques; Rideout and Ramsfield then describe some of the different methodologies that can be used in legal writing.
be better able to digest future material and remain competitive with other students. Learning skills are best absorbed in conjunction with courses students are taking, rather than in Academic Support or other programs that do not attempt to make a reference to these courses. In law schools that do not have an Academic Support Program, Legal Research and Writing may be the only course where skills such as case analysis and synthesis are specifically discussed, with an equal emphasis on learning to analyze and learning the substantive law for the course. Therefore, the visual techniques described in this article are especially relevant to Legal Research and Writing courses.

One of the main principles behind Academic Support Programs (ASPs) that has been incorporated into the Rutgers-Camden Legal Research and Writing Program is the attempt to reach all types of student learners. "ASPs recognize that students have different learning styles and that students learn most effectively when the teacher's style matches the student's learning style." Our Legal Research and Writing Professors and Teaching Assistants are trained in part by participating in a Myers-Briggs Type Indicator (MBTI) workshop. The workshop

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5 Id. at 202-03 (quoting conclusions about the effectiveness of undergraduate academic support programs discussed in Mary E. and Joel R. Levin, A Critical Examination of Academic Retention Programs for At-Risk Minority College Students, 32 J. C. STUDENT DEV. 323, 327 (1991)).
6 Incorporating these or other techniques in Legal Research and Writing can be helpful to students but cannot be considered a complete substitute for an Academic Support Program (ASP). ASPs deal with many issues that simply cannot be addressed by Legal Research and Writing Professors in the context of teaching a course. For a discussion of problems faced by "at-risk" students in traditionally-taught courses, and how they can be addressed in an Academic Support Program that is independent of a particular course, see Ruta K. Stropolis, Mend It, Bend It and Extend It: The Fate of Traditional Law School Methodology in the 21st Century, 27 LOY. U. CHI. L.J. 449, 455-65 & 484-88 (1996). For a comprehensive evaluation of components of an Academic Success Program, see Knaplund and Sanders, supra note 4, at 202-06.
7 Stropolis, supra note 6, at 485.
8 The Myers-Briggs Type Indicator was developed by Katherine C. Briggs and Isabel B. Myers based on the work of Carl G. Jung. Paul VanR. Miller, Personality Differences and Student Survival in Law School, 19 J. LEGAL EDUC. 460, 462 (1967).
9 At Rutgers-Camden, the MBTI inventory and workshops are conducted by Diana P. Avella and Mary Beth Daisey, certified testers who work at the Rutgers-Camden Office of Career Services. The Myers-Briggs Type Indicator must be administered by certified testers, and it would be impossible to conduct this kind of training without Ms. Avella's and Ms. Daisey's generous gift of their time and talent. For further information about the inventory, contact one of the two licensees: Consulting Psychologists Press, Inc. (3803 E. Bayshore Road, Palo Alto, California 94303) or Center for the Application of Psychological Type, Inc. (2720 N.W. Sixth St., Gainesville, Florida 32609). For a brief
helps illustrate how different "types" of people learn differently, and helps Professors and Teaching Assistants understand the theory behind the various methods of instructions recommended in the Rutgers-Camden Legal Research and Writing Professors' Manual.

In addition to assigned readings and traditional background lectures on new material, the Legal Research and Writing Professors use a variety of methods to discuss cases and teach analysis, writing and research skills, including the Langdellian\textsuperscript{10} method, collaborative exercises, role-playing, and other types of active learning.\textsuperscript{11} One of the teaching methods included in the Legal Research and Writing Program is the use of visual techniques.

II. TEACHING THROUGH VISUAL TECHNIQUES

Visual techniques are an efficient method of conveying and organizing information to all types of people: "Visual representation acts as an organizer for ideas, improves comprehension, and functions as an aid to memory."\textsuperscript{12} Law professors have endorsed visual techniques as a way of improving law teaching.\textsuperscript{13} The visual techniques described in this article can be easily in-


\textsuperscript{10} Stropus, supra note 6, at 451-55. The author discusses the origins and purpose of the Langdellian method (classroom discussions using questions and answers based on the original sources of law), arguing that it differs from the classic definition of "Socratic Method."

\textsuperscript{11} A discussion of each of these techniques is beyond the scope of this article. Some of these techniques are discussed by Christopher Rideout and Jill J. Ramsfield, supra note 3, at 70-74.

\textsuperscript{12} Kurt M. Saunders and Linda Levine, Learning To Think Like a Lawyer, 29 U.S.F. L. REV. 121, 185 (1994). "Most people, including juries and judges, learn more when they can both see and hear the material." Submission by Carol Rice, Visual Aids Give Your Students the Big Picture, The Law Teacher, Spring 1995, at 8.

Students can use the visual techniques described in this article to learn analysis and synthesis skills through the process of preparing to write memoranda or other documents in their Legal Research and Writing course. They will then be able to use these models to understand, organize, and integrate the numerous cases and other sources used in their other courses. Ultimately, students should be able to independently create the type of grids, charts, and outlines that help them succeed in their courses.

Appendix 1: Understanding a case

Early in the semester, students are introduced to case-briefing. The grid in Appendix 1 uses traditional case-briefing categories with a slight twist: by placing the trial and appellate rulings and rationales in sequential vertical categories in the grid, students can easily "see" the procedural history of the case. In addition, students can readily compare the differences in reasoning among the different levels of courts that ruled on the case. The grid also allows students to easily compare the majority rulings of the higher courts with any minority rulings or dissents by using the horizontal categories.

Appendix 2: Understanding a statute

In addition to cases, students in the Rutgers-Camden Legal Research and Writing Program work with statutes, which are usually the primary authority for the first memorandum that

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14 For descriptions of other graphics or visual techniques that help students learn legal analysis and writing skills, see Linda Edwards and Paula Lustbader, Teaching Legal Analysis, 2 PERSPECTIVES 52 (1994) (discussing the use of concept maps, graphics and colors to organize information and mark the components of a complete analysis); and Barbara Blumenfeld, A Photographer's Guide to Legal Writing, 4 PERSPECTIVES 42 (1996) (discussing the use of photographs and the three concepts of determining theme, focusing attention on the theme and simplifying, to help teach novice writers "the necessary components of an effective legal document"). For a description of a grid that helps students understand how to effectively use the results of their research, see Peter Jan Honisberg, Organizing the Fruits of Your Research: The Honisberg Grid, 4 PERSPECTIVES 94 (1996).

15 "Nothing can substitute for independent learning." Stropus, supra note 6, at 487. See also Paul T. Wangerin, Law School Academic Support Programs, 40 HASTINGS L.J. 771, 86. (1989) ("Independent learning theorists believe that students, particularly adult students, do not learn well until they develop the ability to function outside the control of their teachers.").

16 See, e.g., CHARLES R. CALLEROS, LEGAL METHOD AND WRITING, 89-104 (2d ed. 1994) and NANCY L. SCHULTZ et al., INTRODUCTION TO LEGAL WRITING AND ORAL ADVOCACY 21-29 (2d ed. 1993).
students prepare during the semester. Students are often frustrated by complex statutes written in unfamiliar language. The detailed questionnaire in Appendix 2 helps students understand a statute by breaking it down into various categories: the statute's purpose, application, effect, elements, enforcement requirements, legislative history (and its relevance), and relationship to the case law and any regulations. This step-by-step process makes the difficult task of statutory analysis more manageable, and helps students focus on the facts of the problem that are relevant to each part of the statute. For example, Title VII has certain exceptions, including allowing qualifying religious schools to hire employees of a particular religion under certain circumstances. In answering question B-2 in Appendix 2, students must consider whether there are any facts that make the statute inapplicable to the particular employer. By focusing on this portion of the statute, the questionnaire allows students to pause to determine whether the statute actually applies to the particular employer, instead of rushing to analyze whether the employer's conduct constitutes discrimination. If this exception applies, the refusal to hire does not constitute discrimination.

Appendix 3: Legal analysis structure using “IRAC”

Once students begin the writing process, they must learn how to structure their legal analysis. The chart in Appendix 3 uses a simple problem to illustrate which legal issues are completely independent issues (guilt versus sentencing) and which legal issues are actually sub-issues of a larger issue (the causation and intent elements of murder). The chart also illustrates to students how each sub-issue must be supported by its own rule and analysis. This chart can be adapted to legal analysis paradigms other than IRAC, such as Richard Newman's “proof of a conclusion of law” discussed in LEGAL REASONING AND LEGAL WRITING — STRUCTURE, STRATEGY AND STYLE, at 84 (2d ed. 1994), or Linda Holdeman Edwards' “paradigm for a working draft”

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**Appendix 4: Determining the value of each authority**

Novice law students are sometimes confused about the relative importance of the cases they receive in a closed memorandum packet or find through their research for an open memorandum. A typical “rookie mistake” is to over-rely on cases that are “on point” although these cases may not be mandatory or particularly persuasive authority. This grid allows students to consider various factors to determine how useful each of the authorities is: whether the authority is mandatory or persuasive, whether it is from a high-level or a low-level court, whether it is recent or old, and finally whether it is on point or analogous. Students can insert the name of each authority in the appropriate place in each of the vertical columns. An authority that seems very useful under one category (for example, it is “on point”) may not look as useful under a different category (for example, it is relatively old, or from a low-level court). This chart helps students place their authorities in a hierarchical order. Naturally, the analysis done through this chart must be supplemented by the more detailed analysis that results from the grid in Appendix 5. This Appendix helps students understand which authorities are “on point” and which authorities are useful in analyzing particular sub-issues.

**Appendix 5: Grid for synthesizing cases**

Besides being able to understand each legal authority studied, one of the most important skills required in law school is the ability to synthesize various authorities: “To excel at the Langdellian method, students must be able to take seemingly inconsistent decisions and precepts and assign a logical order to them.”18 Synthesis is at the heart of teaching legal writing.19 After understanding each case individually, students must synthesize them collectively and apply the synthesized rule to the fact pattern. The grid in Appendix 5 illustrates how a visual technique can be used to help students synthesize the authorities for

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19 “The greatest difficulty faced by those who teach legal writing, however, is communicating to students that legal writing is a means towards synthesizing the law and preparing them for the complex legal and human problems of modern law practice.” Michelle S. Simon, *Teaching Writing Through Substance: The Integration of Writing With All Deliberate Speed*, 42 DePaul L. Rev. 619 (1992).
Using Visual Techniques

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a memorandum. The grid can be used to illustrate the historical development of a legal rule when the cases are placed in chronological order. The grid also allows students to see how the results differ when analyzed under the legal rule derived from each individual case (category 7) and when analyzed under the legal rule synthesized from all the cases (category 8). This particular grid compares authorities used for a closed memorandum problem, but students can adapt this form to synthesize any number of authorities (for example, to synthesize cases discussing the duty to warn in their Torts class, or synthesizing cases for a research memorandum).

The Closed Memorandum problem illustrated in Appendix 5 focuses on whether customers' preference for workers of a particular gender can be considered a *bona fide* occupational qualification[^20] under Title VII.[^21] The Closed Memorandum cases show a semi-historical progression from the airline cases, in which the employers claimed that male business clients preferred to be served by female flight attendants[^22] through more recent cases in which privacy is the reason for the customers' preference of a worker of a particular gender.[^23] Privacy becomes part of the legal rule regarding *bona fide* occupational qualifications. This grid allows the students to compare the employers' and employees' actions and arguments in each case, synthesizing the authorities to determine how they apply to the facts of the Closed Memorandum.[^24]

**CONCLUSION**

The use of visual aids is just one of the teaching methods used in Academic Support that can be easily and successfully integrated into Legal Research and Writing and other courses to help students learn legal analysis and synthesis skills. The visual techniques illustrated in the appendices can help students understand the process of legal analysis and synthesis. The visuals work best initially when professors guide students in the use of these tools. However, the visuals cannot substitute for

[^24]: *Hernandez v. Univ. of Saint. Thomas*, 793 F. Supp. 214 (D. Minn. 1992) was used as the inspiration for the facts of this Closed Memorandum, although a number of evidentiary issues were eliminated.
any student's individual process in understanding the legal authorities and synthesizing them. Rather, a variety of techniques and teaching methodologies should be used in Legal Research and Writing courses to help each student determine which techniques work best for her or him.
Appendix 1: An Alternative Way to Brief Cases

| PARTIES: | Diaz v. Pan Am. Airways |
| JURISDICTION: | Federal |
| COURT: | 5th Cir Ct of App |
| DATE: | 1971 |
| PAGE IN BOOK, CITE: | 442 F.2d 385 (5th Cir. 1971) |
| TYPE OF CASE: | Employment discrimination |

Relevant Facts: Airline refused to hire men as flight attendants. Applicant Diaz filed charges with the EEOC, which found probable cause of sex discrimination, but could not resolve matter with Pan Am. Applicant filed a class action suit in S.D. Fla.

Procedural History and Analysis

<table>
<thead>
<tr>
<th>Court</th>
<th>(Majority) Rulings</th>
<th>Rationale</th>
<th>Dissent</th>
<th>Rationale</th>
</tr>
</thead>
</table>
| Trial       | S.D. Fla: female gender = b.f.o.q. for flight attendant position | 1. Airline’s history using flight attendants  
2. Passenger preference for women  
3. Psychological reasons for preference: Women better at making flights more “pleasurable”  
4. Hiring process: easier to hire only women than trying to find equally nurturing males |         |         |
| Appellate   | Reversed and remanded: female gender not b.f.o.q. | B.f.o.q. exception must be interpreted narrowly: must be necessary (not just convenient) for essence of business (not tangential point). Here, essence = travel, comfort = tangential. Business can look for individuals with desired characteristics, not gender-based stereotypes. | n/a     | n/a      |
| Supreme     | n/a                 | n/a       |         |           |
Appendix 2: Statutory Analysis Steps

<table>
<thead>
<tr>
<th>Issues to consider</th>
<th>Answers and citations</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A. Why is the statute being analyzed?</strong></td>
<td>Title VII (42 U.S.C. 2000e-1 to 2000e-17 (1985)) is binding on facts of the closed memo problem</td>
</tr>
<tr>
<td>1. To learn statutory interpretation skills (LR&amp;W problems)</td>
<td></td>
</tr>
<tr>
<td>2. To learn elements of widely used or model statutes (Federal Rules of Civil Procedure, Model Penal Code, U.C.C.)</td>
<td></td>
</tr>
<tr>
<td>3. To compare sample statutes from different jurisdictions (majority vs. minority rules)</td>
<td></td>
</tr>
<tr>
<td>4. To analyze the relevant law in a particular jurisdiction</td>
<td></td>
</tr>
<tr>
<td><strong>B. Where and to whom does the statute apply?</strong></td>
<td>1. Federal</td>
</tr>
<tr>
<td>1. Jurisdiction (See J, below)</td>
<td>2. Applies to employers, employment agencies, and labor organizations</td>
</tr>
<tr>
<td>a. State</td>
<td></td>
</tr>
<tr>
<td>b. Federal</td>
<td></td>
</tr>
<tr>
<td>2. Specific persons or entities within the jurisdiction</td>
<td></td>
</tr>
<tr>
<td>a. All persons or entities, or</td>
<td></td>
</tr>
<tr>
<td>b. just those with certain characteristics? (Ex-convicts, those who receive federal funds)</td>
<td></td>
</tr>
<tr>
<td><strong>C. What is the effect of the statute?</strong></td>
<td>1. Prohibits discrimination in employment based on race, color, religion, sex or national origin</td>
</tr>
<tr>
<td>1. To prohibit certain conduct (murder, unauthorized practice of law)</td>
<td></td>
</tr>
<tr>
<td>2. To set standards (who is allowed to drive, requirements for opening a nursing home)</td>
<td></td>
</tr>
<tr>
<td>3. To set rules for certain conduct (what one is not allowed to do when driving, rules of conduct for attorneys)</td>
<td></td>
</tr>
<tr>
<td><strong>D. What are the elements of the statute?</strong></td>
<td>1. Prohibits discrimination in hiring, discharging, and employment practices, references for employment and membership/referrals in labor organizations</td>
</tr>
<tr>
<td>1. Proscribes or required conduct (underage drinking, passing the bar exam before practicing law)</td>
<td>2. Disparate impact: not part of this closed memo problem</td>
</tr>
<tr>
<td>2. requisite state of mind (negligence, recklessness, intent, none stated)</td>
<td></td>
</tr>
<tr>
<td>3. particular result required from conduct? (compare drunk driving [where conduct is sufficient for conviction] to death by auto [where a particular result of the conduct is required for conviction])</td>
<td></td>
</tr>
<tr>
<td><strong>E. Who can enforce the statute?</strong></td>
<td>1. Agency: EEOC</td>
</tr>
<tr>
<td>1. Agency</td>
<td>2. Individuals discriminated against</td>
</tr>
<tr>
<td>a. local law enforcement agencies for state statutes; Federal law enforcement agencies for Federal criminal statutes, etc.</td>
<td></td>
</tr>
<tr>
<td>2. Individuals or entities</td>
<td></td>
</tr>
<tr>
<td>a. Does the statute provide a private right of action (civil damages or injunction for violation of statute)?</td>
<td></td>
</tr>
<tr>
<td>3. Evidence of violation of a statute may be relevant in tort cases</td>
<td></td>
</tr>
</tbody>
</table>
### F. How is the statute enforced?

1. **Agency**
   - a. Injunctions
   - b. Fines or civil penalties
   - c. Criminal sanctions
   - d. Granting or refusing to grant licenses or permits

2. **Individuals or entities**
   - a. Payment of damages to individuals in civil actions
   - b. Injunctions

Individual files "charge of discrimination" with EEOC, which investigates, and if finds probable cause of discrimination may either attempt conciliation, issue right to sue letter to individual (or individual may request a right to sue letter 180 days after charge is filed) allowing the individual to file a lawsuit in state or federal court, or EEOC may file a lawsuit without a particular plaintiff. $ & injunctions are possible remedies.

### G. Is the legislative history of the statute relevant?

1. Are the words of the statute clear?
2. If not, is there a need to establish the intent of the legislature?
3. What is the source of your knowledge about the legislative history?

Very little legislative history per Diaz

### H. What is the relationship between the statute and case law?

1. **Previous common law**
   - a. Does statute codify (adopt) previous common law?
     - If so, prior cases are most likely still relevant to the analysis
   - b. Does statute overrule (reject) previous common law?
     - What portions of prior cases are rejected?

2. **Cases decided under the statute**
   - a. cases may interpret words of the statute on a continuum from broadly to strictly

In this problem, cases interpret the "bona fide occupational qualification" exception.

### I. Are there regulations pursuant to the statute?

1. Regulations are promulgated by agencies to put into effect the statute enacted by the legislature; regulations are usually more specific than statutes

Examples: State Environmental Protection Agency for State Environmental Regulations; Federal Environmental Protection Agencies for Federal Environmental Regulations. Each regulation can in turn be analyzed according to the questions raised above.

