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Designing and Using Peer Review in a First-Year Legal Research and Writing Course

Kirsten K. Davis

I could feel the excitement in the room that afternoon as the students in my first-year legal research and writing class exchanged motion memoranda drafts. Until now, students had been permitted to work on legal research together, but they had been under strict instructions not to collaborate in the writing process. Each student had written in a vacuum, not knowing how the other forty students in the class organized, analyzed, and wrote. The process was always the same: turn in a draft and get my comments; re-write the draft and get more comments and a grade. With no basis for comparison, students had to rely upon and trust, often reluctantly, the opinion of a novice teacher to tell them if their writing was “good.”

But no longer. Finally, after six months of waiting, my students were reviewing each other’s writing: reviewing to strengthen their analytical and writing skills, gain perspective on their own ability and effort, build confidence in themselves, and discover they were on the “right track.” As the students began to work, obviously excited about and engaged in the task, I asked myself: “Why had I waited so long to use peer review?”

Peer Review and Legal Skill-Building

Peer review, the editing process in which law students critique each other’s written work, is often considered a “secondary” exercise that can be omitted from a first-year legal

1 Legal Writing Professor, Arizona State University. B.A. 1992, J.D. 1995, The Ohio State University. The Author thanks The Honorable Rebecca White Berch, James B. Levy, Judith Stinson, Charles Calleros, Elizabeth Bruch, Samantha Moppett, Anthony Niedwiecki, Chris Reich, and Mark Vilaboy for their assistance with this Article. The Author also thanks her 2000-2001 Legal Research and Writing students for their willingness to participate in and evaluate peer review.

2 Others have defined “peer review” or “peer editing” as a “structured exercise in which law students critique the written work of fellow classmates by offering both positive and negative comments.” Jo Anne Durako, Brutal Choices in Curricular Design . . . Peer Editing: It’s Worth the Effort, 7 Persp. 73, 73 n. 1 (1999); see generally Lissa Griffin, Teaching Upperclass Writing: Everything You Always Wanted to Know but Were Afraid to Ask, 34 Gonz. L. Rev. 45, 72 (1998) (defining “peer review” as “the process through which students review each other’s work”). Peer review is a type of cooperative learning, which is defined as a “structured, systematic, instructional strategy in which small groups work toward a common goal.” Vernellia R. Randall, Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools, 16 Thomas M. Cooley L. Rev. 201, 234 (1999).
writing course.\textsuperscript{3} For example, many first-year legal-writing courses use only the student-teacher method of evaluation and feedback, engaging each student in a recursive writing process\textsuperscript{4} in which the professor provides written comments and oral feedback to the student who revises the work based solely on these teacher-student interactions. By introducing peer editors into the writing process and allowing students the chance to see how other students approach the same legal problem, however, the peer review experience can teach students writing, editing, and cooperation skills that they can apply in legal practice but that they may not learn through the student-teacher editing cycle.

Using peer review in the first-year writing course has several advantages. First, peer review encourages cooperation between students—an effective learning method often absent from the first-year experience\textsuperscript{5} but an essential part of legal practice. Further, through their roles as readers and editors, students learn to focus on the needs of their audience,\textsuperscript{6} a sensitivity essential for successful writing to the courts, other lawyers, and clients. Moreover, peer review reinforces students' understanding of legal writing and analysis\textsuperscript{7} and enhances their ability to transfer those

\textsuperscript{3}Durako, \textit{supra} n. 2, at 73.


\textsuperscript{6}Durako, \textit{supra} n. 2, at 74; Griffin, \textit{supra} n. 2, at 73-74; see Andrea W. Herrmann, \textit{Teaching Writing with Peer Response Groups}, May 1989 Educ. Resources Info. Ctr. (ERIC) Clearinghouse on Reading and Commun. Skills Dig. 2, 2 (“Cooperative writing helps students discover audience . . .”).

\textsuperscript{7}Dominguez, \textit{supra} n. 5, at 387 (noting that peer activities “strengthen [students'] grasp on the academic material”); Gerald F. Hess, \textit{Principle 3: Good Practice Encourages Active Learning}, 49 J. Leg. Educ. 401, 402 (1999) (indicating that active learning, of which peer review is a type, “helps students grasp, retain, and apply content”); Ulle Erika Lewes, \textit{Peer Evaluation in a Writing Seminar}, ERIC ED 226 355, 8 (1981) (suggesting “peer evaluation helps students internalize the requirements of competent writing”); Zimmerman,
skills from one writing project to another. Peer review also teaches students to respect the opinions of peers and think about how to analyze and evaluate a legal problem and communicate that analysis. Additionally, peer review can give students confidence in their editing and writing skills that they may not otherwise gain from the teacher-student editing process. Finally, peer review helps students learn to articulate criticism in a coherent and constructive manner, thoughtfully evaluate feedback from peers, and selectively integrate that feedback into their own writing. In practice, lawyers use these skills when collaborating on cases, integrating conflicting edits into cohesive documents, offering editing suggestions for others' work, editing their own work, and considering multiple drafting approaches to legal documents. Simply stated, adding a peer review experience to a first-year course can complement and build upon the core skills taught in a legal writing course, help students develop practice skills such as cooperation, rewriting, and editing, and better prepare students for their careers as lawyers.

Designing the Peer Review Exercise

With these benefits in mind, I designed a peer review exercise and incorporated it into my first-year legal research and writing course. The exercise needed to avoid four potential pitfalls. First, given the demands of the first-year of law school, the peer review

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supra n. 5, at 1000 (commenting that “the learning advantages [of cooperative learning] extend from basic academic achievement to a complete understanding or mastery of the subject matter”).

8 Lewes, supra n. 7, at 6; Randall, supra n. 2, at 219.


12 See Griffin, supra n. 2, at 74; Lynch & Golen, supra n. 9, at 47.
assignment could not take too much time outside of class to complete because students might focus only on the time burden and not realize the benefits of the assignment. Second, the peer review guidelines needed to closely parallel what students had already learned; otherwise, the guidelines could make students feel confused and unprepared to edit other students' work. Third, the editing guidelines needed to be clear, or the resulting feedback might be overly general ("good job") or miss important organizational and analytical problems by focusing only on smaller issues such as misspellings or punctuation errors. Finally, the exercise needed to avoid the most obvious risk of a peer review exercise in the competitive law school environment: students' fear that sharing their work with or giving constructive criticism to classmates might give others an opportunity to "steal" their ideas and gain an unfair advantage in grading or in a related oral argument competition. Without accounting for that potential concern, students might resist fully participating in the exercise.

Keeping these pitfalls in mind, I decided to use the peer review exercise in conjunction with the primary writing assignment in the second semester, a ten-page summary judgment memorandum. As with all other assignments in the course, students could research cooperatively and discuss the substantive issues in the memorandum assignment. However, they were specifically instructed not to collaborate in the writing process. Thus, this would be the students' first opportunity to review

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13 Durako, supra n. 2, at 73 (noting that "students . . . need time in the curriculum to complete the peer edits").
14 See id.
15 Id.; see generally John C. Bean, Engaging Ideas: The Professor's Guide to Integrating Writing, Critical Thinking, and Active Learning in the Classroom 222-23 (Jossey-Bass 1996) ("Unless the teacher structures the sessions and trains students in what to do, students are apt to give each other eccentric or otherwise unhelpful advice.").
16 Thanks to Judith Stinson for pointing out this evident, yet often overlooked, pitfall. See generally Durako, supra n. 2, at 73 (noting concern that "[s]ome students may gain an extra advantage if they receive excellent peer edits . . . "). Zimmerman notes that "competitive rivalry" exists among first year law students and is fostered by "[t]raditional legal teaching methods." Zimmerman, supra n. 5, at 972. However, cooperative learning "results in higher achievement than does a competitive goal structure when the tasks become more complex." Id. at 994 (quoting Marla Beth Resnick, A Review of Classroom Goal Structures 2 (unpublished Ph.D. dissertation, DePaul U. 1981) (on file with Dept. of Psych., DePaul U.). As such, he suggests that "[i]t would be absolutely wrong to reject a particular pedagogy because it either does not further or actually limits competition." Id. at 975.
17 In fact, even in my pass/fail writing course, at least two students indicated a reluctance to participate in class discussions about the substance of the primary writing assignment, apparently because they did not want to lose a perceived competitive edge.
classmates' writing. I chose the persuasive memorandum assignment for the peer review exercise because, at that point in the year, students had completed five substantial writing assignments and would be more likely, by virtue of instruction and practice, to possess the knowledge and experience to provide a useful critique of the memorandum's organization and analysis.

