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Legal Writing Unplugged: Evaluating the Role of Computer Technology in Legal Writing Pedagogy

Suzanne Ehrenberg

When I began teaching legal writing in 1985, computers occupied an insignificant and somewhat suspect position in the world of legal education. Few students had their own computers, let alone knew how to use word processing programs. Many of the papers I received were painstakingly produced on typewriters and were liberally splattered with "white-out." When I faulted students for their poor citation form, some of them would blame it on their typist, who was invariably unfamiliar with the whims of the Bluebook. Computerized legal research played a relatively minor role in the research training program; LEXIS and Westlaw training were relegated to a couple of sessions taught by vendor representatives at the end of second semester. We had no electronic mail. I communicated with students by taping notes to their lockers or posting announcements on a bulletin board that they consulted only occasionally. Phrases like "computer-assisted instruction," "internet," "World Wide Web," "notebook computer," "electronic textbook" and "hypertext" were not a part of our vocabulary.

In the intervening ten years, a revolution has taken place and computer technology has become a fixture in virtually every aspect of legal education. All students now produce their papers on word processors. As computer-assisted legal research has become the preferred mode of accessing information by many practicing attorneys, it has also assumed greater prominence in our research training programs. We have added Internet and CD-Rom instruction. Electronic mail has provided us with an efficient way of communicating with our students and has enabled us to carry on electronic discussions. Text analysis programs are available to help students identify technical errors in their writing. More computer-assisted instruction programs are available

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to help students learn skills related to writing, research and analysis. "Infobase technology" has made it possible for students to access their course materials entirely on computer, to annotate their texts on a screen, to access an entire law library through hypertext links by touching a button, and to store and organize their research and notes. The law school certainly looks a lot different than it did ten years ago.

The question posed by this essay is whether the central functions that instructors of legal writing, research and analysis perform have actually changed in any significant respect as a result of this explosion in technology. The more troubling corollary to that question is whether legal writing instructors\(^2\) are in serious danger of being replaced, in whole or in part, by some form of computer-assisted instruction.

In seeking to answer these questions, I have examined five functions that have affected the way in which legal writing, research and analysis are currently taught: 1) word processing; 2) information retrieval (LEXIS, Westlaw and the Internet); 3) infobase technology (hypertext links, electronic note-taking, course outlining, and research organization and retrieval functions); 4) text analysis (correction of errors in spelling, punctuation, grammar, style or citation form); and 5) computer-assisted instruction ("CAI"). In this essay, I assess the extent to which legal writing pedagogy has been enhanced, impeded or remained unaffected by each of these computer functions.

This assessment leads me to conclude that, while computers have had a significant impact on the way in which students produce their work in a legal writing class, computers have not truly enhanced the way in which we teach our students legal writing, research and analysis. The most notable achievement of computers is simply to make the transfer of information to students more convenient or visually appealing.

First, although word processing and information retrieval have certainly facilitated the students' production of legal writing assignments, these functions have made the teaching of legal writing and research, if anything, more difficult. Second, infobase technology has had only a minor impact on legal writing, in part, because such key features as hypertext links and textbook annotation do not have any utility in a legal writing course. Third, text analysis programs are fundamentally flawed

\(^2\) I will use the term "legal writing instructor" to refer to law school faculty members whose primary function is the teaching of legal writing, research and analysis.
and are incapable of accurately identifying the most common spelling, punctuation and grammatical errors in student writing. Finally, legal writing educators have not made very effective use of currently available technology in the area of computer-assisted instruction. Thus, the more sophisticated technologies (such as CAI and infobases) have not yet fulfilled their promise of revolutionizing and improving the way that law is taught.

Lest the reader think that my skepticism of technology stems from techno-phobia, I should emphasize that I love my computer. It has liberated me from the fate of interminably scratching on a legal pad and has helped me produce attractive, readable teaching materials for my students; it has enabled me to extend classroom discussion by means of electronic mail; it has enhanced my classroom presentations by providing an “electronic chalkboard” on which my students and I can compose and edit text together; and, shortly, it will enable me to deliver teaching materials efficiently to my students on the Web. Undeniably, the computer has made valuable contributions to my teaching of legal writing.

My concern, however, is that the significance of technology to what we do has been overestimated, and that the human element indispensable to good skills instruction may be underestimated or dismissed entirely. Even the best technology currently available is incapable of executing the most essential function performed by a legal writing instructor: providing an intelligent, individualized critique of a student’s writing. Until computers can respond to student writing and analysis on an individualized basis, they will never supplant human instruction in the skills of legal writing, research and analysis.

I. WORD PROCESSING

Although word processing is one of the simplest, most unsophisticated functions performed by a computer, it has probably had the greatest impact on the field of legal writing. This impact is evident, however, not so much in that way that legal writing is taught, but in the way that students exercise their writing skills and produce documents for a legal writing course. Because word processing makes it so easy for students make

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3 For an excellent discussion of the ways in which word processing has affected students’ legal writing, both positively and negatively, see Lucia Ann Silecchia, Of Painters, Sculptors, Quill Pens & Microchips: Teaching Legal Writers in the Electronic Age, 75 Neb. L. Rev. 802 (1996).
small-scale edits in punctuation, grammar and citation form, it has plainly improved the technical quality of the papers that students submit in their legal writing courses.\textsuperscript{4} In addition, because students are more likely to go through multiple drafts of a paper than they did in the days of the typewriter, word processing may also, in some instances, have enhanced the quality of students' writing style and substantive analysis.

If we focus on the contribution that word processing programs have made to the actual teaching of writing, however, we find that it is negligible. For most legal writing instructors, the word processor has done little more than provide a convenient method of preparing syllabi and other course materials. Some legal writing instructors have come to rely on word processing functions to expedite their critiquing of student papers and render their comments more comprehensible. For example, an instructor may use word processing "macros"\textsuperscript{5} to generate a set of typed comments for each student.\textsuperscript{6} Other instructors may actually critique student assignments "on disk," embedding their comments in the text using boldface or brackets. Those who have used such techniques believe that it not only saves time in grading but that it enhances the quality of the feedback they give to students.\textsuperscript{7} The computer can also be used in class to create a piece of writing collaboratively. By projecting the computer monitor on a large screen, the instructor can create and edit a text in front of the class, based on suggestions from class members.\textsuperscript{8}

Relatively few legal writing instructors at Chicago-Kent, however, use the word processor to critique papers or to facilitate collaborative classroom drafting; I suspect the same is true at other schools. Their reluctance to embrace the few technological tools that are relevant to their work may reflect technol-

\textsuperscript{4} See text accompanying note 14 infra. However, one tends to proofread less accurately on a computer screen than on a printed page.

\textsuperscript{5} A “macro” is a defined piece of text, which the author labels with a short title and then stores in the computer. The macro can be retrieved at a later time by simply typing in the appropriate label.

\textsuperscript{6} See Coleen M. Barger, \textit{Fast Commentary for Common Problems in Student Writing: Using Word Processing Macros} (1994 Legal Writing Institute Idea Bank submission, on file with the author at University of Arkansas/Little Rock).

\textsuperscript{7} Coleen Barger observes, for example, that she has done a better job of praising what is good in student writing since she began using macros. \textit{id.} at 2. In addition, the production of student comments on a word processor has become indispensable for some instructors whose handwriting is virtually illegible.

\textsuperscript{8} Silecchia, \textit{supra} note 3, at 43-44.
phobia, or simply a belief that the word processor does not significantly enhance traditional critiquing or classroom instruction.9

Not only has word processing failed to significantly improve the way legal writing is taught, it has arguably made the job of teaching writing more difficult. Professor Lucia Silecchia has observed that, in some cases, word processing can detrimentally affect student writing by encouraging verbosity10 and discouraging full-scale rewrites.11 Many students are reluctant to print out their work and look at their document as a whole; instead, they tend to view the document screen by screen, making only word-and-sentence-level revisions and reorganizations.12 Reading a document solely on the computer constrains students from making large text reorganizations, that is those that involve moving several paragraphs of text or moving text to a more remote place in the document.13 In addition, students’ ability to accurately proofread their work, both for technical proficiency and for “sense,” is hampered when they read their documents on a computer screen.14

Professor Silecchia suggests that we must take account of these phenomena in the way that we teach writing.15 We must familiarize ourselves with the technology our students are using and sensitize them to the ways in which this technology affects their writing process.16 She suggests, for example, that we re-

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9 I experimented for several years with the practice of replacing my handwritten “end comment” on student papers with a comment sheet that I typed on the computer. This typewritten comment sheet was individualized for each student and did not make use of macros. I naively believed that typing comments rather than writing them would save me time in grading papers. Alas, I found that I was spending twice as much time preparing the typed comments because I simply wrote more. The ease of typing and editing comments on the computer led me to release an unbridled flow of commentary on each paper that I seemed incapable of stemming. My students probably benefited from the increased feedback, but I found that I could not afford to devote the additional time to grading that my use of the computer entailed. I ultimately returned to using the pen. Now my comments are limited by the constraint of writer’s cramp and the confines of an 8-1/2 X 11 inch piece of paper.

10 Silecchia, supra note 3, at 30-31.
11 Id. at 24.
12 Id.
14 Id. at 20-21, 23-25.
15 Silecchia, supra note 3, at 55-56.
16 Id. at 57-61.
quire students for one assignment to save all their drafts in hard copy and "red-line" them in order to see how they edit on the computer.\(^7\) Such an assignment might encourage students to print out their documents more often and to do more of their editing on the hard copy rather than on the screen.\(^8\)

Teaching students to be "technology-critical" is plainly necessary, but it adds yet one more dimension to the already overcrowded first-year legal writing curriculum. Thus, in the case of word processing, computer technology can complicate, as well as facilitate, the teaching of legal writing.

II. INFORMATION RETRIEVAL

Like word processing, the information retrieval function performed by computers has had a greater impact on the students' production of their legal writing assignments than on the teaching of legal writing and research. Certainly, students do more of their research on-line than ever before. Many of them come to law school already familiar with computerized information retrieval systems such as INFO-TRAK and knowledgeable in the mechanics of boolean searching. Indeed, they may be more comfortable with boolean searching than with an ordinary print index. Our librarians tell us that many of our students have never used, for example, *The Reader's Guide to Periodical Literature.*

Students' preference for on-line over print research is reinforced by the vendors, who provide unlimited free access to LEXIS and Westlaw, including free "dial-in" software. Using such software, students can now access on-line research data bases from their homes, and they are further disinclined to march down to the law school to use print materials. Thus, the impact of information retrieval on the way in which students perform research for their legal writing assignments is substantial.

But what has the computer's information retrieval capability contributed to those of us who teach legal writing? Aside from providing legal writing instructors with a marginally more efficient way to research our legal writing assignments, computerized information retrieval has contributed little to our pedagogy. And, as is true with word processing, the presence of

\(^7\) *Id.* at 63-64.

\(^8\) Professor Silecchia's other suggestions include requiring students to write a short critique of the way in which they approached the revision process and requiring students to do a small-scale project "by-hand" without the use of the word processor. *Id.* at 63-64.
the computer has complicated the task of teaching our students essential skills.

Students have always been more proficient at performing the mechanics of research, than they have been at engaging in research strategy. This is perhaps even more true with respect to on-line research than it is with respect to book research. Students seem quite able to master "point-and-click" techniques to access information on LEXIS and Westlaw, but they have greater difficulty determining how to search on-line efficiently or when it is more appropriate to do their research in books than on-line. Thus, we must not only teach our students the mechanics of on-line research, but we must also teach them about the limitations of computers as a research tool.

We must teach them that performing research on-line is not necessarily more efficient than performing research in print sources. Students who are accustomed to locating information on-line are frequently oblivious to the limitations of boolean searching, and to the need to develop precise search terms in performing an on-line search. We must teach them, therefore, that boolean searches can be vastly overinclusive, and therefore inefficient. Alternatively, such searches can be underinclusive and therefore miss key sources.

Students may also be unaware that reading text on a screen is inefficient. We must alert them to the fact that they are reading text on a screen 20-30% more slowly than they can read the same text on paper. We must convince them, moreover, that by reading a text screen by screen, they are, in effect, looking through a "porthole" which deprives them of the valuable opportunity to see the text as a whole. Just as students may experience a sense of getting lost in a document they are composing on a word processor when they read it exclusively on a computer screen, they may become equally lost in attempting to decipher a complex case or statute on the screen. Those who are accustomed to "screen-reading" may be utterly unacquainted with the virtue of simply flipping through the pages of a text in print form to gauge its length and complexity, to see, for example, the

19 By research strategy, I mean the process by which one decides which search terms to use in researching a problem, which research tools to employ and in what sequence, when to stop using one tool and move to another, and when to stop researching entirely.

20 Edward Tenner, The Revenge of Paper, N.Y. TIMES, Mar. 5, 1988, at 7; See also Haas, supra note 12, at 18.

21 Haas, supra note 13, at 22.
hierarchical arrangement of the sections of a statute and their
inter-relation with one another. They may not realize how much
more efficient it can be to browse through a case on printed
pages to locate the most relevant sections, than to scroll through
screen after screen on a computer. While the "KWIC" and "term
mode" features of LEXIS and Westlaw do permit one to browse
a document in a focused manner by highlighting search terms,
these features can aggravate the "tunnel-vision" problem inher­
et in on-line research because they screen out portions of the
document that do not contain search terms but may nevertheless
be relevant.

In addition to instructing our students about the practical
limitations of on-line research, we also must now teach our stu­
dents to be sensitive to the relative costs of print research,
traditional fee-based on-line research (LEXIS and Westlaw), and
Internet research. With the advent of CD-Roms and "flat-rate"
pricing by LEXIS and Westlaw, an increasing number of smaller
firms and government agencies now have access to computerized
research. But students must nevertheless be taught that there
are some circumstances when doing an on-line search is the
most cost-effective method and other circumstances where print
research is more cost-effective.22 In addition, with legal research
materials becoming increasingly available on the Internet, we
must acquaint our students with the fundamentals of Internet
research. We must help them to identify the websites on which
they can readily locate legal authority so that they will be able
to use the Internet as an alternative to LEXIS and Westlaw
when these services are no longer free to them.

Some educators have argued that all of these lessons are
best taught in the context of an integrated research training
program, in which print research and on-line research are
taught simultaneously.23 Regardless of how the research training
program is structured, however, the proliferation of computer­
ized legal research in law schools has presented legal writing in­
structors with new challenges in teaching legal research and has
done little to facilitate our teaching.

22 West's free pamphlet, Principles of Power Research, actually does a good job of ex­
plaining when on-line research is more efficient and when it is not. In addition, Eman­
uel's LEXIS for Law Students (1994) provides some information on pricing and tips on
cost-effective research.

23 See Marilyn Walter, Retaking Control Over Teaching Research, 43 J. LEGAL EDUC.
569, 583 (1993).
III. INFOBASE TECHNOLOGY

The term "infobase technology" refers to software, such as LEXIS' Folio VIEWS and West's Premise, that enables students to 1) read their textbooks on a computer screen; 2) annotate and manipulate that text; 3) access outside materials in full text form through hypertext links; and 4) store, organize and retrieve research materials through boolean searching techniques. Although these functions are closely related to the simple information retrieval function performed by computers, they operate at a higher level of sophistication.

The purveyors of infobase software tout it as a revolutionizing force in legal education.24 Those involved in a pilot program at Chicago-Kent College of Law that employed Folio VIEWS, however, have been more guarded in their assessment of the software's pedagogical value.25

In the Electronic Learning (or "E-Learn") Project, an entire section of first-year students (approximately 100 students) was equipped with notebook computers ("notebooks") that were loaded with LEXIS' Folio VIEWS software and electronic versions of all the students' textbooks.26 Students were taught how to use the software and were encouraged to use it in all their courses to read text, take class notes within the structure of the textbook, prepare course outlines, access outside materials through hypertext links, and to organize and store their research for legal writing assignments. The majority of students quickly found, however, that they preferred reading their course assignments in print.27 Similarly, when class discussion focused on a particular passage in a statute or opinion, most notebook users nevertheless turned to the passage in print.28 Although a majority of the students used their notebooks in order to take class notes, most of these students used word processing software, rather than Folio VIEWS, to do so.29 Even those using Folio VIEWS to take notes generally chose to work in a separate notes infobase rather than to place their notes within the struc-

24 See e.g. LEXIS-NEXIS' "Office for Legal Education" brochure (1995).
27 Martin, supra note 25, at 4.
28 Id.
29 Id.
ture of the textbook.\textsuperscript{30}

And when it came time for students to create their final course outlines, a majority of that small number who had taken their class notes in \textit{Folio VIEWS} transferred to word processing software rather than using the "automatically generated" outline available through \textit{Folio VIEWS}. These students understood that the process of preparing the course outline was at least as important as the product.\textsuperscript{31}

No information is available about the extent to which students used the hypertext function of \textit{Folio VIEWS}. This function enabled them to jump immediately to the full text of cases that were cited in their textbook's notes or mentioned by their professor during class.

None of the infobase functions described so far has particular relevance to the legal writing course. Although the students had access to an electronic version of their legal writing textbook, they presumably had no need to heavily annotate the text, as one might do in order to prepare for a final exam. Similarly, there was no need for students to prepare a course outline, and little opportunity to use the software's hypertext function in their legal writing class.

The \textit{Folio VIEWS} feature that is most uniquely suited to the legal writing class is its ability to store and organize legal research, and to retrieve material from that specific database through the use of boolean search terms. Indeed, this feature generated the greatest degree of enthusiasm from students involved in the E-learn Project.\textsuperscript{32} Brett Amdur, Director of Technology at the Center for Information Law and Policy at Villanova University Law School, also believes that \textit{Folio VIEWS} can make a unique and valuable contribution to the legal writing course because of its capacity to integrate the functions of outlining, research and writing.\textsuperscript{33}

\textsuperscript{30} Id.
\textsuperscript{31} Id. at 5.
\textsuperscript{32} Id. at 6.
\textsuperscript{33} Telephone interview with Brett Amdur, conducted by Suzanne Ehrenberg, on November 25, 1997. Mr. Amdur developed a pilot program at Villanova in 1997 in which his 40 legal writing students were given notebook computers equipped with \textit{Folio VIEWS} software. He also developed a template for use with \textit{Folio VIEWS} that customizes certain aspects of the software so that it is easy to use for legal research. For example, the template allows students to easily create narrowly tailored searches of their research materials, and simplifies the process of putting the materials in a hierarchical structure.
Does the ability to store, organize and access one's legal research on a notebook computer, however, make students "better" legal writers? Professor Sarah Bensinger, who taught legal writing to E-Learn students for two years, has concluded that while use of Folio VIEWS may enhance the performance of strong students, it offers particular pitfalls for the weaker students. She observes that because it is so easy for infobase users to paste large sections of their research materials into their papers, the weaker students may believe that they are writing, when they really are doing nothing more than reproducing what others have written. Overall, she did not see students perform significantly better in the E-Learn classes she taught than the students she had taught previously in a traditional legal writing class.34

In examining infobase technology, we see again that the effect of technology on teaching legal writing is minimal. It may facilitate the students' production of their assignments, but it does not facilitate their learning of the skills that they need in order to engage in legal research, writing and analysis. The text annotation, hypertext link, outlining and research storage features of infobase software do not help students learn how to locate relevant legal authority, how to extract legal rules from those authorities, how to apply legal rules to facts and how to express their ideas with clarity and precision.

Students who are using Folio VIEWS or Premise software may be more likely to bring their notebooks to a conference with their legal writing instructor and access their writing and research on the computer rather than in print form, but this difference in the medium through which they are working does not fundamentally alter the substance of the conference. And it is in such a conference that the real teaching of legal writing takes place.

IV. TEXT ANALYSIS

To the extent that a primary function performed by legal writing instructors is critiquing student writing, our jobs should arguably be made easier by computer programs that identify er-

34 Interview with Professor Sarah Bensinger, conducted by Suzanne Ehrenberg, September 26, 1996. Mr. Amdur was similarly unable to definitively conclude that use of Folio VIEWS results in better legal writing papers. He observed, however, that good students find it a valuable tool in producing their papers because it encourages organized and hierarchical thinking.
rors in a written text. Many programs are available that ana-
lyze text for errors in spelling, grammar, punctuation, citation
form and even writing style. If our students used these pro-
grams regularly, then arguably their papers would be relatively
free of technical errors and we would have far less to criticize in
their work. Alternatively, it would seem to make sense for legal
writing instructors to use text analysis programs, in conjunction
with their own critique, to expedite the grading process.

Why, then, do text analysis programs actually play such a
minor role in either the students' production or the legal writing
instructor's grading of a legal writing assignment? The simple
answer is that these programs don't work particularly well. Spell-check programs, for example, will identify only words that
are misspelled in such a way that they do not constitute a word
in the English language. Many misspellings, however, are homo-
phones like "sense" and "cents." A computerized text analysis
program will not catch such errors.

Text analysis programs are similarly unreliable in catching
punctuation, grammar and stylistic errors because they are sim-
ply incapable of engaging in the kind of sophisticated analysis
required to consistently identify such errors. Such software is
designed to examine writing for "certain easily identifiable and
quantifiable aspects of the discourse." It can identify some
common errors in grammar, punctuation and style such as pas-
sive constructions, nominalizations, and excessively long
sentences. In doing so, however, it must rely on a limited num-
ber of extremely rigid rules that cannot encompass the full
range and subtlety of errors one finds in a typical student pa-
per. As Professor James Collins has concluded:

Text analysis software concentrates on surface aspects of
writing, on matters of linguistic etiquette and style, and
often does not help with the errors student writers make.
Since the computer must treat words as strings of charac-
ters, it has no access to contexts of meaning, to symbol-

35 Most word processing programs come with "built-in" grammar and spelling check-
ers. For example, Word Perfect comes with the Grammatik program. Cite-Rite is a fairly
common citation checking program. In addition, LEXIS and Westlaw each provide legal
citation checkers.
36 See James Collins, "Computerized Text Analysis and the Teaching of Writing" in
Critical Perspectives, supra note 13, at 10.
37 Id. at 31.
38 Id. at 30.
39 Id. at 30-32.
referent relations, to the content and logic of the writing.  

In one study, a researcher examined three text analysis programs for accuracy by comparing their diagnosis of errors in student essays with the error analyses performed by two experienced writing teachers. All three programs revealed a high degree of inaccuracy, in that they overlooked errors the teachers had found and flagged non-errors. The accuracy rates ranged from a high of 42% to a low of less than 1%.  

Several new text analysis programs, developed in educational rather than commercial settings, show somewhat more promise. One program, called “MINA,” focuses on patterns of errors in students’ writing and can search for 60 different error patterns. The software works on only one type of error at a time. It identifies all the sentences in which errors of that type appear, but does not identify the specific place in the sentence where the error is. The student must then find and correct all errors of that type.  

Another program, called Writing Teacher’s Toolbox and developed at SUNY-Buffalo, is designed to be used by writing instructors and students working together. The designers of the software realized that “most of what’s wrong with student writing is wrong because something’s missing from the writing.” Professor Collins observes that “[c]omputerized text analysis by itself must be limited to what appears in the text, but teachers conferring with writers have access to the writer’s intended meanings.” The program is able to search and highlight certain features of the text that the teacher or writer asks for, such as repeated words or phrases; verbs ending in “-ed”; low-meaning words such as “things” or “nice” etc. The teacher can then work with the student to help her understand how the use of such words or phrases results in incomplete meaning. In addition, the program enables teachers to build in interactive tutorials to supplement conferences. Thus, for example, if the teacher and student had worked on a passive voice problem in conference, the teacher could use the program to mark several additional exam-

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* Id. at 31.
* Id. The programs used in the study were Miliken Writing Workshop, Writer’s Helper, Sensible Speller and Sensible Grammar.
* Id. at 33-34.
* Id. at 35-36.
* Id. at 38.
* Id.
amples of passive voice and have the program present these examples to the student in the form of a tutorial. The computer would ask the student whether a particular passive construction was appropriate and then ask the student to revise the sentence.\(^{46}\) In addition, the program can combine text with graphics to analyze the content and logic of a piece of writing. Using blocks, arrows and lines of various lengths, the teacher can use the software to diagram sections of a piece of writing to show the student how the different parts relate to one another.\(^{47}\)

What makes this software so promising is that it recognizes the primacy of the teacher, the human being, in diagnosing andremediating writing problems. Only a "human text analyst — a teacher or peer in the various roles of reader, listener, respondent, editor, and collaborator" can provide a critique that is sensitive to the "content and logic" of writing.\(^{48}\) And thus, only text analysis software that relies heavily on the input of a human text analyzer can ever perform a useful function in the teaching of writing.

V. COMPUTER-ASSISTED INSTRUCTION

Computer-assisted instruction ("CAI") programs, like text analysis programs, perform a function traditionally performed by human teachers. They purport to teach students a particular body of information or skill — whether it is bibliographic information about legal research tools or the mechanics of organizing a piece of writing according to the "IRAC" scheme. To date, however, CAI programs have played an insignificant role in the pedagogy of legal writing.

Although there are well over 100 CAI programs designed for law students, only a handful provide instruction in skills relevant to legal writing. The Center for Computer-Assisted Legal Instruction ("CALI"), the primary purveyor of CAI programs in law schools, lists only five programs in its directory that are of possible relevance to the legal writing course. These programs (the last three of which were acquired by CALI just this year) purport to teach the following skills: 1) citation form; 2) IRAC; 3) use of "may," "must" and "shall"; 4) general legal research; and 5) administrative regulation research. The ALT Corporation

\(^{46}\) Id. at 39.
\(^{47}\) Id. at 39-43.
\(^{48}\) Id. at 31.
markets a program that teaches students to distinguish between holding and dictum, as well as a citation form program.

In addition to the CALI programs listed above, there are currently two computer-assisted programs available for teaching legal research: Clark Kelso’s *Studying Law: An Introduction to Legal Research* (Matthew Bender 1991), and Steven Epstein’s *Legal Research is Interactive* (LEXIS 1996). Epstein’s work is actually an electronic textbook, but it includes interactive exercises designed to reinforce the bibliographic information in the text. West has also developed a research training program in CD format (which it demonstrated at the Legal Writing Directors’ Conference in 1995), but the program has not yet been released to the public. The only CAI program of which I am aware that teaches law students grammar, punctuation and writing style is a program authored by the late Professor Marc Grinker of Chicago-Kent, called *The Legal Writing Teaching Assistant.*

With such a dearth of programs in the area of legal writing, it is not surprising that CAI has failed to take root as a significant form of legal writing instruction. Perhaps the failure of software developers to provide us with more programs is evidence that CAI is not well-suited to teach the skills of legal writing, research and analysis. Indeed, this conclusion becomes quite clear if we examine the nature of CAI programs and their technological limitations. The CAI programs used in law schools fall into three general categories. In ascending order of complexity, they are 1) drill and practice exercises; 2) tutorials; and 3) simulations.

Drill and practice programs generally take the form of a quiz in a multiple choice or yes/no format. The computer presents the student with a series of questions, each of which is followed by a set of possible answers. For example, a citation form CAI program might provide the student with all the information needed to produce a correct citation and then ask the student to choose the correct citation from among several alternatives. A correct response will elicit words of congratulation from the computer. An incorrect response will provide the student with the correct answer and a brief explanation of why the

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49 The program is currently available only to Chicago-Kent students through our computer network, but may be purchased for use at other law schools by arrangement with the Chicago-Kent Center for Law and Computers.

citation form she chose was incorrect. Drill and practice programs are well suited to teaching the kind of information and skills that are acquired by rote, citation form being a prime example. They are not particularly useful, however, for teaching the analysis and reasoning that are central to the law school curriculum.

Tutorial CAI programs have a somewhat greater capacity than drill and practice programs to respond to individual student performance. Such programs generally use a multiple choice format similar to that in drill and practice programs, but they also provide weak students with remedial instruction or enable strong students to bypass certain questions. The more complex versions of these programs use a “branching” system — a system of remedial loops, fast and slow tracks, and other paths of interaction that depend on the behavior of the individual student. Most tutorial programs, however, (including those related to legal writing) do nothing more than pair multiple choice question and answer drills with explanatory text. According to one pair of authorities, even the most sophisticated tutorial programs “do not present any significantly different type of learning from what is already provided by the classroom setting and assigned reading. While drill and practice and tutorial CAI increase knowledge and recall, they are not generally the best techniques for optimal development of intellectual and inquiry skills.”

Simulation programs provide the greatest potential for developing these essential lawyering skills, but such programs are relatively rare in the panoply of CAI offerings. Making use of CD-roms or laser disks, simulation programs teach students legal skills in an environment that replicates the real world. The environment might be that of a criminal trial or corporate takeover. The computer can introduce the student to the simulated situation, assign a “role” to the student, ask the student to make decisions based on information provided and then continue the simulation based on the student’s decision. For example, one simulation program designed to teach the rules of evi-

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51 Id. at 200.
52 Id. at 201.
53 Id. at 200. See also, Robert Charles Clark, The Rationale for Computer-Aided Instruction, 33 J. LEGAL Educ. 459, 463-64 (1983).
54 Hazen & Hazen, supra note 50, at 201.
55 Id. at 203.
dence visually simulates a trial on laser disk or CD-rom. An attorney appears on the screen examining a witness and the student plays the role of opposing counsel. The attorney’s direct examination of the witness includes objectionable questions and the witness includes inadmissible material in his answers. The student is able to object at any time by pushing a button. After each objection, the student is asked to supply either a reason for the objection or the direct examiner’s argument for admissibility. After the student has completed the argument, the judge states the ruling and the trial resumes. The inadmissible evidence is introduced into the trial if the student does not object or cannot argue correctly in support of an objection.

Simulations provide “a sense of immediacy and involvement” that is lacking in drill and practice or tutorial CAI. They are also capable of responding to free-form (or “natural language”) responses by students, rather than requiring students to select a response from a limited set of alternatives. Nevertheless, simulations are still relatively unsophisticated in that they rely on pre-stored answers and remedial comments, and their ability to understand natural language is limited.

Accepting that CAI programs are only capable of performing a limited function in the teaching of law, how successful are they in performing that function? Do students actually use these programs in significant numbers and is their performance in law school enhanced by such use? No comprehensive studies have yet been conducted in the law school setting to evaluate the effect of CAI on student performance. In 78% of the studies conducted at the elementary, secondary and college level, however, students receiving CAI did not perform significantly higher on exams than did students receiving conventional instruction.

To the extent that researchers have tracked CAI use by law students, they have found that law students do not use CAI

56 The program is called “The Interactive Courtroom” and was developed by the Stanford Interactive Video Project.

57 Id.

58 Paul F. Teich, How Effective is Computer-Assisted Instruction? An Evaluation for Legal Educators, 41 J. LEGAL EDUC. 489, 492 (1991). Some researchers, however, examined the same group of studies using a different statistical technique called “meta-analysis,” and concluded that examination scores of CAI students were significantly higher than the scores of students in conventional classes. They suggested that, on average, the use of CAI boosted a student from the 50th percentile to about the 60th percentile on examination scores. Id. at 493.

59 Few comprehensive studies of CAI use by law students have been conducted and those that exist are seriously outdated. See Gary Clifford Korn, Computer-Assisted Legal
programs with any regularity, despite the increasing availability of CAI in law schools. According to CALI, its program on citation form was used about 3,200 times in the 1994-95 school year. Five hundred of these uses, however, involved copying the lesson to a disk, and it was not clear whether students actually used the program after copying it. Its "IRAC" program was used a mere 1,200 times during the same school year. Keeping in mind that there are currently over 150,000 persons enrolled in law school, these figures are insignificant.

My own experience suggests that unless students are forced to complete CAI exercises, few will avail themselves of this technology. This is true, in part, because the CAI programs related to legal writing, research and analysis do not make optimal use of the available technology. Without exception, these programs are of the drill and practice or simple tutorial variety. In essence, these programs perform the same function as a set of multiple-choice questions and answers in a textbook. None of them permits even the simplest natural language response. None of them employs the more sophisticated "branching" techniques that are possible in a tutorial-type program. To date, no one has used a simulation program to teach library research skills — a perfect candidate, I believe, for the simulation format.

If we look at the more recent entrants into the field of computerized research training, such as LEXIS' *Legal Research is Interactive* or West's CD-rom program, we see that they are nothing more than drill and practice programs wrapped in a fancier package. They may look and sound a lot better than a typical drill and practice program, but they perform essentially the same function. The LEXIS program provides multiple-choice exercises as part of an electronic textbook on legal research. After reading the text, students are quizzed on the bibliographic information. An incorrect response to a question leads the student immediately to the portion of the text that provides the correct answer to the question. While this is a marginal improvement over a program that tells the student the correct answer, it is not fundamentally different from any other multiple-choice CAI program.

The West CD program is similarly disappointing in that it fails to use the CD medium to provide students with a truly enhanced learning experience. The CD format initially draws the


[60 Id.]
user in with sophisticated graphics simulating a law library, and an entertaining audio track. The user is able to learn about different research tools by "visiting" different floors of the library. Once one strips away the bells and whistles, however, what remains is a superficial textual explanation of the research tools followed by a set of drill and practice exercises.\footnote{A typical question asks the student to indicate which set of reporters contains decisions of the federal district courts.}

So far, however, no one has come up with a computer program that really attempts to teach research strategy rather than simple bibliography. The program that I dream of would use simulation techniques to place students in a virtual library, give them a research problem and ask them to select the tools with which to address the problem. The program would enable students to actually see the research tools they have chosen in facsimile form, and would force them to deal with the consequences of their research choices. It would provide individualized feedback to students and would reinforce the use of efficient research strategies.

Apparently, I am not the only one who has had such a dream. A group of legal writing faculty members from Hofstra Law School\footnote{The program is being developed by Donna Hill, together with Richard Neumann, Kathleen Beckett, and Gary Moore, and is supported by a grant from CALI.} is well on the way to designing just such a simulation program that focuses on research process.\footnote{Unfortunately, the program may not be widely available until Fall, 1999.} If the program comes to fruition, CAI finally will have made a significant, positive contribution to the teaching of legal writing and research.