EEOC regs: 29 C.F.R. Sec. 1600 (1995)

### J. Are there other Federal or state statutes that may be relevant? Consider:

1. Whether these other statutes also apply, and their effect
2. Federal preemption of state law
3. Jurisdictional limitation and tactical choice of forum

There may be state or even local anti-discrimination laws -- not relevant to this closed memorandum problem
### Appendix 3: Example of Legal Analysis Structure

<table>
<thead>
<tr>
<th>ISSUE #1: IS DEFENDANT GUILTY OF MURDER IF SHE CAUSES A CAR ACCIDENT WHICH RESULTS IN THE DEATH OF THE VICTIM?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Sub-Issue 1:</strong> Did her acts cause the death of the victim?</td>
</tr>
<tr>
<td><strong>Rule:</strong> Legal rules from the jurisdiction regarding causation.</td>
</tr>
<tr>
<td><strong>Application:</strong> Analysis usually includes the reasonable positions of each side. E.g., in this problem, what Prosecutor and Defense would argue regarding causation: the Prosecutor may be arguing the majority rule, while the Defense maybe arguing the minority rule or the exception to the rule; or, Prosecutor and Defense may disagree on the facts.</td>
</tr>
<tr>
<td><strong>Conclusion to Sub-Issue 1:</strong> Answers to question posed in the issue: Defendant did/did not cause the death of the victim.</td>
</tr>
<tr>
<td><strong>Sub-Issue 2:</strong> Did the Defendant intend to kill?</td>
</tr>
<tr>
<td><strong>Rule:</strong> Legal rules in the jurisdiction regarding intent.</td>
</tr>
<tr>
<td><strong>Application:</strong></td>
</tr>
<tr>
<td><strong>Conclusion to Sub-Issue 2:</strong> Answers the question posed in the issue: Defendant did/did not intend to kill the victim.</td>
</tr>
<tr>
<td><strong>CONCLUSION TO ISSUE #1:</strong> DEFENDANT IS/IS NOT GUILTY OF MURDER.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>ISSUE #2: DID DEFENDANT RECEIVE AN EXCESSIVE SENTENCE?</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Rule:</strong> Legal rules on sentencing.</td>
</tr>
<tr>
<td><strong>Application:</strong> Application of rules to facts in the problem.</td>
</tr>
<tr>
<td><strong>CONCLUSION TO ISSUE #2:</strong> DEFENDANT DID/DID NOT RECEIVE AN EXCESSIVE SENTENCE.</td>
</tr>
</tbody>
</table>
Appendix 4: Factors to consider when synthesizing and organizing more than one legal authority

Ideally, each legal issue would be resolved by finding a clearly relevant statute or a precedent case exactly on point and recently decided by the jurisdiction's highest court. Obviously, this type of authority is rarely available. Attorneys must balance all of the factors below in determining the rule in a particular jurisdiction. The authorities for the closed memorandum can be examined in this grid to determine how useful they are.

<table>
<thead>
<tr>
<th>Applicable statute or Constitutional provision</th>
<th>Mandatory authority: Statute or court in the jurisdiction</th>
<th>Highest court</th>
<th>Recent case</th>
<th>Case on point (See Appendix 5, Synthesis Exercise)</th>
<th>BEST OR MORE RELEVANT AUTHORITY</th>
</tr>
</thead>
<tbody>
<tr>
<td>Title VII and regs</td>
<td>Title VII and regs</td>
<td>Diaz (Fed Ct of App)</td>
<td>Sedita (1991)</td>
<td>Jones (Distinguishable)</td>
<td>Sedita</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Jones, Sedita (Dist Ct)</td>
<td>Jones (1987)</td>
<td>Analogous case</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Diaz (1971)</td>
<td>Diaz (Distinguishable)</td>
<td></td>
<td>Diaz</td>
</tr>
<tr>
<td>Analogous or related statute or Constitutional provision</td>
<td>Persuasive authority: Statute or court outside the jurisdiction</td>
<td>Lowest court</td>
<td>Older case</td>
<td>Very different case</td>
<td>LESS RELEVANT AUTHORITY</td>
</tr>
</tbody>
</table>
### Appendix 5: Synthesis Exercise

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Facts</td>
<td>Airline refused to hire men as flight cabin attendants claiming customers preferred women in those positions.</td>
<td>During layoffs, male orderlies with less seniority retained over females with greater seniority b/c males helped male patients with intimate functions.</td>
<td>All-female health club refused to hire men as instructors and managers claiming customers would be uncomfortable with them.</td>
<td>New University policy reassigned male custodian out of female-only dormitories.</td>
</tr>
<tr>
<td>2. Rule from the authority regarding sexual discrimination based on customer preference</td>
<td>not bfoq unless necessary to essence of business</td>
<td>gender = bfoq if necessary to preserve privacy rights of patients</td>
<td>gender not bfoq for manager and instructor position b/c alternatives existed to protect customers' privacy</td>
<td>privacy must go to core of employee's job performance and be central to business enterprise.</td>
</tr>
<tr>
<td>3. Employer Action (refusal to hire or dismissal)</td>
<td>refusal to hire male flight attendants</td>
<td>laid off senior females, retained male orderlies</td>
<td>refusal to hire male instructors and managers</td>
<td>reassigned custodians to work in buildings with students of same gender as custodians</td>
</tr>
<tr>
<td>4. Reason why employer claimed that its action was not discriminatory (bfoq)</td>
<td>women preferred by and more comforting to passengers</td>
<td>needed male orderlies to help male patients with intimate functions</td>
<td>customers preferred female-only health club</td>
<td>wanted to protect students' privacy</td>
</tr>
<tr>
<td>5. Was the employer's reason accepted by the court? Why or why not? Distinguish reasons based on legal rule from reasons based on evidence (proof)</td>
<td>Accepted by trial court but rejected by appellate court: for bfoq, gender must be necessary to essence of business, not tangential to business.</td>
<td>Persuasive evidence provided factual basis supporting claim re privacy concerns of patients; no scheduling alternatives possible: minimum # of males required for job</td>
<td>No factual basis (evidence problem) that males would undermine business interest; customers' privacy interests can be protected with reasonable alternatives.</td>
<td>sum jlgmt denied bfoq, issue of material fact: do male janitors in female dorms undermine the central purpose of college by violating students' privacy interests</td>
</tr>
<tr>
<td>6. How does this authority apply to the fact pattern?</td>
<td>Matching gender of janitors to students necessary to essence of business? Business = education, cleaning dorms = tangential?</td>
<td>Is privacy interest established or just pretext? Any alternative to laying off male janitors?</td>
<td>Factual basis for privacy interest? Reasonable alternatives to reassigning janitors?</td>
<td>(This case is the basis for the facts used in the closed memorandum problem)</td>
</tr>
<tr>
<td>7. Result when the authorities are applied together (considering value of each authority — See Appendix 4)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Title VII anti-discrimination

exception if gender = bfoq

1. Customer preference not enough; 2. need factual basis that protecting privacy is (a) necessary to (b) essence of business, not pretext and not tangential to business; 3. no reasonable alternatives exist to avoid gender preference.
Using Examinations in First-Year Legal Research, Writing, and Reasoning Courses*

Douglas Miller**

I. INTRODUCTION

Examinations are typically not used in first-year legal research, writing, and reasoning (LRWR) courses; there are some legal writing programs that use them, but these programs appear to be in the minority.¹ I thought it might be useful to discuss some of the reasons for this, to identify some of the objections typically put forward to the use of these examinations, and to see whether I could develop some responses to the objections. The discussion proceeds by means of three straightforward propositions, but it also includes references to actual exam questions that have been used either in the legal writing program at South Texas College of Law, where I teach, or elsewhere. (Ca-

* This article, like the others in this issue of Legal Writing, is based on a presentation given at the 1996 Legal Writing conference sponsored by the Legal Writing Institute. This presentation took place in Seattle on July 20, 1996. In preparing this article, I have retained the tone of the original presentation, which was in essence an exhortation for those teaching legal writing, even though I recognize that not all readers of this article will be legal writing teachers. I wish to thank the Legal Writing Institute for providing a forum for this presentation, and for putting out this special Proceedings issue. Finally, I wish to thank Diane Edelman, Pamela Lysaght, and David Walter for their thoughtful editorial suggestions.

** Assistant Professor of Legal Writing, South Texas College of Law, Houston, Texas; J.D., Boalt Hall School of Law, University of California at Berkeley, 1983; B.A., University of California at Santa Barbara, 1978; admitted to practice in Pennsylvania and Alaska. (My colleague Kim Cauthorn of South Texas College of Law was originally scheduled to participate in the LWI presentation in July, but unfortunately was unable to do so for medical reasons.)

¹ A decidedly unscientific survey has turned up twelve law schools that use something that could be described as an examination in at least one LRWR course. Those schools are the University of Detroit Mercy School of Law, Mercer University Law School, Case Western Reserve University Law School, University of South Carolina School of Law, Stetson University College of Law, South Texas College of Law, Chicago-Kent College of Law, University of Mississippi School of Law, Loyola University School of Law (New Orleans), Nova Southeastern University Shepard Broad Law Center, Saint Louis University School of Law, and Albany Law School. At two other schools (McGeorge School of Law and the University of Cincinnati College of Law), apparently at least one instructor currently uses an examination but others do not. See note 4, infra, for more detail about the examinations used in some of these programs.
II. EXAMINATIONS HAVE VALUE

Most law school courses use final examinations. Most undergraduate courses in this country still use examinations. Examinations provide a means of ensuring that students who receive academic credit for a course have mastered the content of the course, and this holds true regardless of whether the content of the course is best described as a set of skills, a set of principles, or a body of knowledge. Furthermore, giving an examination provides an instructor with a means of distinguishing among students who have attained a bare mastery of the contents of the course, students who have attained a complete mastery of the contents of the course, and students who fall somewhere in between these levels of mastery. Finally, giving an examination increases learning in two distinct ways. First, the process of preparing for an examination increases learning: instructors who use examinations can attest that on the day of the examination the vast majority of students understand more about the content of the course than these students did at the end of the last scheduled class, as a result of the preparation process. Second, the act of taking the examination itself provides an educational experience, as illustrated by the fact that most students know more at some point after the examination (whether immediately after the examination, after a few days ruminating about the examination, or after participating in an organized review of the examination) than they did immediately before the exam.  

2 Perhaps a better way to say this is that students will understand more after the examination than they would have had they never taken the examination. We have all had the sensation of information or knowledge draining steadily out of our brains in the hours, days, or weeks following an examination. The common wisdom arising from this sensation is that we actually know less after the examination than we knew before it, which might require the modification of phrasing I have made here. But this common wisdom may itself be open to challenge: perhaps the knowledge or information merely has been transferred to a less accessible part of the brain, and can be recalled under the proper stimulus or conditions. For example, the designers of review courses for bar exams assume that there is a well of information that an instructor can draw upon, at least in subjects that are required in law schools, even though the common wisdom might be that students have forgotten much of what they once knew. Or perhaps we can say that the goal of our courses is actually to have students develop certain skills, and these skills have been enhanced by the experience of the examination, to be retained by the student over the long term, unless allowed to deteriorate from lack of use.
The second use of examinations mentioned above, distinguishing among students, is not applicable to ungraded or pass/fail courses. Yet the vast majority of LRWR courses offered in this country, like the vast majority of non-LRWR courses, are not offered on this basis, so we can safely retain this part of our description of the value of examinations.

III. MASTERY OF THE CONTENT OF OUR COURSES CAN BE TESTED UNDER EXAMINATION CONDITIONS

This proposition is more controversial. Most law school courses have examinations of a duration that corresponds to the number of credit-hours given, so that a typical three-credit-hour course would have a three-hour exam. Many education theorists would say that some skills cannot be adequately tested in three hours, and some LRWR teachers are quick to point out that some of the skills we teach fall into this category. For example, it would be difficult to argue that the skill of investigating a set of complex legal issues in a law library can be tested in a three-hour, in-class examination.

Yet there are several answers to this observation. One is that this point hardly renders examinations themselves invalid: for every skill that cannot be tested in three hours, there are many that can be tested in three hours. The education theorists who conclude that not every skill can be tested in three hours do not advocate the abolition of examinations: rather, they suggest that in-class examinations be used with other kinds of projects. Thus, if we conclude that there are skills taught in our courses that cannot be tested in three hours, it does not necessarily follow that examinations are useless for us, for the simple reason that we might use in-class examinations in conjunction with other kinds of assignments.

3 Responses to a 1994 survey suggest that 75% of legal writing programs use letters or numbers to grade student performance, and another 8% of programs use an "honors/pass/fail" system; only 11% of programs appear to use a pure pass/fail system. Jill J. Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image, 2 LEGAL WRITING 1, 75 (1996).

4 For example, in the first-semester LRWR course at South Texas, students are required to complete many non-examination assignments, including an open research memorandum of law, and the in-class examination usually counts for only about 40% of the grade. At Albany the examination has roughly the same weight. At Mercer an examination counts for approximately 25-35% of the grade in the second-semester LRWR course. At Saint Louis a research examination given early in the second semester counts for 10% of the five-credit, year-long LRWR course. At Loyola (New Orleans) an examination on research and citation counts for 25% of the first semester LRWR grade. At Case
Another answer is that not all examinations need to be of limited duration, nor do they all need to be administered in a classroom. So-called "take-home" examinations have been used for decades in doctrinal courses at law schools around the country. Some of these have very strict requirements regarding duration and sources to be consulted. For example, a student might be required to pick up the exam at 9:00 a.m., and turn in an answer at 5:00 p.m. that same day, or perhaps 9:00 the next morning. This arrangement allows the instructor to measure a broader range of competencies, without some of the disadvantages associated with more traditional kinds of "papers." Some of the skills we teach could be adequately tested by giving a more traditional memorandum of law assignment, but limiting the duration and sources to be consulted or tailoring the end-product requirements. (Some readers might object that these could not, strictly speaking, be called "examinations." It hardly matters whether we call these assignments "memoranda" or "examinations," so long as we agree that they are not currently used in many programs, and that they might prove useful.) Thus, even library research skills might be tested by giving students a fact pattern and a time limit, and asking them to come back with a list of the ten or fifteen authorities that appear to be most likely to prove helpful in resolving the legal questions posed by the fact pattern, along with a brief explanation of the significance of each authority, and perhaps a narrative of what steps and missteps were taken along the way.\(^5\) While there might be practical problems to be solved before an instructor would decide to employ this means of evaluation, this does not undercut the main point: that mastery of skills in our courses might be tested by means other than traditional writing assignments.

Once we begin to analyze the content of our courses with the goal of identifying discrete skills, we can begin to imagine

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\(^5\) Mary Jensen of the University of Mississippi School of Law apparently uses something similar to this. Mary B. Jensen, "Breaking the Code" for a Timely Method of Grading Legal Research Essay Exams, 4 PERSPECTIVES 85 (1996).
ways that these discrete skills might be tested in timed examinations. I submit that the range of skills that can be tested in this way is remarkably broad, and the range of skills that cannot be tested in this way is quite narrow. (And note that even if this were not true, there might still be a place for exams in LRWR courses, for the reasons explained above.)

A few examples might help here. One skill that we all might agree is important is the ability to recognize relative ranks of authority, or at least to distinguish binding authority from non-binding authority, without knowing anything about the authority other than the information contained in a citation. (This is an important part of research as well as analysis.) This skill in turn may be dependent upon an understanding of the structure of court systems. Thus, on an examination, a student might be asked to do one or all of the following:

1. **Diagram the different levels of the federal court system and explain the basic functions of the courts at each level.**

2. **Diagram the different levels of a typical state court system and explain the basic function of the courts at each level.**

3. **Diagram the structure of the Oklahoma court system.**

More directly, a student might be asked to distinguish binding from non-binding authority, and to demonstrate an understanding of the bases for making these distinctions, in a multiple-choice format:

You are trying a lawsuit in a Texas District Court in El Paso. One of the issues involves a federal statute. The trial judge has asked for trial briefs on how to apply the federal substantive law. Your research for the trial brief has uncovered the following authorities that address your issue. In the following questions, circle the statement that best explains the authoritative value of each authority.

4. An opinion from the Houston [1st Dist.] Court of Appeals is
   a. binding, because it is from a higher court.
   b. not binding, because it is not from a higher court.
c. not binding, because El Paso is in a different appellate district.
d. not binding, because the issue is one of federal law.

5. An opinion of the United States Supreme Court in an appeal from a decision of the United States Court of Appeals for the Second Circuit is
   a. binding, because it is from a higher court with direct appellate jurisdiction.
   b. binding, because the issue is one of federal law.
   c. not binding, because El Paso is not located in the Second Circuit.
   d. not binding, because a state case would not go to the United States Court of Appeals.

6. An opinion of the United States District Court for the Eastern District of Texas is
   a. binding, because the issue is one of federal law.
   b. binding, because El Paso is in the Eastern District.
   c. not binding, because there is no appellate or revisory jurisdiction.
   d. not binding, because El Paso is not in the Eastern District.

7. An opinion of the United States Court of Appeals for the Fifth Circuit, in an appeal from a decision of a United States District Court in Louisiana, is
   a. binding, because the issue is one of federal law.
   b. binding, because Texas is in the Fifth Circuit.
   c. not binding, because Texas is not in the Fifth Circuit.
   d. not binding, because there is no appellate or revisory jurisdiction.

8. An article in the Texas Law Review is
   a. binding, because this is the most prestigious law review in Texas.
   b. binding, because it is published by a governmental entity.
c. not binding, because it is not primary authority.
d. not binding, because students from El Paso are more likely to attend Texas Tech than the University of Texas.

9. An opinion of the Texas Supreme Court is
a. binding, because a case from El Paso could conceivably end up in the Texas Supreme Court.
b. not binding, because the Texas Supreme Court has only discretionary review over some matters.
c. not binding, because the issue is one of federal law.
d. not binding, because the case could only reach the Texas Supreme Court by way of a writ of mandamus.

Note that some of the questions above draw upon particular reading or class discussion. For example, in the early weeks of the first-semester LRWR course, students in my sections read a brief explanation of the doctrine of precedent; I use this explanation, even though it is somewhat idiosyncratic, because I like the way it divides the doctrine into different strands. Question 5 draws on our class discussion of these strands. Others might disagree about the phrasing of that question, but it should make sense to students in my course. Similarly, Question 7 is tied to some very specific reading in the course: because we read decisions in which Texas courts have explicitly held that they are not bound to follow decisions of the Fifth Circuit, even on questions of federal law, students in my course should be able to answer this question. I see nothing illegitimate about drawing on specific reading or class discussion, even though students who did not take my course might not be able to answer these questions, or might answer them differently, so long as I am not setting forth pure claptrap as gospel. Unlike, say, state bar examiners, we are not under any obligation to make certain that our

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6 See Penrod Drilling Corp. v. Williams, 868 S.W.2d 294, 296 (Tex. 1993); Summer-tree Venture III v. FSLIC, 742 S.W.2d 446, 451 (Tex. Ct. App. 1987). (At least one current United States Supreme Court Justice believes that this principle applies in all state courts. Lockhart v. Fretwell, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) ("a]n Arkansas trial court is bound by this Court's . . . interpretation of federal law, but if it follows the Eighth Circuit's interpretation of federal law, it does so only because it chooses to and not because it must").)
questions are so generic as to be answerable by any well-versed student from any law school in the state. Instructors in doctrinal courses routinely take advantage of this opportunity to test students on their understanding of material specific to that course, taught in that semester, by that professor.