In designing the exercise, I gave special consideration not only to the potential design pitfalls but also to the scope of the editing tasks, the time allotted to editing, the opportunity for multiple sources of feedback and group discussion, and the opportunity for self-evaluation. First, the scope of the peer review focused primarily on the organization of the argument section and quality of the analysis rather than on style matters such as grammar and punctuation. I chose this substantive limitation for a number of reasons. To begin, the memorandum used for the peer review exercise would be a "first-draft," and thus the broader concerns of organization and analysis would be ripe for consideration. Also, because the course and grading criteria emphasized legal analysis and organization, students would be familiar and comfortable with those topics and the exercise could emphasize the importance of strong organization and analysis as the foundation for quality writing. Finally, I elected to avoid style matters such as grammar and punctuation on a colleague's advice that, even though students may receive accurate faculty instruction on these matters, students often have an incorrect understanding of grammar and punctuation rules and may make erroneous comments about them in peer review.18

Second, to avoid concerns about onerous outside-of-class assignments or any perceived unfair competitive advantage of having another student's draft for an extended time, I limited the time allotted to the exercise to a one and one-half hour class period. I set this limitation not only to relieve students' anxiety about sharing work but also to more closely replicate the attention a memorandum might get from the audience for a memo in practice such as from a judge or a supervising attorney. The in-class limitation also required students to concentrate their edits on

18 This is not to say, however, that with sufficient training and supervision, using the peer editing exercise to evaluate grammar, punctuation, spelling, and citation would be inappropriate or counterproductive in later stages of the editing process. See e.g. Durako, supra n. 2, at 76 (suggesting peer review can be used to "learn a specific skill" such as citation form).
analysis and organization, and it gave them a sense of the time pressures they will face in practice.

Third, because I wanted to give students the opportunity to read more than one memorandum and receive feedback from more than one student, I created editing groups of three students. By assigning students to three-person editing groups, they could see two other students' approaches to the same problem and critically evaluate whether these approaches improved upon their own. Additionally, I anticipated that the three-person group might result in conflicting advice that students would need to evaluate, thus enhancing their critical thinking skills and simulating the situation in which several attorneys review the same document and provide conflicting editorial comments. Finally, I thought by providing students more than one set of comments on their memoranda, they not only would receive a greater variety of feedback but would also be more likely to trust the reliability of those comments, particularly when student editors made similar suggestions about the writing.

I also wanted the students to participate in a small group discussion immediately after commenting on each other's memoranda. I thought this would give students the opportunity to discuss and debate approaches, elaborate upon edits, clarify criticisms, generate a better understanding of the legal arguments and writing strategies used in the memoranda, and create enthusiasm for the writing project.

Finally, not only did I want students to learn from the comments they received from their peers, I also wanted students to employ what they had learned from commenting on a peer's

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20 Marcoulides & Simkin, supra n. 5, at 221 (“Single reviews are easiest, . . . but multiple reviews increase the reliability and the amount of potential feedback given to each student.”).

21 “Through peer interaction, what individuals learn is more and qualitatively different that what they would learn on their own. Each student reaches a higher level of thinking.” Zimmerman, supra n. 5, at 996, 1000 (quoting Melanie L. Schneider, Collaborative Learning: A Concept in Search of a Definition, 3 Issues in Writing 26, 36 (1990)); see generally Hess, supra n. 7, at 407 (“Good discussions prompt students to use higher-level thinking skills: to apply rules in new contexts, analyze issues, synthesize doctrines, and evaluate ideas.”); Randall, supra n. 2, at 219 (“Cooperative Learning is more effective in developing higher level reasoning. Students generate more new ideas and solutions . . . ”).
writing to improve their own writing and editing skills. Thus, I incorporated self-evaluation into the exercise, encouraging students to reflect upon their own writing in light of the peer review experience.

The Directions

I designed the directions to allow students to easily and effectively participate in the peer review exercise. To limit the amount of training and preparation necessary for students to successfully participate in the exercise, the directions provided to the students for reviewing their peers’ papers used terms and concepts already learned in the legal writing course. Thus, to prepare for and participate in the exercise, students needed only to review the instructions and apply them.

The directions required students to consider specifically the organization and analysis in the argument section of the memorandum and included only editing tasks that the students could easily understand and complete. These limitations served two functions. First, focusing only on the argument section allowed students to complete the review within the class period. Second, directing students to focus only on that section highlighted and reinforced the organization and analytical skills they had already learned during the year.

The directions instructed students to first read only the point headings in the argument section and note in the margin if they could not understand the arguments just from the point headings. This task encouraged students to think about both the substance and the form of the point headings and to consider whether they successfully conveyed the content of the writer’s argument.

Next, the directions asked students to read the argument section and complete four specific editing tasks. First, students were asked to put a question mark next to any word, sentence, paragraph, or argument they had trouble understanding and to note why their understanding was impaired. The directions gave examples of appropriate notations: “sentence too long or incomplete,” “paragraph covers more than one topic,” or “analysis

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22 The directions I used for the exercise are attached as Appendix A. Thanks to Mary Beth Beazley for providing suggestions for and an example of peer review directions.

23 “Peer critiques are most effective if students are applying a clear set of criteria to the written work.” Hess, supra n. 7, at 410.
of facts insufficient." Although the directions encouraged students to make broad comments, I anticipated that the comments would serve as a springboard for a more detailed discussion during the small group session that followed the editing assignment.

Third, the directions asked the student editors to identify any analytical problems with the arguments. They were asked to identify "holes" in arguments as well as any arguments that were not reasonable or persuasive. Next, the directions guided students to consider the internal organization of each argument. If the students saw that any part of the legal analysis ("CRuPAC") was missing or incorrectly organized, they were to note that in the margin. The directions gave specific examples of potential problems: "Does the argument jump from the rule to the conclusion with no discussion of the facts?" or "Is there a rule with insufficient proof?" Finally, the directions asked students to note if any counterargument they had anticipated had not been addressed.

Before finishing their review of the memorandum, students were asked to consider two additional items. First, students were to note any affirmative arguments that they felt were missing. Second, they were asked to write at the end of the memorandum the three most memorable points about the argument section. The directions gave the following example of an appropriate "overall impression" end comment: "1) excellent use of case authority; 2) very persuasive argument on legislative intent; 3) couldn't follow the arguments on judicial estoppel." The purpose of the "final comment" was to give the author information about audience perception and to allow the writer to revise the memorandum if the overall impressions were not ones the author intended.

As the final task in the peer review, student editors were asked to reflect on their own writing in the context of the peer editing assignment. The instruction directed the students as follows:

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25 Early study of peer review by English composition scholars suggests that this type of "descriptive" feedback, relating the reader's "experience of reading" the written work, allows the writer to keep control over what, how much, and why to revise. Lewes, supra n. 7, at 2 (citing Peter Elbow, Writing Without Teachers 85 (Oxford U. Press 1973)).
Think about your own argument section. Did editing someone else's work give you insight into your own writing? For example, did you notice arguments /counterarguments/ counteranalysis you missed? Did you like a particular organizational strategy or stylistic device the memo used that you could apply to your own work? At the bottom of the sheet, note any thoughts you have about your own writing as a result of this review.

Students submitted their written reflections to me at the end of class.

The Process

The peer review exercise took place five days before the first draft of the memorandum was due and was an entirely in-class exercise. The class period lasted ninety minutes: fifty minutes devoted to reading and editing memoranda, thirty minutes assigned to editing group discussion, and ten minutes set aside for wrapping up the exercise. I distributed directions at an earlier class meeting and told the students to review them. I also directed students to bring two copies of their memorandum to class to exchange with their editing group.

I grouped students in threes on the same side of the assignment (plaintiff or defendant). Group assignments were primarily random, although I adjusted the groupings to require cooperation between students who I perceived did not routinely interact with one another and to ensure that each group included both men and women. I made these adjustments to increase the chances that students would receive diverse feedback in the editing process and to give them the opportunity to work with other students that they might not have selected as peer review partners.

Using the peer review directions as a guide, students had twenty-five minutes to edit each memorandum. I gave the class regular updates on the time remaining and required the students to move to the next memorandum after twenty-five minutes had passed. At the end of the time for editing, the students met in their small groups for discussion. They discussed each memorandum for ten minutes, using the time to talk about organizational and analytical issues they noted during the editing session. Students then returned the marked-up draft to the author and gave their peer review instruction sheet, with
reflections on their own writing, to me. The class concluded with a discussion about what students learned from, and their impressions of, the exercise.

**Student Feedback**

Student response to the assignment, both formal and informal, was primarily positive. First, most students appeared to stay on task during the exercise and seemed interested in seeing how their classmates approached the same writing assignment. Additionally, during the small group session, student discussion stayed on point and often prompted students to ask for clarification and additional guidance that ultimately led them to a greater understanding of the material. After class, several students expressed their satisfaction with the exercise.

I also asked each student to complete a “feedback form” designed to determine whether the peer review exercise met its goals. This survey yielded mostly positive responses. Ninety-two percent of the students “strongly agreed” or “agreed” that the peer review assignment gave them insight into their writing. Seventy-four percent of the students either “strongly agreed” or “agreed” that their memorandum improved as a result of the exercise. Ninety percent were satisfied that the directions were sufficient to allow them to give meaningful feedback on their peers’ papers. More than three-quarters of the class (seventy-nine percent) felt that instruction in the course sufficiently prepared them to participate in the peer review exercise. Conversely, a significant minority of students indicated that they either had “no opinion,” “disagreed,” or “strongly disagree” that the exercise improved their editing skills (forty percent) or assisted them in understanding the needs of their audience (forty-two percent).

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26 Nine questions directing students to circle one of five responses (“strongly agree,” “agree,” “no opinion,” “disagree,” or “strongly disagree”) were asked about the peer review exercise. The feedback form is attached as Appendix B.