Even if CAI programs were developed to take full advantage of currently available technology, however, they could never do more than supplement traditional instruction in legal writing, research and analysis. Even the best CAI programs are "pedagogically deficient" in that they provide only a one-track system of feedback — from instructor to student.\footnote{Korn, supra note 59, at 482.} They do not permit feedback from student to instructor in which the student "verbalizes" what the instructor has taught.\footnote{Id.} Such verbalization is necessary for students to organize, refine and solidify concepts in their minds.\footnote{Id.} The computer supplies information to the student, but cannot prevent the student from misinterpreting what
is transmitted.\textsuperscript{67} The only type of CAI program that potentially could perform the functions performed by a human legal writing instructor is an "intelligent tutoring system" ("ITS"). The ITS attempts "to automate the human tutor's role, which is to prod, hint, ask leading questions or ask for justifications, and guide the problem solving with just the right amount of intervention and feedback to keep the learner on track."\textsuperscript{68} Although researchers have been working on ITS's for more than a decade, their efforts are still generally confined to the laboratory and are not yet available widely for use in the classroom. Experts in the field of artificial intelligence are aware of the limitations of traditional CAI, and are strongly motivated to develop an alternative, but the costs of doing so have thus far been prohibitive.\textsuperscript{69}

Nevertheless, some highly respected educators still promote the notion that CAI can effectively supplant human instruction in some areas of legal education. As early as 1982, a Harvard Law School report on educational planning and development recommended that CAI should "supplement or replace, in limited part, traditional modes of instruction."\textsuperscript{70} In the intervening 14 years, Harvard has developed a set of electronic teaching materials for first-year students as part of the "Harvard Bridge Program."

The Bridge Program, which is the first commissioned work for the LEXIS-NEXIS Electronic Authors Press ("LEAP"), includes "lectures, resources, and interactive exercises."\textsuperscript{71} The materials were supposed to have been "available for use in all interested law schools in the Fall 1996 semester."\textsuperscript{72} According to Fran Warren, Electronic Products Development Manager at LEXIS-NEXIS, however, the Program is still being tested at Harvard and may not be available to other law schools until

\textsuperscript{67} Id.
\textsuperscript{68} Randy Kaplan and Denny Rock, \textit{New Directions for Intelligent Tutoring}, 10 AI EXPERT 30 (February, 1995).
\textsuperscript{69} Id. For example, a recent effort by the Pittsburgh public schools to revise its mathematics curriculum using ITS's involved at least 100 hours of development time for each hour of ITS instruction and a 50-person-year effort to codify the math curriculum material in an ITS. Although schools are the most likely consumers of ITS technology, they generally cannot bear the cost of funding its development. So ITS developers are looking for other sponsors such as corporations and the military.
\textsuperscript{70} Tentative Final Draft of the Harvard Law School Faculty Committee Report on Educational Planning and Development, ch. 3, at 1 (April 23, 1982).
\textsuperscript{71} LEXIS-NEXIS, "Office for Legal Education" brochure (1995).
\textsuperscript{72} Id.
LEXIS-NEXIS has been rather tight-lipped about the precise nature of the Bridge Program materials and has declined to provide me with an examination copy of them.

Although Ms. Warren represented that Harvard plans to add more materials over time to eventually "substitute" for its legal skills course, Harvard professor Peter Murray, who teaches that course, dismissed the notion that the Bridge Program materials would ever entirely replace traditional classroom instruction and individualized critique of writing. According to Professor Murray, the Program focuses on legal analysis skills and includes interactive exercises on such topics as case analogy and fact analysis. Professor Murray envisions an increasing role for the computer in Harvard's "Legal Reasoning and Argument" course, but he does not contemplate that classes or tutorials will be supplanted entirely.

At present, therefore, CAI is making only a minimal contribution to legal writing pedagogy by augmenting classroom instruction in subjects such as citation form, grammar, case analogy and legal bibliography. Given the current state of CAI technology, we cannot expect the computer to do much more.

CONCLUSION

In our effort to embrace computer technology and benefit from what is good in it, we must not lose sight of the fact that the computer is simply unable to perform the most essential functions involved in teaching legal writing, research and analysis. Cost-conscious deans and law school administrators, however, may be lulled by the purveyors of info-base technology and computer-assisted instruction into believing that the computer is an economical alternative to human instruction in skills training. Thus, the final burden imposed on us by the technology ex-

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73 Telephone interview with Fran Warren, conducted by Suzanne Ehrenberg, October 3, 1997.
74 Id.
75 Telephone interview with Professor Peter Murray, conducted by Suzanne Ehrenberg on October 6, 1997. Professor Murray teaches Harvard's one-semester required course for first-year students called "Legal Reasoning and Argument." The course covers legal analysis and legal research, as well as memo and brief-writing. It is taught by four full-time Harvard professors (who conduct large-group lectures on legal reasoning and argument and research strategy), in conjunction with librarians and student teaching assistants or practitioners. The student teaching assistants and practitioners critique the students' written work.
76 Id.
77 Id.
The explosion in law schools is the burden of educating our colleagues and our deans about the true limits of technology in the pedagogy of legal writing.
Trying on a New Discourse: Perceptions of Law Students Enrolled in a Trial Admissions Program

Dorothy H. Evensen, Ph.D.*

I. INTRODUCTION

The cover of Scott Turow's *One L* (1977) bears the portrait of a Harvard One-L — a youthful white male wearing a hounds tooth jacket over a crew neck sweater over a Oxford cloth shirt. He sits in a cavernous library, surrounded by numbers of bulky legal texts. The seriousness of the setting is matched by his studious demeanor: pen poised above a clipboard, one hand extended keeping place in an opened text. His eyes focus down upon what he has written, mouth set, brow somewhat furrowed as if contemplating the implications of an idea that may not have occurred to him before, or the logic of an argument that on first glance appeared verbose, muddled, and incomprehensible.

On a rainy Saturday morning in July, I survey the backs of more than fifty heads in a law school lecture hall. Students are bowed over notebooks furiously taking notes as a professor delivers the relevant facts in a case involving the sale of used bricks. Even from the back it is evident that this is a diverse group, indicated mostly in terms of gender and ethnicity. The group I am observing are not called One Ls, but TAPPERS, that is, they are enrolled in a Trial Admissions Program (TAP) because of their failure to meet one or more of the traditional law school admissions criteria: high undergraduate grade-point-averages or high Law School Admission Test (LSAT) scores. These students are engaged in "trying on" the discourse and the methods of law school culture for a six-week period; most believe that the objective is to determine whether they fit it rather than seeing if it fits them. About seventy-five percent will continue full-time employment while they attend, about fifty percent will have to travel well over an hour to make the two evening clas-

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ses and one weekend day class; all have paid a substantial amount of money to attend. In the end, the average of two examination scores will determine whether they are admitted to the Fall class of One Ls. Although they have been assured that there is a seat available for each, they are aware that statistically between sixty and seventy percent will gain admission.

In the twenty years that have passed since the first publication of One L, the student population of law schools has greatly changed. Today more than half of each entering class is made up of women, minorities, and students from working class backgrounds. Law schools, like all institutions responsive to principles of equal opportunity and affirmative action, have willingly opened their doors to previously underrepresented groups, but have been less willing to explore curricular revisions necessary to meet the diverse learning needs of these non-traditional students (Minnis, 1994). Law school curricula are bound to an ideology of science in which law students are positioned to discover the objective standards of the law through a guided inquiry of archival cases (Granfield, 1992). Since the turn of the century, mostly through the efforts of Christopher Columbus Langdell, the first dean of Harvard Law School, countless numbers of law students have endured the stings of the Socratic method as professors challenge their reading, their thinking, and primarily their right to be a lawyer.

While the methods of instruction have remained virtually unchanged, many law schools have responded to external criticisms and internal faculty concerns about underprepared students by instituting special programs that supplement the standard curriculum, while leaving it virtually intact. Some law schools have instituted a "bridge" or "academic support" program taken concurrently with first-year courses, that provides supplemental instruction usually focused on reading and writing skills; others offer an immersion program designed to give students falling short of admission criteria a sampling of law school culture prior to the beginning of studies, and make admission contingent upon success in the program (Wangerin, 1989). The TAP program is an example of the latter.

Investigating the operation and impact of programs such as these presents research opportunities to those interested in issues of learning and the development of literacy practices in discipline-specific contexts. The tasks of early law school studies have been theoretically defined (Minnis, 1994), and the processes of reading law school-related discourse have been em-
pirically identified as both variable and strategic, (Deegan, 1991; Lundeberg, 1987; Stratman, 1993). However, no studies have looked at how non-traditional students engaged in special programs develop, practice, and come to understand the skills they need to learn.

The present study rests on the premise that to study law is to enter a new discourse community requiring the learner to adopt new ways of reading and writing that are susceptible to both in situ and retrospective, or metacognitive, analysis (Flavell, 1985). Gee (1990), speaking from a socio-linguistic perspective, has pointed out that particularly when learning a new discourse is problematic, learners can become “consciously aware of what (they) are doing, or are being called upon to do” (p. 148). The research project further relies on the contention that learner motivations, which include their formulations of goals and perceptions about how such goals can be achieved, affect learning. In many cases, perceptions have been shown to be better indicators of performance than measured aptitudes, abilities, or environmental factors such as instructional programs or systems of rewards (Schunk, 1992).

In summary, this study sets out to provide an insider’s perspective of a special admissions law school program, and discover variables that might contribute to performance. The inquiry focuses on students’ perceptions of their goals or motivation orientations, of the academic and social environment, and of the tasks, particularly the literacy tasks, required by the program.

II. Method

A. Participants and Setting

Subjects in this study were ten students enrolled in a Trial Admissions Program (TAP) at a private Eastern law school. Fifty-three students comprised the total enrollment in this six-week summer program in which students participated in two traditional, case-based law school classes. One class was in Agency, the doctrines applicable to direct and indirect liability. The other class was in Remedies, the legal rules pertaining to contracts. In addition, these students took a course in Legal Writing. In this way, the program contained components of both a high stakes immersion program and a support, or bridge program, both which have been described above. Students were
aware that they had to achieve a grade-point average of 2.5 to be admitted to the law school with the Fall class.

All fifty-three students were invited to join the study. The ten volunteers received no payment or extra credit for participation. Six men participated. Two were in their early twenties just graduated from undergraduate programs. Three, in their mid- to late-twenties, had been employed full-time up to this point. Two of this group held graduate degrees. The final male participant was self-employed and in his mid-forties. Of the four women who participated, two had just graduated from college and were in their early twenties. One female in her late twenties had been working as a paralegal, and one in her early forties had her own business. The mean age of the participant group was 28.

In all but three cases, these students represented first-generation college graduates. The average number of siblings was 3.8. None reported having lawyers in the family. Seven of the subjects were white. There was one Hispanic male, one African-American female, and one female, born in the United States of a South American mother, but whose father was a native U.S. citizen.

The sample group was somewhat representative of the entire pool in respect to age, but almost the opposite in terms of gender. The mean age of all students was 27, with 66 percent in their twenties, 19 percent in their thirties, and 15 percent in their forties. Of the group of 53, 43 percent were males, 57 percent were female. The participant group consisted of 60 percent males and 40 percent females.

B. Procedures

Because of the concentrated time frame and the high-stakes nature of TAP, methods were developed to allow for the least intrusion. Three-fifteen minute telephone interviews were scheduled for each participant at the beginning (during the first week), in the middle (within the third and fourth weeks), and just after completion of final exams taken at the end of the sixth week. These interviews were tape recorded with the knowledge and consent of participants. Telephone interviews were selected rather than face-to-face interviews for two reasons. One was the geographic distance between the researcher and the research site. Second, it was reasoned that the time limit could be better adhered to if interviewees had fewer stimuli to interpret. In other words, since participants could not see
the interviewer, they were unable to "read" things such as facial expressions or gestures.

The three interviews could be described as standardized open-ended (see Appendix A) with follow up, and conversational (Seidman, 1991). Since the purpose of the study was to glean information about these students' perceptions of the learning environment and literacy tasks, questions were designed to be non-leading. In other words, informants were not specifically asked if they used such reading strategies as previewing, questioning, or monitoring comprehension, but rather were asked more generally to describe what they did when reading a case. Confirmability of their responses, or what might be most closely related to reliability, was established by predicating later queries on previous responses. In addition, participants were asked to give a "grand tour" (Spradley, 1979) of their reading of a case during the second interview. The "grand tour" method asks participants to verbally reconstruct a significant experience for the interviewer. In this case, participants were asked to open a casebook to a particularly difficult case and to "talk through" what they remembered doing to understand it when they had read it the first time. This information was compared with both earlier and later reports on reading processes in order to ensure trustworthiness.

As much as possible, a conversational style was maintained during the interview. Information concerning both personal and academic backgrounds was sought through these conversations. All ten students participated in all three interviews. In addition, a formal interview was held with one of the two legal writing professors, and an informal interview was held after a class observation with one of the content area professors.

Finally, traditional admission criteria data such as scores from the LSAT and undergraduate grade-point average, grades from the two content courses in Agency and Remedies, and the final admissions decision were made available to the researcher.

C. **Analysis of Data**

Audiotapes of all thirty telephone interviews were transcribed and a cross-case, content analysis was conducted (Patton, 1990). Using the framework established by the standardized open-ended interview questions, responses were divided into categories related to "goals," "perceptions," "theories," and "practices." These categories, though quite general, were derived from cognitive theories of motivation, learning, and discourse
comprehension, all of which posit that learners can report both explicitly and implicitly held beliefs, attitudes, and ways of knowing.

Once these general areas were identified, finer codes were used to label the actual language used by informants. Glasser and Strauss (1967) identify these as "substantive codes" that attempt to capture the conceptual meanings inferred from the verbal reports. For example, when asked to talk about the ways in which he approaches texts, Arnoldo, a twenty-six-year-old accountant, reported, "And there's a little bit of difference in reading just for the fun of it and reading when you know you're going to be tested on what you're reading." This comment was assigned to the "theories" category and substantively coded as purpose affects reading. A bit later he commented, "and normally I try to put my thoughts in writing so that if I can do that it means that I understood. I try not to move on until I do that." This remark appears to reflect Arnoldo's conceptual understanding that writing is a way to monitor reading comprehension. In short, these substantive codes taken together provided sets of properties subsumed under the general categories.

The next step in the analysis was to determine whether these properties were consistent or at variance with the theoretical models with which they were associated. For example, Arnoldo's comments about purpose affecting process prove highly compatible with constructivist theories like Goodman's psycholinguistic, transactional model of reading (1994). His understanding of the reciprocal nature of reading and writing is consistent with "write to read" theories professed by Murray (1984).

Once all interview protocols were categorized and links were made between substantive and theoretical codes, a sampling strategy (Patton, 1990) was employed concerning which data to report. This decision was governed by the first of the two purposes established prior to the inquiry, that of providing an "insider's view" of experiences related to this special program for non-traditional law students. It was further decided that the students' own words could best represent the similarities and differences of these experiences. Each of the following sections are introduced by way of student comments. Cross-case analyses were selected as the best way to give voice to all respondents. Each section also includes a discussion of the way student's perceptions of goals, the environment, and tasks connect with established theories found in the literature.
Before presenting the results, let me report that eight of the ten respondents were accepted into the Fall class. This 80 percent success rate is only slightly higher than the overall success rate of 73 percent. The two who failed to meet admission criteria are being called Betty and Helen. Arnoldo was accepted on a probationary basis since his average of the two final exams was slightly under the required 2.5. These persons' stories will be told, and some of the factors that might have contributed to their lack of success will be revealed in the sections that follow.

III. RESULTS

A. Goals: It's crazy the number of people who want to go to law school! (Glenn, Interview 3)

The above comment, the final one made by Glenn, a twenty-four year old State employee with a degree in criminal justice, begs the questions of why so many are going into law and what they hope to achieve. Perhaps this is also a commentary on those who, like himself and the rest of the TAP group, are willing to go to great lengths to gain entry into the law. Another question arises as to what goals they set for themselves in this situation and to what do they attribute success or failure for reaching their goals.

The general motivations of these ten students for seeking a career in the law did not diverge much from those reported by working class students polled at Harvard (Grenfield, 1992). Five reported altruistic reasons, three cited materialistic or pragmatic reasons, and two mentioned seeking intellectual stimulation. Obviously the proximal goal of each was to be successful in gaining admissions to the Fall class. Other goals, however, revealed during the course of the interviews, could be categorized into two types: ego-involved and task-involved.

1. Ego-involved Goals

Ego-involved goals relate to maintaining a positive image of self both in private and public ways. Three respondents spoke of "proving" themselves. Arnoldo, for example, stated, "always in the back of my mind is the fact that the rest of the world is observing what I do because I'm Hispanic - and there is always in the back of my mind a force to prove myself." Irene, a twenty-eight-year-old woman working as a paralegal, had planned a way to save face by only letting a few people in her office know she was attending the program. She said, "A lot of people don't
even know that I’ve applied to law school. I wasn’t sure of the outcome and I didn’t want people asking me.” Finally, Ed, a twenty-eight-year-old man holding a masters degree in political theory who had quit his job in a brokerage house in order to attend the program and, hopefully to be admitted full time in the Fall, perceived this as one in a series of “tests” he had self-selected since high school where, he reported, his focus was on sports rather than on academics. He reflected,

I was looking for a four-year degree and looking toward law school, but academically in high school my average wasn’t spectacular, and I wasn’t going to be going on to quote un-quote one of the better schools. And for me to get to that point I needed to do some other work. I needed to, I think, prove myself—that I was capable of doing the work. I wasn’t worried that it was gonna be a problem—I knew I was capable of doing the work, but I thought that I needed to show that I was capable of the work.

2. Task-involved Goals

The second type of goals focused away from self, onto tasks. Almost all of the respondents mentioned what the literature refers to as task-involved, or mastery motivations. These were reflected in goal-related reports of “doing the best I can,” “grasping complex legal issues,” and “learning how law school works.” There were two task-related goals identified: domain-based and skills-based. For example, Jack, a twenty-two-year-old recent college graduate with a major in political science and a few law classes under his belt from undergraduate days, hoped to “learn something useful” in the program. Betty, a forty-two-year-old former nurse now operating her own business, spoke of goals of a less domain-related, more basic nature. Talking about what she called a “lifelong reading problem” she stated, “I think I need strategies and skills. I think that’s what I desperately need . . . . What I’m doing with this TAP program is head-on to something that’s been my handicap my whole life. So it’s like a challenge to see if I can handle exactly what is my difficulty.”

Interviews revealed a conscious focus on task. Each informant realized that he or she had not performed as well as students who would be admitted under traditional criteria and spoke openly about low LSAT scores and less than stellar undergraduate records. A focus on task may have been a useful way to participate in the program without the debilitating ef-
fects of past performances that could have been interpreted as indications of lower ability. It may also have been a way to defer what they intuitively knew was the competition they would face once admitted. The fact that three students reported “blocking out” what they knew would be the competitiveness of the upcoming years, gives further support to such an inference.

3. **Attributions: Abilities vs. Effort**

Another way to explain the dominance of task-involvement might be found in attributions, or to what these students attributed achievement of their goals. Every respondent listed effort, hard work, and discipline as primary strategies for achieving goals. Chuck, a forty-six-year-old CEO of a government relations firm and a former state legislator, reported making the TAP program “a priority over the six weeks . . . . I knew this had to come first in order to give it a fair shot.” Ed had constructed a strict study schedule for himself. In our second interview he stated, “It’s absolutely critical that you get the work done on time and spend as much time on it as you have to spend - that you plan for it . . . . Right now I’m looking at a schedule that carries me through Saturday.” When asked to explain this further he said, “I modify it as I go along. I did the same thing for my graduate and my undergraduate course years.”

In some cases, however, effort was proving insufficient, especially for the two students who failed to be accepted into the Fall program. Betty, who had talked about her history of reading problems related in her second interview, “I’m putting every spare minute I have into it (studying) but I feel like I wish I could do more.” By the third interview, she had shifted her attributions from internal (effort) to external (fate). She said in reflecting upon her efforts, “I think I was a serious student. Maybe I didn’t get into the program, but I did my best. If it’s not meant to be then I don’t know what else I’m supposed to get into.” Later in the same interview she said, “I’m not gonna be happy if I’m not accepted, although maybe it was not meant to be.”

Helen, a twenty-two-year-old woman just graduated from college, participating in a summer internship in a law firm, likewise intimated that her efforts might not be enough, but attributed to full-time employment her inability to put forth a full effort. From the first interview she talked about her problems negotiating time between work and study. She said, “I work a full-time job, so I don’t have time to do everything fully.”
Helen also appeared to be grappling with feelings of frustration and, perhaps, resentment. In the first interview, she had characterized herself as a person who had sacrificed in order to reach academic goals. This, she said, was typical of her undergraduate years where she reportedly "worked harder and gave up more" than other students. This disposition seemed to follow her into TAP and can be evidenced in the following statement:

I would say that I know those people (classmates) have time to relax and go out and do things as well as sleep in and get their work done. I feel they're more prepared than I am and they still get to go out and feel more relaxed about what they're doing.

Helen's sense of frustration and ensuing justification might indicate that the "perceived cost" (Eccles, 1983) of the program exceeded the price she was willing to pay.

Although effort was central to goal achievement, ability was also mentioned in the interviews. Some raised the issue as an aside. Chuck, for example, in assessing his achievement during the second interview said, "I would say very average. I'm disappointed . . . . It's not just ego. I feel that I'm intelligent on whatever IQ scale, I feel that I'm probably as intelligent as anybody else in that class, but—maybe with one exception, there's one guy who's really sharp—wise-ass (laughs)." This playful attitude toward ability was also evident in one of Glenn's remarks: "You know, I work with attorneys everyday and I'm a lot smarter than a lot of them I work with. They made it through law school. So I should be allowed to go to law school (laughs)."

But Glenn also made it clear that he was determined to compensate for any lack of ability with effort. In relation to the process he used to read cases he said, "Basically because I'm in the TAP program I read them (cases) all twice whether I got it the first time or not." Later in the same interview he reported, "Things don't come that easy to me. I have to work for them."

In summary, evidence of both task-involved and ego-involved orientations should not be interpreted as contradictory. Rather, such coexistences might better be interpreted as sites of conflict, or as Nicholls (1992) argues, "What can appear irrational to an observer will, if considered in the light of the individual's purposes or intentions, appear rational" (p. 269). People enter achievement situations with both ego and task motivations and negotiate the two in highly complex ways. In this particular learning situation it appears that the ability to bracket,
or defer ego-involvement would better serve the purposes of the learner who, above all, recognized the intensity of effort involved in achieving the goal. Jagacinski and Nicholls' (1984) studies have revealed that in ego-involving conditions, high effort was accompanied by feelings of inferiority while low effort led to embarrassment. In task-involved conditions, high effort brought with it feelings of pride, satisfaction, and efficacy. It is therefore quite understandable that TAP students would tend to focus more on how task-involvement demonstrated by high effort could result in successful goal achievement. On the other hand, if the demands of a task exceed personal abilities or if the degree of investment does not meet the requirements of the task, achievement of one's goal will be unlikely.

B. Perceptions of the Environment: "That's the way it is"

(Betty, Interview 3)

For this group of students, law school was new terrain. Most admitted, that other than images gleaned from The Paper Chase or One L, they had scant idea of what life would be like on the inside of law school. All ten students reported finding the work both intellectually stimulating and challenging. Ed summed it up in the second interview as follows: "It's tough, it's challenging, you have to think."

Reports of stress were frequent but these were typically associated with balancing time between studies and full-time employment. The law school reported that 75 percent of these students were holding full-time jobs while attending. In the interviews, however, it became apparent that many students held misperceptions about each other in terms of work and experience. For example, Arnoldo stated,

I think that the majority of my classmates at this point have the entire day to themselves. And the majority of them just graduated from college. They have the entire day and they can work on the cases and all that. I can't afford to do that. I have to work in the evenings when they are probably relaxing because they are caught up with their homework.

Helen, as indicated in the last section, held the same beliefs about her classmates, as did Betty who perceived that the majority of students were either fresh out of college who "go to an apartment for six weeks and all they have to do is study," or people who had taken leaves of absence or extended vacations
from their jobs. Irene also estimated that the majority, "two-thirds," were not employed.

Most of the informants perceived work as a deterrent to studies, and with the exception of one, Chuck, all were ready to leave their jobs if they were admitted to the day program. Surprisingly, one of the two legal writing professors responded to a question about the compatibility of work and school during the program by stating that she did not think that having more time to study would change things. She felt that "working students might be better able to manage their time." This remark is particularly curious in light of the apparent shift in attitude witnessed in Helen. From the outset Helen was concerned that work was interfering with her studies. In the final interview, however, Helen was feeling a bit more optimistic about her ability to understand reading and writing tasks. She credited this understanding to a recent meeting she had with her legal writing professor. Later in the final interview, built on her previous comments about work, she was asked what advice she would give future TAP students regarding work. She said, "I would say if you have to (work), do it. I would say if you don't have to, I wouldn't. But it does discipline you." Since this was the only instance of a positive attribution made to work, it raises the question as to whether the conclusion is hers or whether she might be echoing what seemed to be a strong belief of the legal writing professor. An alternative interpretation might be that during this time when, according to Helen "things started to click," work and study were better reconciled.

1. Help from Instructors

This leads to another issue, that is, the sort of help available in the program and students' perceptions of that help. Once again, goal theory predicts that in a task-involved setting, learners will be motivated to seek help both from experts and from each other (Newman & Schwager, 1992). Let me reiterate that this was the first year that the law school had included a course in legal writing in the TAP program. In addition, the large group of 53 was halved once a week, and on alternate weeks met with each of the content professors for an additional "small group" session. One of the two legal writing professors, Professor Masters, required her students to meet with her individually three times over the course of the six weeks.

All of the students believed that faculty were available and would provide help if asked. Eight of the ten students inter-
viewed were assigned to Professor Masters, who required private conferences, and all had attended each of the three. Most reported that these were helpful. Ed discussed what he saw as the importance of the legal writing course:

The legal writing class has been extremely helpful in learning how to read the cases. She spends a lot of time going through the various areas of a case. We just came to these courses—we didn’t have a background, and she did a good job of explaining how to brief a case. She told us what the book’s for, how to find an issue, how to find the rules, how to draw them out of a case.

Dave, a twenty-two-year-old recent college graduate who majored in political science, believed that the conferences served more of a social than a pedagogical purpose, and in the first interview could not imagine himself seeking additional help. He said, “I’m not sort of a professor person.” Fran too described the social nature of these sessions: “I was just talking to her about what to expect if I got accepted.” She continued, “I think I would have managed without them, but since we had to go, I thought they were helpful.” Eight of the ten informants specifically mentioned the legal writing course as the most helpful component of the program.

Only two sought help beyond the compulsory legal writing conferences. One was Ed who, with his study group, made appointments twice each with the remedies professor and the legal writing professor. The group also tried to “corner” the agency professor to comment on a remedies case but, as Ed commented, “He declined—appropriately (laughs).” In response to a question about the frequency of his class participation Ed stated, “I’d go as far as to say that I was probably one of the most proactive individuals in the entire class. I was always asking something.” Ed pointed out that often his group would come to classes equipped with sets of questions, that sometimes they approached the professor before class, but at other times they waited for the appropriate opportunity to arise during the class discussion. In short, Ed felt quite satisfied with the amount of feedback he received and the amount of help available.

Betty’s experience, on the other hand, proved less satisfactory. In the long run it appeared that Betty’s help-seeking benefited other students more than it did her. She related the following incident:
I went to Kramer (the remedies professor) and told him, look I’m drowning. I have the flag up. I’m really getting lost. And he said he was going to give me a menu on how to figure this out, and I said why don’t you just present it to the whole class? I said everybody needs it. And he did . . . . And then the class said that that was the best thing that helped them more than anything. A lot of kids were going, ‘That’s great, that’s great’.

Betty also reported a similar incident with Professor Lloyd, who taught agency.

I went up to Lloyd before he started one day. I said you know Kramer slowed down and now you’re Speedy Gonzales. And that class he went so slow, people said, god, Betty, what did you do to him? He was like so slow and he was like does everyone understand? So that was just the standing joke that I was slowing all the professors down.

Betty was not as successful at finding the specific kind of help she felt she required to deal independently and effectively with literacy tasks. By the second interview Betty reported feeling “very overwhelmed and hyper.” She spoke of the frustration she felt after her first writing conference:

She didn’t really give me the feedback I wanted. She was asking me what I thought and I just told her I didn’t think I was so good. And she said I’m on track—that’s as far as she said. And I know she told another fellow student that she just wasn’t concerned about him at all and he does very well. But she just said I’m on track.

This dissatisfaction was evident in the final interview and had become enmeshed with Betty’s larger perception of the culture of law school. She said, “It’s like I’ve never experienced being involved in something where you don’t even have a sense of how you’re doing.”

When asked specifically about the feedback she had received from the legal writing professor on the two practice tests she had taken two weeks before finals, Betty reported,

Some of her things were a little vague. She critiqued them, and they sounded terrible, and then when I met her for a conference she said that they were on track and OK, but - so everything was very, very vague . . . . She said that law school is like that . . . . She said, that’s the way it is.
Betty concluded,

I would have liked a little more specific feedback for me. I had to kind of pull it out of her a little bit—telling me what could I do and what is the problem and how could I correct this on my own.

It is interesting to note that two other students, Dave and Fran, mentioned in their interviews that they were told their writing was “on track.” It should also be remembered that both of these students perceived the conferences as fulfilling social needs and being somewhat unnecessary, though in non-specific ways “helpful”.

Helen voiced some dissatisfaction after her first compulsory conference. She said, “She (Prof. Masters) felt OK with my writing. She had no suggestions to give me and I guess that’s what concerned me because I know I’m not perfect (laughs).” Helen was scheduled for her second conference the day following the interview and she said that she intended to ask for more specific feedback. By the third interview Helen felt she was getting the feedback she needed, and she credited this to being better prepared to ask questions during the conference. She noted,

I actually had something that she had written down and we could actually talk about it. And I had questions which fielded more questions and that she was able to answer, plus added more to it at this last session. And the third one was the best. She said some positive things as well as saying but you do need to work on this. And that’s what I needed, something concrete.

In the end, Helen credited what she considered the achievement of her primary goal of “doing the best that I could” to the feedback she received from the legal writing professor. She said, “At least from the writing professor I got one-on-one feedback, and that you are doing good up to this point, and I don’t see a problem with you.” From these comments it’s not entirely clear whether Helen valued the corrective nature or the supportive nature of the feedback she received. On the one hand, she appears anxious to find out precisely what she needs to do in terms of her literacy tasks; on the other hand, she seems to need to know that all is well. This apparent contradiction may have contributed to the confusion she revealed throughout her interviews, and may have been a factor related to her overall poor performance.
Two of the students were less than sanguine about the help that was being offered. Jack attended his three compulsory conferences concluding, "they were helpful. She gave me some points on things I needed to improve on—just a general way to check up." Regarding the accessibility of the other professors, however, he said, "They said we could call them, but it didn't really seem like they wanted you to." Of course, it needs to be remembered that this is a perception. Certainly the evidence of professors meeting with students who did indeed approach them provides a challenge to Jack's view.

Finally, Chuck seemed very much aware of the "trial" inherent in the "trial admissions program." He said that the professors were always apologizing for the fact that many of the cases required familiarity with legal concepts not addressed in the six-week curriculum. In spite of that, however, Chuck noted, "They're not throwing you any life-preservers or anything like that." With regard to legal writing, Chuck admitted that he had not anticipated the problem he would face as he became aware that the type of writing he had been engaged in over the course of his career in government would actually interfere with the writing skills he needed to develop in a legal domain. Specifically, he found that his texts were "too wordy," and after an initial bout of ego bruising, he grew grateful for the help he received from the legal writing professor during the compulsory conferences.

In summary, it appeared most students appreciated the help that was offered, yet few sought help beyond that instituted as compulsory. In addition, certainly one and perhaps both students who failed to gain admission raised serious concerns that the help they felt they needed was not forthcoming. When asked what advice she would give a new group of TAP students, among Betty's responses was, "Go to the professors. Seek them out if you're having a problem and try to be a little more assertive of letting them pinpoint how you can help yourself." In reviewing Betty's interview protocols her assertiveness appears obvious, yet she never seemed to get hold of the information she needed.

2. Help from Each Other

Students also sought help from each other. Since law classes are typically large-scale, and the preferred Socratic method allows for students to be "called on" only occasionally (in this sam-
Only three of the ten respondents reported being called on in class, students are encouraged to join study groups.

By the end of the second week, only three of the respondents had joined study groups, and regularly met with their groups through to the final exams. Two reported that they had joined study groups as undergraduates. Ed perceived the psychological advantage of group work in learning that "other students have the same types of questions I have." Similarly, Chuck, who admitted that he never thought about joining a group as an undergraduate, said, "I was now able to ask all the questions I wanted to, even the dumb ones. We realized that we were all struggling; that none of us was unique."

Two of the respondents spoke about groups of expediency. Since they traveled long distances, many car-pooled and used that time to talk about the material being studied. Betty reported nonetheless that as the end of the program approached, competition became more salient. She surmised, "I think that that's why people were a little paranoid and why the two guys I ride with don't want to help each other. You feel—you're supposed to feel that you're competing against each other."

Three students joined groups on the suggestion of the legal writing professors to complete a mandatory outline assignment. Engaging in this process seemed to confirm Helen's skepticism of the value of group work. She said, "I don't know how more than two or the most three could work together on these (outlines) because there are so many sides and so many things to incorporate into an outline that getting so many perspectives—you would think that's good, but it seems that everything would be redundant." Finally, three students stated outright that they worked better "on their own."

It is somewhat surprising, given the prevalence of task-involved orientations among participants, that so few sought out cooperative learning environments, which have been shown to be highly associated with success of task-oriented achievement goals (Jagacinski, 1992). It would be an overinterpretation to say, however, that these students valued individual over social learning. In fact, only three explicitly expressed a preference for solitary study. The low number of study groups may have resulted from either or both the short duration of the program, and work and travel factors.

In general, most of these students did not speak about what might be called the culture of law school, nor did many of them comment negatively about fellow classmates. In Broken Con-
tract, an updated and expanded expose on Harvard Law School, Richard Kahlenberg (1992) comments, "I felt as though I were in a Woody Allen movie, or a Dickens novel, so filled was my class with caricatures" (p. 17). He uses the labels conventionalized in the law school, referring to his peers as "turkeys," "vultures," and the "silent majority," among the last he counted himself. Only one person, Betty, shared Kahlenberg's sense of awe and disdain. In her second interview, Betty commented,

I'm finding these kids very, very snobby, and very to themselves, and I'm just not used to that . . . . I mean I know we're competitive, but it's beyond that. There's some element there that I'm just very uncomfortable with.