Some questions might even refer directly to specific reading or class discussion: 7

11. Professor Neumann divides the potential lifecycle of a civil case into six phases. What are they?

12. Karl Llewellyn said that, in a sense, no case can have meaning by itself. What did he mean?

13. According to the majority opinion in Payne v. Tennessee, all other things being equal, should a court be more willing to overrule its own prior decision on a question of statutory interpretation or a question of constitutional interpretation? Why?

14. How does Harry W. Jones, in his article on the common law, explain the persistence of common-law ways of thought in an age of statutes?

15. Explain the basic position of United States Supreme Court Justice Antonin Scalia with regard to the use of legislative history in interpreting statutes.

16. As we discussed in class, the law sometimes permits both a civil and a criminal cause of action based upon precisely the same conduct and result. Explain why this is allowed, and mention a few of the ways in which the two proceedings would differ.

17. Is legal reasoning more like deductive reasoning or inductive reasoning? Explain your answer.

Let us consider some other skills that are sometimes assumed to be testable only in the context of a large, long-term

writing assignment. Drafting of formal issue statements or questions presented might be put in this category. But a question might be constructed that gets at this skill:

18. Brazoria County ordinance number 38 provides that "no illuminated signs shall be employed after 2:00 a.m. in the county."

Peter Halsey operates a drugstore in Brazoria County. Halsey keeps two lights mounted on a 20-foot pole in front of the store turned on all night even though the drugstore closes at 7 p.m. The lights are directed toward the parking area, but because of the lights, the word "Halsey's" painted in a reflective substance on the front of the drugstore can be seen from a distance of approximately 400 feet.

Authorities repeatedly warned Halsey not to leave the lights on past 2:00 a.m., but Halsey refused to turn off the lights. Eventually, Halsey was cited by the county sheriff for violating the ordinance.

Courts have held that the illumination of names or numbers on the front of residences and residential mailboxes does not violate the ordinance. The county admits that no citizen complaints were ever filed about the lights, and that there are no residences within ¼ mile of the drugstore.

State the main issue in this case.

Of course, there are those who may object that, while it may be true that some skills can be broken down and tested independently, the tasks that are the main focus of the course, solving legal problems and expressing the solutions in writing, are somehow more than the sum of their parts. In other words, those voicing this objection would maintain that the ability to join all the discrete skills together, which might itself be described as a discrete skill, cannot be tested in a limited-time setting. But I do not concede that this is necessarily true. Certainly, state bar examiners do not concede the truth of this objection. Consider the following paragraphs:

I need your help preparing for the trial in this case. As you may know, we represent the plaintiff, Esther Dodson, in this product liability action arising out of an automobile accident in which our client was the driver and her sister, Denise Johnston, was a passenger. Denise claims she was injured in the accident,
and we have reason to believe that Denise intends later to sue Esther for negligence.

There is evidence that, following the accident, CEC changed the design of the sunroof. We fully expect that CEC will attempt to prevent this information from getting into evidence. There may be a conflict between Rule 407 of the Federal Rules of Evidence and the Columbia Product Liability Act concerning the admissibility of subsequent remedial measures in product liability cases. Please do the following:

Write an objective memorandum for me discussing which of the statutes will be applied, the theories supporting admission of this information, and the likelihood that each theory would be successful. In order to assist you, I have attached Rule 407 of the Columbia Rules of Evidence, a section of the Columbia Product Liability Act, two U.S. Supreme Court Cases, and one from the 15th Circuit.8

Does this look familiar? The structure and the call of the question make it appear to be a “closed packet” office memorandum of law, the kind of assignment that forms the core of the traditional first-semester LRWR course. But guess again, because this is an excerpt from a “Performance Test” prepared by the National Conference of Bar Examiners (NCBE) and included in the bar exams of several states in July 1993.9 Thus, an evaluative and educational tool that is common to most legal writing programs in the United States10 is now being used as part of a

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8 Jane Peterson Smith, The July 1993 Performance Test Research Project, 64 THE BAR EXAMINER 36, 38 (May 1995). (See discussion in note 9, infra, and accompanying text.)

9 Id. As part of the project, 1700 applicants in three states that had not previously used performance tests (Georgia, New Mexico, and Virginia) were given at least one of these NCBE performance tests, and an even greater number of applicants in three other states that had previously used performance tests (Alaska, Colorado, and California) were given at least one of these NCBE tests. Id. at 40. The tests were drafted for the NCBE by “highly respected clinical legal educators who [had] ten years’ experience in creating tests for the California bar examiners.” Id. at 37. The answers were scored by six teams of graders from ten different states. Id. The test consisted of a fact summary, a “file” with additional facts set forth on various documents, and a “library” of authorities. Id. at 38-39.

10 The author of a recent study has concluded that only half of the programs in the country use “closed packet” assignments. Ramsfield, supra note 3, at 5, 76. However, the
limited-time exam by the bar examiners of several states to measure the very skills under consideration here. California has used one full day of "Performance Tests" in each test administration since 1983. Alaska has been using a half-day Research Question since July 1982. Colorado has been using some similar questions since February 1989. In 1996, the NCBE gave notice to states that it would begin offering two Multistate Performance Test questions for each test administration, and four states have opted to use at least one of the questions in their February 1997 administrations. In 1996, the director of testing for the NCBE estimated that "up to half of the states [would] sign on within the next three to five years."

actual question upon which this conclusion is based asks "What research assignments are required in the first-year LRW course?" id. at 53, and some respondents might have failed to list "closed packet research" in answer to this question on grounds that "closed packet" assignments are not, technically speaking, research assignments at all.

A recent article on these new kind of questions explained how they differ from other questions:

In contrast [to essay or multiple-choice questions, these "Performance Test" or] PT problems ask candidates to carry out the kinds of activities lawyers actually perform, such as drafting a brief in support of a motion. PT problems require applicants to read and analyze a wide array of documents with which attorneys normally work (such as statutes, regulations, legal opinions, transcripts of depositions, briefs, police reports, news articles, interview notes, investigator reports, and internal memos). Applicants must sift through several pages of these materials to identify the information that is salient to their assigned task and then prioritize and organize that information in preparing their response. Unlike the typical MBE or essay question, a PT problem includes documents that contain the specific laws that are needed to respond. In this sense, PT problems are more like an "open book" exam. As in practice, information sources for PT problems (such as witness accounts of events) may be unreliable or biased; facts are sometimes ambiguous, incomplete, or even conflicting; and applicants have to recognize these problems and determine how to cope with them.


Conversation with NCBE administrator Nancy Holder, January 22, 1997. The Texas Board of Law Examiners recently announced that it would begin using one of the MPT questions in its February 1998 administration. Letter from Rachael Martin, Executive Director, January 29, 1997.

Brendan Kirby, The Bar Exam Is Changing, NATIONAL JURIST 26 (Feb./March 1996). The introduction of the performance test in California was controversial in some respects, but bar exams have always been subject to criticism on grounds that they fail to test "real-life" skills, so it strikes me as harsh to criticize California for trying to deal
If the question above was not recognizable, how about the skills it purports to measure? Here is an outline of the skills the NCBE says its performance tests are designed to measure:\footnote{This outline is derived from the NCBE's own test specifications; I have omitted the sub-subheadings in the interest of saving space. Marcia A. Kuechenmeister, A Performance Test of Lawyering Skills: A Study of Content Validity, 64 THE BAR EXAMINER 23, 31-33 (May 1995).}

A. Legal Analysis: The ability to analyze and evaluate legal authority, identify legal issues, and generate, assess, and justify the relative merits of alternative or competing legal positions.

1. The ability to read and analyze cases, statutes, regulations, and other primary authorities.

2. The ability to identify legal issues.

3. Based on analysis of authority, analysis of facts, and identification of issues, the ability to formulate legal theories.

4. The ability to develop and organize objective discussions or partisan arguments designed to achieve appropriate legal results.

5. The ability to evaluate legal theories and arguments in order to predict outcome of authoritative decision maker.

B. Fact Analysis: Given knowledge of legal rules and preliminary identification of legal issues, the ability to identify areas of factual inquiry, assess facts and marshal facts in support of legal arguments.

1. The ability to identify relevant facts.
2. The ability to acquire additional relevant facts.
3. The ability to identify inconsistencies among facts.
4. The ability to identify the reliability of asserted facts.
5. The ability to group and categorize facts in terms of legal rules.
6. The ability to select aspects of the facts which appear to call for the application or non-application of a legal rule or concept.

C. Problem-Solving: The ability to identify and diagnose problems in terms of client objectives and to suggest measures to achieve those client objectives.

1. The ability to isolate the client’s problem and to identify, generate, and organize factual and legal information in a way that facilitates the formation of alternative solutions.
2. The ability to develop and evaluate alternative courses of action designed to advance some or all of the client’s objectives.
3. The ability to implement the selected solution by adopting strategies and tactics and by taking action to advance the client’s objectives.¹⁸

¹⁸ Before making the decision to make performance tests available to interested states, the NCBE put together four prototype performance tests and a set of test specifications. Id. at 23. The NCBE then submitted both the tests and the specifications to what it called a “Content Validity Study Panel” for a one-day evaluation session. Id. at 24. The panel agreed that the skills listed are “fundamental,” and apparently agreed
Given that the bar examiners are reaching the conclusion that most of the skills we are concerned about can be tested, are we bound to reach the same conclusion, or can we draw some distinctions between their purposes and our own? One distinction might be that bar examinations are designed to separate those candidates who are minimally qualified to begin the practice of law from those candidates who are not minimally qualified to begin the practice of law, while an examination in a legal writing course (at least, a graded one) should be designed in part to establish relative rankings of student performance. Yet this distinction probably cannot withstand scrutiny. After all, no state uses a performance test to the exclusion of other kinds of testing, and on most bar examinations, a strong showing on one portion of the examination can counteract the effects of a poor showing on another portion. This means that, in effect, the performance portion is being used to rank candidates for admission to the bar just as much as a similar examination would be used in a writing course to rank students.

Are there other skills that simply cannot be tested in a limited-time setting? What about research? I have already discussed one option for measuring legal research skills: the limited-time commando-style library raid. But students might also be questioned more directly about research, as in the questions that follow:

19. Name the two national legal encyclopedias.

20. May headnotes appearing in the National Reporter System be cited as correct statements of the law? Why or why not?

21. Give the name of the CD-ROM index to legal periodicals that we have in our law school library, and explain the chief advantages of using it rather than its print counterpart.

that the drafters of the specifications had properly focused on the concerns expressed in a recently-issued ABA report on legal education. Id. at 25 (citing American Bar Association, LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT — AN EDUCATIONAL CONTINUUM, Report of The Task Force on Law Schools and the Profession: Narrowing the Gap (1992) (hereinafter "MacCrate Report"); see also Jane Peterson Smith, supra note 8, at 37 (the specifications "were developed using the California model and the new MacCrate list of fundamental skills"). Interestingly, the ABA task force itself cited the increased use of performance tests on bar examinations as a positive development, although it noted that several criticisms had been leveled at the performance tests used up to that time. MacCrate Report at 280-282.
What about writing style or *Bluebook* form? It might be objected that these skills cannot be tested apart from a large project. But it is not so difficult to come up with questions that get at these skills. Many programs give some form of *Bluebook* examination. As for style, a student might be asked to rewrite a piece of poor writing, or to choose the best and worst from a series of selections. If these questions are written with care, they will operate to measure most of what we are looking for in large writing projects.

So what is left? Again, if there is some intangible skill that can be measured only by allowing a student to ruminate, sift, cogitate, outline, draft, redraft, and polish over a series of weeks (and I am perfectly willing to concede that there is), a limited-time exam cannot, by definition, measure that skill. But this does not end the debate, because, as stated earlier, this skill might be measured by another assignment, either in the same course or in a different course. In addition to the option of giving both a graded examination and a large graded writing project in the same course, schools have the option of waiting to measure the more "intangible" skill in a later semester. For example, a three-semester LRWR program might use an examination as the sole means of evaluation in the first semester, but use an objective memorandum of law in the second semester, and an appellate brief in the third semester.

**IV. FOR MOST PROGRAMS, THE ADVANTAGES OF USING EXAMINATIONS OUTWEIGH THE DISADVANTAGES**

Here is the most controversial proposition. If you have not used an examination in the past, the prospect of constructing, administering, and grading an examination might be a daunting one. And for some programs, an examination may not be feasible. But before you reject the idea, take a long look at the perceived difficulties and disadvantages.

The single largest disadvantage or cost incurred as a result of using an examination is obvious: examinations take additional time to prepare and grade. There is no avoiding this proposition. There have been weeks in which I wondered why we ever decided to give examinations. But preparing and grading examinations may not take as much time as you think. One reason for this is that there are many questions that can be used every time the course is offered: many of the principles being tested are simply fundamental, and there are not that many different ways of asking about them. A technique that fits in with
this approach is to give students a fairly large list of "study questions" at the beginning of the semester, announcing at the same time that a certain percentage of the questions on the final examination will be drawn from these study questions. One of my colleagues has used this technique with great success.

A related approach is to have a departmental pool of examination questions, which also cuts down on the time needed for examination preparation. Courses need not be cookie-cutter copies in order to use some of the same questions on the examination. Departments might even employ a uniform examination, which means that the preparation burden on each individual instructor is minimal.

As for grading, the time spent here can be reduced substantially, depending upon how much of the material you decide to cover with questions that can be graded electronically (usually multiple choice). It may seem counterintuitive to use multiple-choice questions in a course that has the word "writing" in the title, but once you come to the realization that most of the skills we teach can be broken down into their constituent parts, I think it follows that the multiple-choice format will work for many of these parts. The validity of multiple-choice testing in the law field has been established by fairly careful study, and

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19 After years of using mostly short-answer questions, every Assistant Professor in the legal writing department at South Texas College of Law switched to all multiple-choice questions in fall 1996. The cost in time spent drafting questions in September, October, and November was more than repaid by the reduction in grading time in December.

20 See references listed in Rachel Adams, *Multiple-choice Item Writing: Art and Science*, 61 The Bar Examiner 5, 14 (Feb. 1992). Adams describes the benefits of multiple-choice testing as follows:

First of all, the multiple-choice format permits the assessment of a large body of content knowledge in a relatively short time. Second, a test consisting of many well-constructed multiple-choice questions which appropriately sample the knowledge domain can produce highly stable test scores. Third, tests constructed of multiple-choice questions can be efficiently, objectively, and accurately scored. Fourth, well-constructed multiple-choice questions can demonstrate an examinee’s ability to apply a broad body of knowledge, as well as the ability to remember facts and principles. Finally, reliable scores from well-constructed multiple-choice tests can be combined with scores from performance tests to more adequately demonstrate both an examinee’s grasp of the large body of content knowledge necessary for good professional practice and an examinee’s skills in specific or delimited areas of expertise such as writing an analysis of a case.

there appears to be fairly widespread acceptance of this form of testing not only on bar examinations, but also in law school examinations.21

Admittedly, this reduction in grading time does come at the expense of additional preparation time. Good multiple-choice questions don't drop out of the sky: they can be devilishly difficult to construct and fine tune. Here are some suggestions, gleaned from some of the literature on educational testing and my own experience.

First, get as many people to look at the question as you can, within the limits imposed by security concerns. The most innocent-looking sentence can sometimes hide the most awful ambiguity. Be particularly careful to avoid double negatives.

Second, try to make the number of questions on each area roughly proportionate to the amount of attention paid to that area during the semester.

Third, Consider deductions for wrong answers. The NCBE does not employ this method of scoring on the Multistate Bar Examination,22 nor does the Law School Admission Council (LSAC) employ it on the LSAT,23 but the literature suggests that this method can yield a more accurate curve, because it penalizes students who guess from among several choices more than it penalizes students who guess from among just two choices. In other words, statistically speaking, for the set of students who guess on at least one item, there will be a greater difference between the scores of, on the one hand, students who

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21 Steve H. Nickles, Examining and Grading in American Law Schools, 30 Ark. L. Rev. 411, 434, 447-51 (1977). Some legal educators and members of the bar no doubt are concerned about the increased use of machine-scored questions on law school examinations, insofar as they view essay questions as testing different competencies. (As Nickles points out, the idea that essay examinations have "superior power to expose organizational, integrational, and synthesizing abilities of students, which are the abilities to be assessed above all others" in law school is "so firmly embedded as to give the appearance of a truism." Id. at 447-47.) It seems unlikely that increased use of multiple-choice questions will have serious long-term consequences, so long as a substantial portion of law school examinations use at least one essay question. To the extent that a law school depends upon LRWR courses to ensure development of the writing skills, and to the extent that use of a multiple-choice examination in a LRWR course means less emphasis on writing in the course, there might be some legitimate concern here. However, given the number of essay examinations still being given in law schools, and the fact that most LRWR courses will still be giving great emphasis to these writing skills, there would be little danger arising from use of multiple-choice questions on our examinations at this time.

22 See, e.g., 1984 Multistate Bar Examination Information Booklet 1 ("[s]cores will be based on the number of questions answered correctly").

are able, because of superior knowledge, to eliminate at least one of the choices, and, on the other hand, students who are able to eliminate none of the choices. The formula to use for deductions is \(1/X-1\), where \(X\) equals the number of answers available. Thus, an incorrect answer on a question with four choices should result in a deduction of \(1/3\) of a point.\(^{24}\)

Fourth, if you deduct points for incorrect answers, it is very important not to add any answers that are obviously incorrect, because the penalty will then be diluted.\(^{25}\) Thus, in constructing a question, if you can come up with only two plausible incorrect answers, it is best to simply give the student three choices, rather than adding a fourth, even if most of the other questions on the exam have four choices.\(^{26}\) (But if you are not deducting points for incorrect answers, the absolute number of choices is not important: it is statistically important only that you have at least two plausible incorrect answers.\(^{27}\) )

Fifth, avoid questions with a tri-level structure, if possible. Tri-level questions are structured as follows: the top level contains the fact pattern or nucleus of facts; the middle level contains a series of conclusions; and the bottom level contains a series of statements about which of the middle-level conclusions are correct.\(^{28}\) It is difficult to write these questions so that good

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\(^{25}\) *Id.* at 293.

\(^{26}\) *Id.* at 291, 293.

\(^{27}\) *Id.* at 290-91.

\(^{28}\) Howard J. Gensler, *Statistical Instability of the Tripartite Multiple Choice Item on the Multistate Bar Exam*, 14 Glendale L. Rev. 25 (1995). Here is an example Gensler uses:

Tom was in a car accident and was not expected to live through the night. He asked his son, Sam, who was a lawyer, to make his will. Tom left half of his estate to his daughter Ann, one tenth to Sam, and the rest to his church. Tom was lucid at the time, and specifically disinherited his wife, Wilma. Tom executed the will which Sam had written by hand, and it was witnessed by three nurses. It was not dated. Tom died that night.

I. The will is invalid because Tom, a beneficiary, drew up the will.
II. The will is invalid because Wilma was disinherited.
III. The will is invalid because it was handwritten and it did not conform to the requirements of a holographic will.