27 I distributed the feedback form after the students turned in the final draft of the memorandum. To ensure anonymity and minimize student concerns about their responses affecting their grades in the course, students were asked only to circle responses and to indicate the sex of the evaluator by writing “M” or “F” on the top of the form. Students were specifically directed not to write any comments on the feedback form. Of the forty-one students in the class, thirty-eight completed and returned it.

28 Reported statistics were calculated to the nearest tenth and then rounded to the nearest whole number.

29 The feedback form took into account the sex of the responding student, with interesting results. For the most part, men and women responded similarly to the
Students were most troubled by the limited time they had to review the memoranda. Sixty-three percent indicated they either "disagreed" or "strongly disagreed" that they had sufficient time to edit their peers' papers. Finally, although students wanted more time for editing, seventy-four percent of students "agreed" or "strongly agreed" that the written feedback helped them understand problems with their own memoranda and with their writing generally, and sixty-nine percent indicated the same level of satisfaction with the oral feedback from the small group discussion.

Anecdotal evidence showed that students took what they learned from the editing exercise and used it to identify areas for improvement in their own organization and legal analysis. For example, students made the following comments in response to the self-evaluation question that asked what they had learned that they could apply to their own writing:

I will definitely re-think my organization! It was helpful to read a paper that so thoroughly puts the "A" in CRuPAC.

This [memo] is extremely well organized . . . . I tend to jump around. . . . My writing could use a bit more structure.

I made my [argument] too complicated. I missed some counterarguments. I need to simplify my process.

I learned a lot about counteranalysis from reading [my classmate's] paper.
I realized I need to . . . back up my arguments with more case law . . . and remember to [write] my memo [i]n the light most favorable to the client . . . .

We looked at [an argument] slightly differently, so I will think about that.

Moreover, students' written comments on the self-evaluation indicated that they gained respect for their peers' analysis and writing as a result of the exercise:

[My classmate] did a very detailed analysis . . . . I was impressed with his organization [and] persuasive arguments . . . . I noticed a number of arguments I missed . . . . I'm going to talk to [my classmate] about them.

[My classmate's] research was incredible and her analysis was flowing, complete and well researched . . . . I see how [the organizational structure] can be flowing and clear.

[My classmate's] paper was well stated, easily read–just a great paper–it would take me a while to produce what she wrote . . .

Reflections about the Peer Review Exercise and Ideas for Improvement

The peer review exercise appeared to be a substantial success. Student responses suggested that students achieved a better understanding of legal writing techniques and improved the organization and analysis of their own memoranda as a result of the exercise. Students cooperatively interacted with their peers. They gave and received helpful feedback on their writing, and most students improved their editing skills and better understood audience needs following the exercise. More importantly, students gained an appreciation of the abilities and talents of their peers and the contributions each could make to the group.

Certain aspects of the assignment design were particularly successful. For example, grouping students in threes rather than pairs had significant advantages.30 Students read and compared

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30 In fact, research shows that “the optimal number of students per group is three.” Paula Lustbader, Some Tips on Using Collaborative Exercises, L. Teacher (newsletter of the
how two other students writing on the same side of the issue created and organized their arguments. Moreover, students were forced to consider whether to integrate those approaches into their own writing. Requiring students to think critically about alternative approaches exposed them to a dilemma often facing lawyers in practice: having several organizational strategies and arguments available but facing a page limitation that necessitates choosing only the most persuasive ones.

The three-person editing group was particularly helpful for students who questioned their ability to analyze a legal problem and organize their writing. Those students could see that there can be several satisfactory approaches to writing a persuasive memorandum. In fact, one student noted in her self-evaluation her realization that her arguments were both on point and acceptably different: “I felt relieved that most of my arguments were covered by [another student] as well . . . . I thought her discussion on one of the point headings was more detailed than mine, although I am not sure if it was necessary.”

The small group discussion following the editing exercise was also successful. Students benefitted from the give and take of oral criticism. Unlike with written feedback alone, the discussion provided students the opportunity to ask for clarification of confusing comments. Additionally, meeting in groups allowed the students to discuss, compare, and critique three perspectives on the same organizational and analytical issues, an experience that likely improved their understanding of the material. Moreover, the small group setting seemed to generate discussion about the substance of the arguments, a process that helped students think more deeply about the strengths and weaknesses of their positions. The small group discussion also required students to explain and defend their editorial comments, further requiring them to think critically about the assignment, their comments, and the writing process. In sum, the small group experience exposed students to cooperative writing in a professional setting.

The course and peer review instructions also gave the students the tools they needed to complete the peer review

Inst. for L. Teaching) 9 (Spring 1994) (available at <http://law.gonzaga.edu/ilst/Newsletters/Spring1994/ lust.htm>). Groups that have more than five members “tend to get off track or have dominating members.” Id. However, peer review groups should be large enough for students to get “sufficiently diversified responses to their papers . . . .” Barron, supra n. 11, at 26.
assignment. Most students indicated that they were generally able to understand and use the instructions successfully and were prepared to participate in the assignment. By limiting the scope of the peer review to two fundamental skills and tailoring the directions to fit that scope, the exercise accommodated first-year students' skill level. To the extent that student understanding of the directions needs improvement, the professor could take additional time during class to review the directions and answer any questions.

Although students expressed dissatisfaction with the limited time allotted for the exercise, I believe that in-class peer review is an acceptable alternative to an out-of-class assignment. While students may have felt pressed for time to complete the editing assignment, they were primarily satisfied with the exercise as a whole. Additionally, students' frustration with time constraints is not unique to the peer review exercise but rather extends to other law school assignments, such as exams. Simply, students do not like to be pressed for time. Nevertheless, limiting the time for the exercise focuses students' attention on important skills and minimizes their anxiety about sharing their work with other students. Thus, the benefits of the in-class peer review exercise outweigh the disadvantage of student frustration over time limits.

However, a professor may alleviate time pressures on students while preserving the in-class nature and effectiveness of the peer review assignment. For example, one might allow students additional editing time by extending the class period or conducting the review over two or three class periods. Alternatively, the number of pages reviewed might be further limited to preserve the in-class structure of the exercise. Another alternative would be to use the peer review exercise as a continuation of a short in-class writing assignment. For example, the peer review exercise could be applied to a one- or two-page analysis of a narrow legal issue, thus giving students a peer review experience without time pressure or problem complexity. Moreover, by using peer review on a simple assignment, students could experience the benefits of the exercise earlier in the course and build upon that experience throughout the semester with additional, increasingly complex exercises.

As mentioned above, students seemed confused by and dissatisfied with the role the exercise played in learning about audience needs and improving self-editing skills. These shortcomings may have resulted from my failure to adequately
explain how the assignment should help students develop skills in these areas.\textsuperscript{31} To remedy this problem, more time could be spent discussing how student editors play the role of the "audience" in the peer review exercise. For example, the professor may want to lead students in a discussion about how a judge or supervising attorney may respond to the memorandum and encourage students to think about what those readers need from the writing and what they might find persuasive. By leading students through a discussion about audience expectations, students might better focus on audience needs during the exercise and ultimately be better able to address those needs in their own writing.

Moreover, the professor could discuss with students how peer review develops self-editing skills.\textsuperscript{32} A discussion of the characteristics of good editing in the legal writing context (for example, the ability to identify key parts of a legal argument such as the rule or the analysis) might give students the context they otherwise lack for understanding how peer review develops good editing practices. One could also explain that by applying editing techniques to others' writing, students will be better able to use the same techniques to edit their own writing—a situation in which they often lack the objectivity needed to make accurate edits.\textsuperscript{33}

In conclusion, an in-class peer review experience reinforces students' understanding of important legal writing techniques, teaches them to work cooperatively, enables them to better evaluate and edit their own writing, encourages them to respect the opinions of their peers, and better equips them to edit within time limits. Coupled with the satisfaction students gain from being able to work together on their writing and having a context in which to measure the quality of their own writing, peer review is a useful exercise in a first-year writing course to help students learn and improve critical practice skills.

\textsuperscript{31} Durako, \textit{supra}, n. 2 at 73 (noting the importance of adequately explaining the assignment).

\textsuperscript{32} \textit{Id.} at 74 ("[B]eing a good peer editor is another step toward becoming a good self-editor—a more subtle skill to learn.").

\textsuperscript{33} See Mary Beth Beazley, \textit{The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique}, 3 Leg. Writing 175, 181 (1997) (discussing that when students lack the necessary psychological distance for editing their own work they can suffer from "eclipse of the brain," a problem they can often remedy by guided self-critique and practice).
APPENDIX A
Peer Review—Argument Section
Directions

Note: You have 25 minutes to complete this review.
Reviewer's Name______________
Name of Person Being Reviewed__________________________

1. Write your name on the top of the memo.
2. Turn to the argument section. Read only the point headings. Do you understand the argument just from reading the point headings? If not, make a note in the margin.
3. Now, read through the argument section.

Put a question mark next to any word, sentence, paragraph, or argument you have trouble understanding. Note briefly why (e.g., sentence too long or incomplete, paragraph covers more than one topic, analysis of facts insufficient).

Think critically about each argument raised in the memo. Are there problems with the arguments? “Holes” in them? Do they seem reasonable and persuasive? Note any concerns you have about the arguments in the margins.

Do you notice any of the parts of the legal paradigm (CRuPAC) that are not organized correctly or are missing? For example, does the argument jump from the rule to the conclusion with no discussion of the facts? Or, is there a rule with insufficient rule proof? If so, note this concern in the margin.