She went on to observe instances of what she interpreted as unethical behavior as she reported her suspicion that one student may have led admissions people to believe that he was a member of a minority group. She supported this contention based on the evidence that he received one of the free dictionaries that were only handed out to African-American students. She noted another student who was "excessively cruel," who she said was head of a clique that mumbled and laughed among themselves when people struggled with questions from professors. Betty was also the only informant who reported sympathizing with a woman who became flustered and confused when called on, but whom Kramer "stayed on for about thirty minutes."

Only two other students directly commented on other students' behavior, but this was done in a lighter vein. Dave mentioned, "It's like all the annoying kids I knew in college seem to be popping up in law school." Jack, too, joked about people who would "jump start pretty much, so they would be asking questions way ahead of the material." There were indirect references to students who continually raised their hands, or students who asked impulsive questions. Overall, however, no one except Betty registered strong feelings of antipathy toward the culture of the law school classroom.

Of course, it is within the context of the classroom, and more so in the Socratic classroom, where egos are at stake. The structure of the Socratic method is to allow one to perform within the agonistic arena that parallels the courtroom. It is possible that persons who are highly task-involved may find this context incompatible with preferred cooperative methods of learning. Ames (1984) has shown that classroom conditions can greatly affect student achievement when the environment fos-
ters task-values. Betty, perhaps to a greater degree than the other students, clearly valued cooperation and sought support and nurturance in the form of help. In turn, she was willing to expend much effort to keep up. In the classroom, however, the rules changed. This appears to be the part she could not accept, and this might be evident in her outright condemnation of the characters who understood the context as competitive and, above all, ego-involving.

Feedback also has been shown to play an important role in maintaining motivation in achievement situations (Jagacinski, 1992). Again, the law school context is notorious for its lack of feedback. Task-involved students, however, need to know that their efforts are bringing them nearer to their achievement goals. If indeed Betty believed that she was not getting the feedback she needed to sustain her effort, then she may have experienced diminished motivation which, in turn, may have turned the classroom context into an hostile environment.

C. Perceptions of Tasks: “I take in what they tell me and I don’t question that much.” (Helen, Interview 3)

In a review of the motivation literature, Nicholls (1992) points out that in specific achievement situations, students construct theories that have important implications for learning especially with regard to the roles and uses of knowledge and strategies. As these novice law students engaged with this new context, they were required to adopt and practice new ways of reading and writing, and, in some cases, reflect upon previous literacy processes from a new perspective. Many of the theoretical components of the reading process described by the TAP students are consistent with constructivist, cognitive theories that posit reading as knowledge-based, purposeful, strategic, and interpretive (Spivey, 1987); others are more in line with behavioral models, which assume that knowledge is received, or what Friere (1970) refers to as the “banking metaphor” where students “pay back” that which has been “deposited”. The way this group of students theorized about and reported engagements in literacy and learning tasks served as a robust way of distinguishing two groups — groups I label as “agents” and “pupils”.

1. Characteristics of “Agents”

Many informants spoke about the connection of reading with knowledge bases outside of the text. Two of the students
spoke of their frustration with, but their understanding and acceptance of, the decontextualized nature of the concepts featured in the courses. Chuck described this as follows:

We're taking out of what would be normally three or four full-semester courses. We're taking a couple of concepts out of each course, or at least the professors are, to teach us. So there's not an interwoven thread through all of this that we can build on.

Likewise, Ed noted:

We don't have a background. We don't have the prerequisites a student would have when they take these two courses. You really need a contracts course before you get into start talking about remedies for breach of contract. So they give us the very, very basics. And the professor will write certain things off, and if another professor came in and said that this is the way things should be, it could open up a can of worms.

Jack commented, "We started in the middle of the book so we missed some of the important things."

Fran also mentioned the importance of prior knowledge to reading, but instead of connecting it with academic experience as did Chuck and Ed, Fran perceived it as a liability of youth. She said,

We just finished a section on like buying and selling houses. I never bought a house, so I don't know about that. I don't know what is required before you buy a house. Well, I think like half the class is older, so maybe they have—some of them have bought houses. But for us just coming out of college, we don't know what title searchers are.

Recognizing the lack of connections with background knowledge, the above informants relied more on authority, be that embedded in the formalisms taught in the legal writing course, or in the direct reading instruction being offered by professors in class. All of these students mention the IRAC formula suggested both as a way to read cases and as a method of briefing cases. What this amounts to is spotting the issue (I), noting the rule (R), and following the analysis (A) that leads to the conclusion (C), or holding, reached by the court. Spotting the issue is understandably the most crucial element since it both incorporates all the relevant facts of a case and points to the rule that will be applied (Delaney, 1983). Still, these students did not con-
ceptualize IRAC as a template that would unlock the meaning of any case, but as a heuristic that could open the way to interpretation.

Chuck, in the second interview, pointed out that “if you don’t pick it up (the issue), it doesn’t change your comprehension of what happened, but it does certainly change your analysis of what the legal ramifications are.” Ed too highlighted the importance of the issue in the second interview when he analogized, “It’s like a discovery . . . . If you’re not aware of the issue that’s under dispute, the case is basically useless to you.” By the third interview Ed reported, “The issue sort of jumps out at you, and once you have that then in the second reading I try to discover the reasoning that they (the court) use to get the rule which they apply to the issue.”

For neither Chuck nor Ed was the process simply learned. Both of these students admitted that they looked to the professors for direction in undertaking this new process, but also stressed the amount of both individual and group work that culminated in making the processes more accessible. Chuck observed the progress he had made in reading cases. He said, “What I particularly noticed was the fact that I highlighted about 75% of the text in the first few weeks. By the end, I was down to about 25%. I knew what was important.” Ed spoke of training himself not to highlight the first time through a case, but waiting for the second read “when I think that I’ve found what the salient points are” then in a third time through, he begins briefing the case. By the second interview, Ed noted that this process had been reduced from a “two and a half hour process, for one brief, down to about an hour.” In the final interview Ed theorized that “it’s not something you can read once or just go through and say OK that’s great. You have to work at it, and I think you have to enjoy it to work at it.”

Glenn also spoke of how he worked out the process for himself. He explained,

When you read the facts, you can actually visualize like what the people looked like and stuff like that . . . . In every case there’s a lot of inferences you got to make because there’s always facts left out—basic facts. You got to infer what the facts mean in order to argue on an issue . . . . The first couple of weeks, I was very very cautious—I was scared of failing and I was reading the cases three or four times. I was just overcautious. But now basically my outlook on a case is, hey, it’s an argument between people.
Arnoldo, in his second interview described the personal reading style he adopted:

I always look at two things, the first sentence which usually gives me an idea of what the case is about, and the last sentence which is the holding of the court . . . . I know where I'm starting and I know what the end of the continuum is. And all I have to do is just fill the gap. And that's where the real job is.

Arnoldo's theory of reading is closely related to "reception theory," a literary theory described by Iser (1978). Arnoldo, whose father was a cleric, and who held a masters degree in religious studies, persisted in his more literary conceptualization of reading the law. He offered the following analogy:

I think that interpretation is what the law's all about. There's not an absolute anywhere. I mean you have a set of facts here that might look similar to another set of facts, but there's always something different. And in light of that, you have to interpret or apply the legal rules that you have. So in that sense I would say that it's the same dilemma that I have when I face the Bible. You have some universal concepts, then you have a different set of facts. Whether they're coming from the culture or from somebody's personal situation or experience, you still have to take that broad concept and apply it to something specific. But I think it's the same dynamic.

Each of the four students cited above appear to have combined instruction with personal ways of dealing with the literacy tasks. And all, with the exception of Arnoldo who was admitted on probation, were successful in gaining admission. These students appeared characterized by high degrees of autonomy, or agency.

2. Characteristics of Pupils

Another group of students adhered more closely to the guidelines being offered by professors. Simply put, they seemed to be biding their time waiting to find out what professors expected of them before investing in independent strategies. Dave, for example, in the first interview characterized himself as an undergraduate as "a B student" who generally did "what you have to do to get a B." He explained his reading process as an undergraduate as reading "just the important stuff." When
asked how he determined what was important he said, "Usually you go to the back of the chapters and read an outline or summary. And then you listen to your professor who gives a preview of what's to come—here are the key points." Dave admitted that that was not the case in law school, but rather than developing specific strategies he reported that he "read everything because I don't know what is important yet."

By the second interview, Dave mentioned that he generally found the reading unproblematic because the cases were "well laid out" and "well edited." In the final interview, Dave said he believed he had achieved his goal, and when asked to what he would credit that achievement replied, "I did what they said. I used the IRAC and she (the legal professor) said I was doing it the right way."

In spite of the fact that Fran had reported joining two study groups, a practice that often entails collaboration on alternative forms of study, she made numerous references to following prescribed methods in both reading and writing. She appeared somewhat annoyed that they were given a book describing how to brief a case before the program began only to find out upon arrival that "the TAP teachers told us a different way they wanted us to brief cases." Fran reported reading cases just once before writing her brief for class, then "when we get to class they usually go over the case, and then you can determine if your reasoning, if your interpretation was the same as everyone else's." Fran reported that she would reread the case more closely after class. This practice of waiting for the "right" interpretation (that of the professor) was seen as highly beneficial by Fran. She contrasted her later abilities with her earlier ones: "I saw the fact, but I couldn't apply a meaning to it." Fran was also the only student who spoke of purchasing what are known as "canned," or commercially prepared briefs and outlines.

There was a degree of skepticism evident in some of Fran's responses. Again, she appeared annoyed at what she saw as the unrealistic simplicity of law courses she had taken as an undergraduate. When comparing the cases she had read with the ones encountered in the law school she commented, "That was a joke. It was just like outlines. These books—the language used is a lot different than the language used in our book for college." She had some concern that she would find her present reading equally irrelevant. Regarding the application of rules to cases she noted, "You talk to a lawyer and they say that actually the judge don't (sic) use any of that. So it makes you wonder why
we are reading these cases if in real life, they are not being ap­plied—like this is not the rule they are applying.” For both Fran and Dave, knowledge appears to be something received rather than constructed. Dave waits to find out what it is he needs to know; Fran trusts (with some skepticism) that what is being taught is what she needs to know.

Irene had also described her undergraduate practices as “I guess I learned what I needed to know and I didn’t go beyond that.” She went on to explain that she had developed a fast pace of reading only looking for points stressed in class. In contrast, she said that she was very aware that she needed to slow her reading down when reading cases, but still relied on class dis­cussion to highlight important points. She said, “I usually read that case (a particularly difficult one) again after the class to see the point that the teacher brought in.”

Jack’s theory of reading could be summarized as “picking” (he used this word a half dozen times in the interviews) what was important, and deferring understanding of the tough parts for class. In the second interview, Jack commented on the com­plicated language used by the judges in making decisions. He said, “You don’t mess around with some of the things the court says. Sometimes it’s important, sometimes it’s not.” When asked how he made a determination of importance, Jack replied, “When you get in class you find out what was. Whatever the professor says.” From the outset, Jack complained about the vo­cabulary, especially the use of Latin terms. Unlike many stu­dents, however, he did not purchase a legal dictionary, but re­lied on context or professors to explain terms. By the end of the program, Jack reported that he believed he was getting better at determining what was important. He said,

I think I got better. I know I didn’t mess around with a lot of stuff I didn’t think was important. Usually I was pretty well on. As long as I got the main issue out of the case, I think I learned how to pick things out better.

Helen did not seem as successful in negotiating her reading processes. Her adopted metaphor was not unlike Jack’s; she spoke of “weeding” though cases to find important points. She too relied on the professors to point out what was important. In the first interview she remained sanguine that case reading would become easier. She said, “I just have to get used to these certain kinds of cases and what to look for under these topics, and what the professor expects you to get out of the reading.” In
the second interview Helen brought up the fact that reading cases as an undergraduate was easier because "I knew what the professor was looking for."

Throughout the interviews she appeared to be struggling to avoid old ways of reading and learning. Specifically, Helen made numerous references to "memorizing" information in undergraduate classes. In the first interview, she acknowledged that law school was different: "When I read a legal text I think through every sentence. It's like I go slower and try to digest and remember—and try to remember what I learned." It appears that the new process Helen engages in requires more synthesis, so in that way it probably diverges from what might be described as her old method of rote learning. Still, memorization continues to play a role. Her determination to avoid old ways of learning is evidenced in the second interview where she describes her case-reading process:

I just go through it . . . . First we have the issues, the facts, application and conclusion of what the case is. So I don't really memorize; like I remember the facts and how it applies to a rule, but I don't really like memorize exactly what went into what the court said. You have to piece out what's relevant to apply to other cases.

In the final interview, Helen displayed more confidence in her ability to understand the required process. Still, the tendency to memorize was salient. She reported that in remedies "things started to click when I started pounding it into my head." She also talked about using other student outlines to "put things together before I actually sat down and memorized stuff." Helen, of course, did not gain admission and, in fact, received a C- in each course. Nor did Betty, who reported, as was previously discussed, spending large amounts of time trying to find out what she could do to better participate in the kinds of learning required by the professors.

As I argue above, some of these students could be grouped as "agents," students who took responsibility for, monitored, and sought confirmation of the literacy and learning strategies they devised and implemented through the program. These informants tended to perceive significant differences between reading and learning the law and reading and learning in other disciplines. The second group I call "pupils," who more often speak about finding out what professors want and seeking out, usually in classes, what professors identify as important points in the
reading. Although students in this group also see differences between ways of reading and learning in undergraduate courses as opposed to law school courses, they appear less able to reconcile these new ways and more often fall back on old ways. What is interesting, however, is that these two groups did not greatly differ in terms of overall performance in the program, at least not in terms of grades earned. In fact, the highest grade-point averages were attained by Irene and Jack, students who displayed more “pupil” tendencies.

IV. CONCLUSIONS

This study attempted first to give voice to students who are typically unheard within the legal education community. This, I believe, was achieved by allowing individual responses to stand as data. The second purpose was to identify variables that might help us to understand the performance of non-traditional students in law school settings. The three variables that emerged from the data were 1) literacy histories, especially histories of literacy problems; 2) the availability and accessibility of help within the instructional context; and 3) student learning styles. In conclusion, I would like to consider the implications of these findings for both curricular change and future research projects.

The first finding may seem overly obvious, but I would argue it is not unimportant; that is, that persons with histories of literacy problems may not perform well within traditional law school curricula. From the very first interviews, Betty and Helen spoke about a lifetime of problems regarding reading and writing. It is highly probable that official records of academic work might have provided indicators of these problems. A recent study conducted by the Law School Admissions Council (Wightman, 1993) reports that a relaxation of time constraints on the LSAT is leading to overpredictions of performance among learning disabled students admitted to law schools. Neither Betty nor Helen spoke of having diagnosed learning disabilities; however, reading research (Stanovich, 1988) has pointed out that it is virtually impossible to differentiate learning disabled readers from “garden variety” remedial readers. More research is needed in this area especially since law schools appear sensitive to diversity issues and are accepting increasing numbers of students with histories of literacy and learning problems. Both ethical and curricular issues are raised in considering who will be ad-
mitted, how well they can be served, and to what degree limited performance can impinge upon public interests.

This leads directly to the second finding concerning the kind of help offered and the question of whether such help as is offered is sufficient to meet the needs of diverse students. There is no question that this particular law school was working hard to provide assistance for these students. In addition, the one legal writing professor, in making three conferences mandatory, demonstrated her commitment to the belief that given assistance and feedback many of these students would have a better chance at success. She believed this goal could be achieved by giving these students what they didn’t have, that is, the tools to understand the relations between parts of a case (IRAC), and a tool to organize cases holistically (outlines). A constructivist perspective to remediation (Clay, 1992), however, proposes that instruction must proceed from an assessment of what the student knows, rather than what the student lacks. Professor Masters admitted during an interview that there was inevitably a group of students who just “didn’t get it,” and she was quite forthcoming in admitting that she does not know what to do about that. It might be worth considering that those typically teaching and providing help in law schools are lawyers, not educators whose understandings of learning, and particularly learning from texts, might be insufficient to deal with the very hard literacy problems they are beginning to encounter in students. It is commonplace in the medical education community to employ an educational psychologist or curriculum specialist to assist in planning, evaluating, and in some cases, individualizing curricula for students who struggle (Tosteson, Adelstein, & Carver, 1994). Law schools might consider this option.

Some law schools have recognized that more than a first-year course in legal writing is required and are even beginning to use the word “remedial” to bring into focus the extent of help many students need (Weiser, 1997). Programs organized around procedural aspects of “lawyering” that extend to the second and sometimes the third year are beginning to be developed. Weiser reports that at Touro Law Center, for example, a second-year mentoring program provides students with access to faculty feedback and guidance on writing assignments.

Curricular models that conjoin clinical with substantive work might also be seen as a way to help students acquire the literacies of the legal community. The University of Maastricht in The Netherlands offers a four-year law program, 60 percent
of which is offered through a Problem-Based Learning (PBL) format. In PBL, students meet in small groups with a faculty facilitator to both “understand” and “learn through” cases. The primary goal of the group work is to identify substantive learning issues that are necessary to understanding the case. Once these are identified, students engage in self-directed learning outside of the group context, and subsequently bring their new knowledge and understandings back to the group for discussion. The PBL framework has been employed in medical education in the United States and Canada for a number of years, and it has been shown that PBL students outperform non-PBL students in clinical evaluations while they perform as well as their counterparts on evaluations of biomedical knowledge (Albanese & Mitchell, 1993). A recent comparative study between medical and law students at Maastricht (Ronteltap & Koschmann, in press), indicated that development of self-directed learning components were similar for students in both PBL curricula.

PBL curricula also has the potential of more readily identifying individual student needs, both because of the proximity of students to faculty and because daily evaluations are part of the process. Faculty who participate in PBL have been shown to be more concerned with learning processes and are more likely to participate in continuing education programs that feature aspects of learning and pedagogy (Wilkerson, 1994). Finally, unlike academic support programs that isolate at-risk students, PBL programs provide more individualized services to all students, thus eliminating the negative, stigmatizing effects often associated with supplemental programs.

An assumption of curricular reforms like PBL is that learning is enhanced when it is self-directed. This indirectly relates to the final finding from this study, that is, that two types of learners were discerned: agents and pupils. In an ill-structured domain like law (see Feltovich, 1995), processes developed in formal education need to be extended throughout a professional lifetime. Self-direction has been identified as the variable that is most likely to insure lifelong learning, and much research supports the hypothesis that proactive learners, or agents, demonstrate greater degrees of self-direction (Candy, 1991).

Another consideration regarding types of learners concerns how they engage with tasks, particularly the reading and writing of texts, during the period of formal schooling. Do they actively construct meaning from texts, seek multiple sources to solve problems, and make decisions in light of multiple perspec-
tives? Or, do they expect unambiguous meanings to be transmitted through recognized authorities, be they texts or teachers, and insist that assignments be straightforward and correspond to external, measurable criteria? Both of these types of students are surely recognizable to those who teach in law schools, and mostly all would agree that we hope to nurture the former type. How such nurturance takes place, however, is the subject of much debate.

The literature on case reading, for example, divides between those who believe that students can be taught formalisms in order to insure that they read cases more in line with expert readers (Lundeberg, 1987), and those who argue that students' understanding of cases is enhanced when they independently become aware of rhetorical purposes of reading (Stratman, 1993). Legal writing educators (Fajans & Falk, 1992) are also questioning whether "the tyranny of paraphrase," or getting from the case crucial elements like those prescribed in IRAC, precludes the kind of close, interpretive reading that is required in advanced courses and more representative of legal work. It appears that this debate will continue over the years to come, but the data from this study indicate that following formalisms and seeing that readings closely align with the professors' interpretations, might be the kind of readings valued within the law school context, and may be sufficient for success at least in special programs, and perhaps through the first year. More research is needed on how meaning is constructed from legal texts and how these processes change in relation to differential experience and variable contexts.

In conclusion, I would argue that those in the legal education community stand to learn much from this group of TAP students. First, it is obvious that giving such persons a chance is worth it. Eight of the ten met the criteria for admissions and did so mostly through sustained effort. We learn too, however, that some might get through using the less-than-desired strategy of finding out what "they" (the professors) want and giving it to them. In light of this, we might consider how the curriculum might be changed to foster valued characteristics such as cognitive flexibility and self-directed learning. Finally, we need to learn from those who did not "make it" and ask who was lost and how that loss might affect both the school and the profession.
REFERENCES


Standardized, Open-ended Interview Questions

Interview 1
• Talk about your interest in attending law school.
• Tell me about your academic background.
• Tell me about yourself as a reader.
• Do you have any ways of reading that you may have developed in another context that you expect to serve you in law school?
• What are your expectations regarding reading and writing tasks?
• Do you anticipate any problems regarding reading and writing tasks? If so, to what would you attribute those problems?
• Will you seek assistance dealing with reading and writing problems?

Interview 2
• How would you assess your expectations regarding reading and writing tasks?
• Have you developed any new ways of reading and/or writing?
• Reading “grand tour” question: (Interviewee asked to open case book to a recently read, somewhat problematic case.) I’d like you to sort of walk me through what you did when you read this case. I’m not interested in what the case says or means, but what you did in order to read and understand it.

Interview 3
• How’d it go?
• How would you assess the tasks and the strategies you used in dealing with the tasks required of you over the past six weeks?
• Assume that a new group of TAP students were to begin the program next week. What advice would you give them?
• Besides achieving the goal of getting in, what other goals did you have?
• Do you feel you achieved those goals?
• To what would you attribute your achievement?
• What did this experience mean to you?
Teaching the Transitions

Jessie C. Grearson

When I was on jury duty a few years ago, a fellow juror asked me why, if students were taught to write well in college, they couldn't just continue to write well in law school. Since I had just been explaining with enthusiasm how my role as a writing advisor at law school was to help students join the clear writing movement, battle legalese, and so bring legal writing into the sunshine of clarity, I found myself momentarily stumped. How could I argue both things—that good legal writing is—and isn't—like all other good writing?

As a writing advisor, I'm in a unique position—standing at the intersections between writing worlds, trying to help students adapt a variety of previous writing experiences to the new writing situation of law school. This vantage point is both fascinating and painful. I witness much suffering by students who get caught in misunderstandings about the nature of good writing as they move from their previous writing worlds into the world of legal writing.

In this essay, I will focus on two closely-related things: first, the danger in the metaphor I just used—of students "moving into the world of legal writing." That image contributes to the wrongheaded idea that entrance into this world is a one-way ride, that students cannot belong to more than one writing world at a time, and that to acquire competence in this new discourse, they must forget what they have learned elsewhere about writing.

Second, I would like to promote the idea that students can escape such wrongheaded thinking if they see themselves as members of multiple writing worlds. As writing teachers, we can

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help them accomplish this by “teaching the transitions.” By this phrase I mean that we must not deny or exaggerate the differences in purpose, audience and context that arise among different disciplines and discourse communities. We must prepare students to expect those differences and to make transitions between different writing situations. As writing teachers, we need to help students find a happy medium between what I call “hyper flexibility” and “utter conviction”—at one end a kind of academic doublejointedness students develop from teacher-pleasing (which gives them flexibility without conviction), at the other, the kind of zealous never-and-always that comes from buying into one world view that stunts their ability to adapt. Encouraging this adaptability gives students warranted confidence in their writing skills and gives writing teachers the opportunity to prove to students that our teachings are based on something more than personal whimsy.

I. TWO PERSPECTIVES ON LEGAL WRITING

The following contrasting images illustrate how envisioning legal writing as a self-contained and self-sustaining world instead of as a writing community overlapping with, influenced by, existing among other communities, actually limits possibilities for both teachers and students of legal writing.

2 In this article, I address both the general phenomenon of teaching the transitions (preparing students to adapt to any different writing situation), as well as a specific example of that phenomena (preparing new law students to adapt to the demands of legal writing).
TABLE 1 - Two Perspectives on Legal Writing

<table>
<thead>
<tr>
<th>US</th>
<th>THEM</th>
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<tr>
<td>THE WORLD OF LEGAL WRITING</td>
<td>THEM</td>
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- Writing teachers as gatekeepers who guard borders
- Community as exclusive "us" with clearly defined borders; other teachers as interlopers with suspicious intentions
- Exclusive focus inward on discipline leading to hermetically sealed "detachable discourse community"
- Knowledge as a static, valuable commodity owned by insiders to be transferred "into" newcomers
- Conventions as unquestioned and unchanging truth
- Assumption that writers will be lifelong members of this ONE discipline; goal is to produce writers with increasing specialization in one kind of writing

<table>
<thead>
<tr>
<th>WRITING OF THE HUMANITIES</th>
<th>LEGAL WRITING</th>
</tr>
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<tbody>
<tr>
<td>THEM</td>
<td>THEM</td>
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- Writing teachers as guides to new ways of writing
- Community as inclusive with permeable, shifting borders; other teachers as interlocuters with common goals
- Inclusive focus, overlapping circles allowing a healthy eclecticism and information "hybrids"
- Knowledge as generated within a community and between communities; information and ideas transported in and out of community
- Conventions as temporarily agreed upon communication strategies, subject to frequent inspection and possible change
- Assumption that writers move among disciplines and belong to multiple discourse communities; goal is to build on previous expertise to produce adaptable writers and thinkers with a repertoire of strategies and the ability to select from those strategies with confidence
The image on the left suggests an unfriendly, exclusive definition of community. Its “us” would have little interest in ideas from other teachers or disciplines—or in the previous expertise of its potential new members (“them”). This image also suggests a limited view of both knowledge and conventions as a kind of static and unchanging intellectual capital kept within the discipline and passed on to new members as unquestioned and unchanging truth: it’s “the way we do things here.” The column on the left adds up to a limited view of education as a linear series of discrete experiences, with the “world of legal writing” being the last stop on a student’s educational ride, with legal writing as the best, most important kind of writing ever. The student’s goal, then, is to develop an increasing specialization in this kind of writing for the rest of that student’s writing life.

In contrast, the image on the right allows much more potential for both teachers and students. It also seems more in keeping with this year’s Legal Writing Institute theme, “What Can We Learn From Other Disciplines?” This alternative image—of overlapping multiple writing communities with permeable, shifting edges and a multidirectional energy flow of people and ideas—transforms the role of the writing teacher into something more complex and rewarding. Instead of merely guarding borders, the teacher guides students as they move back and forth from community to community by helping students understand the rhetorical differences and commonalities between writing situations. Here, the discourse community is seen not as static and unchanging, but as a flexible, permeable structure that grows and changes with its membership. There is room for students to contribute something to the classroom. Accordingly, conventions are not written in stone, but temporarily agreed upon communication strategies that are constantly reviewed by a given writing community. Finally, this image accommodates the truth that writers belong to more than one writing community at a time and may need to write for more than one writing community at any time.

Today’s students often choose to acquire a J.D. not as a vocational designation but as intervocational enhancement. And today’s tightening job markets have required many law school graduates to branch out into other professional communities.

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3 This paper was originally prepared for the 1996 Legal Writing Institute Conference, held in Seattle, Washington.
with other kinds of writing. In light of this situation, the student's goal should be to learn how to build on previous experience and to develop and draw on a repertoire of writing strategies—in short to become a professional writer who can adapt to each new writing situation by attending to rhetorical considerations such as audience, purpose and context. This idea of building on previous experience as a writer appeals to student writers because they feel their previous education counts for something. It is also one widely recognized by education experts as the way humans learn—not by "forgetting everything you learned about writing in college" but by attaching new information onto old.

With this goal in mind—of helping to teach the transitions so that students learn how to make the transitions that will be required of them as professional writers—I will now discuss two ideas that come from our interdisciplinary overlaps with composition studies, practices associated with the process approach and the theory known as social construction. These ideas have influenced our ways of teaching legal writing. Taken separately they serve a limited purpose, but together they can help us teach students how to make transitions between different writing situations.

A. The Process Approach and Legal Writing

What we often call "the" process approach is actually a group of practices with different contributing influences, namely expressivist and cognitivist influences. I will not discuss these influences here; instead, I would like to articulate assumptions and practices that writing teachers seem to associate with "process" as a whole.

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6 Because I am talking here about practices associated with "process" overall and not distinguishing between its different theoretical influences, I will refer to it as "the process approach" rather than a single coherent theory.

TABLE 2- Beliefs Associated with the Process Approach

- Teachers should take individual student's writing backgrounds, histories, and abilities into account when teaching writing.

- Writing is a way of thinking and learning, not just a means of recording thought or testing students' abilities.

- Writers use writing at different times for different purposes and move from writer-based prose (writing used to explore and explain ideas to the self) to reader-based prose (writing used to communicate ideas to the reader). 8

- Writing should be taught with some attention to the process writers engage in, not just to the documents that are produced:

<table>
<thead>
<tr>
<th>Writer-based prose</th>
<th>Reader-based prose</th>
</tr>
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<tbody>
<tr>
<td>Prewriting</td>
<td>Drafting</td>
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</table>

- Students' best writing comes from topics students are interested in.

- Students' best writing contains a strong sense of individual voice.

- Writing is collaborative--not a competitive--act.

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9Here I have charted some familiar stages of the writing process together with a reader-based/writer-continuum. For more discussion of the different aspects of this chart as they developed over time, see id. (for of reader and writer-based prose); and Flower and Hayes, Problem-Solving Strategies and the Writing Process, 39 C. Eng. 269 (1977)(for an early discussion of stages in the writing process).
As this summary suggests, process pedagogy focuses on the individual student writer and not just on the paper that student produced; promotes some attention to the creative self and to strategies for invention, not just to correcting papers; and values writing as a mode of learning and not just as a means of testing students. In fact, as James Marshall points out in his article "Of What Does Skill in Writing Really Consist?" teaching the process has always been defined in reaction to something else—namely, to teaching traditionally, teaching the product. Teachers who adopted this pedagogical stance had what Marshall calls "attitude"—a critical attitude toward traditional education, a sense of themselves as outsider "Davids" critiquing the "Goliath" of well-established institutions. This deliberately chosen and political stance not only gave writing teachers a way to talk about this slippery thing called writing, but also a slogan to rally around, a way to critique traditional education and to focus on students in a very teacher-centered environment, where students traditionally had little power, little say. However, process practitioners have now moved inside the very institutions they once attacked and thus must re-think goals and strategies if they are to continue allying themselves with process idea(l)s.

The parallels between what process pedagogy gave composition teachers and what it has given teachers in our own profession are striking. Process pedagogy has played a significant role in our own professionalizing. For example, it seems no small coincidence that the influence of process theories of composing can be traced to the Legal Writing Institute’s first biennial conference in 1984. Presentations on process practices were present at that first conference and have become a "common feature" of Legal Writing Institute conferences since. I would argue that process practices helped play an important role in Institute members’ efforts to organize and cohere as a professional group and to find a more comfortable and productive place in the


11 Id. at 51.

12 Id.


14 Id. at 53.
classroom. Process techniques helped legal writing teachers resist the narrow definition of writing as testing associated
with the current-traditional paradigm. Teaching the "process, not just the product" allowed legal writing teachers to discuss invention,
collaboration, writing as learning and so to escape some of the brutality of the rigid, hierarchical world of traditional law school
teaching. Embracing process pedagogies allowed legal writing teachers to organize and tap into the energy of the institutional
outsider, using it to indirectly and sometimes directly critique the system of legal education by promoting attention to students
who traditionally received very little attention.

However, the role of the legal writing teacher within the system of legal education is also changing. Like the writing
teachers Marshall describes, we are also (however slowly this may seem to be happening) becoming more a part of the system,
more institutional insiders. Although recent scholarship\textsuperscript{15} explores problems associated with the tenure tracking of legal
writing professionals, that legal writing professionals are writing about tenure-track issues at all shows remarkable ground
has been gained. Legal writing teachers have brought process into our texts and our teachings. What happens to an outsider pedagogy when it gets institutionalized? Is it taken for granted? Does it simply replace other rote teaching?

More and more of our texts discuss THE process approach and incorporate it into their chapters and our classrooms.\textsuperscript{16}
Sometimes it almost seems as though we are saying, "Come on, we're going to focus on the individual writer's process, but we're all going to do it the same way and here are the standard stages of the writing process." It would be ironic if practices that once gave students more power as individuals should turn into something once more mass produced in the classroom.

For more than a decade, composition scholars have begun to ask questions about process practices.\textsuperscript{17} If legal writing professionals are to continue using these practices successfully, we must ask questions of such pedagogical practices as well—questions that keep such practices vital and prevent them from

\textsuperscript{15} Jan M. Levine, \textit{Voices in the Wilderness: Tenured and Tenure-Track Directors and Teachers in Legal Research and Writing Programs}, 45 J. LEGAL EDUC. 530(1995).

\textsuperscript{16} For example, Linda Edward's new text \textit{LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION} (1996) makes explicit its "process" influence in the title.

\textsuperscript{17} For an excellent discussion of a 1992 conference that reviewed the process movement, see \textit{TAKING STOCK: THE WRITING PROCESS MOVEMENT IN THE '90s} (Lad Tobin & Thomas Newkirk eds. 1994).
merely substituting for other "traditional" ways of teaching writing. We must also consider how well we have adapted process practices to a law school setting. Have we fully taken into account the institutional influences of law school on such practices? Looking at the earlier list of beliefs associated with process, one can see how process tenets become more problematic, less adaptable to a law school setting the further down the list one goes. How often do law students get to select their topics; how often do we discuss "voice" beyond active and passive? After all, law school is still predominantly product-centered and teacher-centered, more competitive than collaborative. Recent Internet discussions about the difficulties involved in grading collaboratively produced writing should not be surprising, then, since these teaching methods were developed in college classes where they would be graded holistically. How can we adapt potentially useful practices so that they will work in law school classrooms, despite their differences from the college classrooms where the practices developed? Is it possible to adapt student-centered practices while still maintaining a powerful position in the legal education environment that still does not value student-centered teaching? How might an unsupportive institutional environment threaten to "warp" such transplanted teaching methods?18

Or how might teaching THE writing process as what Anne Ruggles Gere has called an uninspected "lockstep"19 formula erase the individuality we set out to recognize and protect using process pedagogies? More specifically, how might teaching THE writing process as a series of universal stages through which all writers pass rather than as a highly fictionalized, albeit useful, concept blind us to considerations of how factors such as race, gender and culture affect such processes for different writers?20 When does this useful fiction of "the" writing process break down in the face of what real writers actually do in a variety of real writing situations; how might teaching such stages as an uninspected ritual actually impede rather than help students?