A. I, II, and III.
B. I and II only.
C. II only.
D. None.

*Id.* at 26.
Students get them right and poor students get them wrong.\textsuperscript{29}

Sixth, try to make sure that the questions on the examination cover a range of difficulty. (This provides a nice check on the examination as a whole, as explained in the next numbered suggestion.) For example, I have often used a fairly simple “matching” question, in part to make the students feel a little more confident about the examination while they are taking it, and in part as a kind of check on the exam itself. (See Appendix.) This matching question could be easily converted to multiple choice.

Seventh, consider doing a post-exam statistical analysis of each question to determine the degree of correlation between the group of students who performed well overall on the exam and the group of students who performed well on each particular question.\textsuperscript{30} This will give you a sense of which questions worked well. (A question worked well when the students who performed well on the entire exam tended to do well on that question, and the students who did poorly overall did poorly on that question.) Perhaps even more importantly, this analysis will point up any questions that turned out to be disasters. (If, as to a particular question, the students performing well on the exam overall did no better, or did worse, than the students who performed poorly, you can say with some assurance that there was a problem with the question.) You may even want to strike such questions from consideration when you are scoring the exam.\textsuperscript{31}

Another perceived disadvantage is that an examination shifts the focus of the course away from the writing of documents. One of the strengths of our courses is the close relation

\textsuperscript{29} Gensler, supra note 24, at 294. There is some controversy about this analysis of tri-level questions. Apparently, some of the drafters at the NCBE agree that this structure is flawed, yet the MBE continues to be offered with these items included, which has led to even more criticism. Gensler, supra note 28, at 25, citing Adams, supra note 20, at 10. So far as I know, the Educational Testing Service (ETS) continues to use them on the Scholastic Achievement Test (SAT) and the Law School Admission Council (LSAC) continues to use them on the Law School Admission Test (LSAT). I see some possible problems with Professor Gensler’s analysis, and thus am not absolutely convinced that this form of question is fundamentally flawed, but my lack of familiarity with statistical analyses (and my own difficulties in drafting satisfactory tri-level questions) makes me hesitant to ignore his warning.

\textsuperscript{30} Howard Gensler, supra note 24, at 294-96.

\textsuperscript{31} Id. at 296. I have not done this, although I agree with the principle. I still have a gut reaction that it would be somehow unfair to strike the question entirely, and if I have this reaction, most assuredly some of the students who “correctly” answered the question would have the same reaction, and the energy spent dealing with these students would be better spent elsewhere. As you can see, I’m still struggling with this.
between the main projects we require students to complete and the kinds of projects they will ultimately do in practice: after all, at their first law jobs, our students won't be answering multiple choice questions all day long. But I think it is a mistake to exclude, on this basis, all other kinds of projects. Examinations can complement other projects just as much as they can distract from other projects. For example, a professor could give a fairly straightforward "closed packet" memorandum problem as a three-hour examination in mid-semester, and then assign the same facts as a long-term open memorandum project a few days later, so that students can build on the authorities and the analysis they have already worked with. Indeed, one might argue that there is more realism in a three-hour "performance" examination than in a six-week memorandum project, given the short turnaround time demanded by some law firm supervisors.

Of course, another consequence or aspect of shifting the focus of the course is that students have less time and energy to devote to the more traditional writing projects. This objection is particularly valid if the examination is offered during the regular examination period, not long after the large project of the semester has been completed. In expecting students to finish the large writing project, then turn around and prepare for all their other examinations, as well as preparing for an examination in their writing courses, we are expecting a great deal.32

There would seem to be at least a couple of ways of ameliorating this difficulty. One would be to scale back on the major project, or make it less difficult. Another would be to administer the examination earlier in the semester. After all, most of what we expect students to know in order to complete the large project has already been given to them before they begin that project. Thus, most of the questions on the final examination I give in the first-semester course could be answered by the students at the end of the ninth week of classes, and I'm sometimes tempted, when I'm planning the semester, to schedule the examination for that week. (Of course, this would normally require the permission of the associate dean for academic affairs, or

32 Surprisingly, at South Texas I hear very little grumbling about the LRWR examination, which is almost always given during the regular examination period. I am grateful that the examination was already in place when I came to South Texas; imposing an examination on students who knew that it had not been required in past semesters would probably generate more discontent.
some faculty committee, or both, which itself could be viewed as a disadvantage.)

In fairness, I should add that the one time that our department gave the examination in the middle of the semester, the students were not happy. And they expressed their displeasure not so much at the time of the examination, but at the end of the semester: many claimed that the material covered in the first seven or eight weeks did not "gel" for them until they were nearing completion of the large open memorandum of law, so that the examination was not a fair measurement. (This was particularly true of the research skills covered in the examination, according to the students.) We did not feel particularly guilty as a result of doing this, reasoning that those students for whom things "gelled" later would presumably receive higher grades on their memos, and would not be significantly penalized, but we did switch back to offering the examination during the regular examination period at the end of the semester.

Against these disadvantages or costs must be set the advantages or benefits of using an examination. To the advantages listed in Section II, above, we can add the following concrete benefits.

First, you can evaluate knowledge of principles that are important, but that you were unable to incorporate into the large-scale writing project that semester, or that you find difficult to evaluate independently when grading the large-scale project. For example, there may be some idiosyncrasies in how statutory research must be conducted in your state. If you have only one large graded project, and the problem you choose implicates only federal law or the law of some other state, competency or lack of competency in state statutory research will not be reflected in the grade. Texas happens to have several small idiosyncrasies in this area, but I can measure competency independently here with a question like this:

22. The senior partner says that in 1965 the firm represented a client in an unusual situation governed by a Texas statute, and the partner still has the memorandum written in that case. An almost identical situation has arisen, but the information in the memorandum written for the 1965 problem is too old to be reliable. How would you update the memorandum?

(To make a question like this even more realistic, you might even provide some of the facts and some of the relevant statu-
tory provisions and appropriate tables and supplements. The Lawyering Skills Program at Albany Law School employs this technique, which seems like it might work extremely well."

Second, you can increase incentives for your students to work hard on assignments that do not themselves directly affect the course grade, but which are more obviously related to the course exam than they are to the large writing project. (This is really a corollary of the first advantage: when students can see more clearly that an assignment will probably have some effect on their course grades, they tend to work harder on that assignment.)

Third, you can evaluate knowledge and skills without much fear that students are collaborating improperly or cheating in some other way. 33

Fourth, you can neutralize to some degree the natural advantage held by students who are skilled writers when they arrive at law school. (I recognize that some of you will not agree that this is a benefit, either because you do not agree that skilled writers hold an advantage, or because you believe there is no need to neutralize the advantage. However, remember that perception or feeling can sometimes be as important as reality. Many students walk into our courses feeling unfairly disadvantaged because they are not strong writers, and some walk out feeling the same way.)

Those of us who are making careers in the field of legal writing have sometimes been frustrated with our non-legal-writing colleagues’ refusal to at least consider curricular change. The argument that “we can’t do that because we’ve never done it before” simply doesn’t carry much independent weight, regardless of who makes it. Consider using an exam.

33 From discussions over the years, on Legwri-l (the Legal Writing listserv) and elsewhere, I know that some of us view this as a more significant advantage than others of us do.
## APPENDIX

<table>
<thead>
<tr>
<th>MATCH THESE . . .</th>
<th>TO THESE</th>
</tr>
</thead>
<tbody>
<tr>
<td>American Law Reports (ALR)</td>
<td>A. An individual pamphlet issued upon enactment of a statute into law.</td>
</tr>
<tr>
<td>Digest</td>
<td>B. The same case in a different reporter.</td>
</tr>
<tr>
<td>Law Reviews or Law Journals</td>
<td>C. A system of arranging, by subject, the headnotes of cases.</td>
</tr>
<tr>
<td>Official Reports</td>
<td>D. Statutes enacted by a legislature, arranged chronologically.</td>
</tr>
<tr>
<td>Parallel Citation</td>
<td>E. The first appearance of a decision issued by a court.</td>
</tr>
<tr>
<td>Restatements</td>
<td>F. Alphabetical compilation of terms defined by the courts.</td>
</tr>
<tr>
<td>Session Laws</td>
<td>G. The public, general, and permanent statutes of a jurisdiction in a fixed subject or topical arrangement.</td>
</tr>
<tr>
<td>Shepard's Citators</td>
<td>H. The opinions of a given court published by the court-designated publisher.</td>
</tr>
<tr>
<td>Slip Law</td>
<td>I. Publisher-selected leading cases, both state and federal, with detailed annotations and commentary.</td>
</tr>
<tr>
<td>Slip Opinion</td>
<td>J. The official, permanent session law publication for federal laws.</td>
</tr>
<tr>
<td>Statutory Code</td>
<td>K. Student-edited periodicals that contain respected commentaries on the law.</td>
</tr>
<tr>
<td>Treatise</td>
<td>L. Specialized publications whose purpose is to trace the use of earlier authority in later sources.</td>
</tr>
<tr>
<td>U.S. Statutes at Large</td>
<td>M. Respected reiteration of major legal doctrines covering ten specific fields of law.</td>
</tr>
<tr>
<td></td>
<td>N. Scholarly written discourse on an area of law by an expert in the field.</td>
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Providing Academic Support Without An Academic Support Program

M. H. Sam Jacobson

I. INTRODUCTION

Legal Research & Writing (LR&W) faculty often identify many unmet needs of their students but are unable to offer them support services that might be available in formal academic support programs. Willamette University College of Law does not have a formal academic support program, but the law school has been able to provide its students two important types of support: (1) analytical and writing instruction for students who have not passed one or more semesters of the LR&W course; and (2) additional analytical and writing experience for students who pass both semesters of the LR&W course but who master the analytical and writing skills late in the year and therefore need additional reinforcement. This article describes the successes Willamette University College of Law has experienced from the two programs it developed to address these areas. Many of the programs' techniques and strategies would be easily incorporated into any LR&W curriculum.

II. REMEDIAL LR&W SUMMER CLASS

The opportunity to develop a special program for students who had not successfully completed LR&W arose in academic year 1994-95. Because of an unusually large first-year class, the law school required all students who had not successfully completed LR&W to take a special four-week course offered twice during the summer of 1995.

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1 Instructor, Legal Research & Writing, Willamette University College of Law, Salem, Oregon. B.S., University of Oregon; J.D., University of Iowa. I would like to thank Theresa A. Newman, Director of Writing, Duke University School of Law, for her many insightful comments on this article.

2 Formal academic support programs would generally have staff whose time and expertise involves working with students who have special academic needs. Examples of services they might provide include special classes, tutoring, testing, and counseling.

3 The law school offered the course in May and August. A current syllabus is included in Appendix A.
The summer course was designed to provide an intensive work experience in a small class setting. This structure would help the students in a variety of ways: it would help them master all the skills necessary to successfully write a legal memorandum; it would provide them with tools to overcome any analytical, organizational, or writing deficiencies; it would give them significant individual attention by the instructor; and it would allow them to concentrate on mastering the skills required for the course when their other classes do not divert their attention.

The class was so successful that the faculty made it a permanent part of the curriculum. Personally, it was the most exciting teaching experience that I have had. The course's success was due, in part, to an attempt to avoid the sins of our old system. Under our old system, a student who failed to successfully complete LR&W had to repeat the class. This system had several drawbacks:

(1) The students who were repeating LR&W were added to an already full class. This imposed an additional burden on the LR&W instructors and limited the amount of time they could allocate to the repeating students' special needs.

(2) The students who were repeating LR&W had to take the course in addition to their other courses. This usually meant they lacked adequate time to devote to LR&W and they often had conflicts with the LR&W schedule that resulted in their being unable to successfully complete the work.

(3) The students who were repeating LR&W were not receiving the instruction they needed. Most of the students had passed the first semester of the course but not the second, and therefore the law school only required students to repeat the second semester. However, these students' failure in the second semester was primarily related to matters taught in the first semester. They had not sufficiently mastered the basic skills taught in that semester. This became a significant problem in the second semester when the students were working independently on more difficult assignments and their opportunity to rewrite was more limited. Repeating spring semester only gave the students the opportunity to repeat the same mistakes they had made before. What these students really needed was to return to the subject matter of the first semester to master the foundational skills that would lead to a satisfactory analysis and a successful communication of that analysis in a legal memorandum.
(4) The students who repeated LR&W did not necessarily become more confident about their ability to produce a satisfactory legal memorandum or appellate brief; they often felt even less confident.

(5) The students who repeated LR&W were often embarrassed about the experience. They were reluctant to attend class, because it broadcast to the first-year students, and to their peers who saw them attending the first-year class, that they had not done satisfactory work.

In May and August 1995, those second-year and third-year students who had not received credit for LR&W took the special summer class. The results of the two classes were impressive: 3 As, 4 B+s, 4 Bs, 3 C+s, 2 Cs, and 1 F (this student failed the first year of law school). In fact, these results reflect a higher distribution of grades than in a regular LR&W class. All students showed remarkable progress and all left the class feeling very confident in their ability to perform satisfactory work.

The students' success is attributable to a number of factors:

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4 My typical distribution of grades for a spring semester compare with the grades for these summer classes as follows:

<table>
<thead>
<tr>
<th>Grade</th>
<th>Distribution in regular class</th>
<th>Distribution in summer class</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>14%</td>
<td>18%</td>
</tr>
<tr>
<td>B+</td>
<td>11%</td>
<td>23%</td>
</tr>
<tr>
<td>B</td>
<td>25%</td>
<td>23%</td>
</tr>
<tr>
<td>C+</td>
<td>21%</td>
<td>18%</td>
</tr>
<tr>
<td>C</td>
<td>14%</td>
<td>12%</td>
</tr>
<tr>
<td>D/F</td>
<td>14%</td>
<td>6%</td>
</tr>
</tbody>
</table>

The distribution in my regular class is an average of the last three spring semesters.

The same standards apply for grading the research memoranda produced in the summer course as in the regular course. My evaluation form evaluates each part of the memo separately (question presented, facts, thesis paragraph, analysis, choice of authorities, organization, writing, conclusion, citations, and format). Each part is worth a scaled number of points with a maximum total of 100 points. I assign an overall grade based on the total number of points. The usual breakpoints (+ one point) are 82 and above for an A, 79-80 for a B+, 74-78 for a B, 71-72 for a C+, 66-70 for a C, and 62-64 for a D, and 60 or below for an F.

5 In the course evaluations, all of the students said that the course helped them identify and improve in their weak areas. All of the students said that it improved their understanding of legal analysis and organization (large scale and small scale). In addition, the increased confidence was readily apparent from the change in the demeanor of the students, a transformation from downcast eyes and a glum countenance to sparkling eyes and radiant smiles. Their newfound confidence was also apparent in their personal comments to me about how excited they were that they finally "got it".
1. The instructor and students relied heavily on self-assessment evaluations, including a learning styles evaluation, which required the students to take responsibility for their learning.

Prior to the first day of class, the students completed a skills evaluation\(^6\) that would determine what the students believed to be their weaknesses. The skills evaluation also helped identify students who might have learning disabilities, and it provided some preliminary information on preferred learning styles. In addition to the skills evaluation, the students completed a learning styles assessment,\(^7\) a writing diagnostic exercise,\(^8\) and a drafting exercise.\(^9\)

Each student met with me for one hour to review the results of these assessments. The conferences primarily discussed the results of the skills assessment\(^10\) and the learning style assessment.\(^11\) According to their comments, students uniformly found the results helpful in focusing their efforts. An even greater result, albeit unanticipated, was that the students had to admit they had weaknesses and they had to accept responsi-

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\(^6\) The Skills Evaluation assessment, which I prepared, is included in Appendix B. The questions in the assessment help me identify potential problems a student might have related to learning style or mode, case evaluations, synthesis, statutory analysis, analytical framework, weight of authority, small scale analysis, thesis paragraph, use of authorities, writing, and research.

\(^7\) To assess learning styles, I use the Learning Styles Questionnaire designed by Peter Honey and Alan Mumford. This is a 90-question self-scored assessment that evaluates each learner’s strengths and weaknesses in the learning cycle, and it provides guidance on how to strengthen those areas that are weaker. This assessment tool aids in self-insight and is non-labeling, that is, it does not ascribe to each learner fixed characteristics; rather, it recognizes that each learner will continue to grow and adapt as he or she encounters new learning situations. For more discussion of this assessment tool, see Peter Honey & Alan Mumford, The Manual of Learning Styles (1992) or M. H. Sam Jacobson, Using the Myers-Briggs Type Indicator to Assess Learning Style: Type or Stereotype?, 33 Willamette L. Rev. (forthcoming May 1997).


\(^9\) I asked the students to redraft the convoluted language of a municipal leash ordinance. The exercise helps me evaluate the students’ analytical and organizational skills and how precisely they use language.

\(^10\) We reviewed my written comments to the skills assessment. An example of my comments is in Appendix C. The student who was the subject of this assessment was later diagnosed to have a learning disability.

\(^11\) The results of the Learning Style Questionnaire appear on a grid; an example is included in Appendix D. The student in this example showed strong abilities in three of the four learning spheres (having new experiences, concluding, and implementing/planning). However, the student would want to strengthen his or her “reflector” skills by more completely researching and analyzing a problem to assure that the conclusions drawn were adequately supported and not premature.
bility for their learning. This eliminated student resistance to what we wanted to accomplish with the class. It also eliminated the temptation for students to blame their deficiencies on others. By taking charge of their learning, the students were open to new suggestions on how to improve, and they were motivated to prove that they could be successful.\textsuperscript{12}

2. The course filled in the gaps of missing, but essential, steps to mastering fundamental skills.

The course reviewed all of the fundamental skills involved in LR&W. It used a closed-universe assignment to review the analytical steps necessary to prepare for writing a legal office memorandum. It isolated the analytical steps so that the students could learn various tools that would help improve their comprehension and analysis. For each small step, the students had an assignment. For example, the first week of class, the students had six assignments.\textsuperscript{13} A couple of the assignments were particularly useful in helping the students improve their skills and in helping me improve my ability to guide them.

One helpful assignment required the students to develop their own checklist for what they thought they should include in their legal memorandum. From this product, I could easily assess how well each student understood what an office memorandum should contain and how to address any confusion. For example, one student's checklist was copied from the assigned text;\textsuperscript{14} unfortunately, it was the checklist for writing an appellate brief, not an objective office memorandum.

Another student's checklist showed that the student had little understanding of the component parts of a memo or how to present legal analysis. The result of this checklist would have been a very descriptive memorandum, rather than an analytical one, because the checklist began with the history of the problem followed by a description of the cases before making a general

\textsuperscript{12} The student and I would review the other parts of the self-assessment, the writing diagnostic and drafting exercise, more thoroughly later in the course.

\textsuperscript{13} The six assignments were to develop a checklist for an office memorandum, to synthesize the law in three Supreme Court cases that would establish the law and analytical framework for their closed-universe memorandum assignment, to develop a T-chart for the authorities in their assignment, to develop a T-chart for the facts of their assignment, to complete an organizational exercise that required they edit the organization of a memorandum, and to write a closed-universe memorandum. For a discussion of T-charts, see infra note 15.

\textsuperscript{14} HELENE S. SHAPO et al., WRITING AND ANALYSIS IN THE LAW (3d ed. 1995).
conclusion. This student’s checklist also revealed a lack of understanding of the purpose of some of the parts of the memorandum. For example, the student had a note to “add in legally relevant facts” to the introductory (thesis) paragraph.