At the end of each section, note any counterarguments that weren’t addressed that you feel should have been.

4. After reading through the entire argument, note at the end of the argument section any affirmative argument that wasn’t raised that you think should have been.
5. Now that you’ve read through the argument section, what are the three most memorable things about the argument? Write them at the end of the paper. (For example, you might write: “1) excellent use of case authority; 2) very persuasive argument on legislative intent; 3) couldn’t follow argument on judicial estoppel.”)

6. Think about your own argument section. Did editing someone else’s work give you insight into your own writing? For example, did you notice arguments/counterarguments/counteranalysis you missed? Did you like a particular organizational strategy or stylistic device the memo used that you could apply to your own work? At the
bottom of this sheet, note any thoughts you have about your own writing as a result of this review.

APPENDIX B
Feedback Form
Peer Review Exercise
Professor Davis
Spring 2001

Editing my peers' memoranda gave me insight into my own writing.

Strongly Agree  Agree  No Opinion  Disagree  Strongly Disagree

The peer review exercise helped me improve my editing skills.

Strongly Agree  Agree  No Opinion  Disagree  Strongly Disagree

The peer review exercise helped me to better understand the needs of my memorandum's audience.

Strongly Agree  Agree  No Opinion  Disagree  Strongly Disagree

The peer review directions were sufficient for me to give meaningful feedback on my peers' papers.

Strongly Agree  Agree  No Opinion  Disagree  Strongly Disagree

The Legal Writing and Research course sufficiently prepared me to give meaningful feedback in the areas described in the peer review directions.

Strongly Agree  Agree  No Opinion  Disagree  Strongly Disagree
My peers' written feedback helped me understand problems with my memorandum and with my writing.

Strongly Agree   Agree   No Opinion   Disagree   Strongly Disagree

The small group discussion following the peer editing exercise helped me understand problems with my memorandum and in my writing.

Strongly Agree   Agree   No Opinion   Disagree   Strongly Disagree

I had sufficient time to edit my peers' papers.

Strongly Agree   Agree   No Opinion   Disagree   Strongly Disagree

My memorandum improved as a result of the peer editing exercise.

Strongly Agree   Agree   No Opinion   Disagree   Strongly Disagree
An Interview With Marjorie Rombauer

Mary S. Lawrence

April, 2001

Marjorie Dick Rombauer, Professor Emerita of Law, the University of Washington, founded the teaching of legal writing as a professional discipline. In the 1960s, when in most law schools writing instruction was haphazard, she created a rigorous, intellectually challenging program taught by full-time faculty. The national reputation of Marjorie’s program lent groundbreaking credibility to the teaching of legal research and writing in general. Her text Legal Problem Solving: Analysis, Research and Writing similarly broke new ground. With its emphasis on analysis and problem solving it demonstrated that legal writing instruction was more than mechanics and grammar. It proved that a legal writing program could be as academically demanding as any other law school course. The respect that Legal Problem Solving won for Marjorie as a scholar translated into wider acceptance of legal writing as a field.

Marjorie’s influence has been both profound and far reaching. She was instrumental in forming the AALS Section on Legal Writing, Reasoning and Research, the very first organization for members of the discipline. (Marjorie, however, confides that she would have preferred the Section to be called Legal Analysis and Research). She has spoken at innumerable workshops and conferences. She has inspired and mentored countless legal writing professionals. Her influence on the profession is literally incalculable.

In addition to teaching legal analysis and research, Marjorie taught creditor-debtor law, legal drafting and secured transactions at the University of Washington Law School. She served as Acting Dean in 1990. She has been a frequent panelist on creditor-debtor law for Washington Continuing Legal Education programs. She is the author of Creditors’ Remedies-Debtors’ Relief (2 vols.), published by West in 1996. She was a member of the Washington Law Revision Commission from 1988-95 and its chair from 1990-1995. She participated in drafting many bills for the Washington Legislature. In 1987, she received the Washington State Bar

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Mary S. Lawrence is Associate Professor Emerita at the University of Oregon School of Law, where she was Director of the Legal Research and Writing Program from 1978 to 2000.
Association's Award of Honor and Merit for her work in drafting and securing enactment of the 1987 Enforcement of Judgments Act.

The University of Washington Law School has honored her with its distinguished service award, and its alumni voted her one of the 10 best teachers in the law school's 100 years. At that school, her alma mater, she broke new ground for the status of women as law students and as faculty members.

In 1993 she received an award for Distinguished Service to the Profession from the Association of American Law Schools. The Association of Legal Writing Directors has established an award in her honor.

Lawrence: Marjorie, you are universally respected as a pioneer in the field of legal analysis and writing. In fact, you are the pioneer and for most of us, an icon. How did you happen to begin teaching legal writing?

Rombauer: I began teaching at the University of Washington Law School in the fall of 1960, after I graduated from that school. I had an employment opportunity—the assistant dean, who was in charge of placement, asked me if I wanted to go to work for a local company that I had done some research for. I said no, I was going into practice with Edgar, my husband. He said, “I don’t suppose we could interest you in being a legal writing teacher?” I said I didn’t think so, but I talked to Edgar, and I just decided that this would be a nice bridge for me between law school and practice, so I said, “Yes.” When the dean talked with me, he told me I would have a 9-month contract at $450 per month and it would not be renewed.

There were two of us teaching. We each started with 75 students. In the fall quarter, I did four weeks of orientation with the first year students and then conducted second year moot court and graded about 50 briefs while the library taught legal bibliography to the first year students. In the winter quarter (10 weeks), as planned by the assistant dean, we were to prepare, critique, and grade three research and writing assignments, the third one to be the basis for the moot court exercise. In spring quarter, we conducted moot court, graded briefs, and read and graded civil pleadings for a problem prepared by the civil procedure teachers. I rarely had time to plan or even to think about what I was doing.

To my surprise, they asked me to return to teach again the next year. I said, “Well, if number one, you will increase my salary, and number two, you will hire another instructor, I will
They did, so I came back to teach the second year at $600 per month. I really wanted to do it again just so I could plan a more feasible program. That second year I ended up with only 27 students in my moot court spring quarter. My best year of teaching, it was wonderful.

L: It’s really amazing that you began your career with so many students and at such a miserable salary. Yet you established a program that everyone saw as a model.

R: We still had the substantial dropout rate at that time. So I started out that second year with more in the fall quarter—about 50 or 55—but by spring, almost half had disappeared.

L: Was that because people were failing?

R: Yes, at that time we admitted many students, expecting half to flunk out, and they did.

L: Now, from what I’ve read, legal writing programs started in the ’50s.

R: Generally it’s agreed that the first legal writing program was at the University of Chicago Law School. It was supposed to provide sustained legal analysis and exposition. They gave substantial credit and the program had a good reputation, but they made one mistake, in my view. They staffed it with graduate students from England. And, while I’m sure the English students were very good writers and very good editors, they were not familiar with our style of dealing with case precedents or statutes. But otherwise, Chicago was the leader. The impetus for writing programs at that time, I think, was that after the war, there was a substantial influx of older students into the law schools. When schools relaxed admission standards even more in admitting them, they discovered that the students’ writing was a serious problem.

In 1951 the program at University of Washington started. They created a new title for the teachers, “group instructor.”

L: What was the difference? Anything?

R: No status. No status whatsoever. That continued; that was the system I was hired into.

L: Today, you are regarded by everyone in the field, as the founder of legal writing programs in the U.S. and the person who has most influenced the field. I was wondering what do you see as the major changes that have taken place?

R: Well certainly, I was the most visible, I think, but there were others working in other schools that had ambitions for their programs too. The biggest change is the large number of people who are available, who are interested, and who have experience,
and that is a very important development. That has really led to other important changes that have taken place in the development of legal writing programs. It made it possible to form an AALS section on legal research and writing. It made it possible for Laurel Oates and Chris Rideout to develop the Legal Writing Institute, to have enough people who wanted to come and to have schools want to send them. It made it possible to develop the legal writing directors’ association because with the increased number of teachers there came a need for more directors and interaction. So I think that the increased number of people is most important.

L: Tell us about how that worked with the AALS, how the first legal writing and research section got started. That was a leap forward.

R: Oh, that was a tremendous leap forward. The prime mover was Shirley Bysiewicz from Connecticut. She was a law librarian, and the thrust was for teachers of legal research. (There weren’t that many established legal writing teachers.) She petitioned AALS to form this new section. The section was formed in 1973, and she and Harry Bitner, the law librarian at Cornell and the Bitner of the Price and Bitner legal research text, were the first co-chairs. The following year I was elected, and my recollection is that I was the only chairperson. For a while, we alternated. I don’t know if this was a matter of design or serendipity, but a law librarian chaired the section after my term, and then a legal writing person was a chair and so on. The year that I was chair, that would be 1974-75, a librarian was in charge of the conference program, and the subject was teaching legal research.

L: I remember Shirley Bysiewicz. She spoke, I think it was the last time she spoke, at the AALS writing workshop in Chicago in 1985.

R: No, didn’t she speak at the first one, at Louisville in 1980?

L: I think she spoke at both. In Chicago, she advocated that research should be taught by librarians only. That wasn’t very well received. She died soon after the ‘85 meeting. You wrote a wonderful tribute to her in the AALS newsletter.