18 For example, given the surrounding legal educational environment that does tend to "put down" students, it would be easy to follow suit; we must guard against letting such influences subvert sound process practices—for example, discussing student writing in class in any way that might embarrass students.

19 Anne Ruggles Gere, Narratives of Composition Studies, 3 LEGAL WRITING 51,52 (1997).

20 See Tobin & Newkirk, supra note 17, p.10.
For example, Flowers and Hayes' ideas about writing as problem solving and their suggested heuristics by which writers can more easily move from reader-based to writer-based prose can help legal writing teachers illustrate how students might short-circuit their drafts with a too-early emphasis on creating reader-pleasing, polished prose. This generalized fiction of the writing process, however, may not assist in teaching non-traditional students or the growing population of ESL students because it does not take into account their writing process or their writing goals. After all, the reader-based/writer-based prose chart assumes that the writer's goal is always to move toward the clarity of the reader-friendly prose that we value in our very Western, very writer-responsible culture. But some Asian cultures are "reader-responsible" cultures. Teaching clarity as a universal value or presenting writer-based prose as the "natural" destination of the universal writer may create additional hurdles for some students. After all, some cultures consider this directness insulting; as one ESL teacher explained to me, "It's like starting with the punch line and then going back and telling the joke." How should our increasing knowledge about other cultures and their writing values affect how we teach the four stages of the writing process and how responsible the student feels to "spell things out clearly and concisely" as she moves to the "reader-based prose" side of the writing process equation?

Or how might the influence of another culture's organizational patterns affect ESL students' writing processes? Fan Shen, a Chinese graduate student who has researched the cul-

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21 See the reader/writer continuum in Table 2; see also Linda S. Flower and John R. Hayes, Problem-Solving Strategies and the Writing Process, in RHETORIC AND COMPOSITION: A SOURCE BOOK FOR TEACHERS AND WRITERS 269 (Richard Graves ed. 1984).

22 It is interesting to note how quickly the authors' idea of stages as heuristics were converted into standardized stages of "the" writing process despite the authors' emphasis that the stages are not discrete and the process as a whole is not linear. See id. at 281.

23 For example, Sherrie Gradin raises interesting questions about how socially constructed gender influences might affect different writers depending on their level of comfort with models of writing based on combative metaphors such as "attacking" and "defending"—metaphors on which we rely to teach persuasive writing. See Sherrie Gradin, ROMANCING RHETORICS: SOCIAL EXPRESSIVIST PERSPECTIVES ON THE TEACHING OF WRITING 129-130 (1995).


25 This insight was shared with me in a conversation with Debra Parker, a fellow writing advisor at The John Marshall Law School.

26 See Gradin, supra note 23, at 151.
tural nature of writing, explains how the idea of a “point-first” topic sentence runs counter to the Chinese “bush-clearing” pattern in which the writer “clears the surrounding bushes before attacking the real target.” The Chinese bush clearing pattern is a two-thousand-year old organizational pattern that directly opposes IRAC’s point-first organization structure. Although we need not abandon values such as clarity or organizational tools such as IRAC, we must consider how our students’ previous writing backgrounds will influence their writing in order to help such students learn to adapt to “the way we do things here.”

Finally, when considering how best to discuss writing processes with our students, we will need to address the “wild-card” of technology. What impact will composing on a computer have on a student’s draft? What effect will revising without a finished product? One new legal writing text recommends that students “compose with a word processor,” citing reasons of ease and efficiency. Although this recommendation makes sense for many writers, it leaves out those of us whose necessary composing process includes scribbling on napkins, or composing on a Dictaphone while driving. We must continually question the methods with which we teach, making sure that they take into account changes in our classrooms and in our student populations.

B. Social Construction and Legal Writing

Some of these questions about how a person’s writing process may be influenced by social factors are addressed by social construction. As a writing theory, social construction is newer and less codified than process pedagogies, but its roots are equally complex, with a host of influences as diverse as Marxism and Poststructuralism. Social construction developed in the composition world as a critique of, if not an attack on, practices associated with the process approach. I also see it as a

27 *Id.*
28 Although I can find no research to support this impression, one potential drawback of “composing on screen” seems to be a lack of what students call “flow.” Students’ computer written drafts often tend to be coherent in screen-sized chunks rather than organized in a more global sense.
29 Edwards, supra note 16, at xxii.
30 It also may not take into account some students’ economic realities—and if not, could intimidate a student who fears he or she is not “doing it right.”
31 Faigley, supra note 7.
32 Scholars in the composition world have tended to pit “process” ideas against those
more "elite" theory coinciding with the professionalizing of composition theory as a discipline with an increasing level of status and power in College English departments, and one which seems to exacerbate the unfortunate "teachers" versus "researchers" polarization.

TABLE 3- Beliefs Associated with Social Construction

- Writers write within and are influenced by the sometimes unarticulated rules of the discourse communities they enter.
- Many problems students encounter are temporary and arise because students are confused about (or lack of knowledge about) the new rules and conventions of an unfamiliar discourse community.
- Expertise in writing per se is a myth; expertise exists within and in relation to a particular discourse community and what that community values.
- Writers are "written" by culture and context; writers making "individual" choices is a myth.
- Individual voice is a myth.
- Students best learn to write within a new discourse community by critiquing and reading "skeptically" texts produced within that community in order to see how each writer is written by culture and context.

associated with social construction, as evidenced by the widely publicized and now published debates between Peter Elbow and David Bartholomae. See Writing with Teachers: A Conversation with Peter Elbow, 46 C. COMPOSITION & COMM. 62 (1995).

See Carol Berkenkotter's Paradigm Debates, Turf Wars, and the Conduct of Sociocognitive Inquiry in Composition, 42 C. COMPOSITION & COMM. 151 (1991)(provides an interesting reminder of how scholarly production and theory making is tied to professional self-interest).

One of social construction's chief contributions is that it reminds those attracted to THE process approach that writing does not occur in a vacuum but flows from and always exists within human-made discourse communities where that writing makes sense and has value. Thus, the social constructionist questions the idea of ONE process able to accommodate the activities of the many writing communities populated by a multitude of many writers performing a variety of different writing tasks.

Instead of a focus on the individual learner/writer, this theory emphasizes the context within which a writer writes, and even suggests, in its most extreme formulation, that the individual is "written" by culture and by context, that the "individual" writer does not exist because such writers are always a part of a larger WE that exerts a powerful influence on "individual" choices. Such an idea serves as a helpful check on the idea of the individual creator as completely autonomous agent, in control of and responsible for his or her process OR product (which is often how students are judged and ranked in law school). Social construction can help us understand how experienced writers who have done well in other discourse communities can be so terribly disconcerted when they shift into the discourse community of legal writing with its new rules, conventions, purposes, and audiences.

Finally, this theory also helps us (and all disciplines) remember with some humility that expertise itself is created by communities of individuals agreeing that something is valuable or works well and that patterns of deductive or inductive reasoning are created by humans and are not discovered Universal principles. It is easy to forget that the organizational tool IRAC, so pervasive in our legal writing world, is a human-made creation that has served us well as a group, that we have decided to endorse and pass along to our new members, but it is not, as the 2,000-year-old "bush-clearing pattern" example reminds us, the only or the most important way in the world to organize thinking.

However helpful social construction may be, it is not without its dangers. Because it incorporates so many influences and

35 The idea of a discourse community may be simply understood as a fancy way of saying "the way we do things here" within our discipline or, to use Patricia Bizzell's definition, "a group of people who share certain language-using practices." PATRICIA BIZZELL, ACADEMIC DISCOURSE AND CRITICAL CONSCIOUSNESS, 222 (1992).
ideas, social construction seems to hold some attraction for most teachers. In fact, Patricia Sullivan, reviewing several new books on social construction, calls it the "default theory of the 90's"—a kind of "Alice's restaurant" where writing teachers "can get anything we want." This theory requires real attention to the whole and could be very dangerous if taken up only in part. For example, what legal writing teachers might find particularly attractive is the social constructionist idea of legal writing as a discourse community—because accompanying this idea is the clear-cut professional role of expert initiators of novice students desiring to enter into this discourse community. Unfortunately, this genuinely benign position—helping students into the legal writing discourse community—is perilously close to what was emphasized in the "bad old days" of the current traditional paradigm. If we used the idea of discourse community unselfconsciously, it would be very easy to become "in-focused" on our concerns and on our increasingly specialized ways of doing things. After all, any idea of community can lose its inviting inclusive meaning and become more exclusive. Rituals of initiation can quickly become elaborate forms of hazing in a place where students have little power. Unlike many process practices, the idea of initiating students into a discourse community has ready-made alliances with the law school world, which you can hear in Kingsfield's phrase from The Paper Chase: "You arrive here with a head full of mush and you leave thinking like a lawyer." This quote captures the expert-novice divide, the initiation rituals that reinforce that divide, and the idea of fully realized, merely to-be-learned conventions.

An example of how easy it is to subvert a positive, inclusive sense of discourse community into a more exclusive and less friendly one is provided by Joseph Williams' article, "On the Maturing of Legal Writers." An influential piece that prepared the ground for the legal writing community's interest in ideas from social construction, the article focuses on the socialization of new legal writers and attempts to explain their "seeming incom-

37 Gere, supra note 19, at 52.
38 In fact, increasing specialization is one of the six criteria that applied linguist John Swales suggests should determine whether a "given social group is a discourse community." John Swales, Approaching the Concept of Discourse Community, quoted by BIZZELL, supra note 35, at 226.
petence” at legal writing as more a matter of unfamiliarity with expert legal writers’ ways of doing things than a result of declining literacy skills in the United States. Williams does acknowledge expertise, briefly, as a social construct; however, the article, if not read carefully, could do more to introduce the term “discourse community” as a potentially detachable concept, and less to invite the legal writing community to self-consciously analyze and reconsider the ways in which the group uses language to construct knowledge and “expertise.” An inadvertent emphasis on “social[ization]” without a balancing emphasis on “construction” could have damaging consequences.

Although the article suggests reenvisioning the student-teacher relationship by dismantling the power structure of teacher-on-the-mount, Williams’ reimagined visual metaphor is still limiting since it relies on and reinforces the insider/outsider distinction. In Williams’ picture, this discourse community has a rigid, if not impermeable rind and one narrow opening, and its us/Them division suggests the exclusivity of the inner community. Here the desired action is one way: in. Although Williams acknowledges that “we are all novices in some communities and experts in others,” it is not clear from this image how or if the constant traffic of students/experts brings any change to the legal writing discourse community. The limit of this image in social constructionist terms is that it cannot accommodate the possibility of enriching overlaps and intersections of previous experience or expertise that help keep a discourse community alive and healthy. Finally, envisioning “us” as a detachable discourse community taken out of an institutional context tempts us to ignore what social construction asks us to recall: that discourse communities are built and maintained by power structures.

Without that important background information in mind, the benign role of “initiating students into our discourse community” could begin to sound more ominous and more hierarchical—aren’t experts always “higher” than novices? The phrase (with its expert initiators and novice students) sounds painfully

40 Id. at 15.
41 Id. at 13.
42 Williams’ image, meant to replace the hierarchical model of teacher on the mount with students struggling up the slope of knowledge with an expert-teachers “us” inside a circle and a novice-students “them” outside trying to get in, looks very similar to the “us/Them” image above in Table 1.
43 Id. at 31.
like hazing new law students. As Faigley reminds us, “the learning of literacy as a social activity within a specific community will not necessarily lead to desirable ends” since “consensus often leads to oppression.”44 Many of our students are professionals with distinguished backgrounds and significant levels of expertise in other discourse communities and other professional communities. It is hard to be considered a novice when one is otherwise an expert for eight hours of the day, hard not to have a chance to draw on that source of experience or self-respect. We cannot simply mention in passing that students come to legal writing with their own expertise, and then treat this expertise as a stumbling block, an explanation for students’ incompetence at and discomfort with legal writing. To do so not only frustrates students but it ignores a real possibility: students as potential agents for review and possible reform of legal writing conventions.45

If we don’t balance looking at “the way we do things here” with some attention to the way others do things there, our discipline’s growth—accelerated by our idea exchanges with other academic disciplines like composition or educational psychology—might slow or stall. If we become isolated from a flow of new ideas, ideas to which students can also contribute, then we incur the risk of becoming a hermetically sealed world,46 caring only about preserving THE WAY WE DO THINGS, a discrete and never-changing body of knowledge students must “master.” Teachers would again be gatekeepers of information, and it would be difficult to really see the difference from where we started with a traditional emphasis on product. We must take constant care, then, that phrases like “initiating our students into our discourse community” don’t become detachable concepts, more familiar to us than the whole theory in which they

44 Faigley, supra note 7 at 539.
45 Charles Bazerman, for example, reminds us that although disciplinary teachings may ignore the context within which they are located, pretending to be “methodologically pure and intellectually isolatable from the messy complexity of the world,” this act may be seen merely as a rhetorical move of the “group who has gained the upper hand and is attempting to establish rules that purvey its position.” See Charles Bazerman, Constructing Experience, 75 (1994).
46 At a 1995 AALS colloquium on narrative, James Elkins suggested that the legal writing community appeared to outsiders as an awesome edifice that one could enter but never leave—an image that we do not, in my opinion, currently deserve but one that we should certainly take care to avoid. For the subsequent article in which he discusses ideas raised in the speech, see James R. Elkins, What Kind of Story is Legal Writing? 20 Legal Studies Forum 95,109(1996).
are rooted. The idea of a discourse community cannot be detached from the whole theory of social construction that reminds us how discourse communities are constructed and situated.

It is interesting that this theory of social construction is becoming attractive to us and more a part of our disciplinary conversation as we enter into what I think of as "professionalizing: part two." In this second stage of development, we legal writing professionals no longer feel insecure about the legitimacy of legal writing's status as a discipline. After all, this year's conference theme is "What Can We Learn from Other Disciplines?," a question that confidently assumes we are one. We now face other questions: What kind of a discipline will we be and how will we fit within the institution of legal education—serving whose interests?

It is interesting, too, that Williams' piece, which claims legal writing as a discourse community, appears in the inaugural issue of the Legal Writing Institute's journal, as the existence of such forums is one of the hallmarks of a discourse community. As we struggle for disciplinary status with non-legal writing colleagues, it makes sense that we might be attracted to a theory like social construction that sounds prestigious and that keeps the power and influence within the discipline, while process practices, which share that power with students, might become less so. It is worth considering why we as a group might be attracted to any given theory at any given time and how our political struggles might influence our theoretical choices as a group.

II. Process and Social Construction Ideas in Dialectic

Approaches from process pedagogy can help us avoid the fate of what I've been calling the detachable discourse community. Talking and thinking with our students, as process practices have always encouraged us to do, will help us value our students' previous expertise in other languages and other discourse communities. Then we will recall that our here is balanced against and overlaps many theres. Our students can help us discover new truths about the interplay between the individual and the community, and remind us how even the most

47 See James F. Stratman, The Emergence of Legal Composition as a Field of Inquiry, Evaluating the Prospects, 60 Rev. Educ. Res. 153, 154 (1990). Only six years ago, Stratman urged readers that legal writing "should be given distinct disciplinary status."

48 Bizzell, supra note 35, at 222.

49 I am grateful to Anne Enquist whose conversation helped clarify this idea.
traditional of communities can change with the influence of its new members even as that community exerts an influence on those students.

Such interplay is bound to cause friction and conflict, both for the community and the student writer entering the community. I believe in a healthy amount of conflict: I expect student learners to feel discomfort as they encounter new ways of doing things. But teachers should not ignore this discomfort, or consider students who are uncomfortable with different conventions as somehow backward. We must become learners ourselves and allow ourselves the discomfort of viewing our conventions through new eyes.

Then we could guide a conversation in which we consider with students the following kinds of questions: When does a convention set up what Elaine Maimom\textsuperscript{50} calls a “useful expectation” in the mind of a reader and so serve a genuine communicative purpose? When are we inflicting conventions on students merely because we had to do it that way? Listening to students’ voices and hearing their different world views helps us recall the different ways of reading and writing in the world, so we don’t succumb to tunnel vision. These voices, after all, contain the same healthy skepticism once associate with the Plain English movement, a movement that challenged calcified aspects of legal language and demanded clear communication.

Putting process practices and social constructionist theories into a dialectic—one reminding us of the individual in the community, the other reminding us that communities are comprised of individuals—can help us keep the balance and best serve our students.

III. WRITING ACROSS THE CURRICULUM IDEAS AS PROPOSED DIALECTIC—AND A SOURCE OF TEACHING THE TRANSITION

The following chart illustrates how much would be lost by setting ideas associated with “process” and social construction in opposition. To me, neither paradigm seems complete without the other, but taken together they prompt the kinds of questions that as a group of teachers we should consider: How are each learner’s choices and writing processes shaped by his or her culture/context/task? What impact has each student learner’s educational history had on that student’s introduction to this new

\textsuperscript{50} Elaine Maimom, Provost at Arizona State University West, in conversation.
way of writing? How can legal writing be both an individual action AND a social interaction? Finally, how does each writer take “independent journeys of the mind” 51 within disciplinary constraints; what unique solutions does any given human come up with in the face of joint projects?

### TABLE 4: “Process” and Social Construction Set in Opposition

<table>
<thead>
<tr>
<th>The Process Approach</th>
<th>The Social View</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student centered</td>
<td>Norm centered</td>
</tr>
<tr>
<td>Emphasis on individual style</td>
<td>Emphasis on discourse community</td>
</tr>
<tr>
<td>Judgment of writing suspended</td>
<td>Writing judged in accordance with community norms</td>
</tr>
<tr>
<td>Ideal of form as organic</td>
<td>Form dictated by community</td>
</tr>
<tr>
<td>Interest in process of individual learner</td>
<td>Interest in how learners’ products are shaped by culture and context</td>
</tr>
<tr>
<td>Writer-based, creative focus</td>
<td>Reader-based, critical focus</td>
</tr>
<tr>
<td>Writing as individual action</td>
<td>Writing as social act</td>
</tr>
<tr>
<td>Individual differences celebrated</td>
<td>Common influences examined</td>
</tr>
</tbody>
</table>

Both process practices and ideas from social construction have much to offer the legal writing community, and a considered balance between these two is possible. The Writing Across the Curriculum movement (WAC), long noted for its ecumenical nature, contains many insights about achieving such a balance. The WAC movement has already tried to “embrace the contraries,” to use Peter Elbow’s phrase, involved in responsibly using information from both process-based pedagogy and social construction. Specifically, WAC has toned down what Jones and Comprone call its “missionary zeal” 52 for transplanting expres-

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52 Robert Jones & Joseph S. Comprone, Where Do We Go Next in Writing Across the Curriculum, 44 C. Composition & Comm. 59, 64 (1993).
sivist process practices, tempering it with a social perspective that acknowledges a sensitivity for the discourse community into which writing techniques and theories are to be transplanted. Because of its interdisciplinary nature, WAC offers insights into teaching the transitions. By acknowledging that there are multiple discourse communities and that people move among them, WAC challenges the idea that disciplines are static, independently bounded repositories of knowledge, replacing it with the idea that disciplines are dynamic communities that constantly grow and change with changes in their membership. It is students moving across curriculums, in and out of disciplines, that keep these communities alive.

This recognition of interconnectedness encourages members of different disciplines to respect one another and to treat students transitioning more respectfully. To teach the transitions, we need to mean it when we say that we value what students bring as new members of any discourse community, even while introducing them to the new community's conventions. Acknowledging and respecting the logic and diversity of conventions belonging to various educational communities is an opportunity to constantly live the examined life, to recall why we do the things we do, and to change conventions that have outlived their usefulness. Take, for example, Mellinkoff's explanation of lawyering doubling—redundant phrases like "cease and desist." Once serving a genuine communicative purpose by including synonyms from two different languages to best address potential listeners, the phrase has long since outlived that purpose and has been targeted as repetitive by the Plain English movement.

People who are ensconced in their own discourse communities lack what Maimon calls a "sense of intellectual tact." a perspective on and appreciation for a variety of educational approaches. For example, if legal writing teachers treat their students more like ambassadors from other disciplines, rather than lifelong recruits, we will be more polite about introducing them to how "we do things here." Students can remind us of the need for intellectual manners in an increasingly interdisciplinary world.

Curriculum, 44 C. COMPOSITION & COMM. 59, 64 (1993).

Teaching the transitions between different writing situations requires writing teachers to keep three questions in mind at once: 1) Where are students coming from—what experiences have students had in other discourse communities or other cultures? 2) Where may students be going next as writers, and how can we can teach in a way that will help them make those future transitions from class to class or discipline to discipline? 3) What must we convey to them about the new conventions, rules, and reasons for those in our own writing community?

Teaching the transitions requires something more complicated than simply “initiating students into our discourse community,” as a quick reading of social construction might seem to suggest. It means we have an opportunity to introduce students to our community and its ways while encouraging them to reflect on and more deeply understand the other writing communities to which they also belong, and how to manage moves into other, future discourse communities and writing situations.

In my own work, teaching the transitions has meant providing a series of “traumatic transitions” workshops in which I highlight the differences in the rhetorical situations students move among. Juxtaposing writing communities (for example, legal writing and college writing) or writing courses (objective writing and persuasive writing), I try to illuminate the otherwise hidden logic and connections between conventions, discourse communities and institutions. Explaining the logic that underlies the differences students experience helps keep them saner and less cynical. I envision my role as that of an interlocutor, one standing deliberately in the intersections of writing courses or communities. This role of teachers as interlocutors allows us to teach one another—and our students—more. As interlocutors, we would focus less on surface differences and more on common communicative purposes.

Interlocutors can encourage students to articulate a practical knowledge of differing academic discourses. The more clearly we interlocutors see these differences and connections, the more easily we can help our students become sensitive to them, more able to cope. This heightened interdisciplinary awareness helps us develop with our students what I have heard John Trimbur call a “rhetoric of dissensus”—the language and analytical tools students can use to anticipate and negotiate conflicts and transitions between writing situations.
Teaching the transitions is a way of keeping the borders open between disciplines, letting the intersections be particularly productive places of learning. A guiding metaphor for me is the idea of welcome stations across state lines. If it is too much to ask for free cocoa in such places, at least we can provide traveling students with a large and reader-friendly map and an arrow indicating YOU ARE HERE.
Representing Non-Mainstream Clients to Mainstream Judges: A Challenge of Persuasion

Diana Pratt

In 1948, Prosser delivered an address at Temple University Law School on the two roles he had had in his career: a professor trying to teach law students to think critically and a dean trying to select from a pool of eminently qualified young men those who would become good law professors. In both regards, he quoted the following attributed to a Native American living in the Pacific Northwest:

Lighthouse, him no good for fog. Lighthouse, him whistle, him blow, him ring bell, him flash light, him raise hell; but fog come in just the same.

Prosser's quotation illustrates two things. First, it shows the 'me Tonto, him Lone Ranger' stereotype used to portray Native Americans in 1948, a stereotype that still persists, albeit in a somewhat less blatant form. Second, it illustrates that different theories and interpretations can develop from the same observation.

The Prosser anecdote highlights both the problem and the challenge facing those who would advocate on behalf of non-mainstream clients. The problem is straightforward: how to overcome unconscious bias. The challenge is more interesting: how to persuade a mainstream court to consider the facts from a different perspective.

Despite progress in making the judiciary more reflective of society in general, the vast majority of judges are still white, middle-income, middle-aged, middle-class males. As of September 1, 1996, the 837 Article III judges included the following: 542 white men, 118 white women, 55 African-American men, 16 African-American women, 30 Hispanic-American men, 8 His-

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1 Director, Legal Research and Writing Program, Wayne State University Law School. The author would like to thank the editors, Rebecca White Berch, Anne Enquist, Louis Sirico, and Kristin Woolever, for their insightful comments.

panic-American women, 6 Asian-American men, and 2 Native-American men. Asian-American and Native-American women did not sit as Article III judges. Expressed as percentages, the judges were 81.7% male and 18.3% female; 84.9% white, 9.1% African-American, 4.9% Hispanic-American, 0.08% Asian-American, and 0.02% Native-American. These figures are not surprising. It was not until the 1970s that women or members of minority groups started attending law schools in significant numbers.

By citing these numbers I do not intend to imply that white, middle-aged, middle-income, middle-class males are necessarily biased or do not attempt to understand the perspectives and issues that come before them. Their default positions, however, reflect their universe.

A simple example illustrates the point. Some years ago, I represented a sixteen-year-old mother who was accused of neglecting her six-month-old son. After a brief in camera hearing in juvenile court, the judge found neglect, took jurisdiction of the son, and placed him in foster care. The mother, who was under the jurisdiction of a juvenile court in a different county because of her own mother's earlier neglect, was sent to a juvenile home in that county. Three years later, we returned to the original juvenile court for a review hearing. The mother, now nineteen, lived in a small apartment with her son and supported the family on a grant from Aid to Families with Dependent Children (AFDC). As was the custom at the time, the judge invited the attorneys and the social worker in charge of the case into his office for a prehearing review of the case. By all accounts, the young woman had become a good mother to her son, and the boy was obviously attached to his mother. The judge, however, indicated he was inclined to continue the jurisdiction of the court, because the woman was living on AFDC, she did not have a high school diploma or a Graduate Equivalent Degree (GED), and she did not have a job. When we went into the courtroom, I explained that we had a success story and filled in a few details. Then I moved to dismiss the jurisdiction of the court. The judge turned to opposing counsel expecting the litany of no job, no high school diploma, no GED, and living on AFDC. Instead, opposing counsel said 'no objection.' The judge turned to the overworked social worker, who also said 'no objection.' My

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3 Statistics were provided by the Alliance for Justice, 2000 P Street N.W., Washington, D.C. 20036.
client prevailed because my motion was unopposed, but not because I had persuaded the judge to look at the case from other than his default perspective.

The challenge in persuading judges is to discover what will convince them to adopt a position other than their default perspective. Judges claim that a well-written argument will persuade them. The current investigation began with the assumption that judges’ opinions would reflect the arguments they found persuasive. If the assumption is correct, comparing the briefs filed in the cases with the opinions rendered should yield some insights into what persuades judges to substitute non-mainstream views for mainstream default perspectives.

This method does not create a perfect laboratory; the experimental system has some limitations. Some judges may already be attuned to non-mainstream perspectives, and the arguments presented may not be decisive to the outcome. In addition, the appellate process involves more than a pure colloquy between advocates and the bench; law clerks play an increasingly important role. The complexity of the issues in many non-mainstream cases may obscure decisions based on mainstream views. Although I could not control the first two problems, I have tried to minimize the third problem by choosing cases in which the deciding factor is the mainstream/non-mainstream perspective: Native-American rights to the free exercise of religion and child custody disputes involving lesbian mothers. In both areas, I studied cases in which both the mainstream and the non-mainstream views prevailed.

Although the investigation focused on the briefs and subsequent opinions, the results indicate that more than a skillfully crafted brief is required to persuade judges to view a case from other than their default, mainstream perspective. The opinions suggest that success begins in the trial court with expert testimony designed to educate the bench about non-mainstream practices and beliefs. Expert witnesses are necessary both because of their credibility with the mainstream audience and for their ability to translate non-mainstream practices into mainstream terms by specific analogy to mainstream practices. This education process must continue at all levels of court; a stipulation or concession by the opposition can sabotage a non-mainstream case if the concession prevents the advocate from educat-

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The appellate court. Successful advocacy also requires a theory of the case that highlights the similarities of the non-mainstream client to the mainstream world and minimizes the differences. As with other persuasive endeavors, tone is critical to the outcome; a record and a brief that do not treat the client’s views with respect will not engender respect in the appellate court. Ultimately, you will persuade a mainstream court to decide in favor of your non-mainstream client if the record and your brief prove to the judges that they share with your client values important to the issue(s) on appeal.

I. NATIVE-AMERICAN FREE EXERCISE OF RELIGION CASES

The Native American Free Exercise Clause cases involve a straightforward balancing test and religious beliefs that at least superficially differ from mainstream religious beliefs. Under the Free Exercise Clause, clients must prove that they adhere to a religion, that they acted in accordance with their religion, and that their religious beliefs are sincere. If they successfully establishes all three parts, the court then balances the religious conduct against the competing state interest. For the non-mainstream clients to prevail, they must tip the balance in favor of their religion, their religious conduct, and the sincerity of their beliefs. If they fail to make a strong case on the three parts of the test, the state interest will prevail even in cases with a weak state interest. The cases that follow illustrate successful and non-successful persuasive efforts.

A. Is Fresh Moose Meat Necessary for a Funeral Potlatch?

Frank v. Alaska,\(^5\) decided in 1979 by the Supreme Court of Alaska, presents relatively simple facts. In the winter of 1975, an Athabascan native died. Following the custom in Central Alaskan Athabascan villages, the friends and family assembled to hold a funeral potlatch, a ceremony of several days’ duration ending with the burial of the deceased and a feast during which those assembled celebrated the life of the deceased. Moose meat was important to the feast. The hunting season was closed in that part of Alaska, and the hunting of cow moose had been prohibited that year even during hunting season. However, Carlos Frank and twenty or thirty others went hunting to get the moose meat for the funeral potlatch. The following day, Mr.

Frank was arrested for transporting a cow moose killed out of season. He was convicted and "sentenced to forty-five days in jail with thirty days suspended and fined five hundred dollars with two hundred and fifty of that fine suspended as was his hunting license." He appealed to Superior Court, the upper level trial court and then to the Supreme Court of Alaska.

Mr. Frank's attorneys went to considerable effort to prepare the case on their client's behalf. They hired anthropologists, commissioned an anthropological study of the town, had the study validated, flew throughout the Yukon River area to find native people to testify, and took videotaped depositions from native leaders. This effort and the way Mr. Frank's attorneys presented the case in the trial and appellate briefs ultimately succeeded.

His lawyers used narrative techniques of personification and shifting perspective in their briefs to place the events surrounding Carlos Frank's arrest in their cultural and religious context. To demonstrate the difference between the mainstream view and the Athabascan view, Mr. Frank's attorneys described the events from the mainstream perspective using the trial testimony of the officer who arrested Mr. Frank:

I . . . contacted Mr. Frank, asked him if I could speak to him, and he said yes. We went inside what I understand to be his uncle's house, and I advised him of his rights, and then told him of the incident at 91.5 Mile Elliot, and asked him if he knew anything of it, and where he had been yesterday. And he said he had been transporting the moose meat.

From the mainstream perspective, already something does not make sense; a defendant, once advised of his rights, does not usually confess to the crime. The officer continued with his description of the event:

There was quite a few people that started arriving at this time, and I had — a lot of volunteers were all coming forward and saying that they had shot at it or had helped transport it, or had been hunting for moose. It was getting

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8 Brief of Carlos Frank in the District Court for the State of Alaska, at 3.
to be quite an interesting situation.\textsuperscript{9}

The authors used the officer as the personification of the mainstream view. They characterized him further as a Wildlife Protection Officer, a representative of the government of Alaska and the United States, and as a Caucasian. This shift from the specific individual to a general representative of the mainstream view serves as an introduction to the parallel, but not overlapping, histories of the Athabascan and Caucasian settlements of Alaska and their cultures and religions. The authors explained with specificity what the officer did not understand about Athabascan religion and why the Athabascans did not understand the officer's perspective and, more generally, they explained the cultural gap between Caucasian and Athabascan worlds. The historical section ended as follows:

Finally, in 1955 with no Athabascans present, Alaska held a Constitutional Convention in College, Alaska, one hundred thirty miles north of a settlement over ten thousand years old. The convention set in motion the machinery which brought Officer Binschus to Minto. Alaska became a state and created and enforced game regulations . . .

What Officer Binschus found in Minto was more than an 'interesting situation.' It was the practice of a religion by people who lived upon the very land where he made his arrest thousands of years before he or his ancestors or his laws arrived. The religion of those people predates his Christ by three times the number of years his Christianity has existed. But the Athabascan Indians are now citizens of the State of Alaska and the United States of America, whether they wished it or not, and it is to the Constitutions of both that they now turn for the protection of rights more ancient than the concept of time can convey.\textsuperscript{10}

Frank's attorneys used the extensive anthropological testimony both to explain Athabascan religious beliefs and practices and to demonstrate the parallels to mainstream practices. The parallelism is enhanced by the equally serious tone used to describe the history of both cultures. The following rather lengthy passage from the supreme court's opinion illustrates their success in educating the court.

\textsuperscript{9} Id. (emphasis added).
\textsuperscript{10} Id. at 11.
Athabascan culture is highly individualized. From a complex belief system individual selection is tolerated and is the norm. Yet, there is a distinct belief system recognizable in Athabascan villages many miles apart. These beliefs have blended comfortably with Christianity, which was introduced in the 19th century.

Death is the life crisis receiving the greatest attention in current Athabascan culture. While it may be awaited with equanimity, it is an event of predominant significance, whose repercussions are long felt in the village.

The funeral potlatch is the most important institution in Athabascan life. It is mandatory. Peter John, seventy-six, a former tribal chief in Minto, could not remember a death that was not followed by a funeral potlatch. It is apparently an obscenity to suggest that possibility. While a potlatch may be held to celebrate secular occasions, the funeral potlatch is distinguished by its fundamentally sacred aspect. The ritual has its origins in antiquity and it has not changed in any important respect since anthropologists first began to describe it.

Food is the cornerstone of the ritual. From the moment the death is learned of, food preparation begins. People begin to arrive in the village from nearby and remote places. Food is brought by all participants to one or several houses associated with the deceased and is shared in several pre-burial meals. The body will not be buried until a sufficient quantity of the proper food is prepared for the post burial feast. In the case of Delnor Charlie this took four to five days.

Athabascans believe that the funeral potlatch is the last meal shared by the living with the deceased. It is a communion meal. The deceased is discussed and songs of eulogy are sung. The deceased is thought to partake of the meal and this helps his spirit on its journey.

The funeral potlatch serves other functions. The grief of the family is to be eased. The community becomes involved and the sharing of food is the communal tie. Prayers are said for the dead and the living. All who have come and contributed are thanked. It is hoped that the funeral potlatch and one that is to follow, often more than a year later, the memorial potlatch, will assuage the spirits and
prevent future deaths.\textsuperscript{11}

In this passage, the opinion incorporated the serious tone of the brief and the analogy between Athabascan and other religious practices. Athabascans, like their mainstream counterparts, come together as a community when one of their number dies. They celebrate the life of the deceased, they mark the passage between life and death, they ease the grief of the family, and they ensure the future of the community.