A second helpful assignment required the students to do T-charts at each step of the analysis. T-charts help solve some common analytical problems by forcing the students to take more complete notes as they evaluate their assignment. For example, weaker students often have trouble using the facts from the cases and from their writing problem fully, sometimes because they miss facts and sometimes because they miss their significance. In addition, weaker students have trouble seeing both sides, whether it be with the facts or the authorities. Finally, many students with learning disabilities have trouble documenting how they arrive at their conclusions and they have trouble with deadlines. T-charts help with all of these problems.

The T-chart assignments required the students to create a T-chart for the law and facts on each issue. For the law T-chart, the students would put all of the law that supported one side of the argument (“X”) on one side of the T; they would put all of the law that supported the other side (“not X”) on the other side of the T. They then made another T-chart on the same issue for the facts from the cases and for the facts from their problem, putting the case facts at the top of the T and the problem’s facts at the bottom. They repeated this process for each issue in the

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15 T-charts are a note-taking technique that derive their name from drawing a big “T” on a piece of paper.
16 To illustrate this T-chart, let me use an example involving the Illinois dog bite statute from DIANA PRATT, LEGAL WRITING: A SYSTEMATIC APPROACH 95-111 (2d ed. 1993). One of the elements a plaintiff must prove to recover under the statute is a lack of provocation. The law T-chart might look something like this:

<table>
<thead>
<tr>
<th>lack of provocation</th>
<th>provocation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Messa</strong>: no provocation when merely walking down the hall where have a legal right to be even though the dog reacts to person's presence</td>
<td><strong>Siewerth</strong>: provocation can be continuous (so that provocation occurs when a dog bites Child #1 even though Child #2 kicked the dog last)</td>
</tr>
<tr>
<td><strong>Dobrin</strong>: elem not discussed dir'ly but must have found no provocation b/c court allowed recovery; law same as Messa</td>
<td><strong>Nelson</strong>: provocation can be unintentional as long as dog's response is in proportion to the act</td>
</tr>
</tbody>
</table>

17 To illustrate the fact T-chart, we can use the same example:
memorandum.

This approach produced several results. First, the students learned to do a more thorough job of extracting relevant information from their facts and their authorities because they were looking for specific things rather than trying to analyze the problem holistically. Second, the T-charts helped students freeze their thinking in time so they could leave the project and return later to pick up where they left off. This was of substantial value to the students with learning disabilities or those who had difficulty concentrating for long periods. These students frequently would have difficulty meeting deadlines because each

<table>
<thead>
<tr>
<th>lack of provocation</th>
<th>provocation</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Messa</strong> - merely walking down the hall</td>
<td><strong>Siewerth</strong> - Child #1 kicked the dog 2x; dog growled after each kick</td>
</tr>
<tr>
<td>—dog reacts to person's presence</td>
<td>—child #2 kicked dog</td>
</tr>
<tr>
<td></td>
<td>—dog bit Child #1</td>
</tr>
<tr>
<td><strong>Dobrin</strong> - walking on path up to the house</td>
<td><strong>Nelson</strong> - 3 y.o. child landed on dog's tail playing a child's game (crack-the-whip)</td>
</tr>
<tr>
<td></td>
<td>won't help per Nelson</td>
</tr>
<tr>
<td></td>
<td>prior growl only nec to establ intentional per <strong>Siewerth</strong>?</td>
</tr>
</tbody>
</table>

# # #

5 y.o.

no warning from the dog; already nuzzled dog so knew it was friendly; disting from **Siewerth** since no growling or warning from dog

unintentional; snowball thrown at father, not dog

snowball thrown softly and could not have caused the dog any pain; boy was bit 4 times and needed 117 stitches on his right elbow; distinguish from **Nelson** b/c not a proportional response

was just walking down the path; analogize to **Messa** and **Dobrin**

threw snowball; fact it was unintentional won't help per **Nelson**

threw softball and it startled dog similar to **Nelson**; dog had never bitten or harassed anyone before (response warranted?)

hit with snowball when walking; disting from **Messa** and **Dobrin**

This example also includes notes for analogizing and distinguishing the problem's facts from the case facts.
time they resumed working on their assignment, they would begin their analysis anew.

Third, the T-charts collected all the information the students would need for a complete small scale analysis; their improvement in this area was dramatic. Once students identified the authorities on both sides, they were prepared for a thorough discussion of their authorities; once they had identified the facts of their authorities, they were prepared to discuss the scope of their authorities; and once they identified the facts of their assignment, they were prepared to analogize and distinguish with their authorities. This resulted in more completely developed small scale analysis to support their conclusion.

Fourth, the T-charts broke the assignment into manageable "chunks" so that students could more easily meet their deadlines. Each "chunk" moved them closer to completion.

Fifth, the T-charts were a helpful diagnostic tool that helped me better direct the student to a more thorough analysis, particularly if the student's T-chart evaluations were incomplete or one-sided. To illustrate, the student who prepared the following T-chart was readily able to see that she had not evaluated her facts objectively when she had almost no facts in her chart for one side of the issue:

<table>
<thead>
<tr>
<th>speech of public concern</th>
<th>speech not of public concern</th>
</tr>
</thead>
<tbody>
<tr>
<td>brought, read, and shared Playboy consensually for own &quot;personal&quot; use</td>
<td></td>
</tr>
<tr>
<td>Cynthia Barber - personal feelings</td>
<td></td>
</tr>
<tr>
<td>Janet Babcock, Patricia Vaughn - personal complaints</td>
<td></td>
</tr>
<tr>
<td>two females not offended</td>
<td></td>
</tr>
<tr>
<td>Playboy interview, articles</td>
<td>nude pix</td>
</tr>
<tr>
<td>public fire station</td>
<td>locker private space</td>
</tr>
<tr>
<td>at work</td>
<td>off duty</td>
</tr>
</tbody>
</table>
In addition, the notes in the chart were fairly cryptic so I was unable to evaluate how the information might support public or private speech. Subsequent conversations with the student indicated that she could not articulate to me how each fact supported the point for which she listed it. With this insight, I reviewed with the student how to evaluate facts to select those that are relevant to the analytical point, something I might have otherwise assumed the student understood.

In addition to reviewing all the steps of legal analysis with small assignments, the class included specially designed in-class exercises to reinforce primary skills. Because the classes met for two hours, the exercises in class could be quite complex. I designed exercises for synthesizing cases, analyzing statutes and synthesizing with judicial interpretations, developing analytical framework and small scale analysis, editing writing, and assessing weight of authority.

All the exercises were designed to appeal to a visual, rather than verbal, learner since most of the students in these classes preferred that learning mode. For example, to practice assessing weight of authority, I summarized nine cases on separate notecards. In addition to the facts, reasoning and holding of the case, I included other information that might bear on the case's weight: e.g., the number of times other courts had cited to the decision, the number of judges involved in the decision, the vote, and the number of law reviews that discussed the decision. The students worked in groups of two or three and ranked the cases (by putting the notecards in order) from best authority to weakest authority. My goal was to have the students learn to add a step in their analytical process that would require them to consciously evaluate weight of authority, something weaker students have a particularly difficult time doing.

The results were quite fascinating. Of the nine cases in the exercise, three were directly on point, three were somewhat useful factual illustrations, and three were irrelevant. Some of the students had irrelevant cases ranked high; some had the highly relevant cases ranked low. From this exercise, I could easily assess how the students misjudged some of their authorities, the first step to curing the problem.

After identifying and reviewing each step in the analytical process in the context of the closed-universe assignment, the students could apply what they had learned in a research memorandum. Their success was remarkable as the grades for the class illustrate.
3. Students could devote substantial time and effort to mastering the skills required for the course.

By offering the class in the summer, students were not distracted by other classes. In addition, students were generally not working; of those students who were working in the summer, most began their jobs late (for the May classes) or quit their jobs early (for the August classes) so they could concentrate on successfully completing the course.

4. Success at smaller assignments at each step of the process increased the students' confidence.

Requiring the students to submit assignments at each step of our discussion, gave them a significant boost in confidence. By the time they tackled their research memorandum, all the students were certain that they would successfully complete it. And they did.

5. Assignments focused on more effectively aiding the nonverbal learner.

As determined by self-assessment, ninety percent of the students in the remedial LR&W class were primarily visual learners. Yet few of them had incorporated any visual study or note-taking techniques into their study routines. For many of the students, the simplest visual component to an exercise made a significant difference in their comprehension. Visual components included organizing information in a T, physically stacking authorities into issue piles and then by weight of authority, and using post-it notes, color, charts, diagrams, or drawings.

6. Longer class periods allowed the students to work on more complicated examples that more closely matched the complexity of their writing assignments.

With a two-hour class period, the students could work collaboratively on an exercise that might take an hour or more to complete. This left ample time to provide an overview at the beginning of class and to discuss the results of the exercises at the end of the class. The value came not only from the more complex exercise, but from the collaboration. Exercises done outside of the classroom would have been done individually. By doing these exercises in the classroom, the students could benefit from the different perspectives of their group. For example, in the
weight of authority exercise, the students needed to articulate to their peers why they thought one case had more or less weight than another. If the students had differing opinions, which was always the situation, the students needed to persuade each other of the merits or demerits of the different selections. This process was invaluable for stimulating critical thinking, for improving the students' analytical skills, and for learning the particular skill (how to weigh authority) more thoroughly.

For all of these reasons, the summer class was a resounding success. My goal was to enable the students to perform satisfactory work independent of the professor by the end of the course. In addition to achieving this general goal, the class strengthened students' legal analytical skills, helped the students develop tools for conducting a complete and accurate analysis and for writing, helped improve the students' skills in research, organization, and writing, and helped restore their confidence in their ability to complete a writing project successfully.

III. SPECIAL TUTORING PROJECT

The second program that Willamette University College of Law used to provide additional support to its students was a special tutoring project to give additional analytical and writing experience to second-year students who mastered analytical and writing skills late in their first year of law school by using them to tutor first-year students in LR&W. The tutoring project would reinforce their knowledge of the material when they revisited it as tutors trying to explain it to first-year students. To finance the project, I successfully applied to the Fund for the Improvement of Post-Secondary Education (FIPSE) in the U.S. Department of Education for a grant. Funding is not essential, however. The project could easily be staffed by volunteers; in fact, all of my tutors offered to tutor for free in the event that FIPSE denied my grant application.18

A. Project Description

The tutoring project was an experiment to provide additional opportunities for students to reinforce their legal skills of analysis, research and writing. The project used specially se-

18 Even with the federal grant, the tutors underreported the time they spent tutoring, because they thought they were making a meaningful contribution to the education of first-year students.
lected second-year law students to tutor first-year law students to achieve two goals: (1) to provide learning opportunities for second-year students who could benefit from additional reinforcement of these skills because of their delayed success at mastering them during their first year of law school; and (2) to provide additional resources for first-year law students who are struggling with learning the skills.

Using tutors for whom these legal skills did not come easily essentially turns tutoring on its head. Typically only the top students fill these positions. This project deviates from that norm to achieve the following objectives: (1) improve the self-esteem of tutors; (2) increase individualized instruction of the first-year students; (3) improve the first-year and second-year students' knowledge of the subject matter; and (4) improve the tutors' employability by improving their critical legal skills of analysis, research and writing.

B. Project Status

For the first year of the project, two of the seven LR&W sections participated in the tutorial program. Six tutors were hired before the beginning of fall semester. They were introduced to the new first-year students at orientation, and then they participated in tutor training. At the end of the fall semester, the tutors attended a retreat to evaluate the project. The evaluations collected at the retreat reveal the project was successful in meeting its objectives.

OBJECTIVE 1: Improve self-esteem of tutors.

To provide the second-year law students with a positive experience that would enhance their self-esteem, I trained and supervised them and gave them teaching materials that would improve their confidence in their ability to successfully tutor first-year students.

Selection: Since one of the goals of the project is to assist students whose mastery of legal skills did not come easily, the selection of tutors was somewhat more complex than might otherwise be the case. In addition to the target group, I wanted a diverse group of tutors that would reflect different student populations. Of the six tutors, two were students of color (Asian), two were male, one was a student for whom English was a second language, and one was on law review. While all the students received a final grade of B or better in LR&W,
their grade averages in their other courses ranged from just below a 2.0 to 3.8 (on a 4.0 scale). Three of the students had below-average grades, two had above-average grades, and one had exceptional grades. The students selected to be tutors knew only that they were selected because of their strong performance in my class by the end of their first academic year.

Training: Before fall semester began, I trained the new tutors on how to teach effectively one-on-one, how to teach in a group context, and how to use learning style information and assessments for effective teaching in each of these contexts. I also provided the tutors with a resource manual to support their tutoring efforts.\textsuperscript{19} The tutors evaluated the training program at the end of fall semester by objective questionnaires and in exit interviews. The tutors indicated that the learning styles discussion was the most helpful part of the training. In the words of one tutor:

I think going back to learning styles was helpful, knowing how some students try to get to the end before going through the middle and how other students are so concerned about details that they forget to look at the big picture, and I think just little things like that helped. That training was beneficial when you have students who are under a lot of stress and you pull that out of the student to determine what their actual learning styles are and . . . coming to that understanding, you are able to ask the questions and get to the point [of how to help them].

The tutors indicated that the other training materials were at least somewhat helpful, that they felt comfortable in the various tutoring situations but somewhat less comfortable with impromptu meetings, and that they felt effective or somewhat effective in their tutoring.

Although the exit interviews indicated that the tutors felt adequately trained, two tutors noted that they would have liked additional review of some of the substantive material covered in

\textsuperscript{19} The resource manual included administrative materials, such as tutoring log sheets, tutor information (e-mail addresses, telephone numbers, and law school box numbers); law school and community resources for health and social services; learning style information and the Honey & Mumford, \textit{supra} note 7, Learning Style Questionnaire; articles concerning the psychological impact of the law school experience; LR&W course information; information about the first-year students, such as class rosters, class schedules, and photographs; and examples for one-on-one training that the tutors could use when meeting with students.
class, specifically mentioning citations and small scale analysis, and they would have liked simulations of one-on-one training. The portion of the training they found most helpful was the learning styles information and the discussion about different ways to work with different personalities (the one-on-one training). Based on these comments, we modified the tutor training to include a diversity training session\textsuperscript{20} and to incorporate more substantive material into the weekly sessions.

**Weekly meetings:** The tutors and I met weekly to review material I was covering that week in class and to discuss any special problems that might have arisen, any students who needed special assistance, and any student contacts they may have had. Responses to the fall questionnaire indicate that the weekly meetings were helpful for reviewing course materials and assignments, and for discussing student contacts and administrative matters. The responses also indicate that the weekly meetings were somewhat helpful for reviewing model examples.

**Tutoring:** While the initial training session and the subsequent weekly meetings appear to have contributed to improving the self-esteem of the tutors by making them feel generally more confident of the materials, the primary activity to accomplish this objective was the tutoring itself. The data from the exit interviews clearly indicate that the tutors were flattered to be asked to tutor and that being a tutor made them feel important and esteemed.\textsuperscript{21} The students also mentioned how good it made them feel to help others, particularly if they could alleviate some of the stress of the first year of law school.

**OBJECTIVE 2:** Increase individualized instruction of first-year students.

The second objective of the tutoring project, increasing individualized instruction of first-year students, helps achieve the project’s goal to provide additional resources to first-year students to aid them in mastering complex legal analysis. The data collected indicates that we accomplished this objective. The tutors recorded each tutoring contact they had, and the students

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\textsuperscript{20} Diversity training is designed to sensitize participants to the different values that individuals hold because of the differences in their experiences. Devorah Lieberman of Portland State University conducted the training. Our purpose in adding this training was to help the tutors feel more comfortable in one-on-one training.

\textsuperscript{21} For example, one tutor said she “was honored to be a tutor, to know that [her] skills could be regarded as fundamental and [be] transferred to someone else.”
reported their contacts with the tutors in their evaluation forms. This data reveal that 16 out of 42 students used tutors frequently (5 times or more) and only 7 students did not use the tutors at all.

Notwithstanding the significant number of students who used the tutors, students did not contact the tutors until midway through the semester and then, as might be predicted, only immediately before an assignment was due. Several students expressed to me that they were reluctant to use the tutors, because they felt it was an admission that they did not know something. When the tutors held a group session to try to break the ice (and generate "business"), many students attended. The tutors indicated in their exit interviews that they would have liked to have broken the ice earlier with the students so that they could have been of more use to them earlier in the semester.

Based on these comments, this year the tutors began holding topical sessions the first week of class; nearly all first-year students in my classes attended. In these sessions, they worked through examples that would review material covered in class. This proved an excellent supplement to the course instruction. It gave the students an additional opportunity to apply the lessons they learned in class, and it gave them an early opportunity to ask questions that they may have waited to ask last year. These sessions were very effective. In this year's first memorandum assignment, my first-year students showed a surprising mastery of citation form and a more mature understanding of analytical framework and small scale analysis.

While last year's students received substantial additional instructional support, some were frustrated because the tutors could not give them answers to their assignments. Our honor code requires that students work independently when the student will submit that work for a grade; all of our writing assignments are graded. In addition, because legal analysis is a process that can best be learned (and some would contend, can only be learned) by doing, the tutors were instructed not to provide answers to the students but rather to use questioning or examples to guide the students to self-discovery.22

To avoid student complaints about the lack of definitive answers, we have made the role of the tutors more clear to the

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22 These are the same techniques that I use when meeting with students.
students at the beginning of the semester. We also have initially relied less on one-on-one assistance ("can you edit my paper for me?") and more on topical group sessions led by the tutors. For example, one session focused on how to do triple parallel citing because the students' assignment involved New York cases, some of which have triple cites; however, the tutors illustrated triple parallel citing by using California cases with triple cites. Judging from the good job the students did on their citations in their first memorandum assignment, the students were able to transfer the knowledge to their specific assignment and no one violated the Honor Code.

**OBJECTIVE 3:** Improve first- and second-year students' knowledge of the subject matter.

The third objective of the tutoring project is to improve first- and second-year students' knowledge of the subject matter. Although the data does not reveal any statistically significant effect of the tutoring on the tutor's grades, data from the exit interviews of the tutors reflects that the tutors felt they learned a great deal when reviewing course material in order to be an effective tutor. One student stated that he would recommend the tutoring experience to others:

The best way to learn any material is to actually try to teach it. By going through and trying to explain something to someone else, you improve your own skills, and that effect is secondary to the help you are able to give someone else who is in need of that help.

While no statistically significant improvement in the tutors' grades was apparent, the data revealed a statistically significant difference in the grades of the students who had participated in the tutoring compared to other first-year students. While multivariate analysis could not attribute this solely to the tutoring, the grades of the first-year students improved significantly, and linearly, throughout the year. The data also revealed a statistically significant difference in grades when comparing the grades of the tutored students with the grades of the first-year students who were not part of the tutoring project.

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23 In these sessions, the tutors used examples or problems that did not require advance preparation on the students' part. The examples and problems were self-contained to encourage more students to attend and participate.
OBJECTIVE 4: Improve the tutor's employability.