R: I wish we had acknowledged her contributions in Chicago.

L: Of the developments you have seen since you started, at the time it happened, was the most unexpected development?

R: Developments? I suspect that the most unexpected was the development of the Directors’ Association. Of course at the time it was formed I was so overwhelmed with a busy writing schedule, that I really wasn’t paying attention, but I’m surprised
at how strong it's become in a short period of time. It's what, about seven years old?

L: It started in 1995. It's become very strong politically. It has around 200 members.

R: The very first AALS conference/workshop that was held in legal writing was in Louisville, Kentucky. That was 21 years ago, in 1980, and the Chicago conference was 1985. You could say that the AALS was very generous and farsighted because it's not easy to get an AALS workshop. I think it was Dean Dave Vernon of Iowa who was the moving party for the workshop.

L: A number of us who were at that conference are still in legal writing, and I recall I was in absolute awe of you, just absolute awe.

R: I remember that you were at that conference, but I can't remember you before. Had you attended AALS meetings before that conference?

L: Yes, I met you at an earlier meeting in the 1970s. I recall that so many of us were so impressed by you at that Louisville, Kentucky conference. That was a fairly well-attended conference, there were quite a few people there who still have connections to legal writing.

R: At that time the AALS had a limit of 30 on workshop attendees, so it was a small conference. I think it was fully subscribed.

L: We all felt you had influenced us at that conference.

R: Well, I'm happy to hear that, I wish I could remember what I was influencing you about. Tell me if you remember this -- we had a panel at the end taking questions from the audience and Shirley and I were on the panel; someone asked about teaching legal research - Shirley responded, I don't remember how, but I gave an impassioned statement of my theories that we were not teaching legal writing, we were not teaching research, but we were teaching a process, the whole thinking process. I've often remembered with regret what happened. I was very pleased with the response, there were cheers and everything, but it was kind of a put-down for Shirley and I've always regretted that, because she was the moving party in getting the AALS section established.

L: I understand your feelings about Shirley. It wasn't too long after that she died. She may have felt, particularly at the AALS workshop in 1985, a bit slighted because we moved more and more into programs which integrated research and writing instruction. But the point that you made at that meeting about
teaching research as part of a process has had an enormous influence.

R: I think I had unrealistic expectations at that time. Because legal problem solving is a process, I thought that it should be taught by a single person, and I now acknowledge that is just not possible, because the librarians would have to learn the writing and the analysis (though of course they understand it from their law school studies) and the legal writing teachers would have to learn the teaching of research—all the little details—and so they would have to re-learn legal research. Given the short-term contracts and other limitations at many schools, that’s an unrealistic plan for most schools.

L: Who would you have teach research?

R: I think you could still teach it as a process if you have the librarians teach the legal research (because they’re the specialists), and the legal writing faculty teach analysis and writing. They would have to work closely together to try to replicate teaching by one person. It’s not just librarians over here teaching legal research, but integrating what they’re doing and why they’re doing it with the other teachers.

L: Some schools compartmentalize. You have a course in research, and then you have a course in reasoning. At least that was how I was taught. And it never came together.

R: That reminds me that one of the participants at the Kentucky conference was Steve Burton who had just written his book on legal reasoning. And that book was quite a step forward in terms of addressing the concepts of legal reasoning in separate steps.

L: What should be expected of teachers of legal research?

R: We need to have someone who is very knowledgeable about the materials and keeps up, particularly today, keeps up with Internet research and computer-assisted legal research as well as with book research, because that is an important part of our classes if our students are to be able to do effective legal research efficiently.

L: Some faculty members say that there’s room in the first year program to teach legal research but not for teaching writing because students can either write or they can’t when they arrive at law school. Is it teachable? Who should teach it?

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3 An Introduction to Law and Legal Reasoning (1985).
R: Of course that's nonsense. I always divided writing into two parts in my thinking and in grading, assignments, everything. One part is conventional writing, and writing conventions—mechanics, grammar, syntax, the basics of writing that are dependent on convention. The second part is the thinking part of writing, which relates more to the organization, manner of presenting the material, style and so on. And, I forget what your question was—who should teach it?

L: Should it be taught?

R: Of course. We should teach what's different in terms of the kind of writing that people come into law school to learn. That's the thinking part of it. That's what legal writing teachers should teach. My views on this have changed over the years. In the beginning, I thought we should first focus on conventional writing problems. My views changed when we were very fortunate to be one of the first schools to hire a legal writing specialist—someone who dealt with the conventions of writing and the basic writing techniques. That was Lynn Squires.

L: She wrote a book.

R: That's right. Having a writing specialist was a wonderful way to get reviews of students' drafts, so the legal writing teachers didn't have to get involved in the students' thinking process at an early stage. Some people advocate that early involvement, but I think it's important for the students, even from the first, to try to think on their own. They learn very quickly. But if the legal writing teacher reviews drafts, she or he imposes her or his framework on the draft. In our system, students submitted the first drafts to Lynn, and she would have conferences to critique their writing and help them with the basics of writing. Then the legal writing teachers would receive a more polished draft. That was a very good system.

L: Most people today say students write less well than they did 10 years ago.

R: In my early years of teaching, when the law school expected to flunk out a large number of first year students, I had students who really had writing problems. They could not express themselves about mundane matters much less about legal matters. I saw that change over the years. As admissions standards became more selective, the quality of the students' writing improved. With the writing test that was included in the LSAT

\[4\] Legal Writing in a Nutshell (with Rombauer) (1982).
test, it improved even more. But then a decline set in; perhaps it continues today. The decline began in the Vietnam War years when the whole university and college system became more lax in terms of demand for excellence, with soft grading and so on.

L: Earlier, we were talking about your contract and how you had a one-year contract because everyone burns out.

R: If teaching was kept at the level of my first year of teaching for long, you would burn out, and I guess that is still a problem today in some schools. Well, legal writing teachers need sabbaticals just like other faculty members. Believe me, the burnout factor in teaching third-year students is much greater than in teaching first-year students on a one-to-one basis.

L: Why do you say that?

R: I say that because from 1978 on, I taught two upperclass courses that attracted mostly third-year students. While you get a higher level of sophistication among some of the upperclass students, in spring quarter they are so burned out that it is like pulling teeth to get a large number of the students really engaged. They have learned all the formulas on how to study and how to take exams, and they just "know" what they're doing. For some, classes are just a nuisance, and that is very demoralizing for the teachers. But, first year students always seem to be wired—they are excited; they want to learn something new; they want to do well. So you have students who want to learn and not just get by.

L: Now, in that respect, do you think it is helpful not to have the courses in legal research, writing and analysis graded or should they be pass/fail?

R: I don't believe in pass/fail. I think that it's important for students to know at what level they are performing, both on an independent scale and in comparison with their fellow students, and pass/fail doesn't provide that information, and I think that pass/fail encourages a "get by" attitude. If, instead, you have a system, let's just go back to the old A, B, C, D, F, the student who gets a D knows he or she is in trouble. The student who gets a "pass" doesn't have a clue. Now if you change to fail, low pass, pass, honors, that gives you a little better clue. but that makes it too difficult for teachers and administrators to decide if students are performing at an adequate level. I know all the problems with numerical grading (for example, on a 100 point scale), but you spread the leeways of numerical grading over all the faculty members who grade a student's work during three years of law
school and you get a much better evaluation of what that student is doing than is provided by a bunch of low passes.

L: Today there are people who teach legal writing and want to stay in legal writing as professionals. So I have a question that has two parts—you've got persons who have taught this before, what advice would you give them if they want to become a legal writing professional? Then if you've got people who are currently in legal writing and want to stay in, what advice would you give them about what to do?

R: I think in both instances, my advice is to concentrate on learning their profession. That means interacting with established legal writing people, attending institutes, attending AALS meetings where they get to feel that they are a member of the law faculty. Attend regional conferences. The more interaction they have with other law professionals, the better they will become. Now, I am reminded of one young man who was very interested in staying in legal writing. He was on tenure track, and the advice he received from his mentors on the faculty was to stop playing around with this legal writing or "you're not going to get tenure." Quite a few schools now have legal writing instructors on tenure track or on a long-term professional contract. Now, those are the people that might receive exactly that kind of bad advice, and we need to counteract it. What should they do? There is one response that we might consider: Is it good advice to tell legal writing teachers to ask to teach a so-called "regular" law school course in addition to legal writing? If you have a program where the number of students is small, and then in the spring quarter or late second semester, when work with first-year students usually tapers off, there might be time to do an adequate job. Some people felt, in the past that such "regular" teaching would improve the chance of getting tenure because faculty members who won't recognize quality teaching of legal writing will recognize quality teaching of a kind they are familiar with. I was given that advice when I was teaching. In early years, after I was on tenure track, I did teach a doctrinal course. It wasn't a course I was particularly interested in, and I think it was a mistake. Later, when I got the course I wanted, it was ok. I raise the question whether that is good advice or bad advice, because it something that must be discussed.

L: What is your advice?
R: One of the problems I see with the desire to teach another course is that it can be more geared toward status than interest. If that's the reason, then absolutely no.