In considering whether moose meat was essential to the funeral potlatch, as the Athabascans contended, or not essential as the district and superior courts concluded, the court relied on anthropological testimony and a specific analogy to the wine and wafers necessary to a Roman Catholic communion service.

A. If a Roman Catholic priest were in some bush area up here and found himself without the proper wafers and wine, he could still perform his function with some substitute, but it wouldn't do in the sense—If at all possible to have the proper foods, that's what you would use.

Q. But nevertheless it could be accomplished?

A. I believe so. As a dire strait, in some unusual circumstances.\textsuperscript{12}

While neither wine and wafers nor fresh moose meat is essential in an absolute sense, Roman Catholics and Athabascans share a firm conviction that the proper foods are necessary. Once the court was persuaded of the analogy, it could find that moose meat was essential to a funeral potlatch.

As the Supreme Court of Alaska majority opinion indicates, Frank's lawyers persuaded the court by using four techniques. First, they explained the Athabascan religious beliefs in detail with extensive documentation; there were no naive reader problems in the exposition. Second, they made good use of expert, social science based testimony to validate the proofs; the anthropologists had credibility with the mainstream audience. Third, they used a serious and in some instances reverent tone that treated Mr. Frank and his community with dignity; because of the tone, the reader could not dismiss the facts as quaint native customs. Fourth, they drew analogies to mainstream religious practices and mainstream emotions.\textsuperscript{13}

\textsuperscript{11} Frank v. Alaska, 604 P.2d at 1072 (emphasis added).

\textsuperscript{12} Id. at 1072.

\textsuperscript{13} From the opinion, I was unable to assess whether the narrative techniques of per-
In the portion of the opinion that addresses the balancing test, the majority spent the most time discussing the religion itself, the funeral potlatch, and specifically the requirement for fresh moose meat. The court treated as given the sincerity of Frank’s beliefs. It spent relatively little time balancing the game laws of Alaska and the religious beliefs. Where only one Athabascan died in Minto in 1975 and only one moose was required for the funeral potlatch, the court concluded that the state had failed to meet its “burden of demonstrating a compelling state interest which justifies curtailing a religiously based practice.”

The decision was not unanimous. Despite the anthropological and other scientific data, the dissenting justice was unconvinced that fresh moose meat was essential and cited the absence of anthropological documentation.

The Alaska Supreme Court decided the case in 1979 using the “compelling state interest” standard. Although Frank’s burden of persuasion was considerable at the time, he was aided by this standard and the fact that the state interest seemed so trivial, the loss of one moose among many thousands. This case appears to represent the far end of the spectrum of what an advocate must do to persuade a majority to adopt a different world view. The resources and effort expended far exceed what is normally available; Frank’s lawyers, anthropologists, bush pilots, and fellow Athabascans all contributed to the endeavor. What was essential to persuading the Frank court? An analysis of other Native American free exercise cases provides some insight.

B. Do Prisoners in the Eighth Circuit Have the Right to Wear Long Hair?

A series of cases analyzes the rights of Native American prisoners to practice their religion while incarcerated. As in Frank, the courts apply the three part test to establish whether an inmate had the right to free exercise of religion. If an inmate succeeded in proving all three parts, the court then balanced the sonification and shifting perspective persuaded the court. In the Advanced Legal Writing course, I used excerpts from the briefs to encourage students to consider incorporating narrative techniques in their persuasive writing. Both the 1995 and the 1996 classes split evenly, finding the techniques either persuasive and effective or contrived and ineffective.

14 See Frank v. Alaska, 604 P.2d at 1074.
15 Id. at 1076 and n.1.
constitutional rights against the state's interest. Although the *Frank* court applied the "compelling state interest" standard to its determination, the United States Supreme Court in *Turner v. Safley* imposed the "rational relationship" standard for use in the prison setting.16 "[W]hen a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."17 The standard shift increased the burden for all inmates asserting a right to the free exercise of religion.

Primarily, the Native-American prisoners in these cases wanted two things: permission to wear their hair long and access to a sweat lodge for an Inipi ceremony, a religious ceremony of purification. In pre-*Turner* decisions, the results were mixed.18 In post-*Turner* decisions, the prisoners fared poorly.19

The Eighth Circuit is the best test forum because it has considered more Native-American inmate rights cases than the other circuits. After an early decision holding a hair length regulation unconstitutional under the free exercise clause of the First Amendment,20 it reversed course and consistently upheld prison grooming requirements despite articulate and analytically tight briefs written for the Native-American and similarly situated prisoners. Although the different results may be attributable to the dates of the decisions, pre- and post-*Turner*, the

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17 The Turner Court listed four factors for determining whether a regulation is reasonable: (1) "[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." (2) If the inmate has alternative means of exercising the right, the court should give some deference to the prison officials. (3) The court should also assess the impact the accommodation will have on the rest of the prison community, guards and prisoners. (4) If there are no ready alternatives to the regulation, that is evidence that the regulation is reasonable. Id. at 89-90.
19 The Sixth, Ninth, and Tenth Circuits all affirmed lower court decisions upholding hair length regulations. Pollock v. Marshall, 845 F.2d 656 (6th Cir. 1988); Escalanti v. Lewis, 935 F.2d 1013 (9th Cir. 1991); Hall v. Bellmon, 935 F.2d 1106 (10th Cir. 1991). The Tenth Circuit did remand one case, finding summary judgment inappropriate where there were material facts in dispute. Mosier v. Maynard, 937 F.2d 1521 (10th Cir. 1991).
20 Teterud v. Burns, 522 F.2d 357 (8th Cir. 1975).
opinions and briefs suggest otherwise. In Teterud,\textsuperscript{21} a pre-\textit{Turner} case, the court spent some time discussing the sincerity of Teterud’s religious beliefs and the importance to a Cree of wearing long braided hair. The court quoted the testimony of two anthropologists and a Native-American spiritual leader. Professor Thomas, a social anthropologist testified as follows:

Let’s put it this way. All of life, I think, to the Cree people, and I think the older Cree would say that when God created the Cree he gave him long hair and that is, you know, that is as it should be. That’s not something you have a reason for. You see, that is in the nature of the world that the Cree has long hair. Now, to not have long hair is unnatural for a Cree. So that for those Crees who I think are, you know, like the kind of put theirself into their religion, they will tend to grow their hair long.\textsuperscript{22}

Professor Holder testified:

The closest I can come to it is that your body is a gift from nature. This is your link. It is your link with the world, with the universe. . . . So the body has always been considered to be sacred.\textsuperscript{23}

And Wallace Black Elk testified:

The hair, like I say, we wear it natural. Everything relates just the way the Great Spirit created me. The spirit come and he talks to me. I talk to him.\textsuperscript{24}

The use of anthropological testimony and the explanation of Cree beliefs are analogous to the techniques used in \textit{Frank}.\textsuperscript{25} The evidence built a bridge between the Native-American experience and the judges’ world in the same way that the experts in \textit{Frank} analogized fresh moose meat for the funeral potlatch to the wine and wafers in a communion service. The following colloquy quoted in the court’s opinion illustrates the technique. Professor Thomas, a Cherokee as well as an anthropologist, was asked on cross examination why he wore his hair short.

Q. Would you, for the record, describe what your hair length is today?

\textsuperscript{21} Id.
\textsuperscript{22} Id. at 359, n. 4.
\textsuperscript{23} Id. at 360, n. 5.
\textsuperscript{24} Id. at 360, n. 6.
\textsuperscript{25} See \textit{supra} note 6 and accompanying text.
A. Just above my collar.
Q. So that if someone wants to continue with his religious beliefs as an Indian it is not necessarily dependent upon having long hair, is it?
A. Not dependent upon it, but it’s, you know, certainly - it’s not quite Kosher.
Q. Well, if you don’t-
A. If I might continue? I live in Detroit, Michigan, and if I do wear long hair they might drop a net over me, you know, or at least everybody would look at me and I’m not quite brave enough, to tell the truth, to grow long hair in Detroit, Michigan and put up with all the stares I would get.

Now, I would feel better as a religious Indian if indeed I have long hair.
Q. But you can adjust to it, can’t you?
A. Yes, with a little sense of betrayal, of a sense of self-betrayal - of a sense of self-betrayal, I might add. 26

Professor Thomas explained the conflict between his religion/culture and his mainstream environment in human terms. Although the court did not need to quote this testimony for its legal analysis, it nonetheless included it. If the court’s opinion accurately reflects what it found to be persuasive, then Teterud’s success in persuading the panel is attributable, at least in part, to the ability of his witnesses to educate the bench and translate his perspective into mainstream terms.

That persuasion is lacking in Hill v. Blackwell, 27 also a pre-Turner decision. Hill, a Muslim, claimed that a prison regulation prohibiting the growing of beards violated his First Amendment rights to the free exercise of his religion. The defendants, prison officials for the State of Missouri, used an interesting strategy on appeal; they conceded that Hill adhered to the Muslim faith, that he wished to grow a beard as a part of his religious beliefs, and that he was sincere in his beliefs. By their concession, they limited the issues to consideration of the prison regulation and precluded Hill from translating his perspective into the mainstream view.

Two years later, the court followed its decision in Hill and upheld the application of prison regulations to adherents of the

26 Teterud, 522 F.2d at 360, n.7 (emphasis added).
27 774 F.2d 338 (8th Cir. 1985).
Moorish Science Temple.\textsuperscript{28} In this case, the parties went even further than in \textit{Hill}; they stipulated at trial to the legitimacy of the religious organization and the sincerity of the religious beliefs.\textsuperscript{29} By stipulating to the three parts of the religious test, the plaintiffs effectively precluded themselves from explaining their religious beliefs and denied themselves the opportunity to draw any analogies to the mainstream.

The most instructive of the Eighth Circuit cases is \textit{Iron Eyes v. Henry},\textsuperscript{30} a post-\textit{Turner} case. Robert Iron Eyes filed his §1983\textsuperscript{31} \textit{pro se} complaint\textsuperscript{32} after his hair was forcibly cut. The trial judge found that the plaintiff was born on the Standing Rock Reservation and that he had adhered to traditional Sioux religious beliefs. With respect to his practice of wearing long hair, the court found as follows:

7. Among the traditional practices of the Sioux religion to which plaintiff adheres is the wearing of long hair. The

\textsuperscript{28} Butler-Bey v. Frey, 811 F.2d 449 (8th Cir. 1987).
\textsuperscript{29} Id. at 451, n. 3.
\textsuperscript{30} 907 F.2d 810 (8th Cir. 1990).
\textsuperscript{32} Iron Eyes' \textit{pro se} complaint set forth the following allegations:

On or about December 10, 1987, I received an order from Major Charles E. Harris that I was to get a haircut before 4:00 pm, or that I would be locked up in the hole if I did not get it cut. I tried to explain to Major Harris that I am a full-blooded Native American Indian and Maj. Harris told me that I was not an Indian as there are no Indians in his prison system and that I was really a white boy trying to get over on him. I even told Maj. Harris that he could look in my files and see that I am really an Indian and verify my heritage but he said that was all lies too. Well, since I did not want my hair cut Maj. Harris handcuffed me and put me in the hole.

On December 14, 1987, just before Christmas, Maj. Harris, Capt. Rosenberg and about 9 or 10 other guards handcuffed me behind my back real hard and put leg shackles on me and made me go in a room with all of them. Then they shoved a table in front of the door so nobody could get out. Then, Dan Henry, the Asst. Supt. said that I am going to get a hair cut one way or the other and they didn't care if I was Geronimo. I told them that the courts also said us Indians could keep our hair and Dan Henry said for me and the court to go and fuck our selves. I am sorry about the word but that is what he really said.

Well, Dan Henry, Maj. Harris, Capt. Rosenberg and the guards all took my leg shackles and handcuffs real hard and held me down and this inmate barber named Earl Wells came over and cut my hair into a raggedy mess. That is when they all started laughing and Maj. Harris said that now I could get some white religion.

\textsuperscript{1} Iron Eyes' version of the haircut and racial abuse was supported by the deposition testimony of Earl Wells, the white prisoner who performed the haircut.

Complaint (Mar. 5, 1988). FN 1 Iron Eyes' version of the haircut and racial abuse was supported by the deposition testimony of Earl Wells, the white prisoner who performed the haircut.

Deposition of Earl Wells at 8, 16 (Oct. 11, 1988).

907 F.2d at 817.
Sioux believe that one's hair is a gift from the Great Spirit, and it is considered an offense to the Creator to cut one's hair except to symbolize grief for the loss of a loved one. When a loved one dies, the grieving person(s) cut their hair, wrap it and place it with the deceased person. While defendants pointed out and plaintiff acknowledges that the wearing of long hair was not a tenet of the religion as set forth in a book entitled *Black Elk Speaks*, that is not the only authority upon which plaintiff relies for the religion's principles. There is no evidence of record that any tenets of this religion, as understood by plaintiff, do not include the wearing of long hair.

8. Because of his religious beliefs, plaintiff's hair has been cut only four times in his twenty-seven years. Each of the first three times were in mourning: in 1965 or 1966 for the death of his grandfather; in 1976 for the death of a friend who committed suicide; and in 1978 for the death of his cousin. The fourth time occurred at FCC in December 1987.³³

His conclusions of law on the religious prongs of the test were even briefer.

Here, the Court finds plaintiff's belief in the need to wear long hair is religious in nature and sincerely held. Plaintiff has maintained Sioux religious beliefs throughout his life, and participates in religious ceremonies to the extent possible. The present record credibly establishes the significance of long hair to plaintiff's religion. Furthermore, testimony of Wallace Black Elk, who is recognized as an American Indian spiritual leader, as quoted in *Teterud, supra*, 522 F.2d at 360, n.6, indicates that long hair is part of the American Indian spiritual beliefs.³⁴

The judge treated the religious issues as given and moved on to the *Turner* test, ultimately deciding against Iron Eyes and in favor of the prison regulation. Given the victory on the religious prongs of the test in the district court, Iron Eyes' attorney relied exclusively on these facts on appeal.³⁵ The Eighth Circuit also treated the issues as given. After an even briefer rendition of

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³⁴ Id. at 14.
³⁵ See Appellant's Brief at 6.
the facts presented by the district court, the appellate court considered the issues:

The court's determination that Iron Eyes' desire to abstain from cutting his hair was based on a sincerely held religious belief is factual in nature and thus is subject to the clearly erroneous standard of review. See Butler-Bey, 811 F.2d at 450. From our review of the record, we cannot conclude that this determination is clearly erroneous. Therefore, we now review the questioned regulation under the factors discussed in Turner. By giving lip service to Iron Eyes' religion and the sincerity of Iron Eyes' beliefs, both courts neatly finessed the religious issues and set themselves up to uphold the prison regulations. The balance had already been struck in favor of the prison establishment over the quaint native custom. Iron Eyes, by winning so easily on the religious issues, lost the case. Iron Eyes differs from Teterud in that the advocate failed to educate both the district and appellate courts.

There is no way of knowing if the Teterud court would have reached a different result under the "rational relationship" Turner test or if the Iron Eyes court would have decided differently using the "compelling state interest" test. The facile way in which the Iron Eyes court found a rational relationship between the prison regulation and the security rationale suggests that the outcomes would have been the same under either test. While serious security reasons support prison regulations that would pass constitutional muster even when limiting mainstream religious practices, the reasons in this case do not. The ease of identification rationale is illustrative. The majority recognized the weakness of the argument, yet adopted it anyway.

Farmington officials contend that a prisoner with long hair could either keep it long or cut it off, possibly changing significantly his appearance from his initial prison photograph, and thus necessitating multiple pictures to ensure that law enforcement officials have at least one photograph matching the prisoner's appearance. Iron Eyes argues that rephotographing is simply a nuisance, which could be

36 See Iron Eyes v. Henry, 907 F.2d at 811.
37 Id. at 813.
achieved easily, and further that he was never photographed with short hair, despite the fact that his hair was forcibly cut twice while incarcerated. We cannot deny the strength of Iron Eyes’ argument here. If identification concerns are so important for security, it is incredulous [sic] that the prison officials, after forcibly cutting Iron Eyes’ hair, failed to rephotograph him. Regardless, the officials’ security fears concerning identification create a rational link between that objective and the regulation. Allowing prisoners to wear long hair would enable them to quickly alter their appearance, and could conceivably hinder their identification, whether inside or outside the walls of the Farmington facility.38

Under the rational relationship test, even a lightweight security rationale will prevail if the advocate fails to educate the court and bridge the gap between non-mainstream and mainstream beliefs. Judge Heaney in dissent rejected the ease of identification rationale as pretextual.39 The majority probably would not have accepted the same identification rationale had plaintiff adhered to a mainstream religion. Although the brief filed on behalf of Iron Eyes does a masterful job of making the arguments on each of the Turner factors, it failed to convince the majority to take Iron Eyes and his religious beliefs seriously.

Convincing the court to see the facts from a non-mainstream perspective is not an easy task. Opposing counsel can reinforce the judge’s default position without difficulty. Two examples from Kemp v. Moore,40 a case brought by a Chickasaw prisoner, illustrate the problem. The defendant prison officials

38 Id. at 814.
39 There is no merit to the contention that a hair-length regulation is necessary to or facilitates identification. The defense has presented no evidence that there had even been an identification problem caused by hair length despite haphazard enforcement of the regulation. Moreover, allowing 4 prisoners out of 1700 to have longer hair for religious reasons aids their identification; it makes them instantly distinguishable. More particularly, from the photos submitted, it appears that the length of Iron Eyes’ hair does little to alter his appearance. His hair is long, thin, and stringy; it lies flat against his head. Iron Eyes also possesses distinctly Native American features, facilitating identification. Finally and conclusively, the defendants’ conduct in this case is a frank confession of the importance and truth of this concern. Iron Eyes had long hair in his admission photograph and the defendants never bothered to rephotograph Iron Eyes after the haircuts. The defendants’ claim that short hair is necessary for easy identification is pretextual.

Id. at 814.
40 946 F.2d 588 (8th Cir. 1991).
moved for summary judgment based on the Eighth Circuit decision in *Iron Eyes*. Attached to their trial level brief as Exhibit A was a list of the items Kemp had requested for religious purposes:

Herbs:
- Tobacco
- Red Willow Bark
- Sage
- Kinnikinnic
- Cedar
- Sweetgrass (Braided)

Natural Objects:
- Crystals no larger than 2” in diameter
- Alter stones about the size of marbles
- Animal bones
- Feathers
- Rabbit hides for storing of prayer and ceremonial pipes
- Animal & Bird Claws
- Tree bark & roots
- Small willow stick approximately 1X12”
- Sacred prayer pipe
- Medicine bag, up to 6X12”, made of leather
- Ribbons - assorted colors; 2”X3’
- Candle - 2X3”
- Animal horns
- Animal teeth

Without some explanation as to the religious significance of the objects, they appear to be the playthings of primitive people. Kemp had also requested a Sweat Lodge for an Inipi Ceremony.41 At the hearing, the explanation of the Sweat Lodge was limited to the following:

A. Like a sweat lodge.
THE COURT: What you’ve described sounds like a sauna.

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41 The Inipi ceremony is a tenet of the Native American religion. The ceremony is performed in a dome-shaped structure called an Inipi or sweat lodge, which contains a fire pit where hot rocks are placed. The participants pour water over the rocks to produce steam, which cleanses and purifies the body and the spirit. From the Order of the United States District Court for the Eastern District of Missouri, No. 88-1706 C(3), issued October 22, 1990.
MR. SWITZER (counsel for defendants): That's what it sounds like to me.
THE COURT: Do you know what a sauna is?
THE WITNESS: Yes, I know what a sauna is.
THE COURT: Is that what the sweat lodge is?
THE WITNESS: No, a sweat lodge is a more — used as religious — because it's built from the earth, and we use certain trees to cover it and stuff.
THE COURT: I see. Go ahead, counsel.\textsuperscript{42}

With opposing counsel's assistance, the judge had made his mainstream analogy and was ready to decide that the prison should not be required to build a sauna for the exclusive use of four out of 1,827 prisoners at FCC.\textsuperscript{43} The Eighth Circuit spent little space in its per curiam decision of this case. Half of the opinion was devoted to the concurring opinion of Judge Heaney, the dissenting judge in \textit{Iron Eyes}. He concurs only because of that decision and notes:

This case smacks of harassment and religious persecution to me. \textit{See generally}, John Rhodes, \textit{An American Tradition: The Religious Persecution of Native Americans}, 52 Mont. L. Rev. 13 (1991). The sooner our court en banc considers this question and resolves to do away with the penological myth that the director of this institution perpetrates, the better.\textsuperscript{44}

Judge Heaney's information comes, however, from a law review article, not from the briefs submitted in the case.

The Religious Freedom Restoration Act of 1993, 42 U.S.C. \S\textsuperscript{2000bb} (1994), temporarily changed the rule in the Native-American prisoner cases. Two purposes of the Act were "to restore the compelling interest test" and "to guarantee its application in all cases where free exercise of religion is substantially burdened."\textsuperscript{45} The district court in \textit{Hamilton v. Schiriro}\textsuperscript{46} relied on the Act to require the Missouri Department of Corrections to permit Native Americans to wear their hair long and to provide them with a sweat lodge. In \textit{Boerne v. Flores}, 65 U.S.L.W. 4612 (1997), the Supreme Court held the Act unconstitutional.

\textsuperscript{42} Transcript of hearing, p. 14.
\textsuperscript{43} Memorandum in Support of Defendants' Motion for Summary Judgment at p. 4.
\textsuperscript{44} Kemp \textit{v}. Moore, 946 F.2d at 589.
\textsuperscript{45} 42 U.S.C. \S 2-000bb(b)(1).
\textsuperscript{46} 863 F. Supp. 1019 (W.D. Mo. 1994).
The Eighth Circuit cases demonstrate two pitfalls in representing non-mainstream clients before mainstream judges. To prevent testimony designed to educate the court, opposing counsel may concede a point. No tacit acquiescence or strategic concession can substitute for convincing the court to take clients' perspectives seriously. Opposing counsel may attempt to trivialize the clients or their positions, treating them as long-haired hippies who want special privileges, such as a sauna.

C. Tentative Conclusions Drawn from the Native-American Free Exercise Cases.

To persuade mainstream judges, the advocate must educate the court about non-mainstream beliefs and practices. This education process requires expert testimony of a kind the judges will respect. Historical and anthropological testimony works in the Native-American cases. In addition, the advocate must draw an analogy or build a bridge between the mainstream and non-mainstream perspectives. If the advocate fails to educate the court either by omission or because the opposition concedes the point, the mainstream perspective will prevail or the judge may draw the wrong kind of analogy and, for example, compare a sweat lodge to a sauna. As in other persuasive efforts, a tone that seems unconvinced or a style that divorces the client is also detrimental to the persuasive effort. The question remains whether these conclusions are valid only in Native-American Free Exercise cases or whether they apply to other non-mainstream cases, such as lesbian mother child custody cases.

II. Child Custody Cases Involving Lesbian Mothers

Lesbian mother child custody disputes, the second experimental system, were chosen because they involve issues different from those in the first system. As with the Native-American free exercise cases, the experimental system isolates the non-mainstream issue. I chose child custody cases in which the only deciding factor was the mother's sexual orientation, either because the court isolated the issue or because the scope was limited by the facts. Most child custody cases involving lesbian mothers are disputes between the biological parents.47 In these

47 Nancy D. Polikoff, This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families, 78 Geo. L.J. 459,463 (1990).
cases, courts use the “best interests of the child” test, a multi-factor test. While a court may decide custody on the basis of the mother's sexual orientation, the decision can be framed in terms of any of the factors. A custody dispute between the mother and a third party, however, provides a cleaner case. There is a strong presumption in favor of the biological parent, and third party must overcome this presumption before the court will consider the best interests test. To do this, the third party must show by clear and convincing evidence that the biological parent is unfit, unwilling, or unable to care for the child, or that continued custody by the natural parent will be harmful to the child. The non-mainstream issue is isolated at this stage of the inquiry.

A. Is a Biological Grandmother a Better Parent than a Natural Mother Who is a Lesbian?

The case of Bottoms v. Bottoms fits the experimental model because it involves a dispute between the biological mother and her mother, the child’s grandmother. The biological mother, Sharon Bottoms, was divorced from her husband while she was pregnant. The divorce decree awarded her custody of her son, Tyler. The child's father had never been actively involved with his son and had never paid any child support. The grandmother, Kay Bottoms, frequently cared for Tyler; she initially estimated that she had cared for him 70% of the time, but later retreated from this estimate. In 1993, Sharon and Tyler had moved in with Sharon's lover, April Wade. At this time, Sharon informed Kay that Tyler would be spending less time at Kay's house because of the presence of Kay's live-in lover, Conley, who had lived with Kay for many years. Sharon explained to Kay that Conley had sexually abused her while she was growing up, and she did not want Tyler in the house with Conley. Although Kay did not initially believe the allegations of sexual abuse, she later decided there was some basis for them.

Shortly after this conversation, Kay asked Conley to move out and she filed for custody of her grandson in the Juvenile

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49 Id. at 821-22.
51 Appendix containing the transcript of the trial conducted on September 7, 1993, in the Henrico County Circuit Court, 25, 64, 66, 67.
and Domestic Relations District Court. After a brief hearing, the court transferred custody to the grandmother based on the sole factor that Sharon was living in a lesbian relationship with April. Sharon appealed to the circuit court. The evidence included the following: "Sharon and April are a 'healthy, well-functioning couple'; that Sharon is 'warm' and 'responsive' with her son, and that 'Tyler behave[s] as if entirely secure and at ease with his mother, it being a very familiar and comfortable situation for him'; that Tyler is a 'bright, self-confident, socially responsive little boy who is experiencing no undue emotional discomfort, cognitive deficits or developmental delays.' Kay testified that Tyler 'shouldn't be raised by lesbian[s] . . . [because] [i]t's just going to mess him up.' The court-appointed guardian ad litem presented expert testimony to the court about children with lesbian or gay parents. Dr. Charlotte Patterson of the University of Virginia testified that the social scientific studies show that a parent's homosexual orientation has no adverse effect on the child." The Circuit Court judge concluded that the presumption in favor of the biological mother had been overcome on the grounds that Sharon was living in a lesbian relationship with April, which is both immoral and illegal. The illegality was based on Virginia's "crimes against nature" statute, which applied both to heterosexual and homosexual conduct.

Sharon appealed to the Virginia Court of Appeals. The strategy on appeal was to attack the per se standard applied by the circuit court and the court's reliance on Roe v. Roe, a case denying custody to a gay father under the best interests test. In a unanimous opinion, the Virginia Court of Appeals agreed with this analysis. It rejected the trial court's application of the per se rule and criticized the court's reliance on the Supreme Court's decision in Roe v. Roe for two reasons. First, the Roe court did not rule that homosexual parents are unfit as a matter of law; it held that the particular father was unfit because he continuously exposed his child to his homosexual relationship. Second, Roe was a custody dispute between two parents and the presumption of parental fitness was inapplicable. The court was

52 The hearing in The Henrico County Juvenile and Domestic Relations Court was held on March 31, 1993.
53 From the Brief of Appellant, Sharon Bottoms, filed in the Court of Appeals of Virginia, No. 1930-93-2, p. 4.
56 Id.
called upon only to consider the best interests of the child. The trial court should not have extended that case beyond its procedural setting. The court then relied on the Virginia Supreme Court to reach its decision.

The Supreme Court of Virginia has held that adverse effects of a parent's homosexuality on a child cannot be assumed without specific proof. [Citations omitted.] “There is no evidence that children who are raised with a loving couple of the same sex are any more disturbed, unhealthy, or maladjusted than children raised with a loving couple of mixed sex.” [citations omitted.] The psychological testimony presented in this case was to the effect that a parent's homosexual relationship alone does not harm a child emotionally or psychologically or make the parent an unfit custodian. The social science evidence showed that a person's sexual orientation does not strongly correlate with that person's fitness as a parent. No evidence was presented to refute these studies. No evidence was presented that tended to prove that Sharon Bottoms' living arrangement with April Wade and their lesbian relationship have harmed or will harm Sharon Bottoms' son.

For these reasons, we hold that the trial court erred in finding that Sharon Bottoms' lesbian relationship alone constituted clear and convincing evidence of parental unfitness. The trial court erred in holding that the evidence "of the cursing [and] . . . of the child standing in the corner" and the fact that Sharon Bottoms is a lesbian who lives with her lesbian companion are "of such an extraordinary nature as to rebut the presumption [of parental fitness]."

The appellate court focused its analysis on the legal standard. Like the Frank court, which relied on anthropological studies, the appellate court here relied on the social science evidence introduced in the trial court.

The grandmother, Kay Bottoms, appealed to the Supreme Court of Virginia. Although Sharon's brief applied the strategy used in the intermediate appellate court, the result was quite different; in a 4-3 split, the court reversed the appellate court decision and remanded for reinstatement of the circuit court's decision. The court's focus was also quite different. "In all child

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58 See supra note 12 and accompanying text.
custody cases, including those between a parent and a non-parent, 'the best interests of the child are paramount and form the lodestar for the guidance of the court in determining the dispute.' And “[i]n custody cases, the welfare of the child takes precedence over the rights of the parent.” The court then invoked the standard of appellate review:

When the trial court hears the evidence *ore tenus*, its findings are entitled to the weight accorded a jury verdict, and these findings should not be disturbed by an appellate court unless they are plainly wrong or without evidence to support them. [Citation omitted.] A reviewing court should never redetermine the facts on appeal.

Absent clear evidence to the contrary in the record, the judgment of a trial court comes to an appellate court with a presumption that the law was correctly applied to the facts. [Citation omitted.] And, the appellate court should view the facts in the light most favorable to the party prevailing before the trial court. Accordingly, we shall summarize the facts in the light most favorable to the grandmother, resolving all conflicts in the evidence in her favor.

The court proceeded to review the facts in a light favorable to the grandmother and concluded the trial court was correct, despite the fact that the trial court’s decision was based not on that factual record, but on a *per se* rule that lesbian mothers are unfit.

The three dissenting justices would have adopted the analysis of the intermediate appellate court that the trial court refused to follow Virginia’s rule that a lesbian mother is not *per se* unfit. The dissent would have remanded the case for another evidentiary hearing with instructions for the circuit court to apply the proper standard. Another hearing was necessary because nineteen months had passed since the earlier hearing and child custody determinations are subject to change.

Sharon Bottoms managed to persuade six of the twelve judges and justices who considered the case; her ultimate failure was to convince the one justice that would have changed the outcome. She used the social science evidence that the model

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60 Id.
61 Id. at 104-105.
62 Id. at 109.
suggests is essential to prevailing; she built that evidence into
the trial record, but she did not persuade. A second lesbian
mother/third party custody case provides a possible explanation.

B. Can a Court Deprive a Natural Parent of Custody
Because She Happens to be a Lesbian?

In Teegarden v. Teegarden, the Indiana Court of Appeals
cited with approval the Virginia Court of Appeals decision in the
Bottoms case for the proposition that in a custody dispute with
a third party, a lesbian mother is not per se unfit. Twila Tee­
garden was divorced from her husband in 1990. At that time,
the judge granted custody of the two minor children to the fa­
ther with regular and unrestricted visitation for the mother.
Two years later, the father remarried. When he died suddenly
within a year, Twila attempted to contact the children. When
she was unable to do so, she filed a motion for immediate cus­
tody and then a petition for an order of custody. Shortly there­
after, the second wife filed a motion for custody. After a hearing,
the trial court granted custody to the mother, denied custody to
the second wife, and imposed two conditions. The apparent ra­
tionale for the conditions was the trial court's concern that the
children might at some point hear comments from others about
their mother's lesbianism. The mother appealed the two
conditions.

The mother's brief first questioned whether a court can
limit a fit natural parent's custody and then raised three consti­
tutional issues. The argument on the first issue was based on

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64 The trial court denied Twila's motion for custody on jurisdictional grounds. Her
subsequent petition for an order of custody alleged that as the surviving parent, custody
automatically reverted to her on the custodial parent's death.
65 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner's cus­
tody of her children is conditioned upon her (1) not co-habitng with women with whom
she is maintaining a homosexual relationship; and (2) not engaging in homosexual activ­
ity in the presence of the children.
IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Petitioner shall ar­
range for counseling for herself and her children to aid them in making the transition
into their new home and custodial arrangement.
66 (2) Under the Equal Protection clause of the United States Constitution, may a
parent's custody be limited in whole or in part on the basis of possible reactions to the
parent from other members of the community?
(3) Is the Court's Order prohibiting the Mother from engaging in "homosexual activi­
ties" unconstitutionally vague under the Due Process clause of the fourteenth Amend­
ment because it has a chilling effect on the Mother's constitutionally-protected conduct
and activities and is susceptible of discriminatory enforcement?
law and devoted almost entirely to proving points unrelated to
the narrow issue on appeal. Upon the death of a custodial par­
ent, custody reverts automatically to the surviving natural par­
ent. As between a natural parent and a third party, there is a
strong presumption in favor of the natural parent. This pre­
sumption can be overcome only by proving that the natural par­
ent has long acquiesced in a loss of custody, has voluntarily re­
linquished custody, or is unfit. The trial court found that the
second wife proved none of these. The brief then reviewed cases
in which a court had considered imposing conditions and argued
none was applicable.67

The first issue ended with a policy argument: “Any expan­
sion of the established test for depriving a natural parent of cus­
tody would strike to the heart of legal protection for the family.
Every parent has faults that may have some adverse impact on
a child, even though the child is otherwise normal healthy and
happy. In theory, courts could try to limit the custody rights of
fit, natural parents based on these personal failings.” The exam­
ples included the workaholic parent, the parent who smokes, the
parent who is not good with finances, and the moody parent.
The mother’s strengths as a parent and as found by the trial
court appeared in the text of the argument. The only references
to her sexual orientation appeared in the conditions, which are
quoted, and in one footnote.

The Court of Appeals adopted this approach in its opinion.
It declined to consider the constitutional issues when the case
could be resolved on nonconstitutional grounds. It identified the
case as a natural parent/third party custody case and analyzed
the trial court’s findings on the three factors, quoting with ap­
proval the trial court’s statement of the rule on the impact of

(4) Is the Court’s Order prohibiting the Mother from engaging in “homosexual activi­
ties” unconstitutionally overbroad because it sweeps within its coverage speech or con­
duct protected by the First Amendment?