The fourth objective of the tutoring project is to provide second-year students with a significant work experience that would enhance their competitiveness in finding employment and provide them with the skills that will make them more successful in that employment. To determine if we meet this goal, we plan to track the employment history of the tutors. This data has not yet been generated. However, I can report that all of the tutors who completed this academic year successfully obtained good clerking positions for which there was substantial law student competition.

IV. CONCLUSION

As these two programs illustrate, law schools and law teachers can provide significant academic support without a formal academic support program. For whatever reason a law school might not have an academic support program, it still has a need to provide academic support to its students. Schools can provide that academic support by, for example, adopting programs similar to the two presented here or incorporating a few ideas from these programs into existing curricula. For some law teachers, these ideas may expand their repertoire in meeting the special needs of their students. For other law teachers, these ideas may spawn new ideas which they, in turn, will share with us.
## APPENDIX A

**SYLLABUS: Summer LR&W 1996**

<table>
<thead>
<tr>
<th>Week 1:</th>
<th>Assignments:</th>
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<tbody>
<tr>
<td><strong>Pre-class</strong></td>
<td>Develop a checklist for a memorandum; synthesis of 3 cases assigned for August 1 (both are due August 1 in class).</td>
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<tr>
<td></td>
<td>Closed-universe memo (due no later than 3 p.m. on Friday, August 9).</td>
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<tr>
<td><strong>Aug 1</strong></td>
<td>T-chart of authorities; t-chart of facts; organization assignment</td>
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<tr>
<td></td>
<td>(all are due August 6 in class).</td>
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<tr>
<td><strong>Aug 8</strong></td>
<td>Self-diagnosis exercises (due July 24).</td>
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<tr>
<td></td>
<td>Develop a checklist for a memorandum; synthesis of 3 cases assigned for August 1 (both are due August 1 in class).</td>
</tr>
<tr>
<td></td>
<td>Closed-universe memo (due no later than 3 p.m. on Friday, August 9).</td>
</tr>
<tr>
<td></td>
<td>T-chart of authorities; t-chart of facts; organization assignment</td>
</tr>
<tr>
<td></td>
<td>(all are due August 6 in class).</td>
</tr>
<tr>
<td><strong>Aug 13</strong></td>
<td>Determining the law: synthesis.</td>
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<tr>
<td></td>
<td>Review Pickering v. Board of Education, 391 U.S. 563 (1968);</td>
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<td></td>
<td>Review Shapo, pp. 47-51 and Chapter 5.</td>
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<tr>
<td><strong>Aug 15</strong></td>
<td>Organizing the law: developing analytical framework with SSA and</td>
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<td></td>
<td>the logic of analogy, and by using organizational tools.</td>
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<td></td>
<td>Review Shapo, Chaps. 6, 7, 9.</td>
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<tr>
<td><strong>Aug 19</strong></td>
<td>Communicating the law: writing style and grammar.</td>
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<tr>
<td></td>
<td>In-class exercises.</td>
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<tr>
<td></td>
<td>Review Shapo, Chapter 10 and pages 338-349.</td>
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<tr>
<td><strong>Aug 19</strong></td>
<td>Priority of authority.</td>
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<tr>
<td></td>
<td>Research assignment (due no later than 9:00 a.m., August 19).</td>
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<tr>
<td></td>
<td>Research memo (due August 22 in class).</td>
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<td></td>
<td>Exercises 3 and 5 to Chapter 2 and exercises 3 and 4 to Chapter 3 in the Edwards materials (due August 15 in class).</td>
</tr>
<tr>
<td><strong>Aug 22</strong></td>
<td>Research assignment (due no later than 9:00 a.m., August 19).</td>
</tr>
<tr>
<td></td>
<td>Research memo (due August 22 in class).</td>
</tr>
<tr>
<td></td>
<td>Exercises 3 and 5 to Chapter 2 and exercises 3 and 4 to Chapter 3 in the Edwards materials (due August 15 in class).</td>
</tr>
<tr>
<td><strong>Aug 20</strong></td>
<td>Class party.</td>
</tr>
</tbody>
</table>

**Week 2:**

| **Aug 6**                  | Organizing the law: developing analytical framework with SSA and           |
|                            | the logic of analogy, and by using organizational tools.                   |
|                            | Review Shapo, Chaps. 6, 7, 9.                                               |
| **Aug 8**                  | Communicating the law: writing style and grammar.                          |
|                            | In-class exercises.                                                         |
|                            | Review Shapo, Chapter 10 and pages 338-349.                                  |
| **Aug 13**                 | Discuss closed-universe memorandum.                                        |
|                            | Researching the law: review.                                                |
|                            | Read Cohen, Chapter 16 (handout).                                           |
|                            | Review Shapo, Chapter 12 and Kunz (all relevant chapters).                 |
| **Aug 15**                 | Statutory analysis and synthesis.                                          |
|                            | Read Edwards, Chapters 2 and 3 (handout).                                    |
|                            | Review Shapo, Chapter 3.                                                    |
| **Aug 19**                 | Discuss research assignments.                                               |
| **Aug 20**                 | Priority of authority.                                                      |
| **Aug 22**                 | Class party.                                                                |
APPENDIX B

SKILLS EVALUATION

For Legal Research & Writing, you must master legal analysis, research and writing skills. To evaluate how this special course can best help you, I would like to know where you perceive your strengths and weaknesses relative to these skills. Thank you for answering the following questions.

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td>1.</td>
<td>I sometimes forget to let the reader know how I have organized my discussion in my thesis paragraph.</td>
</tr>
<tr>
<td>2.</td>
<td>I have difficulty organizing my thoughts into an outline before I begin writing.</td>
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<tr>
<td>3.</td>
<td>I use transitions between each paragraph in my discussion.</td>
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<tr>
<td>4.</td>
<td>I can easily determine from a number of cases the test or analytical framework that the cases create.</td>
</tr>
<tr>
<td>5.</td>
<td>I sometimes discuss my facts before I have discussed my authorities and their facts.</td>
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<tr>
<td>6.</td>
<td>I sometimes have trouble determining what makes a case persuasive.</td>
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<td>7.</td>
<td>I tend to be wordy when I write.</td>
</tr>
<tr>
<td>8.</td>
<td>I sometimes confuse persuasive authority with binding authority when I am evaluating a number of cases on the same legal issue.</td>
</tr>
<tr>
<td>9.</td>
<td>My paragraphs are often too long.</td>
</tr>
<tr>
<td>10.</td>
<td>I have problems using too many commas.</td>
</tr>
<tr>
<td>11.</td>
<td>I sometimes have difficulty determining how a case adds to or modifies the language of a statute that it interprets.</td>
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<tr>
<td>12.</td>
<td>I tend to describe my authorities rather than directly state the rules of law they represent.</td>
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<tr>
<td>13.</td>
<td>I often have problems concentrating on my work.</td>
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<tr>
<td>14</td>
<td>I can easily determine how a rule of law evolves from a series of cases.</td>
</tr>
<tr>
<td>15</td>
<td>When developing the analysis of a single point or subpoint, I sometimes have difficulty incorporating the facts of the cases into the small scale analysis.</td>
</tr>
<tr>
<td>16</td>
<td>My sentences always flow from each other in logical order.</td>
</tr>
<tr>
<td>17</td>
<td>I frequently finish my work in advance of the due date.</td>
</tr>
<tr>
<td>18</td>
<td>I use too many quotations in my writing.</td>
</tr>
<tr>
<td>19</td>
<td>I often daydream when I am working on my assignments.</td>
</tr>
<tr>
<td>20</td>
<td>I write using introductory clauses.</td>
</tr>
<tr>
<td>21</td>
<td>I sometimes have trouble ending my thesis paragraph with how I am going to organize my discussion.</td>
</tr>
<tr>
<td>22</td>
<td>When I am evaluating a number of cases, I can easily determine how the cases relate to the legal doctrine involved.</td>
</tr>
<tr>
<td>23</td>
<td>I sometimes forget to discuss the relevant facts of the authorities in my small scale analysis.</td>
</tr>
<tr>
<td>24</td>
<td>I am not certain of the proper usage of a semi-colon.</td>
</tr>
<tr>
<td>25</td>
<td>I always include a thesis paragraph for every issue/question presented.</td>
</tr>
<tr>
<td>26</td>
<td>Sometimes I make inappropriate word choices in my writing.</td>
</tr>
<tr>
<td>27</td>
<td>I sometimes use transitions that are inappropriate for the context.</td>
</tr>
<tr>
<td>28</td>
<td>When I read, I forget the first part of the sentence or paragraph by the time I finish reading the entire sentence or paragraph.</td>
</tr>
<tr>
<td>29</td>
<td>I sometimes miss key authorities in my research.</td>
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<td></td>
<td>Question</td>
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<tr>
<td>30.</td>
<td>When developing the analysis of a single point or subpoint, I sometimes distinguish the facts of my legal problem from the facts of a case when the facts were not essential to the outcome of the case.</td>
</tr>
<tr>
<td>31.</td>
<td>When developing the analysis of a single point or subpoint, I sometimes use authorities that are not the best for establishing the rule of law for the point or subpoint.</td>
</tr>
<tr>
<td>32.</td>
<td>When I am briefing cases, I can easily identify the holding and rule of law from each case.</td>
</tr>
<tr>
<td>33.</td>
<td>I prefer to paraphrase my sources rather than quote directly from them.</td>
</tr>
<tr>
<td>34.</td>
<td>I always include the legal foundation for my discussion (legal context) in my thesis paragraphs.</td>
</tr>
<tr>
<td>35.</td>
<td>I have difficulties complying with the style rules required for written materials.</td>
</tr>
<tr>
<td>36.</td>
<td>I sometimes fail to include key authorities in my analysis even though I found them in my research.</td>
</tr>
<tr>
<td>37.</td>
<td>I sometimes have difficulty determining which facts are most significant for making my legal problem analogous to my authorities when I am developing the analysis of a single point or subpoint.</td>
</tr>
<tr>
<td>38.</td>
<td>I have no trouble understanding the instructions for my assignments.</td>
</tr>
<tr>
<td>39.</td>
<td>I sometimes have trouble evaluating the language of a statute to determine what legal analysis it requires.</td>
</tr>
<tr>
<td>40.</td>
<td>I do not know how to use transitions to link points to my analytical framework.</td>
</tr>
<tr>
<td>41.</td>
<td>When I am evaluating a case, I can easily identify the facts that were central to the case's holding.</td>
</tr>
<tr>
<td>42.</td>
<td>My paragraphs are often too short.</td>
</tr>
<tr>
<td></td>
<td>Statement</td>
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<td>--------------------------------------------------------------------------</td>
</tr>
<tr>
<td>43.</td>
<td>When developing the analysis of a single point or subpoint, I can easily determine which facts are most significant to distinguish my legal problem from my authorities for the point or subpoint.</td>
</tr>
<tr>
<td>44.</td>
<td>I sometimes have trouble determining a single statement of the law from more than one case on the same legal issue.</td>
</tr>
<tr>
<td>45.</td>
<td>I write very concisely.</td>
</tr>
<tr>
<td>46.</td>
<td>I sometimes have difficulty determining the relevant authorities whose facts help define the rule of law I am developing in my small scale analysis.</td>
</tr>
<tr>
<td>47.</td>
<td>I find it difficult to focus my attention on my assignments for long periods of time.</td>
</tr>
<tr>
<td>48.</td>
<td>I can easily determine the scope of a rule of law from a case by looking at the case's facts.</td>
</tr>
<tr>
<td>49.</td>
<td>I am a good with detail.</td>
</tr>
<tr>
<td>50.</td>
<td>I can see how my facts are distinguishable from the facts of unfavorable authorities but not how they are analogous.</td>
</tr>
<tr>
<td>51.</td>
<td>I begin my assignments as soon as I receive them.</td>
</tr>
<tr>
<td>52.</td>
<td>When I read, I read very slowly.</td>
</tr>
<tr>
<td>53.</td>
<td>I can easily communicate to the reader why a case is persuasive.</td>
</tr>
<tr>
<td>54.</td>
<td>I write my sentences in active voice.</td>
</tr>
<tr>
<td>55.</td>
<td>I sometimes have difficulty determining the analytical framework or the legal test for analyzing a legal issue when I am evaluating a number of cases.</td>
</tr>
<tr>
<td>56.</td>
<td>I develop my small scale analysis in a logical order.</td>
</tr>
<tr>
<td>57.</td>
<td>I prefer to learn from lectures.</td>
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<tr>
<td><strong>58.</strong></td>
<td>When developing the analysis of a single point or subpoint, I cannot analogize or distinguish the policy behind my authorities with the policy that would be established by my legal problem because I sometimes have difficulty determining the policy behind my authorities.</td>
</tr>
<tr>
<td><strong>59.</strong></td>
<td>When I am briefing cases, I sometimes have trouble determining how the facts help define the rule of law from each case.</td>
</tr>
<tr>
<td><strong>60.</strong></td>
<td>I always begin my analysis of a point or subpoint with a thesis sentence.</td>
</tr>
<tr>
<td><strong>61.</strong></td>
<td>I sometimes forget to include the legal foundation for my discussion (legal context) in my thesis paragraphs.</td>
</tr>
<tr>
<td><strong>62.</strong></td>
<td>I cannot spell.</td>
</tr>
<tr>
<td><strong>63.</strong></td>
<td>I often go to the conclusion of my small scale analysis without developing the steps that support the conclusion.</td>
</tr>
<tr>
<td><strong>64.</strong></td>
<td>My sentences are sometimes fragmented (incomplete).</td>
</tr>
<tr>
<td><strong>65.</strong></td>
<td>When I am evaluating a number of cases, I can easily determine which cases are more important than others.</td>
</tr>
<tr>
<td><strong>66.</strong></td>
<td>I sometimes have trouble developing a thesis paragraph.</td>
</tr>
<tr>
<td><strong>67.</strong></td>
<td>I sometimes write with extra language that detracts from the real point of the sentence.</td>
</tr>
<tr>
<td><strong>68.</strong></td>
<td>I think it should be obvious to the reader from the citation why a case is persuasive.</td>
</tr>
<tr>
<td><strong>69.</strong></td>
<td>I have difficulty getting my nouns and pronouns to agree in number.</td>
</tr>
<tr>
<td><strong>70.</strong></td>
<td>I have difficulty determining the framework for analyzing a legal issue.</td>
</tr>
<tr>
<td><strong>71.</strong></td>
<td>I do not know what a thesis paragraph is.</td>
</tr>
<tr>
<td>72.</td>
<td>When developing the analysis of a single point or subpoint, I can easily determine which facts are most significant to make my legal problem analogous to my authorities for the point or subpoint.</td>
</tr>
<tr>
<td>73.</td>
<td>I often forget to state the conclusion to my small scale analysis after developing the steps that lead to it.</td>
</tr>
<tr>
<td>74.</td>
<td>I have no problems with punctuation.</td>
</tr>
<tr>
<td>75.</td>
<td>I often begin a point or subpoint with a descriptive sentence.</td>
</tr>
<tr>
<td>76.</td>
<td>After completing an assignment, I sometimes discover that I have misunderstood the instructions for it.</td>
</tr>
<tr>
<td>77.</td>
<td>When developing the analysis of a single point or subpoint, I sometimes forget to analogize or distinguish the policy of my authorities with the policy that would be established by my legal problem.</td>
</tr>
<tr>
<td>78.</td>
<td>Some of my sentences are hard to read.</td>
</tr>
<tr>
<td>79.</td>
<td>My assignments frequently have typographical errors.</td>
</tr>
<tr>
<td>80.</td>
<td>I sometimes forget to use transitions.</td>
</tr>
<tr>
<td>81.</td>
<td>I sometimes have a difficult time communicating to the reader why a case is persuasive.</td>
</tr>
<tr>
<td>82.</td>
<td>I always outline my writing assignments before I begin writing.</td>
</tr>
<tr>
<td>83.</td>
<td>I always include the relevant facts of my authorities in my discussion.</td>
</tr>
<tr>
<td>84.</td>
<td>When I read, I need to reread what I have read in order to remember or understand it.</td>
</tr>
<tr>
<td>85.</td>
<td>When developing the analysis of a single point or subpoint (small scale analysis), I can easily determine the relevant authorities that establish the rule of law for the point or subpoint.</td>
</tr>
</tbody>
</table>
86. I sometimes have trouble including adequate legal context in my thesis paragraph.  T F
87. My sentences are written in passive voice.  T F
88. I sometimes am missing parts of my small scale analysis.  T F
89. I prefer to learn from diagrams, videos and other visual representations of the materials.  T F
90. I prefer to quote directly from my sources.  T F
91. I think I can spell but my spelling is often incorrect.  T F
92. I sometimes use "there is" or "it is" as the subject and verb of my sentences.  T F
93. I frequently have problems meeting deadlines.  T F
94. I sometimes have difficulty determining how the facts of a case limit the scope of the rule of law from the case.  T F
95. I use transitions between each point in my discussion.  T F
96. My paragraphs sometimes include more than one subject.  T F
97. When I am briefing a case, I can easily identify the policy behind the court's decision.  T F
98. Sometimes I am uncertain as to which cases are most important when I am evaluating a number of cases.  T F
99. I always let the reader know how I have organized my discussion (organizational context) in my thesis paragraph.  T F
100. When developing the analysis of a single point or subpoint (small scale analysis), I can easily identify the relevant facts from the cases that help illustrate the parameters of the rule of law.  T F
<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>101. When I am evaluating a case, I sometimes have trouble determining which facts were most important to the court in arriving at its holding.</td>
<td>T F</td>
</tr>
<tr>
<td>102. When I am evaluating a number of cases on the same legal issue, I can easily determine how the cases build on each other in establishing a rule of law for the subject area.</td>
<td>T F</td>
</tr>
<tr>
<td>103. I sometimes have difficulty determining which facts are most significant for distinguishing my legal problem from my authorities when I am developing the analysis of a single point or subpoint.</td>
<td>T F</td>
</tr>
<tr>
<td>104. I sometimes misinterpret the rules of law from my authorities.</td>
<td>T F</td>
</tr>
<tr>
<td>105. My sentences are sometimes run-ons.</td>
<td>T F</td>
</tr>
<tr>
<td>106. I can easily determine how judicial interpretations of a statute modify the language of the statute or require additional terms.</td>
<td>T F</td>
</tr>
<tr>
<td>107. I have trouble remembering what I read.</td>
<td>T F</td>
</tr>
<tr>
<td>108. I have always had trouble with detail.</td>
<td>T F</td>
</tr>
<tr>
<td>109. I write with simple sentence structure.</td>
<td>T F</td>
</tr>
<tr>
<td>110. I sometimes have trouble understanding the relationship between my ideas.</td>
<td>T F</td>
</tr>
<tr>
<td>111. When I am evaluating a number of cases on the same legal issue, I can easily determine which of the cases are binding and which are persuasive.</td>
<td>T F</td>
</tr>
<tr>
<td>112. When developing the analysis of a single point or subpoint, I can easily determine the relevant authorities whose facts help define the rule of law for the point.</td>
<td>T F</td>
</tr>
<tr>
<td>113. I get behind on my assignments because my attention gets diverted to other matters.</td>
<td>T F</td>
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<td></td>
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<tr>
<td>---</td>
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</tr>
<tr>
<td>114. I can easily evaluate statutes to determine the legal analysis they require.</td>
<td>T</td>
</tr>
<tr>
<td>115. I am uncertain as to what goes into a thesis paragraph.</td>
<td>T</td>
</tr>
<tr>
<td>116. I usesemi-colons regularly.</td>
<td>T</td>
</tr>
<tr>
<td>117. I sometimes have problems with one sentence following logically from the sentence that precedes it.</td>
<td>T</td>
</tr>
<tr>
<td>118. When I am briefing cases, I sometimes have trouble articulating the holding or rule of law from each case.</td>
<td>T</td>
</tr>
<tr>
<td>119. I write with long sentences.</td>
<td>T</td>
</tr>
<tr>
<td>120. I can easily determine why a case is persuasive.</td>
<td>T</td>
</tr>
<tr>
<td>121. I always begin a thesis paragraph with an introductory sentence that connects my client with what my memorandum will discuss.</td>
<td>T</td>
</tr>
<tr>
<td>122. When developing the analysis of a single point or subpoint, I sometimes analogize the facts of my legal problem to the facts of a case that were not essential to the outcome of the case.</td>
<td>T</td>
</tr>
<tr>
<td>123. I have problems being objective in my analysis.</td>
<td>T</td>
</tr>
<tr>
<td>124. I have problems with omitting necessary commas.</td>
<td>T</td>
</tr>
<tr>
<td>125. I prefer to learn by reading.</td>
<td>T</td>
</tr>
<tr>
<td>126. I can easily determine the framework for analyzing a legal issue but have difficulty developing each point within the framework.</td>
<td>T</td>
</tr>
<tr>
<td>127. I have trouble getting started on my assignments.</td>
<td>T</td>
</tr>
<tr>
<td>128. When I am briefing a case, I sometimes have trouble identifying the policy that supports or motivates the court's decision.</td>
<td>T</td>
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<td>---</td>
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</tr>
<tr>
<td>129. I like to visualize what I am going to write before I write rather than do an outline.</td>
<td></td>
</tr>
<tr>
<td>130. I often know the answer but not how I got there.</td>
<td></td>
</tr>
<tr>
<td>131. When developing the analysis of a single point or subpoint, I can easily determine how the policy behind my authorities is analogous to or distinguishable from the policy that would be established by my legal problem.</td>
<td></td>
</tr>
<tr>
<td>132. When evaluating a number of cases on the same legal issue, I sometimes have difficulty determining how the later cases modify the legal rule of the prior cases.</td>
<td></td>
</tr>
<tr>
<td>133. Sometimes my writing is not sufficiently precise.</td>
<td></td>
</tr>
<tr>
<td>134. I can see how my facts are analogous to the facts of my favorable authorities but not how they are distinguishable.</td>
<td></td>
</tr>
<tr>
<td>135. I sometimes have trouble finding the appropriate transition to use in the context of my discussion.</td>
<td></td>
</tr>
<tr>
<td>136. I sometimes forget to include a thesis paragraph as an introduction to my legal memorandum.</td>
<td></td>
</tr>
<tr>
<td>137. I do not understand the style rules required for written materials.</td>
<td></td>
</tr>
</tbody>
</table>