R: Going back to your earlier question about what I would recommend to individuals who are just starting their legal careers and to those who are already there and who would like to continue in legal writing. I would like to tell you what was important to me when I was a young teacher. At a number of conferences I have referred to this and made this recommendation. I had a very supportive dean in my third year of teaching. He called me to his office and he said, "I want you to draw up a five-year plan for me. I want you to tell me where you want to be in five years, and how you intend to get there and what you are going to do on the way." I spent a considerable amount of time (at that time I had no idea that I would continue in a teaching career, I was still planning to go into law practice) and I decided that yes, I would like to develop the legal writing program into something more substantial than it was. It was a very low-credit course and taught by in-and-out instructors. So I wrote my plan. I said that I would like to write a set of materials and develop my ideas. At the time there were books, but some of them were outdated and they didn't fit my ideas about how a legal writing program should be conducted. Also, I indicated that I would like to become a legal writing teacher permanently and would like to develop the program at the University of Washington. He said "Good! Do it!" Well, it took me 10 years to write the book, but along the way, I became the unofficial director of the program. The dean and faculty always accepted my recommendations on who should be new instructors and on renewals. That five-year plan was very important to me, and I have recommended to either those starting or to those who are already teaching to develop a five-year plan and write it out. What do they want to accomplish? First the young ones, in terms of their teaching career, and for those who have been around for awhile, write up a plan for the school and how they are going to accomplish it. I think that's the most important recommendation I could make.

L: Looking at the larger picture and reflecting on your own career, what other advice would you give?

R: My other advice is don't let your carefully reasoned beliefs turn into prejudices.

L: What do you mean by that?
R: Well, every year I had to sell a program to the faculty and administration, and I became more and more emphatic about expressing my beliefs and hanging on to them. Just in little things even. Since I've retired from teaching entirely, I've often thought, well, maybe that was a mistake. Maybe I should have been more flexible. I was not oriented to thinking that way. I was too intent on selling my program.

L: It's different, as you are pointing out, if you are constantly selling a program. You can be more relaxed about it if you're not under constant pressure—at what point did you stop having to sell it?

R: That was in 1975. For about 15 years I was engaged in my selling activities. I kept assuring the faculty that there were tenure track people who wanted to teach legal writing. They said no—they will just pretend that they want to teach legal writing—but when they get in here on tenure track (you see that was my whole pitch, we need tenure track people to teach this course)—when they get in here, then they'll want to teach other courses. No, no, I insisted, I know there are people who want to teach legal writing as their profession.

Well, the first ones we hired on tenure track, I was right. One in particular, Linda Hume, turned out to be just perfect. She had good ideas, and she was a team player. We could talk together and decide on a fairly common program while still trying different approaches. She was very good at what she was doing. Another was not chosen as a legal writing candidate. He was told by some older members of the faculty—"You come with us—you teach this course for five years, and then we'll let you out." He was very good and willing to abide by his bargain. A subsequent teacher proved that I was wrong. I've told the story of the end of our tenure-track program already, so I won't repeat it.

L: We were talking earlier about people being committed to teaching legal writing, and that it was hard for you to persuade other faculty members that this was really the case. Their argument was that they would switch from legal writing. Is that why so many schools have put in their legal writing contracts a two- or three-year cap?

R: Well, in my view, there is no difference between legal writing faculty and other faculty members; you get some good

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5 Regular Faculty Staffing for an Expanded First-Year Research and Writing Course: A Post Mortem, 44 Albany L. Rev. 392-411 (1980).
ones, some bad ones. They come in thinking that they want to teach the course that is not covered—torts, or some other course for which we need a teacher. Oh, yes, this is where their research interests lie. But even before they get tenure, some other course opens up, and they want to teach it rather than the one they were initially committed to. In other words, people's interests change. This can happen with legal writing people. You have not only the burnout problem and the status problem, but this tendency of human beings to change their interests. We should deal with that change of interest in the same way we deal with other faculty members who want to teach other courses. The rule in our school was, if you wanted to teach something else, you can, once we have your section of legal writing covered. That rule applied to other faculty members. The difficulty is when there is no other faculty member who wants to teach legal writing. There were, in our school, some who were willing to do it just to keep the program going. But, it's a rarity. For the same reasons—the status and overload problems.

L: What do you think legal writing directors can do to improve the status, their own status, the instructors' status and the program status?

R: Have a first-rate program. That means getting first-rate people to teach, and that's it. Certainly the status of our program and of the teachers went up as we developed over the years. We also had a very supportive dean during the discovery and development years, 1963-1968, when we made our greatest strides in terms of recognition of what we were doing. I think, also, that it is important to work toward recognition of the significance of what we are doing. I was very amused when one of the U.S. News and World Report rankings of law schools came out some years ago. Numerous deans got together and wrote a letter to U.S. News and World Report, questioning the value of the rankings. They said, after all, there are many things that are important to a law school that are not considered in your ratings system, for example, the legal writing program. I don't know if anyone ever picked up on that in the legal writing world, but that's something that I would have put on my letterhead!

L: To what extent do you think student evaluations of teachers and programs should influence status and job security?

R: That's a hard one. On the one hand, students can provide the best feedback on how the program is functioning and how they're reacting to it. On the other hand, you do not always get
honest responses. You get responses from those who have a
grudge against the teacher; you get those who have not done well,
so they blame it on the program, they blame it on the teacher, and
there is no way of segregating out whether the bad ratings come
from the good students or from the disgruntled. Some teachers
regularly play to the students for approval. I think that’s now
generally recognized. So maybe only some attention should be
paid to student evaluations. If they are all bad, or predominantly
good, then that could be significant. But otherwise they are just a
factor to be considered in my view. One way to get more reliable
evaluations of programs is for faculty members to actually talk to
groups of students about their experience in legal writing. Pick
out students who you know are conscientious students and just
talk to them as a group and let them give you feedback. That, I
think, would be more reliable feedback. Not just for legal writing,
but for teachers of all courses, but especially with legal writing
and legal research, however, because students are sometimes more
critical when they are in the course than after they’ve finished the
course and after they have graduated and become associates. It
seems to me that feedback after they graduate is incredibly
valuable, about the program, the curriculum, and perhaps about
the person who was teaching or the kind of person who was
teaching. It would certainly give excellent feedback on the quality
of the program in terms of what it contributes to their practice or
whatever they are doing.

L: Did you ever try to do that?

R: Yes, one of the deans had such a survey of the whole
curriculum done once, and legal writing was evaluated quite
favorably. The question was, “Which courses would you consider
most important or most helpful?”—something like that. I
remember only that legal writing fared well. But that was
addressed to the subject matter. Of course, people’s reaction to the
subject matter is often shaped by the quality of the teacher. It
would be useful to have a survey just about legal writing courses.
Questions such as: What was the strongest part of it? What was
the weakest part of the program? What helped you most? What
else would have helped you? If you were planning a legal writing
program what kind of assignments would you give, what kind of
feedback would you give? Would you have conferences on drafts
and so on. From time to time I asked graduates these kinds of
questions, and the responses helped me to shape our program.
L: Because we have a lot of turn-over in legal writing instructors, we have lots of directors writing advertisements for their instructors, writing the qualifications they want their instructors to have. What kind of criteria did you have in choosing instructors, and what kind of criteria did you recommend? In other words what kind of people should go into legal writing?

R: Those who like to write and those who like to work with individuals. My criteria, it's been a long time since I've done any hiring, but of course I started with their law school records and looked for law review and for seminar papers, and when I called references I always called the legal writing people and the people under whom they had written any other paper—and someone on the law review. Of course you can't get as good feedback from the student editors as you can from the faculty members. They are less inclined to talk about quality of work and work ethics of their own peers, but it is useful to have student opinions of former editors. I did not always have an opportunity to interview the people before I hired them. When I did interview, I looked for a pleasing personality and ability to respond with enthusiasm, I liked those with ideas about what they would do, even if I disagreed with their ideas. If they had thought about it, I thought that was important. Those are the criteria I can recall right now.

L: In terms of advertising for instructors, these days, I have noticed that many are asking for prior practice experience, prior teaching experience. They no longer seem to be receptive to people straight out of law school.

R: That was one of my criteria too. I liked to have people who had been out of law school for a few years, but that was not my most important criterion. But now you have so many more people who do have the teaching experience that you can expect to find someone with teaching experience. In my later years I regarded law practice as very helpful, but from my observation of what happened after I withdrew as director, those with law practice, while they had much to bring, were not always successful in bringing it. Those whom I observed at that time tended to feel "I am a lawyer! I'll do it my way!" and that's a disaster to a program. They have some very good ideas and you may even have a successful course, but more often they start a disruption.

L: Sometimes it seems as if people who have been in law practice come with unrealistic ideas about what first year students can write about.
R: Yes, they want to use the case that was such a challenge to them in practice. With respect to practice, I think it's important what the practice background is. Someone who worked in a large firm where they had a mentor and did a lot of writing would be ideal. But that's not a model that's regularly followed in the offices anymore. The individual practitioner or someone from a small firm who is always scrambling wants to teach the students how to scramble (shortcuts). How to survive. Of course, maybe we're overlooking the most important background and that would be clerking for a judge, appellate or trial. That gives writing experience, it gives greater insights into the court decisional process. Work with the legislature, having been a member of a committee staff, for example, is excellent background because that gives insight into dealing with statutes. So there are a variety of backgrounds that may be helpful.

L: When you had instructors, how did you go about training them, or making sure they could do the best that they could within your program?