67 The only cases in which a court has approved the imposition of conditions are vis­
itation cases involving two natural parents. The only custody case that raised the issue
involved a dispute between a natural parent and third parties. The trial court had
granted custody to the grandparents and required the teenage mother to enroll in
parenting classes and other programs before it would consider granting her custody. The
court of appeals held as follows:

The trial court set conditions requiring [the mother] to prove fitness. The trial
court obviously, but incorrectly, applied a [typical, two-parent] analysis to this case.
Despite what appear to be good intentions on the part of the trial court, its actions
ignored [the mother’s] rights as a parent and amount to reversible error.
homosexuality on fitness: "homosexuality standing alone without evidence of any adverse effect upon the welfare of the children does not render the homosexual parent unfit as a matter of law to have custody of the child."\textsuperscript{68} The appellate court also quoted the trial court's findings that the second wife failed to prove that the mother was unfit. It distinguished the cases the trial court used as authority for imposing the conditions and concluded that the trial court had abused its discretion in imposing the conditions. It reversed the order below only with regard to the conditions. While this seems like a clear victory for the mother, and in practice it may be, the court concluded with the following \textit{dictum}: "[Had] the evidence revealed that Mother flagrantly engaged in untoward sexual behavior in the boys' presence, the trial court might have been justified in finding her to be unfit and, accordingly, awarded custody to StepMother."\textsuperscript{69} This standard is only slightly less vague than the condition of "not engaging in homosexual activity" imposed by the trial court.

Although the court considered only the narrow question of whether a court could impose conditions on a grant of custody in a case between a natural parent and a third party, neither the mother's brief nor the court's opinion was confined to that issue. Both seemed to assume that the underlying issue, like that in \textit{Bottoms}, was whether homosexuality renders a parent unfit. The rule in Indiana and probably also in Virginia is that in a natural parent/third party custody case, homosexuality does not render a natural parent unfit as a matter of law. However, a trial judge in either jurisdiction can find a natural parent unfit based on a factual record. Because the standard of review is abuse of discretion, a trial court's default anti-homosexual perspective may unconsciously influence the outcome.

Three differences between the \textit{Bottoms} and \textit{Teegarden} cases may account for the different outcomes. The cases arise in procedurally different contexts: \textit{Teegarden} was an appeal of the conditions imposed, while \textit{Bottoms} was a custody case. Twila Teegarden was portrayed as a normal parent with one "personal failing"; Sharon Bottoms seems to have had more than her share of failings. Although none by itself would have been sufficient for a finding of unfitness, the totality in conjunction with her homosexuality may have influenced the judges. Her mother,

\textsuperscript{68} Teegarden v. Teegarden, 642 N.E.2d at 1009.
\textsuperscript{69} Id. at 1010.
Kay Bottoms, took pains to portray her daughter in a less than favorable light. The cases also differed in the tone and theories used in the briefs. Sharon Bottoms characterized her case as a lesbian mother custody case. Although she and the Lambda Legal Defense Fund as *amicus curiae* on her behalf spent a good deal of time trying to educate the court generally about lesbians who have the attributes of good parents, neither managed to apply this persuasively to Sharon's case. There is no way of telling from the opinions how successfully the briefs educated the judges who decided or would have decided for her. Twila Teegarden used a different theory. She approached the case as a natural parent/third party custody case; her sexual orientation was neither hidden nor particularly relevant. While the Bottoms' briefs espoused the lesbian mother cause, the Teegarden briefs treated the individual mother with respect.

At first blush, the attributes of successful advocacy in the Native-American religious cases and the lesbian mother custody cases appear to be inconsistent. In the former group, the successful advocates educated the mainstream judges about Native American religious practices; in the latter group, the successful party deflected attention away from the attribute that took her out of the mainstream. The situations are, however, comparable in one respect. For the non-mainstream parties to prevail, they had to persuade the judges that despite their differences, they shared values that were critical to the case. In *Frank*, for example, Frank was successful in part because he showed the judges that mainstream religious practices and Athabascan practices, despite their superficial differences, approach death in similar ways. Both have ceremonies designed to honor the deceased and help friends and family members cope with the loss. In the losing cases, the Native Americans and others did not convince the courts of the importance of the religious beliefs or draw the parallel to mainstream values; the differences remained. Similarly, Twila Teegarden showed first and foremost that she was a natural parent who shared values with the court as to what constitutes a good parent. As the *dictum* in the case indicates, however, if her non-mainstream attribute had interfered with their shared values, the court might have decided against her. Sharon Bottoms did not persuade because she did not convince enough justices that under the court's value sys-

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70 Frank, 604 P.2d at 1068.
71 Teegarden, 642 N.E.2d at 1010.
tern, she was first and foremost a good mother. She highlighted the differences rather than the similarities.

III. CONCLUSIONS

This investigation began with the assumption that judges’ opinions would reflect the arguments made in the briefs that the judges found persuasive. I had hoped to uncover persuasive techniques that were decisive. The results did not yield a magic formula, but they provide some insight into what is required to prevail in non-mainstream cases.

Non-mainstream cases are like other persuasive endeavors. To be successful, the advocate must know the audience. In non-mainstream cases, this requires understanding and respecting the judges’ values and experiences in order to find the common ground these judges share with the client.

The appellate brief is not the starting point for the persuasion in these cases. The advocate must set the stage for the appeal in the trial court, presenting all the evidence necessary to build the common bonds with the trial and appellate court judges. The evidence may require expert testimony from sources the judges respect, such as anthropologists, historians, and other social scientists. Experts are particularly effective when they belong to both worlds and can explain the non-mainstream view to the mainstream audience. A failure to make the case in the trial court because of the opponent’s concessions or stipulations is fatal; the advocate is deprived of the opportunity to educate the court about the client’s values and establish the common bonds.

Persuasion must occur at every level; the fact that three intermediate level appellate judges are convinced does not guarantee that a majority of the justices at the highest level will agree.

Successful briefs have three attributes. First, the advocate must have a well-defined theory of the case, the fundamental reason the client should prevail. For the theory to be successful, it must highlight the values and experiences the client shares with the judges, rather than the differences that separate them. The theory should focus the issue on appeal, the presentation of the facts, and the thrust of the argument. Second, the brief writer must use a respectful tone in portraying the client’s position. The court need not take the arguments seriously if the tone lacks seriousness and respect. Finally, the advocate must draw specific analogies between the practices and values of the non-mainstream client and the mainstream court. Only by plac-
ing the non-mainstream practice in a mainstream context of shared values will the advocate be able to persuade the court to look beyond the superficial distinctions and rule in favor of the non-mainstream client.
Ethical Considerations In Advocacy: What First-Year Legal Writing Students Need to Know

Beverly J. Blair*

I. INTRODUCTION

One of the most difficult transitions for first-year legal writing students is shifting from the objective legal writing of syntheses of the law and legal memoranda in their first semester to advocacy writing in motions and appellate briefs in their second semester. Not only does the tone of the writing change but also the purpose and the audience change. As one authoritative text explains, a brief transforms the objective analysis of a memorandum into an adversarial argument to a court. But it also suggests that while the change is important, the basic standards of communication remain the same; the advocacy writer must make his or her arguments clear. "Advocates win most of their points by clarity and straightforwardness—not, as many novice litigators seem to believe, by demonstrating sincerity or outrage, or by laying down an artillery barrage in the hope that the sheer volume of the argument will produce victory." 

The new role for the legal writer as an advocate demands candor, honesty and credibility with the court. The advocate must conform to the ethical requirements of the legal profession. The American Bar Association has promulgated both the Model Code of Professional Responsibility which a minority of the states now follow and the Model Rules of Professional Conduct which more than two-thirds of states here adopted. In legal

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2 Id.
3 American Bar Association, Model Rules of Professional Conduct vii-viii (1998 ed. 1997). The ABA House of Delegates adopted the Model Code of Professional Responsibility on August 12, 1969, and subsequently the vast majority of the state and federal jurisdictions adopted it. Following a six-year study and drafting process, on August 2, 1983, the ABA House of Delegates adopted the Model Rules. As of 1997, more than two-thirds of the jurisdictions adopted the new professional standards based on these Model
profession or ethics courses, second and third-year students delve in depth into ethical dilemmas and the professional responsibilities of the lawyer in modern complex society. However, first-year law students must develop a rudimentary understanding of their ethical obligations to the practice of law as they assume the new role as advocates in the adversarial litigation setting.

The Code of Professional Responsibility consists of canons, ethical considerations and disciplinary rules. As explained in the Preliminary Statement to the Model Code, the canons are axiomatic norms which express in general terms the standards of professional conduct expected of lawyers. The ethical considerations ("EC"), aspirational in nature, represent the objectives toward which lawyers should strive and provide guidance in many specific situations. The mandatory disciplinary rules ("DR") state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. In contrast, the Model Rules consist solely of rules.

II. PROBLEMS OF CANDOR

Canon One directs: "A lawyer should assist in maintaining the integrity and competence of the legal profession." Implementing this norm, DR-102(A)(4) prohibits an attorney from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and DR-102(A)(5) prohibits an attorney from engaging in conduct that is prejudicial to the administration of justice. Model Rule 1.1 directs: "A lawyer shall provide competent representation to a client." But the Model Rules directly address candor toward the courts. Rule 3.3 mandates that

(a) A lawyer shall not knowingly:
   (1) make a false statement of material fact or law to a tribunal;
   (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

Rules.

4 AMERICAN BAR ASSOCIATION, COMPENDIUM OF PROFESSIONAL RESPONSIBILITY RULES AND STANDARDS 162 (1997).
5 Id. at 165.
6 Id. at 166.
7 ABA, supra note 3, at 11.
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) offer evidence that the lawyer know to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.8

The advocate can violate the requirement of candor in at least five ways: not disclosing or misstating facts, stating purported facts unsupported by the record, distorting case law, failing to update a brief when case law changes, and distorting quotations.

A. Nondisclosure or Misstatement of Facts

At both the trial level and the appellate level, an advocate must exercise scrupulous care in stating the facts of the case. The Supreme Court of New Mexico held an attorney who filed a brief to the state appellate court which contained false, misleading, inaccurate and improper statements of fact violated both DR-102(A)(4) and DR-102(A)(5).9 In his appellate brief, the attorney misrepresented at four different places that the testimony of causality was "uncontroverted," "undisputed," and "uncontradicted" when in reality at the trial the testimony of one of the two witnesses concerning causality was inconsistent.10 The New Mexico Supreme Court public censured the attorney for making false, misleading and inaccurate statements in a brief to the court of appeals, fined the attorney one thousand dollars, and ordered the public censure be published in the State Bar of New Mexico News and Views and the New Mexico Reports.11 One justice dissented stating he would suspend the attorney from the practice of law for thirty days.12

An attorney who took over an appellate case when it reached the Supreme Court of New Jersey failed to examine the trial transcript but instead relied on the statement of facts from the brief filed with the state’s intermediate appellate court.13 As

8 Id. at 62-63.
9 In re Chakeres, 687 P.2d 741 (N.M. 1984).
10 Id. at 741-742.
11 Id. at 742.
12 Id.
a result of this dangerous shortcut in effort, the attorney found himself before the Supreme Court of New Jersey responding to an order to show cause "why he should not be disciplined for a misrepresentation of fact in the presentation of the cause of his client, censurable as in disregard to his professional duty to his client and to the Court."\footnote{Id. at 48.} Finding that the attorney acted in good faith, the Supreme Court did not discipline him. The Court did sternly warn that when

there are no facts on which to predicate a statement or from which he may reason or argue, he [an attorney] makes such false statements of facts or false inferences from such non-existing facts at his peril. The failure of his adversary to discover his mistake here or below is no excuse for what may turn out to be an imposition on the court, even if it can be attributed merely to carelessness and lack of thoroughness in the preparation of the appeal. The facts of a case are or should be peculiarly within the knowledge of the counsel who are arguing the appeal and there is great likelihood of error by the court and of consequent injustice to the parties, if counsel do not adequately present the true facts of the case.\footnote{Id. at 808.}

The message is clear. Each advocate, regardless of when he or she entered the litigation, has an ethical responsibility to present a true and accurate statement of the facts to the court.

B. Statements of Purported Facts Unsupported by the Record

Interrelated with the problem of a misstatement of facts is the ethical violation of the over-zealous advocate who argues purported facts which simply are not supported by the record. The Supreme Court of Indiana has directed that while a lawyer should zealously plead his client's case, "the court is entitled to a fair statement of the facts from attorneys on both sides, not an exaggerated, self-serving version of the facts or an omission of crucial facts."\footnote{Cooper v. State, 309 N.E.2d 807, 808 (Ind. 1974).} The court chastised the defense attorney in a murder appeal, noting that no one who had read the trial transcript could in good faith say the evidence was "uncontroverted" that the defendant-appellant fired a gun in self-defense.\footnote{Id. at 808.}
court explained that when it "can not rely upon the statement of a lawyer, the lawyer has lost effectiveness with the Court and has therefore, in fact, injured his client." 18

The Ninth Circuit Court of Appeals echoed the view of the Supreme Court of Indiana. In an employment discrimination case, the Ninth Circuit found that transcript references demonstrated that several of the appellant’s assertions of fact were absolutely untrue and fabricated from misstatements of the record and taking statements out of context. 19 The Ninth Circuit instructed:

[i]t is appellate counsel's professional duty to be scrupu­

ously accurate in referring to the record and the authori­
ties upon which he relies in his presentation to the court in

his brief or oral argument. He must not mislead the court

by misrepresenting the record. Vigorous representation is

admirable, but it does not permit misrepresentation. 20

Attorneys who misrepresent the record on appeal have been
disciplined by the courts even when the attorney asserts it was
his first appeal in federal court, he never intentionally at­
temted to make false representations or to mislead the court,
but he had merely neglected to review the record carefully. 21 In
a federal securities case the Ninth Circuit suspended an appel­
lee's attorney for two-months from practice before the court for
misrepresenting the record on appeal. 22 The attorney errone­
ously stated that the district court had not provided its ratio­
nale for denying appellants' motion to amend. This misrepresen­
tation by the attorney went to the heart of the appeal. 23 In
disciplining the attorney, the Ninth Circuit explained the court
is not required to find intentional conduct in order to discipline
an attorney. Lack of diligence which impairs the deliberations of
the court is sufficient conduct warranting disciplinary action. 24

18 Id.
19 Frausto v. Legal Aid Society of San Diego, 563 F.2d 1324, 1327, n.8 (9th Cir. 1977).
20 Id.
21 DCD Programs, Ltd. v. Leighton, 846 F.2d 526, 528 (9th Cir. 1988).
22 Id. at 528.
23 Id. at 527.
24 Id. at 528.
C. Distortion of Case Law

In addition to ethical violations involving nondisclosure of facts, misstatements of facts and allegation of purported facts not supported by the record, the advocate who misstates or distorts the law faces serious consequences. The courts do not always rely on disciplinary actions to address offending attorneys but may instead assess costs and impose sanctions. The First Circuit expressed its disdain for the actions of appellate counsel who in a breach of contract case failed to state accurately the rule on waiver and the requirement for consideration. Commenting that the appeal was obviously frivolous and expressing its dislike for some of the "tricks of advocacy indulged in by counsel," the court ordered double costs on the appeal to be recovered by the appellee.

In an action for fraud, negligence and breach of contract involving an allegedly defective computer system, the Northern District Court of California imposed monetary sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure against the law firm of the defendant. In his memorandum in support of the defendant's motion based on the statute of limitations, the attorney led the court to believe that an argument was supported by existing law when it was not. The district court instructed:

The duty of candor is a necessary corollary of the certification required by Rule 11. A court has a right to expect that counsel will state the controlling law fairly and fully; indeed, unless that is done the court cannot perform its task properly. A lawyer must not misstate the law, fail to disclose adverse authority (not disclosed by his opponent), or omit facts critical to the application of the rule of law relied on.

The court further explained that "it is as badly misled by an argument purporting to reflect existing law when such law does not exist as by a failure to disclose adverse authority." The

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25 Griffin Wellpoint Corp. v. Munro-Langstroth, Inc., 269 F.2d 64 (1st Cir. 1959).
26 Id. at 67-68.
28 Id. at 127, 129.
29 Id. at 127.
30 Id. at 128.
court noted that Rule 11 sanctions were appropriate regardless of whether the offending attorneys acted in good faith.\textsuperscript{31} The sanctions were subsequently reversed by the Ninth District Court of Appeals instructing that Rule 11 does not impose the risk of sanctions in the event that a trial court decides that a lawyer was wrong as to his decision that cases were dissimilar thus leading to his failure to cite adverse authority.\textsuperscript{32}

In an appeal concerning a wrongful discharge claim, the Seventh Circuit Court of Appeals considered imposing sanctions against an appellant for misrepresentations of controlling law.\textsuperscript{33} The court noted that "sanctions were available under Rule 38 of the Federal Rules of Appellate Procedure, which penalizes 'frivolous' appeals under 28 U.S.C. § 1912, which deals with 'unnecessary delay' or under 28 U.S.C. § 1927, which authorizes sanctions for 'unreasonably and vexatiously' multiplying proceedings."\textsuperscript{34} While declining to impose sanctions, the court was troubled by appellant's counsel's apparent attempt to mislead the court as to the holding in the most recent decision of the Wisconsin Supreme Court addressing the public policy exception to Wisconsin's employment at will doctrine.\textsuperscript{35} The court did reiterate "that lawyers owe a duty of candor to the tribunal."\textsuperscript{36} The court stated: "[c]ounsel for appellant would be well advised to observe that violations of this duty can lead to sanctions even more severe than payment of an opponent's fees and costs."\textsuperscript{37}

D. Duty to Update

Closely related to the problem of distortion of case law is the advocate's on-going duty to update his or her brief when relevant case law changes. As the Northern District Court of Georgia has advised, advocates have a duty to file supplemental memorandum when a case which constitutes an essential part of a party's argument has been reversed on appeal.\textsuperscript{38} Thus, the advocate must not only relate the cases accurately at the time of

\textsuperscript{31} Id.
\textsuperscript{32} Golden Eagle Distributing Corp. v. Burroughs Corp., 801 F.2d 1531, 1542 (9th Cir. 1986).
\textsuperscript{33} Beam v. IPCO Corp., 838 F.2d 242 (7th Cir. 1988).
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 248-249.
\textsuperscript{36} Id. at 249.
\textsuperscript{37} Id.
filing the initial brief but must also stay abreast of the status of cases on which the advocate relies and affirmatively advise the court of any changes pending the resolution of the case before the court.

E. Distortion of Quotations

Lawyers have gotten themselves in trouble by failing to exercise adequate care in accurately quoting from the cases on which they base their arguments. The Seventh Circuit Court of Appeals has instructed that "[a]ttorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinion of other courts as well as other statements therein are completely accurate." The Seventh Circuit also considered counsel's omission of a key sentence as one indicator of the attorney's bad faith when it upheld sanctions against the attorney.

Because the brief of a patent infringer misstated the law and distorted a quotation, the Federal Circuit Court of Appeals ordered the infringer to pay the patentee an amount double the patentee's costs on appeal. In assessing the costs the court pronounced:

Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by the Model Rules of Professional Conduct, Rule 3.3 (1983), wastes the time of the court and of opposing counsel, and imposes unnecessary costs on the parties and on fellow citizens whose taxes support this court and its staff. A quotation containing deletions that so clearly distort the meaning and relevance of the quotation as to render it misleading will not in this court be encouraged by acquiescence.

Because the good advocate writes multiple drafts of his or her brief, the possibility of unintentionally altering a quote is high. Thus before any brief is filed, its author should return to

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40 McCandless v. The Great Atl. and Pac. Tea Co., 697 F.2d 198, 201-202 (7th Cir. 1983).
42 Id.
the actual cases used and with a partner proofread out loud each quote in order to detect potential distortions or omissions.

III. Assertion of Claims and Defenses

Pursuant to Canon 7, EC 7-23, and DR 7-101, an attorney owes a duty to his or her client to argue the case vigorously.\(^{43}\) In carrying out this duty, the attorney will often argue for creative extension of existing law or replacement of existing law with the new rules or interpretations. Fundamental principles of professional responsibility, however, impose some limits on this advocacy. For example, Rule 11 of the Ohio Rules of Civil Procedure requires every attorney to certify that to the best of his or her knowledge there is good ground to support the pleading he or she files and provides for sanctions for frivolous filings.\(^{44}\) The purpose of Rule 11 is to discourage claims or defenses that are intended solely to harass the opponents, to delay the proceedings or to discourage claims that reflect irresponsibly lax investigation.\(^{45}\)

Further Disciplinary Rule 7-102(A)(2) provides that in his or her representation of a client, a lawyer shall not knowingly advance a claim or defense that is unwarranted under existing law, except that he or she may advance such claim or defense if it can be supported by good faith argument for an extension, modification or reversal of existing law.\(^{46}\) Similarly, Model Rule 3.1 requires that "[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law."\(^{47}\)

As an advocate, an attorney does not have the duty to argue the opponent's case or even to present the balanced analysis appropriate for an office legal memorandum.\(^{48}\) Nonetheless, every attorney is not only an advocate but also an officer of the court and has a general duty of candor and fairness to the court and to other lawyers. Within this framework, the Model Code of Professional Responsibility specifically requires every advocate to

\(^{43}\) ABA, supra note 4, at 217-232.
\(^{44}\) Ohio R. Civ. P. 11.
\(^{45}\) Id.
\(^{46}\) ABA, supra note 4, at 226.
\(^{47}\) 47 ABA, supra note 3, at 61.
\(^{48}\) CHARLES R. CALLEROS, LEGAL METHOD AND WRITING, 259 (2d ed. 1994).
disclose significant authority adverse to the advocate's argument.

Disciplinary Rule 7-106(B) on Trial Conduct mandates:

(B) In presenting a matter to a tribunal, a lawyer shall disclose: (1) [l]egal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel.\textsuperscript{49}

This rule is extremely tricky as it depends in large part on the interpretation of the "directly adverse" language. The language could arguably be interpreted to require an attorney to disclose even clearly distinguishable adverse authority that nonetheless offered importance guidance to the court through analogy, dictum or general reasoning. In contrast, a narrow interpretation may require an attorney to disclose only authority that is squarely on point.

Arizona State University law professor Charles R. Calleros, suggests that the most sensible approach to disclosure is one that maintains the attorney's credibility as an advocate.\textsuperscript{50} Calleros posits if adverse authority within the forum jurisdiction is sufficiently analogous that the court would consider it in deciding a case, the judge or the judge's law clerk will likely discover the authority sometime before the end of the proceedings, even if it has escaped the notice of opposing counsel.\textsuperscript{51} An attorney can minimize the impact of such adverse authority by acknowledging it early in the proceedings and distinguishing or discrediting it.\textsuperscript{52}

In practice the likelihood of the trial judge discovering the authority sometime before the end of the proceeding varies dramatically among the trial courts. Certainly in federal district court with the court's strong staff of law clerks, discovery of relevant authority is most likely inevitable. However, in state court it is somewhat appalling to discover how little law some trial judges know and how much they underutilize the few law clerks they employ. While an advocate should never base his or her decision regarding disclosure of adverse authority on the likelihood

\textsuperscript{49} ABA, \textit{supra} note 4, at 228. Similarly Model Rule 3.3(a) (3) specifies that a lawyer shall not knowingly "fail to disclose to the tribunal in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." ABA, \textit{supra} note 3, at 62-63.

\textsuperscript{50} CALLEROS, \textit{supra} note 48, at 255.

\textsuperscript{51} \textit{Id.}

\textsuperscript{52} \textit{Id.}
that the trial judge will not find it, the advocate should be aware of the realities of law practice as well as the ideals taught in law school textbooks and classes.

In 1982, Geoffrey C. Hazard, Jr., Baker Professor of Law at Yale University addressed "Arguing the Law: The Advocate's Duty and Opportunity" at the John A. Sibley Lecture in Law delivered at the University of Georgia. Hazard observed that many lawyers think an advocate should cite only favorable authority and cite adverse authority only when there is no practical way to avoid doing so. Hazard explained that each side cites authority going its way and then leaves it to the court to figure out which line of cases to follow. Hazard perceived this practice to be followed in the trial courts all the time, in the intermediate appellate courts most of the time and even often in the Supreme Court.

Hazard speculated that lawyers who are writing briefs that ignore adverse authority have calculated the risks in doing so. The risk of violating the disciplinary rule is low because the opposing side will normally cite directly supportive authority. Further Hazard suggested even if the offending counsel is caught, counsel has determined that the court probably will not make much of it because the disciplinary rule is at variance with the prevailing practice. Other commentators have suggested advocates' failure to cite adverse precedent may stem from inexperience, neglect or incompetence.

Hazard noted that having to cite adverse authority means having to think why and how particular cases can be distinguished or neutralized; this requires in-depth thinking and takes time and money. Hazard concluded that the failure to give adverse authority serious and respectful attention results in bad briefs. The weight of an advocate's argumentative position can be properly gauged only by reference to what can be set

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54 Id. at 827-828.
55 Id. at 828.
56 Id.
57 Id.
58 Id.
59 Id.
61 Hazard, supra note 53, at 828.
62 Id.
against it. Thus briefs that expound only favorable case law deal merely with the surface of the controversy before the court.

Hazard advised that because the court's task is to acknowledge and to resolve competing considerations, the effective advocate should anticipate the court's task and help in its performance. An advocate must recognize conflict in authorities and demonstrate to the court how that conflict can be resolved in such a way that his or her client prevails. An advocate should isolate the opposing party's strengths that can be conceded, while adhering to a prevailing position. An advocate's strongest position may be one that is positionally moderate. Generally courts do not want to adopt new, difficult or controversial positions. An advocate who addresses adverse authority and who assumes a moderate position can effectively argue that his or her requested result is the natural application or extension of law.

Advocates who calculate the risk of getting caught for violating the disciplinary rule requiring disclosure of adverse authority to be low may have miscalculated. Courts will impose serious sanctions when they determine an attorney deliberately intended not to cite controlling adverse precedent. The Eleventh Circuit upheld the district court's imposition of Rule 11 sanctions against appellants' attorneys for failing to cite adverse controlling precedent in a memorandum filed in support of an application for injunctive relief which challenged the validity of a county ordinance prohibiting nude dancing at businesses that serve alcohol. In their brief the appellants cited a number of cases describing the limits of the exercise of the general police power but failed to advise the court of a controlling Florida Supreme Court decision that "required the validity of the ordinance be judged in light of the powers retained under the Twenty-First Amendment rather than the general police

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63 Id.
64 Id.
65 Id. at 830.
66 Id.
67 Id.
68 Id. at 830-831.
69 ARMSTRONG AND TERRELL, supra note 1, at 10-7.
70 Howard, supra note 60, at 296.
71 Jorgenson v. County of Volusia, 846 F.2d 1350, 1351 (11th Cir. 1988).
power." The court noted that the appellants were not redeemed by the fact that opposing counsel subsequently cited the controlling precedent. The court instructed that "[t]he appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent . . . ."

In a particularly egregious case of lazy lawyering, the Court of Appeals of Texas warned appellate counsel that it would not tolerate counsel's failure to inform the court of controlling adverse precedent. The State had filed a motion to strike the appellant's brief in the appeal of an obscenity conviction. The State correctly indicated that counsel for the appellant had filed identical briefs in numerous similar obscenity appeals before the court and one of those appeals resulted in a published opinion dispositive of the current appeal. Not only did appellant's counsel fail to distinguish that published opinion, he failed to mention it in his brief. The review court expressed its disdain for counsel's "fill-in-the-blanks" briefs, found his practice to violate the Texas Code of Professional Responsibility, notified counsel that the court would report any future violations of this type to the State Bar of Texas for appropriate disciplinary action, and warned counsel that the court may find him in contempt.

Because the penalties for failing to disclose controlling adverse authority are real, the new advocate must fully understand the requirements of the disciplinary rule. Again, the disclosure rules contained in Disciplinary Rule 7-106(B) and Model Rule 3.3(a)(3) mandate the lawyer shall disclose authority in the controlling jurisdiction known to him or her to be directly adverse to the position of his or her client and which is not disclosed by opposing counsel. The "controlling jurisdiction" reference appears to exclude completely authority from other than the forum jurisdiction, even if it is squarely on point. Thus, when preparing an advocacy motion or brief, the advocate must be clear as to what courts are included in the controlling juris-

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72 Id. at 1352.
73 Id.
74 Id.
76 Id. at 235.
77 Id.
78 ABA, supra note 4, at 228; ABA supra note 3 at 62-63.
79 CALLEROS, supra note 48, at 256.
diction. The advocate must ask which court of appeals would review the trial court's decision.

In some circumstances broader disclosure than required by the specific ethical rule may be necessary for the advocate to maintain credibility with the trial court. Professor Calleros suggests, if the question before the court is so novel that no authority within the forum jurisdiction addresses it, and if adverse authority from another jurisdiction would be particularly persuasive, then the court might expect disclosure of the nonbinding adverse authority.

If an adverse authority is not from the controlling jurisdiction or does not address a novel issue or is not particularly persuasive from another jurisdiction, the advocate need not address it unless the other party relies on it or the court raises a question that encompasses it. In an opening brief, such as the supporting brief for a motion for summary judgment or a motion to dismiss the indictment, an advocate need not waste time by distinguishing marginally analogous adverse cases or by criticizing poorly reasoned persuasive authority on which the opposing counsel is unlikely to rely. Instead, the advocate should concentrate on affirmatively presenting his or her own arguments and supporting authority. The advocate should attack only the most obvious adverse authority. Then the advocate can wait to see on what authority the opposing authority relies in the answering brief, and attack that adverse authority in a reply brief, provided the rules permit a reply brief. Of course, if at a hearing on the motion the court asks the advocate broadly about adverse precedent, the advocate should make such frank disclosure as the question seems to warrant.

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80 Id.
81 Id.
82 Id.
83 Id.
84 Id.
"What Were You Thinking?": Using Annotated Portfolios to Improve Student Assessment

Steven J. Johansen*

I. INTRODUCTION

For many years, I have been interested in how to make assessment of student work most effective. As a writing teacher, I have spent hundreds (thousands?) of hours assessing student work. Most of the time, I felt those hours were well spent. After all, my students' writing did get better, eventually. And, over the years, I became more adept at making meaningful comments that my students could understand. Still, I felt that I was not getting the most of the assessment process—that much time should produce more measurable results. This led me to explore alternative assessment techniques, including annotated portfolios.

This paper illustrates how portfolios can improve student assessment in law school writing courses. In Section II, I examine some general ideas about the purpose of assessment. At the outset we must distinguish assessment from ranking. That is, evaluating student work is different from applying a grade to that work. This paper, and portfolios generally, have little to do with ranking students. Section II also asserts that assessment is primarily a tool for learning. This assertion carries with it a number of implications. First, students will learn most from assessment that involves them. When students have greater participation in the assessment, they will learn more from it. Second, reflection itself is a powerful tool. These fundamental notions about assessment provide the pedagogical foundation for using annotated portfolios.

In Section III, I explore the use of portfolios for assessing student writing. This involves two key steps, one before the stu-

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dent writes and one after. First, the teacher must define concrete objectives for each writing assignment. If students are to gain control of, and accept responsibility for, their own writing, they must have a clear picture of what their writing should accomplish. By identifying specific writing objectives, and supplying ample models to follow, the teacher gives the students the power to assess their success at achieving those objectives.

After students have written, they are ready for the second step—explaining their work through annotations. Annotations are student comments about their writing—explaining the choices they have made in reaching their final product. These can include reaction to reader comments, explanations of how they have incorporated writing techniques discussed in class, and points of concern that they still have about their work.

While portfolios are commonly used in elementary, secondary, and even undergraduate education,¹ they are relatively rare in graduate and professional schools.² We who teach at the most advanced level of education could learn a lot from those who have taught our students before us. By incorporating anno-


² Medical schools have used performance-based assessment methods since the 1960s. These assessment methods, which closely resemble the types of work that may be included in a portfolio, include: written clinical simulations, computer-based clinical simulations, oral examinations, and standardized patients. David B. Swanson, Geoffrey R. Norman, Robert L. Linn, Performance-Based Assessment: Lessons From the Health Professions, EDUC. RESEARCHER, June/July 1995, 5; "Portfolios have been used by . . . graduate students wanting to document their formal classroom and field-based learning experiences." Bruce C. Barnett, Portfolio Use in Educational Leadership Preparation Programs: From Theory to Practice, 19 INNOVATIVE HIGHER EDUC. 197, 198 (1995).
tated portfolios into our writing courses, we too can draw on the powerful tools of self assessment and reflection.

II. WHY DO WE ASSESS STUDENTS?

A. How Assessment Differs from Grading

This is not a paper about grading. Letter grading is an exercise in ranking—deciding how well students appear to have mastered a subject compared to other students. Assessment, on the other hand, is the process of determining what a student understands, how that student can improve that understanding, and how she can apply that understanding to future experiences. When we read and comment on student drafts, we are assessing. Our purpose is not to rank, but to help the student learn. Our goal is not to decide who goes to the head of the class, but to have all our students achieve mastery, that is, to be competent beginning lawyers.

While our assessments are often the basis for letter grades, the two need not be inextricably intertwined. Indeed, some would suggest that the two serve contradictory goals. This paper will not examine the implications of improved assessments on grades for this simple reason: while improved assessment can lead to more meaningful grades, grades themselves do not improve assessment. While grades may tell us how one student compares to another student, they do not tell us what that student has learned, what that student has not yet mastered, or how well that student knows her own strengths and weaknesses. However, whether one values ranking or not, improving assessment is a good idea. The better we can determine students' progress and understanding, the more accurately we can help them learn, and if necessary, rank them.

Assessing writing is a difficult, imprecise task. No assessment method will eliminate all the vagaries of the process. However, by involving students in the process through guided, thoughtful reflection, annotated portfolios can make assessment easier for teachers and more useful to students.

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3 Some experts recognize three stages of grading: criticism, evaluation, and ranking. Criticism is the method by which a teacher analyzes student work. Evaluation is the process of measuring a student's work against a standard. Letter grades serve only to rank students. Jay Feinman & Marc Feldman, Pedagogy and Politics, 73 Geo. L.J. 875, 919 (1985). Under this approach, assessment would include criticism and evaluation.