I think my primary analytical problems are:
I think my primary organizational problems are:

I think my primary writing problems are:

I would most like to improve these skills:

My primary goal in this class is:
<table>
<thead>
<tr>
<th>The part of a legal office memorandum that gives me the most trouble is:</th>
<th>The part of a legal office memorandum that gives me the least trouble is:</th>
</tr>
</thead>
<tbody>
<tr>
<td>(please circle those that apply)</td>
<td>(please circle those that apply)</td>
</tr>
<tr>
<td>Heading</td>
<td>Heading</td>
</tr>
<tr>
<td>Question Presented</td>
<td>Question Presented</td>
</tr>
<tr>
<td>Facts</td>
<td>Facts</td>
</tr>
<tr>
<td>Thesis paragraphs</td>
<td>Thesis paragraphs</td>
</tr>
<tr>
<td>Small scale analysis</td>
<td>Small scale analysis</td>
</tr>
<tr>
<td>Organization</td>
<td>Organization</td>
</tr>
<tr>
<td>Choice of authorities</td>
<td>Choice of authorities</td>
</tr>
<tr>
<td>Use of authorities</td>
<td>Use of authorities</td>
</tr>
<tr>
<td>Writing</td>
<td>Writing</td>
</tr>
<tr>
<td>Conclusion</td>
<td>Conclusion</td>
</tr>
<tr>
<td>Citations</td>
<td>Citations</td>
</tr>
<tr>
<td>Format</td>
<td>Format</td>
</tr>
<tr>
<td>Other (explain)</td>
<td>Other (explain)</td>
</tr>
<tr>
<td>The research materials that are easiest for me to use are:</td>
<td>The research materials that are the most difficult for me to use are:</td>
</tr>
<tr>
<td>----------------------------------------------------------</td>
<td>----------------------------------------------------------</td>
</tr>
<tr>
<td>(pls circle)</td>
<td>(pls circle)</td>
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<tr>
<td>Encyclopedias</td>
<td>Encyclopedias</td>
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<td>Dictionaries</td>
<td>Dictionaries</td>
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<td>Treatises</td>
<td>Treatises</td>
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<td>Law Reviews</td>
<td>Law Reviews</td>
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<td>ALR's</td>
<td>ALR's</td>
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<td>Digests</td>
<td>Digests</td>
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<td>Reporters</td>
<td>Reporters</td>
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<td>Shephards</td>
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<td>State statutes</td>
<td>State statutes</td>
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<td>Fed statutes</td>
<td>Fed statutes</td>
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<tr>
<td>CFR</td>
<td>CFR</td>
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<tr>
<td>State regs</td>
<td>State regs</td>
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<tr>
<td>Fed const'n</td>
<td>Fed const'n</td>
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<tr>
<td>State const'n</td>
<td>State const'n</td>
</tr>
<tr>
<td>Other (explain)</td>
<td>Other (explain)</td>
</tr>
</tbody>
</table>
### Learning Methodology

| 52 | 54 | 62 | 69 | 91 | 109 | 93 | 127 | 529 | 56 | 137 |

Your answers strongly suggest a learning disability; you’ll want to develop learning techniques that compensate for slow reading and that incorporate your desire to visualize material; dividing tasks into smaller segments will help with concentration - projects won’t seem so overwhelming and with proper note-taking, you can do them in smaller chunks; use checklists to be sure you’ve included all the steps:

### Learning Style

| 108 | 69 | 93 | 17 | 127 | 51 | 52 | 129 | 38 | 76 | 13 | 113 | 47 | 107 | 125 | 57 | 89 | 49 | 130 | 129 | 63 | 73 | 79 | 35 | 137 |

You indicate problems with detail and concentration; checklists plus dividing tasks into smaller chunks will be helpful; you prefer to learn visually or orally, rather than verbally - adjust your learning tools to compensate for this (to learn in these ways); to organize, try using visual techniques such as diagrams or charts; using checklists will also help you be sure you have covered all the steps and are objective.

### Evaluating Cases

| 41 | 101 | 32 | 118 | 59 | 97 | 128 | 48 | 94 | 104 |

You indicate some problems in assessing factual scope of cases; using T-charts will help you better focus on and analyze case facts.

### Synthesizing Cases

| 22 | 44 | 102 | 11 | 4 | 14 | 132 |

You indicate few problems with synthesizing cases except separating binding and persuasive authority; for that, you need to be more familiar with court structure (review Shapo?) so you can evaluate which cases are binding on your court - rest of the cases will be persuasive.

### Synthesizing with Statutes

| 119 | 39 | 106 | 11 |

You indicate some problems with statutes and their synthesis with judicial interpretations; you want to outline or parse out statutory language and then determine how judicial interpretations of each part modify the statute’s language.

### Developing Analytical Framework

| 126 | 70 | 55 | 4 |

You indicate no problems with determining analytical framework.

### Determining Weight of Authority

| 88 | 65 | 92 | 129 | 6 | 53 | 81 | 68 |

You indicate problems in determining why cases are persuasive; review Shapo’s discussion on factors to consider; we’ll also be going over an example in class - let’s discuss if you have add’l questions.
You indicate some problems in SSA with using facts: picking the most appropriate ones, including them in SSA, and using them to analogize and distinguish - T-charts will help you develop your facts and a checklist for RAFADC will help make sure you include all parts and are more objective.

**Thesis paragraph:** 25, 137, 66, 121, 115, 71

You indicate no problems including a thesis parag or understanding what goes in it but some probs in including adequate legal context and organizational context; if your AF is clear, legal context will be more clear; org’l context follows from that. To develop, try working on visual outlining to see if that is an easier way to organize your thoughts.

**Use of organizational tools**
- Transitions - 95, 3, 135, 40, 80, 27, 110

The answers to 135 and 110 are related: it’s difficult to know how to communicate to the reader how ideas are connected (i.e., transitions) when you aren’t sure how the ideas are connected; strengthening organization by outlining will help here; you don’t need Roman outlines - see alternative examples in your materials.

**Thesis sentences** - 60, 75

**Sentence flow** - 16, 117, 9, 42, 96

Conflict between 16 and 117?

**SSA order** - 56, 88, 573

Using a checklist for SSA and following RAFADC order will help improve SSA organization.

**Use of authorities:** 29, 36, 104, 12

Q29: you may need more thorough research
Q104: you may need more care in case evaluation
You'll want to work on editing your writing for more simple sentence structure that'll be more clear to reader; use semi-colons to cure run-ons.

Weak subject/verb - [92]

"There is" and "it is" convey no concrete meaning as subj/verb unless the subjects refer to something in particular; improving sentence structure to promote main idea will elim this.

Voice (active/passive) - [54, 87]

Passive voice adds to lack of clarity in sentence structure - learn to identify it by using our test for passive voice and edit it out.

Wordy - [67, 7, 45]

Extra language detracts from what your main idea is; need to develop an editing technique that'll work for you - let's discuss some ideas.

Imprecise - [26, 133]

Imprecise writing/wording may be due to imprecise thinking - let's discuss.

Grammar - [69]

This answer conflicts with your grammar evaluation.

Use of quotes - [90, 18, 33]

You indicate you have no problems with overuse or proper use of quoting.

Punctuation - [74, 10, 124, 116, 24]

Q74: see grammar evaluation for areas to work on
Q74: see Shapo at 341
The dotted line represents being well-developed in all the four learning spheres; the solid line represents the student’s scores plotted on this chart.
A Writers' Board and A Student-Run Writing Clinic: Making the Writing Community Visible at Law Schools

Terrill Pollman¹

INTRODUCTION

In this article I explain institutional programs I developed in response to a common problem, students' frustrations with the limits of a law school's legal writing program. In Part One I propose establishing a Writers' Board, where members of the law school community who care most about legal research and writing training can work together to create opportunities for students to learn more. In Part Two I describe the Writers' Board's primary project, a Writing Clinic that offers diverse ways to improve legal research and writing on campus. In Part Three I identify problems that are likely to arise when creating a Writers' Board and Clinic. Finally, I conclude that these projects will not only improve legal research and writing training, but also raise students' confidence in the writing program and in themselves, and draw positive attention to a law school's legal writing program.

PART ONE: THE WRITERS' BOARD

One way to improve legal research and writing education is to make visible the community of writers that already exists in each law school. The school should bring together those who share an interest in expanding and promoting legal research and writing skills. A Writers' Board accomplishes this because its members include representatives from the various institutions at the law school whose work centers around legal research and writing.

¹ ©Terrill Pollman, Director of Legal Writing, College of Law, University of Illinois at Urbana-Champaign, 1996. My thanks to the two students whose energy and devotion made starting a Writers' Board and Clinic a lot of fun: Dawn Buff and Kevin Wells.
A. The Rationale for Creating A Writers' Board

Most lawyers write for a living, so it should come as no surprise that many members of law school communities highly value writing skills. In fact, the reputation of a law school depends, in large part, on how well its members research and write.²

Institutionally, however, we tend to organize law schools in ways that obscure this common bond. We have no place on a law school campus where writers come together to talk about research and writing. Discourse on legal research and writing is hindered in part because many law school faculties hold legal research and writing education in lower regard than other areas of instruction,³ discouraging professors from expressing an interest in the area. Similarly, doctrinal faculty members may fail to understand or recognize the teaching mission of professional librarians. And although both librarians and legal writing professors devote much of their professional life to legal research and writing training, even relations between librarians and the legal writing faculty may be distant or strained.⁴

Furthermore, student organizations offer scant chance for students to interact about writing. Law schools fail to promote inter-organization writing-centered conversation. And far from encouraging better writing in the general student body, student

² Specifically, faculty members must publish well to maintain or enhance the law school’s academic standing. See e.g., James Lindgren & Daniel Seltzer, The Most Prolific Law Professors and Faculties, 71 CHI. KENT L. REV. 781 (1996). Law review members must write, choose, and edit articles well to increase the journal’s, and the law school’s, prestige. Id. Similarly, members of the moot court team must score well on the brief writing portion of their competitions or be relegated to losing performances. Furthermore, the law school’s graduates must write well to ensure that the local legal community thinks well of the law school. The law school’s placement officers can attest to the power of well written resumes, cover letters and writing samples.

³ Criticism and status differences are well documented. See e.g. Maureen Arrigo-Ward, How to Please Most of the People Most of the Time: Directing (or Teaching in) A First-Year Legal Writing Program. 29 VAL. U. REV. 557, n. 3 (1995); Jan Levine, Voice in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs, 45 J. OF LEGAL EDUC. 530, 538 n. 33 (1996). Librarians also suffer from faculties’ failure to respect those who teach LR&W, and the lack of resources to devote to the labor-intensive LR&W instruction process. See I. Trotter Hardy, Why Legal Research Training Is So Bad: A Response to Howland and Lewis, 41 J. LEGAL EDUC 221, 223 (1991).

⁴ See Professor Christina L. Kunz, The Tension Between Librarians and Legal Writing Teachers: The Perspective of a Legal Writing Course Coordinator and Legal Research Text Author, a handout from a presentation given at the American Association of Law Librarians National Conference & Annual Meeting, July 18, 1995, on file with the author.
members of the honorary organizations that focus on writing, such as the law review or the moot court bench, may be viewed as privileged and unapproachable elitists by non-member students. Creating an organization whose purpose is cooperation for the educational benefit of the entire student body can encourage a general sense of community in the law school.\textsuperscript{5} Non-member students may come to see organizations such as the law review or moot court bench in a more positive light. A Writers’ Board can provide the forum needed for legal research and writing conversation to flourish.

B. Composition and Mission of the Writers’ Board

If the Writers’ Board is to create a campus-wide sense of community, Board members should represent as many groups as possible.\textsuperscript{6} A large Board in the first few years helps ensure survival. Consider representatives of the following groups: the law review; the moot court bench; the library staff; teaching assistants; research assistants; students representatives of the CALR companies; the student technology association; the trial team; the negotiations team; the client counseling team; the law and literature class; the drafting class; in-house clinic students; the student bar association; the placement office; and, of course, interested faculty.\textsuperscript{7}

At the beginning, it also makes sense to actively recruit students that will make the best Board members. Good candidates are those students who have an interest in the law school process itself. Some students react to the emotional and intellectual intensity of the first year of law school by analyzing it and thinking about ways to improve it. These students make excellent Board members.

\textsuperscript{5} This sense of community is desperately needed in our law school today. The sense of isolation and alienation is prevalent among law students. E.g., Phyllis W. Beck and David Burns, \textit{Anxiety and Depression in Law Students: Cognitive Intervention}, 30 J. of Legal Educ. 270 (1979); James R. Elkins, \textit{Rites de Passage: Law Students Telling Their Lives}, 35 J. of Legal Educ. 27 (1985).

\textsuperscript{6} Given the current job market, another activity on a student’s resume that highlights research and writing ability makes many students willing to serve.

\textsuperscript{7} Doctrinal faculty may be reluctant to volunteer their time as Board members initially. Faculty participation in various projects, especially the more entertaining projects, is a good way to generate faculty interest. Additionally, the faculty is likely to respond well if they see a positive difference in the skills of their research assistants or if students’ seminars papers improve due to workshops that the Writers’ Board or Clinic sponsors. Finally, many faculty members are grateful to be able to suggest (rather than provide) extra help for students needing remedial work.
The charge to the Writers’ Board is straightforward. Essentially, the Board’s faculty sponsor tells the members: “You tell me that the law school needs to focus more on Legal Research and Writing. Let’s provide for that need together. To do that, the Board must first identify a need, and then must address the need it has identified.” The primary vehicle for accomplishing this goal is the Writing Clinic.

PART TWO: THE WRITING CLINIC

A. Projects

The Writing Clinic is the executive arm of the Writers’ Board. In addition to providing individual instruction on a walk-in or appointment basis, the Clinic sponsors or co-sponsors most of the activities the Board uses to promote excellence in legal research and writing.8

The Board may most easily identify students’ needs by considering the typical progression of students through law school, including summer employment, progressing to a job search and finally law practice. For example, during the tumultuous and confusing first year, students may need more individual feedback than LR&W professors with a high faculty/student ratio can give.9 The Writing Clinic staff may act as first-year mentors, or simply provide another voice explaining important LR&W principles.10 Also, in conjunction with the law school’s ASP, the Clinic can give workshops or lectures on study or exam-taking skills. But typically, in those law schools where formal legal research and writing training ends in the first year, second and third-year law students need the Clinic most.

These upper division students often have nowhere to turn with questions about their writing.11 Instruction concerning sem-

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8 For a more complete list of possible topics for projects, see the Appendix.
9 In spite of a school’s best efforts, legal writing professors may have very large teaching loads. For example, in the years when I first started a student-run writing clinic, I taught all incoming first-year students at Stetson University College of Law. Teaching assistants provided some editing assistance, but I was responsible for classroom instruction, grading and conferencing for over 125 students per semester.
10 In schools without an ASP, need for the Clinic is great. In schools where an ASP exists, but enrollment is limited to certain students, the assistance that the Clinic offers to all students may help reduce backlash against the ASP students and program.
11 In addition to lectures and workshops, the Clinic should also collect and create handouts. Some handouts may be instructions, such as “Researching Tax Law.” Others may be practice exercises such as “Nominalizations” or “Using Commas.”
inar papers, clerking projects, cover letters, resumes and writing samples for job applications, are some of the most common writing needs. The Clinic will need to set ethical boundaries for how much assistance it gives on these projects, but the second and third-year law students' need for writing advice creates excellent teaching opportunities in these areas. Additionally, some professors of upper-division classes may welcome a referral service for students who are disappointed in their performances on exams.

Research training for upper-division students may be an acute need since most students learn research skills before they are "learning ready" and few schools offer advanced research training for more than a handful of students. Researching legislative history, administrative law, special areas such as tax or bankruptcy, and using new tools such as CD-Rom research or Internet research are only a few of the possible topics to address.