R: I tried not to act like a director. I tried to make it a "here we are together" thing. I was always fortunate, with one exception, in having people who were interested in knowing my views because of my experience and who were team players, so we were always able to develop our own programs, but they were always close enough together that no section would feel that it was doing more work than other sections or getting less from its teacher. And so it was always mutual planning. I think mutual planning is the key to training and in engendering confidence in your own experience—getting them to ask questions and encouraging them to do so while still respecting their ideas.

L: What you are saying is mutual planning and teamwork and not a hierarchy driven program. How do you handle the teacher that is not a team player and clearly is not willing to be collaborative within your program?

R: In the pre-tenure track staffing, I had that problem only once. People were always very cooperative, but I had one teacher who was very bright and ultimately became a good friend, but was an oddball. Because I was known to be the director, students would come tell me about their problems with him, and I would tell them to go and talk to him. Some would say "OK." Some would say "I tried," and some said "No way." As the year wore on, the complaints were bad enough that I knew he was just not doing a good job. He was doing it his way, and he was failing completely.
So I talked to him about what he was trying to do and whether there was anything I could do to help. I tried to see his viewpoint, and I learned from him, and he learned something from me. I didn’t want to give the feeling that I was the boss. I thought that we were each individuals and we should deal with our own problem, and I think that normally, the teachers must deal with their own problems—if they understand that they have problems. But I was the director. I had responsibility to my students that they get what they were paying for and to the other students to get at least a semblance of it. I did not like to have to raise the problem myself to him, but I saw no alternative. I think that’s the director’s responsibility, and the question is at what point do you make that decision.

L: In terms of mentoring, as director, how did you go about mentoring your teachers? Getting them to work as a team?

R: Well, that’s just part of the mutual discussion when you’re talking about how you want to set the program up. When one comes up with an idea that’s too ambitious, lay out the time schedule and demonstrate that it can’t fit into this box. Sometimes when they have an idea, you can say, “Well, I tried it and this is where it went wrong. Can you get around that problem?” It’s a matter of dealing with each problem as it comes along and not with a “do it this way” attitude—instead, “Let’s think about this.” Sometimes they would come up with new ideas, and if I couldn’t see any flaw in them, then I would say, “Run with it.”

L: How do you deal with the person who tries to take over. That can happen when you are hiring people who have had independent experience after law school. That is one particular source of the problem. Or, you have the attorney who thinks he or she knows what should be done and wants to do it, and you don’t know what you’re talking about, you’re just an academic, or he just has ambitions to be in charge. How to deal with it?

R: You just have to be, number one, confident about the quality of your program and work, and number two, confident that you are doing the right thing and that your faculty will back you. That doesn’t always happen, I always had two supportive members on my faculty, two senior members. Going beyond that, those who want to take over your position are those who want to depart from the general plan, and if they have faculty backing (and they often can pick up one or two faculty members who will see an instructor as a poor down-trodden underling), then it
becomes a problem of dealing with your faculty or dean. Then you have to say, "I am the director and I think so-and-so is wrong and I am not going to rehire her/him." If you don’t have the faculty or dean’s support, then you are in a bad spot. I have seen it happen both ways. How to maintain the necessary support is another topic.

L: We talked earlier about advice you would give to persons who want to continue teaching legal writing. What advice would you give them to help further their careers?

R: In terms of mentoring their teaching skills, for their careers, I would tell them: Put all your energies into planning and teaching, developing your problem assignments, conferring with your students, reviewing their writing and analysis, doing everything you can to be a good teacher and to develop a strong class. For those who want a career that includes tenure-track, I have to make an additional recommendation: You have to write, and the question is, do you write about your legal writing course and its facets, or do you write about something else, something that other faculty members will be able to appreciate. I think you have to write a traditional law review article. I had to respond to a question that kept coming up when I was pitching for tenure track for the teachers. Some faculty members asked, "How can you evaluate them? You have nothing to write about. You don’t have a discipline to write about." My response was that legal writing people can write about anything because they are not tied to particular subject matters. My suggestion to the teachers was that they should first write about the substance of the memo and brief problems they develop. I never did write an article like that because I was too busy working on my book. I had at least a half-dozen problems that I developed for first year students that were on the cutting edge of the law. Any one of them would have made an excellent short article, not an earth-shaking one, but a contribution to the literature. That is the kind of writing the faculty members can understand and evaluate. The reaction I had from faculty members when I made that suggestion, in the years past, was, "Well, there isn’t really anything very significant to be written about." That is very untrue. There are all sorts of interesting issues—they talk about them in class! They can be used for research and writing problems, or just writing problems for the students. To the extent that the subject matter is not covered in journals or reviews, why then why not write an article? The first article or two may be short, but the teachers do part of
their research when they're working on their teaching responsibilities. Then, I would hope, with some experience, they are able to streamline their teaching and become efficient enough to get a little bit of research in during the regular school year; otherwise, it's a summer project. I always did most my writing in the summer, and most faculty members did. And there is no reason why legal writing people cannot do the same. In fact, some schools give a stipend. At least at some schools, legal writing people are entitled to have summer grants. So, my advice is, write that substantive article first and then write in the legal writing field, making a contribution there, because that's important for tenure track purposes too. It demonstrates they're doing something that's not just throw-away work. I think that if you don't have the tenure-track problem it's easier to make a recommendation. Those who just want a long-term contract with the security that it will be renewed so long as their work is satisfactory can devote all their energies to the legal writing program.

L: Some programs currently are what they call directorless programs because all teachers have equal status, no one has leadership responsibility.

R: That's like the tenure-track model I have just been talking about. But the dean should provide guidance and point out when faculty members are going astray. That's what deans should do with their faculty. With an effective dean, that model can work. The one problem I see is that, as with the tenure-track model, the individual teachers can develop more demanding or less demanding programs. The students get different quality and different coverage, but that's what happens in regular faculty courses. Some students get a first-rate contracts course, some students get lectures from dated notes, and so on. That possibility presents the biggest question of all—whether we should try to be more nearly perfect than the rest of the faculty, or whether we should accept the limitations of the law school. In any group of faculty members, there will be weaknesses, there will be strengths, there will be some students that will get short-changed here and others long-changed over there. I don't have an answer. I think this is a concern of the students, though, particularly in legal writing and research classes—the inconsistency among sections. When they are students they probably don't worry as much about the inconsistencies in subject matter coverage of other courses because they haven't been out in practice and don't
appreciate the significant differences in coverage, though eventually that could be one of the sources of disenchantment with their law school education. You get those differences in law school; you get them in any school. But the thing that concerns me most, and I think this is what bothers the students most, is the difference in time requirements. Students in some section may be expected to work, work, work, to the detriment of their other classes and those in other sections have a fairly free ride. You get that kind of difference in other classes too—and watch the enrollment in upperclass courses: The free-ride teacher gets the largest enrollment; those who are very demanding get the brightest students. Here's the difference in legal writing; the students are not signing up for this section, they don't have a choice.

L: That's right, they have no choice.

R: Of course, that's true of all first year courses, so maybe I should stop comparing legal writing to all law school courses and take only the first year courses, but I think deans are very, very careful to assign their better teachers to the first-year courses, and if somebody's just not doing his or her job in teaching property, or criminal law, and so on, the dean will get somebody else in there to do a better job. But, switching teachers is usually not possible with legal writing.

L: What are the changes that have been taking place since you started teaching legal writing? For example, we have more male legal writing teachers than we used to have, but we have far, far more female students. Now the increase in the number of women students—what difference does that make?

R: I don't think the fact that male or female predominate should matter at all. We have students, period, though I had a female student in one of my early classes who told me later, when we became friends, that she always felt I was more demanding of the female students than I was of the male students. And, maybe I was; I wanted them to be at the top of the class. At that time, I felt we needed constant reinforcement of the point that women students were just as able as the men. Given the presence of many women now, I don't think there should be any difference at all.

Now, as to the increasing number of males teaching legal writing, we went through a period when the faculties were frantically searching for women faculty members. The women who might have gone into legal writing were being enticed into regular teaching positions, and males who were seeking regular teaching
positions didn’t have as many opportunities. This may account for the larger number of males teaching the course. Now, I think, the courses have developed to the point where they are desirable teaching positions for women or men, not only from the viewpoint of doing something you want to do, but something more stable, with long-term contract, better salaries, maybe not as much as we would like, but more than the equivalent of the $450 a month I initially received. Before my time, they were almost exclusively males. I looked back at our school records, and I have the record with me. From 1951 to 1960, only males taught the program. I was the first woman. For the first four years I taught, all the other teachers were males. Finally, I interested one of my female former students in teaching the course after she had been out in practice three years. She was a very good teacher, and all of a sudden we had all women teaching! I think that was because I was a woman and was attracting some of these students, they were all former students for a while. They’d come to me and ask if they could teach a course. I’d be getting applications from men, too, from other schools, but none of them was anyone I knew. Comparing them with the women graduates with whose work I was familiar, I found the choice to be easy. The second woman teaching the course also served as a role model. For a while it became almost exclusively women teaching. Later, we got back to an appropriate balance between men and women when other teaching opportunities opened up for the women.

L: Perhaps in the initial phases there were more men teachers in legal writing because there weren’t that many women law students.