4 Id. at 895.

5 Id. at 920-21.
B. Designing Assessment to Improve Learning

If our goal is to prepare our students to be competent lawyers, then we should use assessment strategies that further that goal. In other words, we should design assessment strategies that will help students learn to be competent lawyers. Assessment then becomes merely another teaching tool to help our students learn. It stands with modeling, lecturing, collaboration, and all the other tools we have for improving our students' ability to think and write. Effective assessment will allow the student to see how he succeeded and where he still needs to improve. Through assessment, the teacher can help the student to better understand the thinking and writing concepts inherent in good lawyering. When we use assessment as a teaching tool, we provide greater opportunity for student learning. By placing greater emphasis on assessment, we may also reduce the anxiety inherent in rank-based grading.

If we start from the premise that our goal is to produce competent legal writers, we must then determine how assessment can further that goal. That is, we should design our assessment for the benefit of our students. In this light, the long term interest of the student—a solid preparation for the practice of law—becomes paramount. Consequently, those assessment strategies that are counter-productive to that goal (e.g., those that discourage independence, accountability, and reflection) are replaced with processes that will better serve the long-term interest of the student.

We must also remember that assessment, no matter how it is done, carries with it many unspoken messages. For example, students learn whether their teacher respects their ideas. Students learn whether they should have confidence in their own writing and reasoning skills. Students learn whether form is more important than content. Because these lessons are often not part of the teacher's intended range of assessment, there is greater likelihood that the students' perceptions in these areas

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6 Feinman and Feldman, supra note 3 at 876.
will be misguided. For example, a teacher who criticizes a student’s work as sloppy or unprofessional may be trying to encourage the student to take more time with the details of editing and proofreading. The student, on the other hand, may interpret the comments as an irrelevant personal attack, or accept responsibility for the poor work, but feel unable to correct the problem. A greater awareness of these and other impacts of assessment should also help us improve the accuracy of these perceptions.

Once we accept that assessment should be designed to benefit the student, i.e. to help prepare her to be a competent legal writer, we must next determine how to achieve that goal. In other words, what can a student learn from assessment that will make her a better lawyer? Of course, the answer to this question will vary greatly from one project to another. However, assessment of writing can improve a student’s learning by exploring four general factors:

How well she understands the substantive issues of a particular project.
How well she has communicated that understanding.
How well she can apply her knowledge to future work.
How she can continue to improve her understanding of the material and her ability to apply it.

Any assessment can provide the student with some semblance of this information. Even a letter grade will tell a student whether the teacher believes she understood the material. It may provide a hint of what she can expect in future situations. Certainly, a teacher’s written comments can provide even greater insight for the student. But these forms of assessment have limitations. Foremost among these is that they place the responsibility for assessment, and consequently for learning, in the hands of the teacher. When assessment is done solely by the teacher, it undermines many of the goals identified above. It does not encourage students to apply their knowledge to future situations. It does not require students to identify weaknesses in their understanding of the law or its application. It does not encourage independence. Rather, it encourages stu-
dents to accept their lot—as determined by those wiser than themselves—as either brilliant rising stars, hopeless losers who never should have gone to law school, or faceless additions to the mass of mediocrity called the middle of the class. To give students more control over their learning, we can shift some of the responsibility for assessment into their hands. This, in turn, allows students to focus their efforts toward improving their work, rather than toward defending against perceived external (and unfair) attacks upon their efforts.

When a student performs below her expectations (and this would be most law students), the “blame” often falls on the teacher, the “system,” or some other external cause. Students rarely accept that they have control over their performance. By shifting responsibility for some of the assessment to students, they necessarily must accept greater responsibility for their performance.12 This added responsibility will, in turn, give the students greater understanding of their own learning and how to apply that learning to future tasks.13 By giving students some control over assessment, we also give them a greater stake in the learning process, and hence more motivation to succeed.14 Once assessment becomes meaningful to students—that is, once they value it—they learn even more from the process.15 Assessment, then, becomes an integral part of how students learn.

What does this mean for writing teachers? It means we should reconsider some fundamental assumptions about how we assess students. For example, should our assessment focus most heavily on the finished product or are there effective ways also to assess how our students reached that product? Consider the primary vehicle we use for assessing student learning: the final version of a student’s writing. Why do we have students write memos, briefs, or client letters? Is it to produce a usable document? Not likely—few of us will ever send a student memo to a partner, a judge, or a client. Rather, it is for the student to display her understanding of synthesis, legal reasoning, fundamental writing skills, and attention to the necessary details of the legal writing genre. Certainly, a well-written appellate brief

12 Barnett, supra note 1, at 202; Kuhs, supra note 11, at 335.
14 Feinman & Feldman, supra note 3 at 897.
15 Frasier & Paulson, supra note 11, at 62.
says something about a student's understanding of reasoning, synthesis, and fundamental writing skills. However, exploring how the student produced that well-written brief may do even more toward preparing her for the next time she must use her skills. Thus, we should look for ways to assess the choices the student made creating the brief. Why did she choose to synthesize the cases she did? How did she decide when her research was finished? What editing steps did she go through?

Looking beyond the final product is even more important for students who are struggling. A poorly written paper can be the result of many things: poor fundamental writing skills; misunderstanding the assignment; poor analytical skills, procrastination, disinterest, and so on. Of course, telling a student his paper is poor—or even what's wrong with it—won't make for a better paper unless he also knows how to fix it. And fixing the problem is impossible, unless we know what the root of the problem is.

It is easy, of course, to point out the shortcomings of traditional methods for assessing students. It is harder to offer effective, manageable solutions. However, the road to improvement begins with two simple steps: identify our objective, and then ask how our actions can attain that objective. Our objective for improving assessment is to have our assessment be a positive learning tool that better prepares our students for the demands of law practice. Portfolios are one way to better meet this objective. There are three critical steps to using portfolios successfully: identify the learning objectives; invite students' assessment of their own progress; and demand students' reflection on their progress toward the learning objectives.

III. USING PORTFOLIOS TO IMPROVE ASSESSMENT

A. Defining Objectives

Perhaps the most difficult aspect of improving assessment comes before the assessment process even begins—when you explain the assignment's objectives to your students. Before a student can begin to assess her work, she must know, in concrete terms, what the objectives of that work are. Unless your objective is to have the student produce obscene writing, it is not enough to tell them, "I know it when I see it." It is perhaps too

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obvious to mention that a student will learn a task better when she knows what that task is—in specific terms.\textsuperscript{18} Yet, too often, we don’t provide students with specific, concrete objectives until after they have attempted to meet those objectives. This “guess what I’m thinking” approach is both frustrating and counterproductive. Thus, the first step toward improving performance is to identify the specific objectives of the assignment, and, ideally, to identify the varying levels of success a student is likely to experience. One way to do this is to create a detailed objectives “rubric” that reflects the assignment’s goals and various levels of success.

Writing detailed objectives for an assignment is a difficult and time-consuming process. It requires carefully thinking through the objectives of your assignment and explicitly identifying the indicators of success.\textsuperscript{19} These objectives should be broken down into individual teachable units.\textsuperscript{20} Of course, many writing teachers already do this, in some form. If you have used checklists to guide students through their drafts, you are well on the way to developing a detailed scoring system. To create a fully developed system, however, one must identify not only the ideal model, but also identify intermediate levels of success.\textsuperscript{21}

An effective scoring system must convert abstract goals into concrete performance. Thus, the first steps in creating a scoring system are to identify a goal, and then ask: how do you know when someone has achieved the goal? What action demonstrates the goal?\textsuperscript{22} Make a list of as many concrete measures of the goal as possible.

For example, assume one goal for an intra-office memo is for the student to use case law effectively. We first need to identify concrete measures of effective use of case law, such as:

- States general principles of law from case.
- Explains factual context of general principle.


\textsuperscript{22} For a general discussion of designing and measuring goals, see Robert F. Magur, \textit{Goal Analysis} (2d ed., 1984).
Explains how facts of authorities compare to facts of problem.
Pinpoints the legal significance of those comparisons.
Considers policy behind express principles.
Anticipates and refutes counter-arguments.
Reaches conclusion that is consistent with legal and ethical principles.
Reaches conclusion that is consistent with application of law to facts.

Once the teacher has defined these specific objectives, the next step is to convert this list of concrete objectives into a form that is useful to students. Of course, each student will achieve the objectives with varying levels of success. The rubric will provide the students with the guidance necessary to assess their progress fairly. It also reinforces the concepts they have heard in class and read about in their texts. Thus, when it is time for the students to assess their work, they will have yet another opportunity to internalize the intended lessons of the assignment.

One approach of identifying differing levels of success is to create a checklist that measures the frequency of success in meeting each objective:
<table>
<thead>
<tr>
<th>Objective</th>
<th>Seldom</th>
<th>Frequently</th>
<th>Always</th>
</tr>
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<tr>
<td>States general principles of law from case.</td>
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<tr>
<td>Explains factual context of general principle.</td>
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<td>Explains how facts of authorities compare to facts of problem.</td>
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<tr>
<td>Pinpoints the legal significance of those comparisons.</td>
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<tr>
<td>Considers policy behind express principles.</td>
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<tr>
<td>Anticipates and refutes counter argument.</td>
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<tr>
<td>Makes sure conclusion is consistent with those policies.</td>
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<tr>
<td>Reaches conclusions that are consistent with legal and ethical principles.</td>
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<tr>
<td>Reaches conclusion that is consistent with application of law to facts.</td>
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An alternative approach is to identify the characteristics of papers that reach varying degrees of competence for each aspect of an assignment. For example, effective legal reasoning relies on some form of authority. To be effective, the student must explain that authority. If dealing with a case law problem, the student needs to explain the facts of the authority. Perhaps synthesis is required—combining principles from several cases to develop a general rule. Of course, all of these things would be covered in class, in the assigned text, and possibly in a handout. What then, would the scoring system add? Consider the following approach for a “rule” paragraph:

- Marginal: Asserts a general principle of law. Does not properly identify the source of that authority. Assertion is conclusory, ambiguous, or unsupported by evidence.
- Basic: Correctly identifies general principle of law and its source. Explains the factual context of that principle, but doesn’t explain significance of that context. Principle is generally sound, yet use of rule to resolve future problem may lead to ambiguous results.
• Proficient: Correctly identifies general principle of law and its source. Explains factual context of that principle and why that context is significant. Anticipates potential ambiguities and alternative interpretations and reconciles with general principle and factual context.

The student now has a target to shoot for, with concrete objectives. While this won't guarantee that all students will produce a "Proficient" rule paragraph on their first draft, it will allow the students greater control over (and hence responsibility for) their work. If a student misses the target, the scoring system will help both the teacher and the student assess where the student went awry. Thus, by starting with concrete, defined objectives, we improve learning as students are planning their writing, and again when they assess their writing as part of the portfolio project.

Of course, even our most concerted efforts at creating concrete criteria cannot anticipate every aspect of a concept as varied and sophisticated as "effective reasoning." But the better we are able to reduce abstract ideas to concrete objectives before our students write, the more quickly the students will be able to internalize these objectives and move on the continuum toward expertise.

Identifying the objectives ahead of time—telling the students what to aim for—is hard to argue with. Few teachers admit to consciously playing the "guess what I'm thinking" game. Nonetheless, some may have concern about spoon feeding the answers to students. After all, law students need to learn to think for themselves. The challenge of law school is to be able to reason effectively. The study of law cannot be reduced to objective bits and bites that can be spewed back in accordance with a formula. So, do we demean the study of law by giving our students concrete targets? Absolutely not.

Recent studies about expert/novice learning theory help explain the importance of identifying concrete objectives for novice legal thinkers. Novices need concrete examples to understand new ideas. While an expert has internalized many of the subtleties that go into legal reasoning, a novice has not.


still has to expressly think about each step of her analysis—and is never sure whether she has remembered everything, or whether she is taking each step correctly. Providing specific guidance gives the novice information in a form she can grasp: concrete goals that fit with her prior experience.\textsuperscript{25} If you want students to be able to synthesize cases, of course, you will work on that skill in class. You should also reinforce that learning by providing concrete objectives regarding synthesis—before the students attempt to incorporate synthesis into their work. Until the students have internalized the concept of synthesis, they will have to think through every step of the process.

To illustrate this idea, think back to when you first started learning to drive: everything about a car seemed new. You had to think about how to put the key into the ignition, how hard to push the gas pedal to start the car, how soon to brake before making a turn—is that car far enough away to turn safely in front of it? On top of all that, you suddenly forgot how to get home!

Compare this with how you now drive your car—you do it without thinking. You know how much space you need to pass, you know when it’s time to flip the turn signal, you even know where to punch the radio to change the station. Does this mean you have forgotten all those concrete steps you struggled with as a novice driver? No. It means you have internalized the skills, including sound judgment, that go into driving a car. However, if given a new challenge, say driving a school bus, you could once again draw on those concrete skills, and learn perhaps a few new skills as well, to adapt to the new experience.

Novice legal writers face a similar challenge. There is so much to learn, to internalize, that it cannot happen at once. The students have to think about each step. By providing that explicit guidance before they write, you give them the opportunity to learn the dashboard; to test the power steering; to remember to put in the clutch before shifting. Later, when they have practiced legal reasoning, when they have written many legal memos, when they have developed expertise as legal thinkers, they won’t need to consciously run through the concrete checklist for every writing assignment. Rather, like the experienced driver who “just knows” when to slow down for a tricky curve, they will have internalized what makes for sound legal reason-

\textsuperscript{25}Id. at 283.
ing. Eventually, they too, will "just know" when their writing is right. However, when faced with new writing challenges, they will be able to draw on those concrete foundations, just as experienced drivers would adapt their car driving expertise when learning how to drive a school bus.

Before moving to portfolios, it is useful to reflect on how well this first step of identifying concrete objectives meets our defined objectives of assessment. First, by sharing specific objectives, before the students write, we recognize their need, as novices, for concrete guidance. We ease the transition toward expertise by giving them a manageable, defined target. More importantly, we recognize that the primary purpose of assessment is to improve learning. We give the students greater ability to assess their own work—properly placing responsibility for learning on the student. The concrete objectives better allow them to see their progress by identifying a continuum of improving skills. Finally, we make it easier for students to make future improvements by providing concrete measures of excellence. Of course, identifying objectives before students write will not, by itself, guarantee success. The most important assessment occurs after the students have put pen to paper.

B. The Annotated Portfolio

1. What Is a Portfolio?

In its most basic form, a portfolio is simply a collection of self-selected student work. Its primary purpose is to provide a vehicle for students to reflect upon their writing as the writing class draws to a close. At the end of the course, a student chooses samples of his writing that he thinks best reflect his progress during the course. There are different kinds of portfolios.26 Perhaps most common is the "best work" portfolio. For this, the student selects pieces he thinks represent his finest hour. Another approach is the "work in progress" portfolio, which may chronicle a single piece from first draft to final copy.

I prefer a combination of the two. In my Advanced Legal Writing class, students complete five projects. I have them select at least two projects to include in their portfolios. I ask them to pick projects that best reflect how well they achieved the goals they set for themselves at the beginning of the course. They

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26 For an interesting survey of different portfolio experiences see PORTFOLIO PORTRAITS (Donald H. Graves & Bonnie S. Sunstein, eds.) (1992).
need not select their best work, but rather those pieces that best reflect their learning. However, the portfolio is more than just a collection of the student's work. Its most essential function is to encourage self-reflection. Consequently, I encourage students to comment on their work in a number of different ways. I request that the students include the following information:

1. A general letter of introduction. This letter explains what the student's goals were for the course, what he worked on in the class, a brief description of the projects he selected for the portfolio, and why he selected those projects.

2. The drafts and final versions of selected projects. This section includes three parts. First, for each project, the student includes a summary of his goals for the assignment and how he achieved or struggled with those goals. Second, the student includes an early draft of the assignment that has received reader comments. This draft is included primarily as a reference point for the third part, the student's final version of the project. The student must annotate the final project, including reflection on a number of potential areas. These annotations are the most important aspect of the portfolios and are discussed in greater detail below. The annotations include responses to reader comments on drafts, examples of ideas taken from the course texts, organizational strategies, substantive choices, and other comments the student finds enlightening.

3. An overall assessment of the student's performance in the class, including his final grade. Remarkably, many students are reluctant to assign a letter grade to their work, although they can provide very thorough assessment of their work product. I suspect this reluctance may have several causes, including an expected internal conflict between modesty and self-interest. However, I also believe that students who have spent a full semester carefully assessing and reflecting upon their writing come to view letter grades as generally superfluous to their learning. Because they can recognize the growth they have made in their writing and thinking, they do not measure their success by the letter grade they receive. Simply put, learning surpasses grading as a motivator for most students.

2. Using Annotations Effectively

The process of writing is about choices. Writers must choose an organizational structure, a voice, a style of writing. All of this, of course, is in addition to substantive choices. Indeed, in a simple five page intra-office memo, we will make hundreds of
conscious choices, and untold subconscious choices. How we make those choices—the knowledge we draw on, the objectives we set, the alternatives we consider—determines what kind of writer we are. The more aware we are of what our choices are, the better we can choose wisely.\(^{27}\)

When students annotate their work, they begin to recognize, and gain control over, the choices they make. Thus, the most important step in creating the portfolio is the annotations the students add to their work. I encourage students to annotate every draft they turn in to me. Throughout the semester, students become more adept at talking about their writing—at reflecting upon it while they are in the drafting stage. Annotations in the portfolio, however, are written weeks after an assignment has been initially completed, assessed, and returned to the students. This leads to a different level of reflection for two reasons. First, the student has distance between writing and reflecting that allows greater objectivity. Second, the student has the added perspective of the entire semester of thinking, writing, peer review, and reflection. Consequently, the portfolio annotations tend to show greater student awareness of their own writing processes.

Involving students in the assessment is a critical step toward achieving our assessment goals.\(^{28}\) Most importantly, it encourages students to reflect on their writing and thinking. This, in turn, allows students to expand their understanding of new concepts, recognize familiar ideas, and identify areas of weakness.\(^{29}\) In addition, it reveals to the teacher what the student was thinking about when putting the work together. This improves the teacher's ability to make meaningful comments about what the student was trying to achieve and whether the student was successful. Of course, if the student was not successful, the annotations will often reflect where the student went amiss. This, in turn, makes it easier to direct teacher comments to the areas of greatest need. Finally, involving students in assessment makes it virtually impossible for students to put together a careless, or sloppy product.\(^{30}\) When students annotate their

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28 Gottlieb, supra, note 11; Kuhs, supra, note 11; Frazier and Paulson, supra, note 11.
29 Kuhs supra, note 11, at 333; Wolf, supra, note 1, at 38.
30 Bimes-Michalak, supra note 1, at 54.
work, they are, in effect, defending their choices. It is much more difficult for a student to defend sloppy work than it is to just hand it in. Because the student must defend her work, annotating places the responsibility for the quality of the work on the student. Finally, when students must explain the choices they made in arriving at a finished product, we expand assessment to include the process of writing as well as the finished product.\textsuperscript{31} In doing so, we reinforce the importance of the writing process to our students.

3. \textit{Suggestions for Guiding Students in Annotating Their Work}

Annotating work will be a new experience for most of your students. They may have done some self-reflection, but not to the degree that annotation requires. Consequently, it is useful to offer specific instructions as to what is expected.\textsuperscript{32} Encourage them to begin by identifying the objectives they had in writing the paper, and then explaining how the finished product reflects those objectives. For example, for an intra-office memo, you might suggest the students address the following in their annotations:

1. Identify each step of your organization. (E.g., in the margin of your paper, label the Issues, Rules, Applications, and Conclusions.)

2. Identify and discuss your two best examples of case synthesis.

3. Explain three examples where you effectively compare the facts of your authority to the facts of your problem and explain the significance of that comparison.

4. Identify the most effective counter-argument that you raise and rebut.

5. Identify one case that you considered using, but rejected. Explain why you chose not to use it.

6. Identify three examples of editing that led to more concise writing.

7. Explain the best paragraph of your memo. Why is it effective?

\textsuperscript{31} Wolf, \textit{supra} note 1, at 37; Wiggins, \textit{supra} note 27, at 138.

\textsuperscript{32} Just as with other assignments, it is important to give students concrete objectives before they begin annotating their work.
8. Explain the paragraph of your paper that gave you the most difficulty. Why was this so difficult to write?

One danger of such specific instruction is that it can easily overwhelm the student. Too many instructions can lead students to see the annotations as too much work. If students perceive the annotations as merely a task to be completed, that is what they will do—complete the task as quickly as possible. Therefore, it is wise to keep the instructions somewhat flexible. For example, from the eight suggestions listed above, I might require students to address a minimum of four. This flexibility allows students to focus on those aspects of their paper that are most important to them. Remember, no one becomes a great legal writer in one paper. The goal is to improve, not to attain an unrealistic goal of perfection. Thus, the student, and the teacher, should select a limited number of goals for each assignment.

This is not to say that the annotations should be taken lightly. Students should expect to spend a considerable amount of time on this reflection process. Thus, it is a good idea to encourage comments on a variety of aspects of a particular assignment: organization, reasoning, style—as well as those things that were edited out of the final paper. Often, that which is deleted will reveal as much about a student’s thinking as that which is left in. The goal then, should be to encourage extensive and thoughtful reflection on those aspects of the project that are of most interest to the student.

IV. WHY USE PORTFOLIOS?

Portfolios are not new to education. However, portfolios appear to be used rarely in law schools. It is time for this to change. Portfolios can be a valuable tool for law school teachers, especially those who teach Legal Writing. Portfolios provide an essential step in the assessment process by sparking student reflection. This, in turn, promotes self-regulated learning. By en-

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33 However, portfolios are not unheard of at the law school level. See Terri LeClercq, I Use Them! Law School Portfolios, AALS LEGAL RESEARCH AND WRITING SECTION NEWSLETTER (AALS Washington, D.C.), Apr., 1993 at 3-4.

34 Although portfolios could play a significant part in seminars and doctrinal courses as well, that is a reform that is beyond the scope of this article.

35 SCOTT G. PARIS & LINDA AYRES, BECOMING REFLECTIVE STUDENTS AND TEACHERS WITH PORTFOLIOS AND AUTHENTIC ASSESSMENT 53 (1994). For a different strategy to encourage self-reflection, see Mary Beth Beazley, The Self Graded Draft: Teaching Stu-
couraging student involvement in the assessment process, we are able to better meet our objectives of using assessment to improve learning and our ultimate goal of preparing our students to be competent lawyers. More specifically, portfolios are useful for three audiences interested in assessing student growth: the students themselves, their teachers, and potential employers.

A. Benefits to Students

Self-reflection is, of course, a tool found in every writing teacher's tool kit. Others have offered numerous ways to get students to think about their writing after they have written. These many techniques may be designed to cover anything from effective reasoning to the final steps of editing. For example, outlining a paper after completing the draft rather than before is a useful exercise for students having trouble with organization. As an editing exercise, I often have students underline every example of passive voice in their drafts and decide if each use is appropriate. Annotated portfolios, however, go beyond these exercises. Annotations require students to reflect on how they moved from initial drafts to finished products. Those reflections allow students to explore the choices they made in reasoning, style, voice, organization—all the pieces that go into the writing puzzle. This, in turn, assists both successful and struggling writers to improve their writing.

When struggling students annotate their work, they begin to see the holes in their writing and reasoning. For example, all students know that organization is important. After all, they have compulsive legal writing teachers pounding this concept into them since the first day of class. Nonetheless, many students write papers that seem to string together independent thoughts in a virtually random order. Such organizational chaos becomes readily apparent when the student is forced to explain his organizational choices.

By demanding that these students annotate their organizational choices, it forces them to make conscious choices. This leads to one of two results: either the student recognizes organizational flaws and is able to correct them, or the student reveals

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36 For a more detailed discussion of metacognition, i.e. students learning about their own learning processes, see Paul T. Wangerin, Learning Strategies for Law Students, 52 ALB. L. REV. 471 (1988).
that he does not understand what effective organization is. In the first instance, the struggling student achieves success in two ways. First, by having to explain his organizational choices, he has begun to internalize organizational concepts and should be better able to use those concepts on future projects. Second, and equally important, he has taken control of his writing—he may begin to realize that he is not dependent upon the teacher for his success.37

Even where the student fails to recognize his organizational problems, or is unable to fix them, the annotation process is still valuable. The teacher can now identify where and why the student is misunderstanding and offer suggestions aimed at the specific problem the student has. In this regard, the teacher may be able to best help the student by noting what a student does not address in his annotations. For example, the student whose paper rambles aimlessly may have no annotations about organization. This would then alert his teacher that the student may not even be considering this important aspect of writing. The teacher can then direct her comments appropriately, and the student will get the direction that will be most valuable to him.

Annotations can also be valuable to our best writers. We all have some student writers who seem to be “naturals.” Early in their law school career, they have adopted the “voice” of a good legal writer. Their work is well-organized and easily read—and they appear to write with ease. These “natural” writers face different challenges than their struggling classmates. While they may not struggle at the same level as their classmates, they too should be able to improve their work—and yet many cannot even explain how they do what they do—it just “sounds right.” Reflection allows these students to understand what they already intuitively know, while at the same time adding greater sophistication to their reasoning and writing. For these students, their annotations may not focus on basic organization schemes or reasoning strategies. Rather, they may explore choices that add polish to their writing or creative arguments that reflect more subtle understanding of legal principles. Most importantly, student annotations allow for more individualized assessment directed toward the particular needs of each student.

37 Simmons, supra note 20, at 33.
Finally, all students benefit from slowing down the writing process and taking time to reflect on what they have written. Thinking and writing about writing forces students to recognize the choices they make in writing, both good and bad. These perceptions are often keener after time has created some distance between the author and the writing project. Thus, by putting together a portfolio at the end of the semester, most students are able to learn much from a writing project weeks or even months after they have finished it.

B. Improving Teacher Assessment

The first time I required my students to provide detailed annotations of their work I was shocked. The students knew more than I did—at least about their own choices. They were able to identify subtle rhetorical devices that we had discussed in class. They were able to identify where they edited to create a parallel structure. They were able to identify arguments that they tried, but didn’t like. All of these points, and many more, had escaped the watchful eye of their professor.

I don’t think this is a reflection on my inadequacy as reader. After fifteen years of assessing papers, I can bleed ink with the best of them. But I am only a reader. At best, I can only see the ideas as they are expressed on the page—after the revision, after the countless choices that go into a piece have been made. The author, on the other hand, has experienced the entire process of writing.

Put another way, the author knows what she is trying to accomplish. For example, consider the following introduction to a paper on adoption:

In recent years, there have been a steadily increasing number of cases involving the rights of parents and children. Many of these cases involve adoptions. Often, the adoptive parents take custody of the child and bond with him while adoption proceedings are proceeding. The adoptive parents then discover that the biological parents have changed their minds and are seeking to regain custody of their child. A complex battle for custody ensues. The courts are then faced with the difficult decision of whether to uproot the child from the adoptive parents, or to deny the biological parents custody of their child.

This opening sets the stage effectively—it catches the reader’s attention, and identifies the issue the paper will address. How-
ever, the student’s annotations reveal writing choices that are not readily apparent to a reader:

I decided to organize the work product by starting out broadly and then narrowing it down. I used Brody’s\textsuperscript{38} drafting process for this step. I found creating an outline to be especially helpful.

In the next to last sentence, I realized that “for custody of the child” was repetitive and could be discarded.

The decision to create an introduction that moved from the general to the specific was a good one. It was an effective beginning that drew the reader into the issue and created interest in what the student had to say. However, as I was interested in other writing issues, I did not recognize this carefully planned organizational scheme until the writer herself noted it in her final paper. This was a beautiful example of writing that is good because it doesn’t draw attention to itself. It set an appropriate tone while at the same time getting the reader off to a good start. It worked, and I had missed it. The author, on the other hand, was able to explain her method—and show me that she really had learned an important concept.

Perhaps even more likely to be missed are wise choices in editing. Here, the student cut out needless words, creating a much more effective sentence. The revised sentence was short and stated the problem dramatically. Without the annotations, however, her skillful editing job may have gone uncredited.

Portfolios not only illuminate skilled writers’ work, but can also assist the teacher in helping struggling students. A paper may be so difficult to follow that a teacher doesn’t know where to start. We have all had the experience of looking at a paper and wondering how a student could corrupt an entire semester of fine teaching into a garbled mess of poorly written, poorly organized, and poorly reasoned legal analysis. We may be even more amazed and frustrated after we have spent hours commenting on this work and the next draft is only slightly better. When students don’t respond to our comments, we are tempted to ask “What were you thinking? Are you stupid, or just obstinate and lazy?” Well, annotations can quickly show that often students are none of these things. Instead, they may have tried to respond to our comments, but simply misunderstood what we were asking. Or perhaps we misdiagnosed the student’s prob-

\textsuperscript{38} \textsc{Susan L. Brody, et al., Legal Drafting} (1994).
lem. Of course, it may also be that they remained confused about a particular legal or writing principle. Without knowing why the student made a poor writing choice, it is very difficult to fix the problem.

One reason that student responses to our comments are often unsuccessful is that we are focusing on the symptom of a disease, and not the disease itself. That is, we look at the end product rather than the process that led to it. On the other hand, when we have student annotations, we can better see the disease itself: where the student is making poor choices. We can get the answer to the question: “What were you thinking?” And once we diagnose the correct disease, we can fashion a cure: our comments will be directed toward the flaws in the student’s thinking and writing processes, rather than only at the result of those processes.

To illustrate this idea, imagine a student who failed to mention a leading case in a research memo. Does this mean her research was incomplete? She thought the case was not important? She couldn't figure out how to distinguish the case, so she just ignored it? It is hard to tell, without knowing the choices the student made. But when the student explains, “I considered using Smith v. Jones, but it didn’t fit my theory of the law,” we know what kind of direction the student needs.

Too often, the final product tells only where the student has ended up, and nothing of the journey that led her there. The annotated portfolio tells the reader, “This is why I made these choices. I understood your comment to mean this—and I disagree.” For example, I assigned students to write a plagiarism statute for the law school. After spelling out a range of penalties, one student wrote, “The honor panel will regard each case on its specific facts.” I wasn’t sure why the student had included this, or even what it meant. In the margin, I wrote, “Is this necessary? Does it imply the honor panel cannot impose a harsher penalty for repeat offenders?” What I meant to ask was whether the honor panel would consider prior offenses in meting out its sanctions. The student’s annotation revealed that she understood this comment differently, believing I was suggesting a harsher penalty than her recommendation of expulsion: “Being permanently expelled is really harsh enough . . . The panel could just put out a contract on a repeat plagiarizer, but that might lead to some Constitutional problems.” Well, this view, which, I suppose is a reasonable reading of my comment, explains why the student left the language as originally written. It’s not that
the student didn’t pay attention to my comment, but that she misinterpreted my meaning. Had I communicated better, she might have edited differently. Her annotation allowed me to communicate more accurately. Even though she had completed this assignment, the comment could direct her to more precise writing on future assignments.

Perhaps, in an ideal world, individual student conferences would accomplish much of what is gained through portfolios. We would be able to sit down with all our students and go over their work, line by line. We could have them explain their choices about organization, style, reasoning, and the rest of what went into their work and provide them with instantaneous feedback. However, we live in a different reality and there simply isn’t time to do this with every student, on every draft. Annotated portfolios, however, allow us to achieve many of the same benefits of extensive conferencing—we learn what the students are thinking. We see what choices they consciously made, and what ideas they failed even to consider. We can know where they think they are struggling, as well as where they think they are succeeding. Annotations expand the dialogue between student and teacher. Without annotations, the teacher “hears” only the final product. With annotations, the teacher hears about the process that went into the product—talking about writing, rather than at writing, enables us to better assess the progress of our students.

C. Benefits to Potential Employers

If portfolios are a rarity in law schools, they are virtually unheard of by prospective employers. However, every employer requires a writing sample from its applicants. The reason is obvious: employers demand law clerks and associates who know how to write. Often, the traditional writing sample is a poor predictor of actual writing ability. Employers are skeptical of student work that may have been heavily edited by professors. On the other hand, an annotated portfolio can portray a student’s writing ability at a level of sophistication most hiring partners have rarely seen.

A portfolio aimed at potential employers may differ slightly from one developed solely for a legal writing class. But the concept remains the same. The student should select writing that is illustrative of his entire law school writing experience. This may include such things as his first year moot court brief, a contract from a drafting class, and a scholarly paper written for a semi-
Again, he should include a letter of introduction explaining why he chose the projects he included in the portfolio, and most importantly, detailed annotations for each project. For example, in explaining an opinion letter, one student wrote:

In answering my client’s query, I made it a point to be specific. I explained the legal options in a manner that a lay person could understand. After reviewing the facts, I stated my conclusion and then explained how I arrived at it. I made suggestions, but left the decision up to the client.

I thought the outline given to us in class was very helpful. It provided a good template for corresponding with clients. I keep a copy in my desk for reference.

The student then included specific annotations throughout the letter, noting such things as his effort to explain legal jargon in a way his client would understand, his disclaimer that his opinion was based on the facts as the client explained them, and his attempt to soften the blow of bad news through effective rhetorical devices.

Imagine the signal such a portfolio would send to an employer: This is a student who is serious about his writing, has had a variety of writing experiences, and is able to recognize his writing strengths. Not only has this student demonstrably strong writing, he is able to talk about writing at a sophisticated level. I submit that a student who demonstrates this level of understanding about the writing process provides a potential employer with the information that employer most needs in making a hiring decision.

V. CONCLUSION

Portfolios will not guarantee complete success for every student. The greatest tools for success remain hard work and dedication to the process by both the student and teacher. However, annotated portfolios can play an important role in improving student writing. When students are able to recognize and defend their writing choices, they are more likely to be able to transfer those choices to future projects. They will also have a better understanding of their strengths and weaknesses. That understanding will, in turn, prepare them to deal with new writing challenges as they continue their legal career. Not only will they have learned much about writing, they will have learned how to continue that learning on their own, after their formal training has ended. When students recognize the power of self-reflection,
they come to appreciate how much they can learn from what they already know.
Integrating Theory and Practice Through Teacher Portfolios
Susan R. Dailey

I. INTRODUCTION
The theme of the 1996 Legal Writing Institute Conference, "Learning from Other Disciplines," reflects the extent to which scholarship in fields such as learning theory, logic, rhetoric, and composition is changing Legal Writing pedagogy. The process of discovering new and better ways to teach, however, involves the challenge of absorbing a large body of interdisciplinary information. Legal Writing professors find that they must learn more about other disciplines, and also adapt that research to the distinctive needs of the Legal Writing program.