Student needs may also include training in the technology they are likely to find in a modern law office. Word processing, computer assisted legal research comparison or cost effectiveness training, training in Internet sources, and in use of software such as Premise or Folio Views or office management software are likely technology topics. If the Clinic facilities in-

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12 Doctrinal faculty are often more interested in teaching the substance of the seminar, than in using the seminar paper as an opportunity to instruct on legal writing. The Clinic can help with this problem.

13 Students rarely have a place to go for help on job projects that may determine whether they receive that all important "offer" at the end of the summer.

14 The Placement office may welcome the opportunity to help the Clinic staff on this project.

15 A few jobs require applicants to submit writing samples that have not been edited by another. The writing sample request is a perfect example to use when teaching Clinic staffers the difference between commenting to teach and editing to produce a perfect product. We want students to learn while correcting mistakes. Merely pointing out how to fix every error may allow students to misrepresent their writing skills, and Clinic staffers must avoid it. See supra text accompanying note 35.


17 Jill J. Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image, 2 J. OF LEGAL WRITING 1, n. 78. Professor Ramsfield's 1994 study shows that 16% of responding schools offer advanced legal research classes. Only 3% make the course a requirement for all students.

18 These are software programs which create a database out of text, and allow the user to manipulate that text electronically in a number of ways. The West Company produces Premise, and Lexis produces Folio Views.
clude computer work-stations, CALI lessons can be available for students in the Clinic.

In addition to projects designed in answer to specific student needs, the Clinic can directly improve the reputation of a writing program. The Clinic can advertise existing writing competitions and create some of its own. The Clinic may organize the law school’s participation in writing competitions by sponsoring a Legal Writing Honor Society. Legal Writing Honor Society members each write at least one paper a semester to enter in an outside writing competition. This gives students who do not belong to the law review an opportunity to practice and to showcase their writing skills.

A related project, an abstract service, is likely to make your school, and your students, popular with the practicing bar. Students may submit abstracts of research papers prepared for class, or, rules permitting, prepared for writing competitions. The Clinic can then make them easily available on the Internet, by building hypertext links to the abstracts on the law school’s home page. This abstract service will not only enhance the reputation of the school, but also offer students a wider audience for samples of their best work. If you are lucky enough to have Board members who are technically sophisticated, creating the Clinic’s own Home Page may draw favorable attention to the writing program.

The Clinic may sponsor projects that coordinate writing related activities across the law school curriculum. Most law schools would benefit from a writing calendar that lists due dates of major projects or school-wide competitions. The Clinic may act as a repository for handouts from all of the LR&W classes within a school. A bank of sample exams is also a good ser-

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19 Credit for the ideas of the Clinic sponsoring a Legal Writing Society and publishing abstracts of the best papers goes to Assistant Professor Darby Dickerson of Stetson University College of Law.
20 Professor Dickerson suggests inducting from five to ten new members a year, based on an interview and a written application packet which consists of a current resume, two writing samples, and a 250-word essay about why the student wants to join the Honor Society.
21 Many competitions offer monetary awards, and the awards are often quite generous. Professor Dickerson and the Writing Clinic at Stetson are in the process of making a list of competitions that they are willing to share upon request. The list contains the name of each contest, its sponsor, the approximate due date, the topics covered by the competition, and basic rules.
22 The Clinic can offer the handouts on disk, as an e-mail attachment, or on the Internet as well as traditional paper handouts. Students can replace lost handouts easily, and are also delighted with the opportunity to browse handouts from other LR&W
vice to offer students. Advertising national writing competitions to the general student body is also useful.\(^{23}\)

Some Writing Clinic projects simply remind the community that writing and research are fun. Law and literature evenings, book clubs, and poetry readings are some of the more conventional projects. Less conventional projects might include a treasure hunt party in the library with silly prizes, a contest to write the best story about what later happened to the characters in the law school memo or exam, or simply posting one of the new magnetic poetry kits on a wall outside the clinic. Filming staged productions of famous cases, such as the short film of *Palsgraf* that is currently available, might be another fun Clinic project.

B. Operations

The Writers' Board administers the Writing Clinic, using the Clinic to achieve its goals. The Clinic is student staffed, and offers feedback or instruction on a walk-in and appointment basis. The faculty sponsor is ultimately responsible for the Writers' Board and the Writing Clinic. Although the final authority will rest with the faculty sponsor, the Co-chairs of the Writers' Board make plans and participate in setting guidelines. In addition to making policy decisions under the supervision of the faculty sponsor, these students should have primary responsibility for staffing the Clinic. While students plan, advertise and teach most projects, faculty members also participate in some presentations.\(^{24}\)

Choosing the right staff, especially at the beginning, is crucial.\(^{25}\) If the law school uses teaching assistants in its legal research and writing program,\(^{26}\) then for the most part the Clinic

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\(^{23}\) Students may choose to enter a competition without committing to the Legal Writing Honor Society, should you decide to start one.

\(^{24}\) In my experience, faculty are more likely to participate in the Clinic if students, rather than the faculty sponsor, ask for their cooperation. This is true whether the participation is supplying recent sample exams for the exam bank, or attending a discussion of a law related novel.

\(^{25}\) The number of students needed to staff a Clinic will vary. As a general rule, however, two students can provide enough help to start a Clinic for a student body of around 450-550. At the busiest times of the semester, the Clinic may want to plan for extra help, perhaps at an hourly wage.

\(^{26}\) Use of LR&W teaching assistants is common. Schools that allow 2Ls to work as teaching assistants will find this good training for working in the Clinic. See Julie M. Cheslik, *Teaching Assistants: A Study of Their Use in Law School Research and Writing*
staff should come from this group. Look for excellent writing and analytical skills, teaching ability and experience, enthusiasm and availability. Although a “tough love” philosophy can be effective for many teachers, for the Clinic it is better to look for nurturers. Consider hiring at least one staffer who has had experience in teaching English As A Second Language.

The Clinic should be open for at least three hours a day, four days a week. Organizers need to be aware of the logistics of allowing the Clinic staff time to see written work before meeting with students to discuss the work.

A modest budget is adequate to start the Writing Clinic. Clinic staffers should receive the same salary that other teaching assistants in the law school receive. The Clinic will need an allocation for photocopying. Similarly, the physical needs for starting a Clinic are few. They include a place to conference, a place to post notices and sign-up sheets, a computer with modem,27 a telephone with voice mail,28 a place to distribute handouts, and a file cabinet that locks.

C. Benefits of Using Student Teachers

Students can be especially effective teachers.29 Upper division law students remember clearly which concepts or skills are likely to cause confusion and distress to first year students. Students needing help may also be less inhibited about asking another student for help. But not only the students asking for help benefit; both students do.

Of course, every teacher knows that one of the best ways to learn something is to teach it. And not only the Clinic staff realize this benefit. As Board members identify a need and plan a workshop or lecture to address it, they turn to the members of the organization they represent for students to present various topics. For example, during the first year course on appellate advocacy, the Writers’ Board representative from the moot court bench may ask each moot court member to commit to editing three first-year papers.30 Moot court members get editing practice. First-year students get another edit. Both benefit.

Programs, 44 J. OF LEGAL EDUC. 394 (1994), for a survey of the use of teaching assistants in LR&W programs.

27 Not strictly essential, but extremely helpful even if it is an older machine.
28 Again, not strictly essential, but extremely convenient if possible.
29 Id.
30 Or moot court bench members might offer extra practice oral arguments.
Similarly, the Clinic may sponsor a workshop on academic writing to help students prepare seminar papers. Several presentations would comprise the workshop. A faculty member might talk generally about picking topics. A librarian or a student working as a research assistant might talk about the difference in researching to write documents for practice, and researching for academic papers. A law review member might talk about how and when to footnote, or the differences in citation for court documents and citation for academic writing.

The students who prepare these presentations must gather, analyze and organize their own experience to present the information clearly and accurately. They not only improve their knowledge of the area in this way, but also practice effective public speaking. These are skills that will enhance their ability to practice law.

PART THREE: POSSIBLE PROBLEMS

The Writers' Board and the Writing Clinic are likely to face three significant problems. First, student teachers may spread advice that conflicts with the advice of faculty members. Second, the Clinic staff may face ethical conflicts when students seek advice for graded classes or writing samples that students may represent as their own. Third, in some schools, students may hesitate to use the Clinic for fear of stigma. Conflicting advice and misinformation can be the Board's most difficult problem. While Board members should not hesitate to admit and correct their own mistakes, preventative measures are best. Careful hiring will help, but the Writers' Board faculty sponsor must also plan time for training Clinic participants. Despite conscientious training, occasional problems will arise. The legal research and writing faculty should address the issue in their classes. They can draw attention to the possibility of a problem and teach first-year students to benefit from varied responses to the same document.

31 See Elizabeth Fajans and Mary R. Falk, SCHOLARLY WRITING FOR LAW STUDENTS (1995). This text is an excellent source for any student or faculty member making this presentation.

32 Training is crucial to the Clinic's success. It should likely be similar to teaching assistant training. The Legal Writing Institute has offered excellent sessions of training students. I have found sessions by the Legal Writing Faculty at the University of Texas to be especially helpful.
Legal writing programs often instruct students on giving and receiving peer feedback in their first-year class. This instruction usually includes the principle that while any reader's critique can help authors understand how clearly they have communicated, authors must ultimately take responsibility for their own work. Similarly, students need to learn the difference between questions of style that allow an author to make choices, and rules that writers must follow. Finally, it is important for students to learn to balance conflicting advice because many of them will soon be working in situations where they must please several different audiences. Learning the best ways to reconcile conflicting advice is something they will need to know.

The second problem, the amount of help students may seek from the Writing Clinic, impacts both academic writing and writing that students produce for jobs or job searches. Regarding academic writing, not all faculty members will embrace cooperative learning principles. The Board needs to set firm parameters to assure the faculty that help for graded classes will be within the guidelines the professor of each class establishes. Some Boards may choose to ban substantive comments, or even all comments on large scale organization and analysis in general, to avoid political problems. Others may choose to educate the faculty on collaborative learning.

Regarding writing samples or clerkship projects, the Board members, especially those who work regularly in the Clinic, must themselves understand and be comfortable with the ethical limits on their work. Next, the Clinic should prepare a handout that details the student's ethical obligation that Clinic members can distribute when they meet with students to discuss this type of work.

The third problem is that stigma may attach to those using the Clinic if the law school community sees the Clinic as a place

33 An example of a stylistic choice that some students might believe to be mandatory: One should never write a one sentence paragraph. An example of a rule not open to interpretation: Personal pronouns must agree in gender and in number with their antecedents.
34 The Clinic should design and circulate a faculty approval form that reflects their school's culture on cooperation.
35 Teaching, editing and respecting the limits of authorship present difficult questions that sometimes will require a personal decision for Clinic staffers. It should be clear to all staffers that they must not rewrite the paper for the student who brings it to the Clinic. On the other hand, if staffers are to teach, they must truly engage the author on their work. This debate is not limited to the law school clinic. See e.g., Irene Clark & Dave Healy, Are Writing Centers Ethical?, 20 Writing Program Admin. 32 (1996).
primarily for those in need of remedial instruction. This may be especially true if the Clinic encourages faculty members to send students with poor test performance to the Clinic. Depending on how competitive the law school culture is, students may see seeking help as showing weakness, unacceptable in an adversarial environment.

The answer here lies in the attitude of the Board. One response to this problem lies in the subject of the workshops and lectures that the Clinic sponsors. Workshops such as “Hints for a Successful Summer Internship,” or “What a Good Research Assistant Should Know” will naturally attract many good students. Likewise, good writers understand that every author, no matter how skilled, benefits from feedback. Board members should occasionally bring their own work to the Clinic for an edit, and encourage their friends to do so. Top students using the Clinic will allow the Board to capitalize on the students’ competitiveness. When word spreads that successful students use the Clinic, as it will very quickly, stigma will rarely be a problem.

PART FOUR: CONCLUSION

The benefits of creating a Writers’ Board and a student-run Writing Clinic are both pedagogical and political. Pedagogically, through the Clinic the law school can offer more individual attention, a broader curriculum, and the chance to learn through teaching. Enlarging the teaching opportunities unleashes creative energy and may yield unanticipated benefits. Each school will find the projects and activities that make the most sense in its unique culture. The Writing Clinic is a public way to support, even celebrate, legal writing and research. This reveals the common bond that so many in the law school share, thus creating a sense of community.

This sense of community has political benefits as well. In a time of shrinking resources for many law schools, the project can boost student morale, draw positive attention from the doctrinal faculty to the legal writing program, and enhance the reputation of the law school in the legal community at large.

36 The Writing Clinic will continuously advertise projects. These advertisements are a reminder to the doctrinal faculty of the enormous task faced by the legal writing department, and doctrinal faculty may better appreciate the legal writing faculty’s talent, energy, and commitment.
Appendix A

Suggestions for Clinic Projects

Note: While students plan, advertise and teach most projects, faculty members also participate in many presentations.

A. Intramural Contests:
1. Writing contest where students' summer projects serve as entries.
2. "What Happened to the People in the Hypothetical" writing contest.
3. On-your-feet-editing bees.
4. Citation bees.
5. Library treasure hunts.

B. Brown Bags:
1. Research
   a. Special areas of law: tax, bankruptcy, international law, etc.
   b. Special tools: ALRS, CFR, CD Roms, Internet sources, etc.
2. Writing
   a. Job search tools: cover letters, thank you letters, resumes, suggestions for writing samples.
   b. The "Clerking Projects You Never Heard About in LR&W" Series: jury instructions, complaints, discovery documents, simple motions, etc.

C. Lectures:
1. Citation review.
   Several a semester, strategically timed: before first memo requiring citation is due; before research test; before law review write-on competition. A good place for law review to help.
2. Academic Writing.
   Again, strategically timed for seminar papers: Finding a topic; academic research; citation for academic papers; using footnotes.
3. Exam Preparation.
   Outlines, exam writing tips, exam study tips are all popular. (These work well when successful students share study tips.)
4. Co-sponsoring some lectures with Westlaw and Lexis—for example the West multi-media lectures on research with optional attendance.
D. Entertainment:
1. A lecture on legal aspects of the crimes in Sherlock Holmes stories.
2. Law and literature book clubs.
3. Law movie evenings—but be aware of copyright issues.
4. Poetry or fiction readings.

E. Workshops:
1. Training workshop for students with jobs as research assistants.
2. Analogical reasoning workshop for 1Ls.
3. Oral argument workshops (with help from Moot Court Bench).
4. Researching legislative history.
5. Word-processing: general or for specific tasks like building a Table of Authorities for an appellate brief.

F. Special Projects:
1. Replenishing sample exam banks. Recalcitrant faculty may be more amenable when approached by favorite students.
2. Writing or collecting exercises for students with specific problems: grammar, style, citation, practice test questions and answers, etc.
3. Developing a bank of samples, and “how-to” handouts for workshops (e.g. “Jury Instructions” “How to Research the Model Rules for Professional Responsibility”).
4. Creating a Legal Writing Honor Society whose members agree to enter writing competitions.
5. Compiling a calendar of writing assignments and events on campus.
6. Creating an abstract service on the law school home page where the public has access to abstracts of students’ academic papers.
Getting Respect

Louis Sirico

Achieving a high status for a Legal Writing program does not turn solely on obtaining tenurable positions. By that criterion, many programs will find their goal unattainable. Achieving the desired status must be a goal with a functional definition. I would frame the goal this way: A program achieves a high status when it receives its fair share of its law school’s resources.

Gaining these resources depends on gaining the respect of the administration and the rest of the faculty. The only way to gain this respect is to provide this audience with information about your program. The rest of the faculty must know that you are conducting a high quality program that the students respect. Programs in which the legal writing team isolates itself from the rest of the faculty will never increase their status.

To that end, I offer four central pieces of advice:

1. Act and think like a full-fledged member of the faculty. Do not adopt an “Us v. Them” mentality.

2. Prove yourself on the tenured faculty’s terms. Its criteria for academic excellence are excellent teaching and excellent scholarship.

3. Let the rest of the faculty know the depth of your teaching endeavor. To quote a current slogan, we don’t teach just grammar anymore.

4. Recognize the limits of what you can get.

I also offer eighteen specific suggestions for gaining respect at your school. I have implemented most of them. These suggestions fall into five groupings.

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1 Professor, Villanova University School of Law.
I. Educate the Faculty about the Quality of Your Program and Your Staff.

1. Conduct a faculty colloquium on the Legal Writing program. Make a presentation in which you spotlight interesting teaching techniques and your underlying teaching philosophy.

2. When you hire new Legal Writing faculty, send the entire faculty a memo in which you summarize the newcomer's professional history. At the end of the memo, attach that individual's résumé.

3. Package Your program. Write the copy for a slick page brochure on your program. The brochure goes to faculty members, prospective students, alumni, and potential employers.

4. Tell your instructors that their job description includes a public relations function. They are to get to know other members of the faculty and regularly inform them of the experiments and achievements of the Legal Writing Program.

5. Publicize the activities of the Legal Writing instructors that are external to the law school, for example bar activities, and activities in the Legal Writing Institute.

II. Get the Rest of the Faculty Involved in the Legal Writing Program.

6. Before you distribute a writing project to your students, ask a faculty member with experience in the area to review it. You gain three benefits. First, you avoid difficulties with which a defective project can beset you. Second, you impress a faculty member with the quality of your work. Third, you encourage the faculty member to feel that he or she is part of the program.

7. Have other faculty members sit as judges on your moot court panels. A panel might consist of the Legal Writing instructor, another faculty member, and a moot court board student. Again, you give your colleagues the opportunity to see your work and interact with you.
8. Find instructional components in your program in which other faculty members can participate. For example, a Property professor can lead a class discussion on the substantive issues raised in a writing assignment dealing with Property Law.

III. Encourage the Legal Writing Faculty to Participate in the Life of the Law School.

9. Participate in the law school's social life. Legal Writing faculty should be eating lunch regularly with a number of faculty members. They should be visible at a number of events, including dinners, receptions, and speeches.

10. Offer to participate in other courses in role playing exercises and skills segments.

11. Offer to serve as judges in practice rounds for moot court teams, negotiation competitions, and other skills competitions. Offer to coach a team.

12. Offer your assistance to the school's law journals and moot court board. Run short workshops for them on subjects of their own choosing.

13. Assist in student placement efforts. Run workshops on such topics as composing résumés, drafting cover letters, and excelling in interviews.

IV. Seek Help From Other Faculty Members.

14. Seek reviews of your scholarly efforts. Before you ship out a manuscript to law journals, ask a seasoned veteran to critique it.

15. Ask for help when you are seeking employment. In the law school world, there are a number of "old boy" and "old girl" networks. Seek the active support from those who are part of those networks.

16. When you are preparing to seek a teaching position elsewhere, you must prepare a presentation that you can deliver at a school interested in you. You need to know how your audience will respond. Invite veteran faculty members to serve as the audience for a mock
presentation. The benefits you receive will be immeasurable.

V. Apply External Pressure.

17. Let those at your law school know about the Legal Writing programs at other law schools. Use the many outstanding programs around the country as a benchmark for your school’s program. Engender a competitive spirit.

18. Garner alumni support. When your program has been in place for a while, survey recent graduates on the value of their legal education, particularly the Legal Writing program. You should obtain gratifying responses. Persuade your law school magazine to include a feature story on your program.