This raises important questions for faculty development. How do we support our Legal Writing faculty members in their efforts to learn new information that can help them become better teachers? How do we create development programs that respect individual teaching styles and set high standards for professionalism in teaching? How can we help our Legal Writing faculty members create and preserve a record of the substantial effort that they put into the development of their courses? In this article, I will discuss a faculty development program for Legal Writing professors that uses teaching portfolios as a means of encouraging reflective practice and professional growth.

II. FACULTY DEVELOPMENT THROUGH TEACHER PORTFOLIOS
Teaching portfolios, which have been used in university English and Education departments, are particularly suited to the field of Legal Writing because they provide a means of exploring assumptions about teaching and learning in our newly emerging
discipline. Portfolios encourage new Legal Writing faculty to integrate theoretical material over time and help to create a culture of support and professionalism within the program. Moreover, they can help Legal Writing professionals acquaint other faculty members with the creativity and reflection that they use in their teaching methods and materials year after year.

A system of compiling and sharing teacher portfolios creates a flexible, effective framework for a faculty development program tailored to the specific needs of Legal Writing professionals. Traditional faculty development programs have used workshops to acquaint teachers with the basic issues they will face in the classroom. Teacher training for Legal Writing programs, for example, may include guidance on holding conferences with students, teaching grammar, responding to student papers, applying learning theory, and developing classroom presentation methods.² Some Legal Writing experts recommend that these faculty development programs also include a "rigorous exploration of writing theory that extracts the methodologies most useful in teaching legal writing."³ They believe that writing professors should "explore theory, study linguistic perspectives on professional register, and analyze small-scale structure in legal prose."⁴ A Legal Writing faculty development program that addresses all these issues would indeed have a full agenda.


³ J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 WASH. L. REV. 35, 89 (1994). Composition experts would agree that knowledge of writing theory is an important component of writing pedagogy. See, e.g., Charles W. Bridges, The Basics and the New Teacher in the College Composition Class, in TRAINING THE NEW TEACHER OF COLLEGE COMPOSITION, 15 (Charles W. Bridges ed., 1986) ("It is difficult to see how a teacher of writing can proceed without . . . grounding in rhetorical theory and in the major works applying that theory.") See also, Richard P. VanDeWeghe, Linking Pedagogy to Purpose for Teaching Assistants in Basic Writing, in TRAINING THE NEW TEACHER OF COLLEGE COMPOSITION, supra at 37:

Those of us familiar with [writing theory and research] know the expertise that writing teachers with such knowledge bring to their classroom practices: they understand writing processes and the problems that beset writers at all levels of development; they analyze writers' needs and try to solve them in informed and systematic ways, and they develop and refine pedagogical approaches that, because they are derived from theoretical guides and research support, have an intellectual foundation that gives teachers sound reasons for choosing one approach or strategy over another.

⁴ Rideout & Ramsfield, supra note 3, at 89.
Designing an effective faculty development program, however, involves much more than selecting appropriate content. The program must reflect an understanding of how teachers learn and how they incorporate new information into their classroom practices. Every Legal Writing professor has assumptions about teaching and learning that will influence her behavior in the classroom. Past experiences as student, writer, researcher, and practitioner all contribute to a constructed view of teaching Legal Writing and an intuitive "philosophy" of pedagogy. Like other teachers, Legal Writing professors are not likely to be "passive transmitters of knowledge but rather active and adaptive agents who filter curricular innovations—like any other externally initiated reform—through complex meaning systems." Thus, acknowledging the importance of individual integration of theory into teaching style and self-constructed beliefs is crucial to developing an effective faculty development program.

Research in the field indicates that an ideal faculty development program for Legal Writing professors would involve a number of important components. Such a program would encourage reflection on the conventions of the discourse community of law, require participants to be aware of writing theory and pedagogy, and help them synthesize their readings in the field into their own constructed views of teaching. It would be

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5 See Chris Anson, Portfolios for Teachers: Writing Our Way to Reflective Practice, in New Directions in Portfolio Assessment: Reflective Practice, Critical Theory, and Large-Scale Scoring 185 (Laurel Black, et al. eds., 1994). Anson asserts that even new teachers are likely to "act on self-constructed theory" about how students learn.

6 Deborah Swanson-Owens, Identifying Natural Sources of Resistance: A Case Study of Implementing Writing Across the Curriculum, 20 RES. IN THE TEACHING OF ENG. 69, 71 (1986). See also Elizabeth Rankin, Seeing Yourself as a Teacher: Conversations with Five New Teachers in a University Writing Program 49 (1994)(describing student teachers' perceptions that their seminar "denied the value of personal theorizing"); David Bleich, Evaluating the Teaching of Writing: Questions of Ideology, in Evaluating Teachers of Writing 11, 23 (Christine A. Hult ed., 1994)(concluding that "ideology cannot be taught or inculcated directly"); Kathleen Blake Yancey, Teacher Portfolios: Lessons in Resistance, Readiness, and Reflection, in Situating Portfolios: Four Perspectives 244, 245 (Kathleen Blake Yancey & Irwin Weiser eds., 1997)(discussing student teacher resistance in an English Methods course); Barbara E. Walvoord et al., In the Long Run: A Study of Faculty in Three Writing-Across-the-Curriculum Programs 139 (1997)(describing the extent to which participants in a writing-across-the-curriculum faculty development program adapted the information in the program to their own needs and personal goals).

7 Several researchers recommend that faculty training and development programs encourage synthesis and integration of theoretical ideas. See Richard C. Gebhardt, Unifying Diversity in the Training of Writing Teachers, in Training the New Teacher of College Composition, supra note 3, at 1, 4; VanDeWeghe, supra note 3, at 37.
sufficiently concrete to meet the needs of a first-time teacher and sufficiently stimulating to challenge a more experienced professor. It must be designed with the adult learner's needs in mind and be sensitive to a faculty member's desire for autonomy. The program should support a spirit of intellectual inquiry and rigorous examination of pedagogical techniques while encouraging individual growth within a collegial atmosphere. A system of teacher portfolios can provide an organizing framework for supporting such a program while creating a culture of mentoring, collaboration, and excitement about teaching.

A. Building a Teacher Portfolio

A teacher portfolio "is a structured collection of evidence of a teacher's best work that is selective, reflective, and collaborative, and demonstrates a teacher's accomplishments over time and across a variety of contexts." This definition reflects the specific ways in which a teacher portfolio differs from a typical personnel folder. First, the portfolio is assembled by the teacher herself, who maintains the authority over its contents. Second, it contains the reflections of the teacher, her philosophy of teaching, and her comments on the materials in the portfolio. Third, it is collaborative in the sense that the teacher shares her portfolio with her colleagues, who may suggest changes or write materials that could be included in it. Thus, portfolios are more than extended resumes or folders with student papers; they are "uniquely suited to capturing some of the more complex and subtle dimensions of teaching."

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9 Melissa Sue Kort, No More Band-Aids: Adult Learning and Faculty Development 95 ADE BULL. 21, 21 (1990). Kort points out that autonomy is particularly important for people who seek jobs in higher education because they value their academic freedom and are accustomed to working independently. She finds, in fact, that "autonomy provides one of the strongest elements of job satisfaction for faculty members." Id. Consequently, she believes that "fear of threats to status and to professional autonomy is a strong barrier to success" in professional development programs. Kort recommends that such programs be sensitive to the varying learning styles of individual faculty members and emphasizes that the "learning situation must be made nonthreatening, confidential, and caring." Id. at 21-22.
11 See Anson, supra note 5, at 186-88 (discussing differences between portfolios and faculty dossiers).
The contents of the teaching portfolio will depend to a large extent upon the purpose for which it is assembled. One purpose of the type of "best work" portfolio described above is summative evaluation or teacher assessment. In answer to nationwide concern about the quality of undergraduate education, many colleges and universities have turned to faculty portfolios to make decisions regarding tenure, raises, and teaching awards. Many educators believe that teacher portfolios are superior to traditional assessment tools because they create a detailed, accurate portrait of the individual professor and "allow teachers (and others) to examine actual work performances over time and across contexts in ways that other forms of assessment cannot."

Legal Writing programs with a variety of staffing configurations can use teacher portfolios for summative evaluation. As long as the Legal Writing faculty and the assessment committee are clear about evaluation guidelines, portfolios are appropriate for both full-time and part-time faculty. Student teaching assistants might also compile portfolios for summative evaluation if they receive graded academic credit as part of their compensation for teaching. Indeed, law school faculty members may be more receptive to the idea of giving teaching assistants academic credit or grades if they see the types of information that can be included in a teacher portfolio.

A second purpose for assembling a teacher portfolio is formative evaluation, which has as its primary goal helping an individual improve as a teacher. Educators have recognized that portfolios can be valuable tools to encourage faculty develop-

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13 A complete discussion of summative evaluation is beyond the scope of this article. At Quinnipiac, however, where we use portfolios for faculty development, Legal Writing professors have the option of presenting portfolios with other materials when they are being evaluated.

14 See Edgerton et al., supra note 12, at 3.

15 Wolf, supra note 10, at 4.

16 Harvard, for example, has used teacher portfolios at its Derek Bok Center for Teaching and Learning, see Edgerton et al., supra note 12, at 49. The teaching assistants compile portfolios to document their teaching effectiveness and may present the portfolios to prospective employers upon graduation. Id. at 59-63. In higher education, teacher portfolios are also rather commonly used for summative evaluation in teacher preservice or training programs, where the student's grade for a Methods course or teaching seminar may be determined solely on the basis of the portfolio. See also Wolf, supra note 10 (listing the variety of ways that teaching portfolios have been used in other educational contexts).

17 See Cheslik & McCrary, supra note 2, at 94 (raising the issue of faculty reluctance to give teaching assistants graded credit).
Portfolios can improve teacher performance because they “enable[] the professor to: 1) ponder personal teaching activities, 2) organize priorities, 3) rethink teaching strategies, and 4) plan for the future.” Portfolios compiled for formative evaluation may include not only the teacher’s best work, but also “work in progress.” When Legal Writing faculty members share the contents of their portfolios and discuss both their successes and common problems, benefits accrue to the whole program. It is then that teacher portfolios realize their potential to “forge a new campus culture of professionalism about teaching.”

Portfolios can be adapted to meet the faculty development needs of different types of Legal Writing programs. Portfolios have already been used in higher education as a means of encouraging more thoughtful reflection on the importance of teaching as part of the scholarly responsibilities of full-time tenure-track faculty members. Legal Writing professors with long-term contracts or tenure will find that over the years their portfolios will include rich, detailed entries that reflect the development of their expertise. Faculty members on short-term contracts, however, also benefit from faculty development through teacher portfolios. Legal Writing professors who have little teaching experience when they are hired would also certainly profit from a program that supports their efforts to become better teachers. In addition, professors who are faced with heavy course loads and marginalized status vis-à-vis the rest of the faculty may appreciate the focus on professionalism that teacher portfolios can provide. In Legal Writing programs using student teaching assistants, teacher portfolios can provide a tool for mentoring if student trainees have the opportunity to review and discuss model portfolios from previous years.

Since its inception in 1995, the primary goal of the teacher portfolio program at Quinnipiac has been formative rather than summative evaluation. From the first experimental year to the present, the portfolio program has replaced the more traditional workshop format previously used for faculty development. The purpose of Quinnipiac’s program is to create a non-hierarchical community of Legal Writing faculty members interested in pursuing excellence in teaching. A basic assumption of such a community is that we can all be better teachers, and that teacher


19 Edgerton et al., supra note 12, at 4.
portfolios can provide an appropriate forum for exchanging ideas.\textsuperscript{20}

Although the primary goal of a portfolio program is likely to be either summative or formative evaluation of faculty, a third potential use for portfolios is program evaluation. Faculty who do not teach writing or incorporate writing assignments into their courses may be unfamiliar with the types of challenges that face Legal Writing faculty. Portfolios offer an organized framework for presenting curricular goals, writing theory, and illustrative student work. Because they contain teachers’ reflections and students’ written assignments, portfolios can provide concrete issues for discussion between Legal Writing professors and the rest of the faculty.\textsuperscript{21}

Depending upon the purpose for which it is assembled, therefore, the contents of a portfolio may include examples of teacher performance of the four “core tasks” of teaching: “course planning and preparation, actual teaching, evaluating student learning and providing feedback, and keeping up with the professional field in areas of teaching.”\textsuperscript{22} A wide variety of documents can be used to demonstrate a teacher’s mastery of these core tasks: syllabi, assignments, lecture notes, student evaluations, handouts, student papers with comments, course overviews, classroom narratives, teaching journals, letters from colleagues who have observed a class, statements of teaching philosophy, videotapes of classroom activities, case studies of individual students, and statements of teaching goals.\textsuperscript{23} Documents for the portfolio may be thought of as primary, “actual

\textsuperscript{20} In 1995, the writing program at Quinnipiac was staffed by full-time, non-tenure-track faculty who had one-year contracts that were renewable for up to five years. We believed that we could help our faculty move on to other writing programs after they had reached the five-year cap if they could demonstrate their excellence as teachers by means of a portfolio. Our Legal Writing faculty now have the opportunity to apply for status as Assistant Professor of Legal Skills, a position that has no five-year cap. Application for this position requires summative evaluation. Legal Writing faculty members may present their portfolios for summative evaluation by a faculty committee at that time.

\textsuperscript{21} Despite Quinnipiac’s focus on the use of portfolios for formative evaluation, they also proved useful when the Law School curriculum committee reviewed the Legal Writing program several years ago. Legal Writing faculty members were able to present portions of faculty portfolios to show curricular goals and student progress at various stages of the first and second semester courses.

\textsuperscript{22} Edgerton et al., \textit{supra} note 12, at 10.

\textsuperscript{23} Wolf, \textit{supra} note 10, at 8. Some institutions require that certain types of information be included in all portfolios. This type of standardization makes summative evaluation easier.
materials from classroom instruction" and secondary, "materials that demonstrate active, critical thinking about instructional issues and materials." Indeed, it is the secondary materials, the teacher's reflective statements, that give shape and coherence to the mass of information that might be generated during the course of the semester. Without these secondary materials, other "pieces of evidence are largely uninterpretable." It is the teacher's commentary on her materials that makes it clear to the reader why the items were included and why they are meaningful.

A Legal Writing professor with several years of experience in teaching might develop a portfolio with the following organization: introduction, statement of teaching philosophy, syllabus, examples of student writing with professor's comments, a case study of an individual student, sample assignments, and a peer's comments after a class observation. Such a portfolio would create a detailed picture of this professor's pedagogical beliefs and teaching practices. The reader of the portfolio can view the professor's activities at different stages of the teaching process, from planning the curriculum to working with individual students. The contents will be selective and individualized, and will reflect the professor's own style of teaching. Although the more extensive portfolio of an experienced Legal Writing professional might serve as a model for others, even first-year professors can and should be encouraged to start to assemble and think about their own approaches to teaching. A first-year writing professor, for example, might draft a preliminary statement of teaching philosophy to be tested against her experiences the following year. She might also include some of the assignments she designed as well as some examples of her responses to student writing. Ideally, the portfolio provides the opportunity for both experienced and novice Legal Writing professionals to grow as teachers.

B. Portfolio Roundtables

If portfolios are assembled in isolation and reviewed only by the Director of Legal Writing, the opportunity for collaboration and growth of the whole writing faculty is lost. Portfolios used

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24 Anson, supra note 5, at 187.
25 Id.
26 Wolf, supra note 10, at 8.
for faculty development require an organized format through which participating professors can share portfolio entries with their colleagues. In Quinnipiac's Legal Writing program, this format is the portfolio roundtable. In each roundtable, a different Legal Writing professor presents her portfolio to her colleagues in the writing program. During the roundtable, the presenter has the opportunity to share her thoughts and get feedback from her colleagues in an informal, supportive atmosphere. The roundtable allows for an exchange of ideas and an evaluation of evidence of teaching practices.

Before the roundtable, the presenter should distribute the portfolio to the Legal Writing faculty and other invitees. Participants prepare for the roundtable by reviewing the presenter's portfolio, which should contain a reflective component as well as evidence of teaching in the form of student work. After some introductory remarks, the presenter may ask a question of her colleagues as a way to focus the discussion. Questions may concern evaluation of student work, follow-up activities, or problems the presenter perceives in her own portfolio. The other participants will try to answer the question and give their reactions to the portfolio. They may suggest further readings, potential areas for classroom research, or follow-up exercises and assignments. The roundtable itself presents an opportunity for growth because it reflects a two-way process: the presenter gets feedback from her colleagues and the colleagues are introduced

27 See Cynthia Onore, Roundtables: Seeing Ourselves and Seeing Ourselves as Others See Us, Remarks at the Learning and Literacies Conference of the National Council of Teachers of English (1996). In Quinnipiac's pilot program, we used the term "portfolio presentation," but we have adopted Onore's term because it captures the atmosphere of the event more accurately.

28 In Quinnipiac's pilot year, we invited some members of the faculty who had expressed an interest in writing pedagogy. We also invited the Director of the Freshman Writing Program from Quinnipiac College.

29 Onore, supra note 27. Onore's reviewers were expected to bring both "warm" and "cool" comments about the portfolio to the roundtable, an interesting idea because the presenter would be prepared for both types of comments. But the goal of these roundtables was summative evaluation. After the roundtables, students in her Methods class would be told whether they had "passed" or would have to continue to work on their portfolios and present them at another roundtable.

30 At Quinnipiac the presenter typically discusses a single portfolio entry consisting of a reflective statement, supporting documents (such as handouts or materials given to students), and student written work. Additional materials are added to a more complete portfolio if it is to be used for summative evaluation at a later date.

31 For the idea of the question as a point of focus for discussion, I am indebted to Carol Anne Orticari and Mary McKenna of the Quinnipiac College Master of Arts in Teaching program.
to new ideas anchored in the context of actual student work. The roundtable format for sharing portfolios fosters a rich discussion of pedagogical issues. Other researchers have observed that sharing portfolios encourages "the creation of a culture in which thoughtful discourse about teaching becomes the norm."32

The process of preparing for a portfolio roundtable is the first step in introducing the integrating effects of assembling a portfolio. In writing a reflective statement, the professor confronts a cluster of issues and questions about her own teaching practice: What was the problem that she identified and wanted to solve? What articles on classroom research suggested approaches to solving this problem? Did she consider ideas from colleagues or students? In what ways were materials adapted for the specialized uses of a law school community? Does the new approach reflect a particular pedagogical theory? What theories did she consider and reject? As she answers these questions, the faculty member addresses the extent to which she has integrated theory, research, and individual teaching style into the particular context in which she is teaching.

The reflective statement might explore the theorizing that takes place at each stage of the teaching process or trace the evolution of an idea over time. Consider, for example, the process of the individual professor preparing a portfolio entry for presentation to her colleagues at a roundtable. She has decided to describe a recent successful experiment with using a peer editing assignment. Her reflective statement might describe her initial reluctance to try peer review. Perhaps she was initially unconvinced that her students could provide meaningful editing advice to each other. Perhaps her concerns were more logistical, centering on the potential cheating problems that could arise if students exchanged papers on the same topic. The reflective statement might also include references to influential articles about classroom research or approaches and theories she rejected as inappropriate for law students. The reflective statement might also tie the peer editing project to a more general theory of learning based on social constructivist views. As she reviews the student work she will use as evidence, the presenting professor has the opportunity to re-evaluate her first impressions of improved performance, make new discoveries about the direction of her teaching, and think about future projects.

32 Edgerton et al., supra note 12, at 4.
Even in assembling a single portfolio entry, a professor can encounter in microcosm the type of integration that takes place in assembling an entire portfolio. The portfolio becomes a site for resolving potential dichotomies between theory and practice. It can also provide the opportunity for discovering the "unifying threads running through the diverse models and theories of the writing process."\(^{33}\) The act of creating a portfolio is itself worthwhile and has been linked to improved teaching performance.\(^{34}\) As portfolio advocates have noted, "The reasons [for improvement] are not hard to understand. In the very process of assembling portfolios, faculty reflect on their teaching: selecting best work, organizing evidence so that it creates a larger authentic picture of their practice."\(^{35}\)

The process of presenting a portfolio to colleagues is clearly helpful to the presenter, who has the opportunity to receive feedback on an issue of great concern to her. Other roundtable participants, however, also benefit from the work she has done. In reviewing the portfolio materials, colleagues see how the presenter has applied writing theory and pedagogy in classroom situations very similar to their own. This shared context makes the presentation more relevant to the concerns of the other roundtable participants, who are likely to have encountered similar issues or problems in their own teaching.

### III. Implementing a Teacher Portfolio Program

Legal Writing faculty members who are unfamiliar with portfolios may benefit from some introductory workshops that allow them to experiment with developing portfolio entries. Such workshops would give the faculty an opportunity to become familiar with some of the core concepts of portfolios before they attempt a roundtable presentation. Two such core concepts are reflective teaching practice and evidence of excellence in teaching. Ideally, the design of the workshops will help faculty generate preliminary drafts of documents for their individual portfolios.

\(^{33}\) Gebhardt, *supra* note 7, at 6.

\(^{34}\) See Edgerton et al., *supra* note 12, at 50.

\(^{35}\) *Id.* at 6.
A. Statements of Teaching Philosophy

One important concept worth exploring in a workshop introducing portfolios is the statement of teaching philosophy. Although few teachers would be able to write a comprehensive teaching philosophy at a single sitting, a preliminary draft of such a document could be written and discussed in a workshop format. Writing prompts for eliciting thoughtful reflection on this subject will contain questions about past educational experiences in the classroom, and the role of the teacher, student, and classroom in the learning experience. Other questions might focus on readings or classroom research that may have had a significant influence on the faculty member.

Encouraging reflective teaching practice lies at the heart of the teacher portfolio, and sharing drafts of teaching philosophy or even answers to basic questions about teaching can prove illuminating to the faculty. At Quinnipiac, for example, we found that more concrete questions generated the most animated responses and seemed to get to the crux of differing teaching styles, philosophies, and goals. In answer to a question about favorite teachers, for example, we found that most of our faculty reversed the question and described negative role models from their law school days. Many members of our Legal Writing faculty, it seems, developed a teaching philosophy from a negative rather than positive image. This was instrumental in shaping their commitment to being accessible to students, using humor in the classroom, and understanding the types of errors students make in their early attempts at legal writing.

The preliminary draft of a reflective statement on teaching generated at this type of workshop will undergo changes as the individual faculty member examines her assumptions more carefully over time, and her views of teaching change in response to her own experience. Individual professors may revise their

36 Chris Anson et al., Remarks at Annual Convention of Conference on College Composition and Communication (1995). In their workshops on teacher portfolios, the speakers suggested a number of writing prompts to elicit reflective statements about teaching. They also provided several models for structuring portfolio materials.

37 The Quinnipiac faculty evaluated this workshop component very favorably. Several people commented that they wished we had done this type of exercise before. In fact, similar workshops in other years were not as successful in generating discussion. This may be attributed to the writing prompts we used, which explored concrete classroom experiences and constructed views of teaching. It could also be that the experience of producing a draft for the portfolio provided the workshop with a framework that had been missing in other years.
drafts to integrate readings in educational theory or classroom research. The portfolio, however, provides the framework for thinking about and noting those changes in philosophy as the teacher develops over time. In the process of sharing ideas about teaching in the workshop format, we are creating an atmosphere of mutual support and respect that is not only useful in creating a faculty development program, but also necessary in a time when the efforts of the writing faculty may be undervalued.

B. Evidence of Excellence in Teaching

An introductory portfolio workshop might also explore the nature of evidence of teaching excellence. Published portfolios can provide raw material for discussion. Seldin’s collection, for example, contains the portfolios of experienced faculty from various disciplines in higher education.\(^{38}\) He defines the teaching portfolio as the “factual description of a professor’s major strengths and teaching achievements. It describes documents and materials which collectively suggest the scope and quality of a professor’s teaching performance.”\(^{39}\) Seldin’s emphasis on description is reflected in the collection itself, which does not provide the supporting materials, such as student work or evaluations. The collection nevertheless provides an overview of possible portfolio structure and content.

The Edgerton collection, on the other hand, publishes individual entries from teacher portfolios.\(^{40}\) These entries contain both the teacher’s commentary and supporting explanatory materials.\(^{41}\) This collection, therefore, provides more detailed examples of the variety of ways in which individual portfolio entries can show evidence of teaching performance.

Although portfolio entries from other disciplines can provide models for Legal Writing programs, the most effective way to communicate the value of assembling and sharing a portfolio would involve examples from each writing professor in the program. A workshop structured around short presentations of preliminary portfolio entries from each member of the writing faculty can provide a draft of another entry for each faculty portfolio. Ideally, the entry would be an innovative assignment or teaching idea accompanied by a reflective statement outlining

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38 Seldin, supra note 18, at 31-91.
39 Id. at 3.
40 Edgerton et al., supra note 12.
41 Id. at 15-48.
the goal of the assignment. If possible, student work could be included to demonstrate the success of the assignment.

In an introductory workshop, each faculty member would present a draft of a single portfolio entry, but the entries are likely to be varied enough to cover a broad range of topics. In Quinnipiac’s program, for example, we asked the Legal Writing faculty to bring to the workshop a successful teaching exercise and an accompanying explanatory, reflective statement. The resulting portfolio entries generally fell into one of two categories: documents that set out goals or plans for the semester, and documents that demonstrated successful teaching practice in the past. In the former category, professors contributed a handout for outlining to address student weakness in organization, a plan for addressing student grammar problems, and a plan for a series of revised research assignments. The documents that demonstrated successful teaching practice included examples of peer reviews and in-class editing assignments.

IV. BENEFITS OF FACULTY DEVELOPMENT THROUGH TEACHER PORTFOLIOS

The format of the portfolio roundtable is particularly suitable for faculty development in a Legal Writing program. To be effective, any faculty development program must be designed with a clear understanding of the needs, values, and discourse conventions of the community it serves. The law school is a discourse community that values rationality, methodical presentation of evidence, and problem solving through critical thinking. Consequently, the greatest strength of a teacher portfolio program is that it applies these habits of mind to the context of teaching.

Portfolios encourage the systematic organization of evidence. Within individual portfolios and roundtable discussions, theories about teaching and learning are situated firmly within the context of student work. Because lawyers are trained to assemble and critically examine evidence, experienced lawyers who happen to be novice teachers have the opportunity, through portfolios, to exercise an area of expertise as they make the transition to academia. In general, this is simply a more effective way to present and process information for an audience of Legal Writing professionals.

Teacher portfolios are also particularly beneficial in the field of Legal Writing because there is little classroom research upon which we can base firm conclusions about whether our students
are meeting the goals we set for them. Under such circumstances, the role of the classroom teacher, as researcher, becomes all the more pivotal in framing issues and testing pedagogical assumptions. Consequently, a rigorous examination of student work is an important component of faculty development. Writing faculty should also carefully examine successful teaching practices from other educational contexts to assess the extent to which the assumptions and theories from other fields can reasonably be transferred to our own.  

This approach discourages the proliferation of unexamined theories and unsuccessful teaching practices.  

A study of the connections between writing and thinking is especially important when teaching adult students as they enter a new discourse community. Researchers who study novices entering new academic disciplines have discovered the complex tasks involved in learning the discourse conventions. They have found that “students entering academic disciplines need a specialized literacy that consists of the ability to use discipline-specific rhetorical and linguistic conventions to serve their purposes as writers.” The change of discourse communities challenges not only how students use language but how they think about the subject matter.

These differences are likely to involve fundamental disciplinary concepts — notions of causality and proof, of evidence or warrants for claims, of assumptions that can be taken for granted, and of premises that must be made explicit and defended. Such concepts may lie at the heart of successful performance in a new discipline, as well as at the

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42 See Rideout & Ramsfield, supra note 3, at 89.
43 The time and effort involved in studying what happens in our classrooms is warranted by the complexity of the process that links writing and thinking. Consider, for example, the following description of the writing process:

Writing is a recursive process that requires the reconstruction of text already written, so that what we add connects appropriately with what has preceded. That process brings ideas not written into conjunction with what has been reconstructed, providing endless opportunities to reconsider ideas and reengage the processes that gave rise to them in the first place. This generation and reprocessing of conceptual content takes place in the context of purposes that involve the writer's knowledge of inquiry, discourse, and audience. All of this argues that writing is a very complex process.

44 Carol Berkenkotter et al., Social Context and Socially Constructed Texts: The Initiation of a Graduate Student into a Writing Research Community, in LANDMARK ESSAYS ON WRITING ACROSS THE CURRICULUM 211, 211 (Charles Bazerman & David R. Russell eds., 1994).
heart of the development of the higher-level intellectual skills that so few students seem to achieve.45

Although reflection is valuable for all teachers, Legal Writing professionals in particular can benefit because of their pivotal role in initiating novices into the profession. We need to reflect on an area in which we are already "expert," and become self-conscious about our own basic assumptions and how we have come to those assumptions. Teaching writing in a discourse community requires that teachers reflect on the implicit assumptions in their field, making "visible" the conventions that the students do not see. Unfortunately, this is a process that has not been widely studied by high school and college teachers within the disciplines. "The discursive practices of each academic field are so embedded in the texture of its disciplinary activity that they have not . . . become an object of study or teaching within the disciplines."46 In fact, despite experts' call for "heightened critical awareness of our disciplinary discourses,"47 most teachers in the disciplines have not mastered this skill. Although they may, for example, stress critical thinking skills when stating their goals, "teachers in a range of disciplines focus on their students' mastery of content and not on the thinking that was evidenced in their students' writing."48 A well-designed writing program can challenge students to grapple with these discourse issues as they write. Consequently, an important role of the writing professor is to develop a repertoire of ways to introduce students from a variety of backgrounds into the discourse community of the law. Researchers have noted the importance of reflective teaching in developing this skill:

If teachers are to help students develop higher-order reading, thinking and writing skills, they must be able to articulate the ways of knowing that are central to particular domains. Only then can they begin to conceptualize student learning in terms of the ways in which students think about and discuss the subjects they are learning, rather

48 Id.
than in terms of recitation of rote context. 49

V. POTENTIAL PROBLEMS

Assembling a teacher portfolio requires a great deal of time and effort. Some educational researchers believe that faculty will not be motivated to create portfolios unless they are used for summative evaluation:

Without some form of external support and rewards, most teachers simply will not keep portfolios. While of tremendous value, it is a time-consuming and strenuous task to document and critically examine one's own performance in a systematic and extended fashion. Without some form of encouragement, teachers will be swept away by the tsunami-like everyday demands of their job. Thus, the two purposes - improvement and evaluation - are likely to go hand-in-hand. 50

Portfolios do take time, but their sole purpose need not be summative evaluation. Faculty members may be happy to have an organized format for sharing innovative teaching ideas with their colleagues.

Regardless of the particular staffing configurations of a Legal Writing program, the first year of implementing portfolios is likely to be experimental. During the pilot year, the Legal Writing faculty can focus on the development of the portfolios rather than on assessment procedures. 51 The director and the Legal Writing faculty can work toward developing the requirements and details of using portfolios. Teaching is highly situational, and "[o]ne can learn from but not necessarily replicate what works on another campus." 52

There are good reasons for proceeding cautiously during the pilot year of a portfolio program, especially if the emphasis is on summative evaluation rather than faculty development. Some portfolio proponents have warned that "[h]igh-stakes assessment can exert tremendous pressure on the portfolio process, potentially distorting the assessment approach and undermining its original purposes. Portfolios could turn into a documentation

49 Langer, supra note 45, at 70.
50 Wolf, supra note 10, at 4.
51 Edgerton et al., supra note 12, at 49.
52 Id. at 53.
nightmare." Legal Writing professors, who sometimes feel marginalized by the rest of the law school faculty, may be especially sensitive to requests for documentation of their activities. There is a danger that portfolios could become "'pack-ratting run rampant,' an exercise in collecting paper, a dreary bureaucratic routine." If portfolios are viewed as simply one more addition to an already overburdened workload, their introduction could be met with lowered morale.

Writing program directors can avoid such potential pitfalls by proceeding cautiously during the early years and emphasizing formative rather than summative evaluation. During Quinnipiac's pilot year, for example, Legal Writing faculty volunteered for the roundtables and presented only a single entry from their portfolios. Although we now regularly use portfolio roundtables for faculty development, we still do not require that portfolios be presented for summative evaluation.

VI. CONCLUSION

Teacher portfolios encourage reflective pedagogy and rigorous examination of classroom practices. At Quinnipiac, the portfolio roundtables have proven to be a productive, energizing form of faculty development. The portfolios allow us to tap into the expertise of our faculty more effectively and provide a way for us to examine our assumptions about the success of our curriculum. Each Legal Writing professor now takes a more active role in faculty development, and although the portfolio presentations are developed independently, we are able to cover a broad range of subjects in a few days.

Last year, for example, the portfolio roundtables included presentations on the effects of using student papers as models for class discussion, the use of research journals to promote more effective research skills, techniques to improve student conferences, the results of a peer mentoring program, and a method of encouraging student reflection on the writing process. Each of these portfolio presentations contained a reflective theoretical component as well as the student work that resulted from the assignment or project under discussion. Since our early attempts with the roundtable format, the portfolio presentations have become more sophisticated and have addressed more com-

53 Wolf, supra note 10, at 5.
54 Edgerton et al., supra note 12, at 4.
plex teaching issues. In general, the portfolio roundtables have proven to be a more satisfactory format for faculty development than more traditional formats we had used in the past.

In designing a faculty development program we are forced to confront basic issues about the qualities of an excellent teacher. Such teachers do more than simply combine "subject-matter expertise" with some teaching techniques.\textsuperscript{55} Researchers have found that "in exemplary teaching, knowledge is not just being 'transmitted'; it is being 'transformed.' Great teachers find analogies and metaphors that 'transform' concepts into terms that students can understand."\textsuperscript{56} Such teachers have a variety of strategies for communicating their ideas and are able to adapt their style to the needs of the students.

Portfolios provide a vehicle for excellence in teaching to be recognized and rewarded. They encourage professional growth and provide opportunities for collaboration and dialogue about teaching. They create a culture in which professionalism is appreciated and the teachers have a sense that in their labor-intensive jobs there is room for reflection and scholarly activity.

\textsuperscript{55} Id. at 23.

\textsuperscript{56} Id. at 55.