R: That’s true. And those women were generally at the top of the class. Although they might have trouble getting a job, they wanted to get out into the law field. They weren’t interested in teaching. That may be the explanation. Or perhaps more probably, the schools just didn’t consider the possibility of asking women to teach.

L: Some people feel that the predominance of women in the legal writing field has contributed to its low status.

R: I don’t think so, because the course had even lower status when I started—and the teachers were all men.

L: That’s a very good response, I didn’t know that! Did you do some kind of research to get that information?

R: Remember that I did do a survey in the early 1970s, and I received lots of responses from men. Most of the women
responding were librarians. I didn’t find many other women teaching legal writing. I ultimately was able to make contact with several persons teaching legal writing at other schools, but that was difficult at first. You know how they gather information for the AALS directory. They send out the little bio forms, and the deans give one to each new teacher, but for many years they did not give that form to the legal writing people because they were coming and going. (Fortunately, in my second year of teaching, the dean did get me listed.) So because legal writing teachers did not fill out these forms, they didn’t get in the directory, and it was very difficult to identify people who were teaching in the field. This explains why Ralph Brill started teaching at Michigan as a legal writing teacher the same year that I started at University of Washington, but it wasn’t until after the AALS section was formed that we found each other and found out we had mutual interests. I did meet some people at early AALS meetings (men), but they were regular faculty members and many taught legal writing as a duty or obligation.

L: I think at this point we may want to go back to certain issues. We were talking about your early experiences in the field. When we talked about it earlier you didn’t expand on it. I know you made very little money and you had a great number of students.

R: Yes, the second year the number of students was reduced because they agreed to hire a third teacher. I’m not sure that my experience is helpful to other legal writing teachers, even in those early years, because I did have a special standing with my faculty. I graduated at the top of my class, and I picked up all the honors on the way for writing and other things, so I had a built-in respect that is not necessarily accorded to an outsider. I always was able to enlist the cooperation of almost every faculty member. If I asked them to do something, they did it. I developed a very strong support group. There were two senior professors in particular and then others joined them. Anything I said, then the support group would argue in my behalf. They supported what I asked for and what I wanted. They supported me when I asked for credit because it was a three-credit course when I started, zero in the fall quarter, two in the winter and one in the spring. Credit by credit the faculty raised it to six hours. When I began my pitch for renewal contracts for my teachers, most of the faculty supported me, but my loyal support group was always in the forefront arguing on my behalf and the others just went along. And then
when I finally pitched for the tenure track model, they supported me. When my supportive dean from 1962-1968 was gone, I ended up with an equally supportive dean. “Supportive” in the sense that he was willing to implement the program. I think that really covers my experience that might be of interest to others.

R: I said that there was one thing that I really wanted to talk about—what type of model should we use. This question raises one point that I often ponder: Did I make a mistake in getting caught up in the tenure track model, both for myself, in my career, and for the program. For myself, it all worked out OK. I was able to do some other teaching and writing on the side and still maintain my teaching in legal writing. But, that was more luck than anything else. The other thing that I think about more is, did I make a mistake in developing my plan, which was based on the need to accord the same status to legal writing as to teachers of “regular” law school courses or most of the law school courses: The teachers have to be treated the same; they have to be equal. Very fine aspiration. We actually did have five teachers on tenure track. For two years we had a good solid program. The problem is this: If you have a director who knows how to do teach legal writing effectively, has planned a good program, and is able to motivate teachers to do their best within this framework, you may have the ideal program. But that can disappear when you hire tenure track people. They are independent. They may cooperate with others, and they may not. The result is the same wide variation in teaching effectiveness and coverage that you find among other law teachers. I think now, sometimes, the better approach would have been to develop the teaching staff and push them into the tenure track only after they had established an interest in legal writing and demonstrated their continuing interest. At a luncheon I attended at the Legal Writing Institute last summer (2000), the person conducting the program asked how many were new teachers attending their first Institute, and there were four or five people at one table who raised their hands. Later, I asked them how they happened to be seated together—how they found each other at the Institute. The answer was that they were all from the same school, and they all had just gone on tenure track. This started me thinking whether that isn’t the better model; to develop the program, to get the teachers working up to speed and then push for tenure track. I think, on reflection, that my interest in tenure track was too status-oriented. I think the more confident position would be to say that we don’t need
tenure track to have status with our students or in our jobs if we have security.

Here is what I think of as the regular tenure track model. Everyone who would teach in legal writing would be hired in the same type of position as every tenure track faculty. That includes being permitted to leave their responsibilities for teaching legal writing and try other courses if they want to, but with the same limitations as apply to other faculty members. The important limit, which I suspect is true at most schools, is that is you can’t stop teaching a course if there is not someone else on the faculty who wants to teach it, unless the school is in a position to hire someone else to teach the course being dropped.

The second model is the one I really like, although it does not contemplate equal status in the full sense. Teachers are hired on tenure track but are expected to be dedicated to legal writing and to become specialists in that area—sort of like a law librarian who is a member of the faculty but who would not ordinarily be expected to say, “I’m tired of the law library and I want to teach Con Law,” although, I’m sure there are some schools where that might be permitted to happen. Then there is the third model, which I now sometimes think is better, which is the director’s model where you start with the director on tenure track and the other teachers on renewable contracts with the prospect of going on tenure track. The reason I think this may be better is that it maintains control over the content and teaching of the course. It keeps the legal writing course from deteriorating into the other kind of courses where you get spotty teaching and different subject coverage. In other words, it gives some uniformity in what I think is the most basic course in law school. And, I suspect it’s the model that is the most common. I do think that I made a mistake in insisting that we hire people on tenure track. That incident that I talked about earlier—the people who were seated at the same table because they were from the same school and they had all been moved on to tenure track at the same time—may suggest a better approach. That is, it might be better to hire on a renewable contract and then move the best teachers to the tenure track on one of the first two models. That’s the way we started out. The first person to be tenured after I was tenured was the woman who had been working on renewable contracts for several years.

L: In the 1970s you did a survey about legal writing teachers. Tell me about it.
R: Well, it certainly was not a professional survey. I was looking for people like me who were interested in teaching legal writing and who were doing it. From the AALS directory I made up a list of all the people who were teaching in the field and also all the people listed under legal research. Then I went through all the law school bulletins to find legal writing courses, and I hired a stepson to go through and make connections of course descriptions with names. He filled out a card for every school and that gave me a name data base. Then I developed the survey questionnaire—one for law-library-connected people and one for everyone else listed as teaching legal writing. I sent the surveys out and I reported the results in the 1973 Journal of Legal Education. I hoped to find that there were some people out there who were teaching legal writing because they wanted to, as I did. The exercise permitted me to establish contact with some of my kind. (It was so isolated in those days to be the outlander on the faculty.) Over the years I developed first one teacher and then another, but I was pretty much on my own. I was interested in others' ideas. It was very rewarding for me to establish those early contacts and find out I wasn't alone.

L: In the journal article that came out about the survey, you didn't survey anything about salary or status?

R: Oh yes, status I did. I can't remember about salary in those days, but I did do a small salary survey in 1966.

L: Do you have the data from that survey?

R: I do.

L: I think a lot of people would like to see early salary figures. I'll put them in an appendix. [See Appendix 1.]

R: The thrust of the article was that yes, there are too people out there who are interested in teaching this course as a permanent part of their teaching responsibilities. I made contacts and later met the people at the AALS meetings, and they became the initial core of the legal writing people in the section.

L: I first met you at an AALS meeting, it was before the Kentucky one, it was a regular AALS meeting, seems to me it was in New Orleans, but I'm not positive. But I remember I was all by myself, you know, because I was kind of isolated too. I wandered into the dining room and you asked me to have breakfast with you—and that was when we first started to be friends. That was a

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very welcoming gesture. It meant a very great deal to me because at that time I felt insecure professionally. Even more importantly, though, it signaled to me how you, from the outset, have influenced legal writing to be an inclusive community.

R: I remember you coming through a hotel door on one occasion and my greeting you. I very clearly remember you from Kentucky.

L: Yes, well that Kentucky meeting, that was a groundbreaking workshop put on by AALS, because that is when so many of us met each other.

R: That was when the core of dedicated people really got together for an extended time.

L: It’s amazing we saw each other not just for an hour at an AALS meeting, but for three days wasn’t it?

R: Yes, it was a long conference and it was a good conference.

L: I remember it very positively.

R: A significant number of people who were there are still in the field. I did have lists of all those people. I followed those lists of people from conference to conference. I can remember making marks on them and tracing how many were still in the field.

L: Helene Shapo did that for the AALS meeting that was held in 2000 in Washington D.C. Helene organized a program to commemorate the very first legal writing conference. Not everybody who was at that original Kentucky workshop was still able to attend but most of us who are still in the field were there. There were Helene Shapo, Grace Tonner, Richard Neumann, Bari Burke, and Ralph Brill and Christina Kunz and myself—all of us went to that first workshop in 1980 and every one of us on the panel that Helene organized for the 2000 meeting talked about you.

R: I appreciate your tribute to me made at that meeting. Yes, the Kentucky conference was a very important event for a great number of us, and of course the list of names has changed extraordinarily since then. It was what people now are calling professionalizing, if you would. I think we were professional then, but this is a different meaning of the word—there were not as many of us. We didn’t have all the textbooks. In all the developments of a profession, you start off small and quality improves as you go on. We were professionals, we are now professionals at a higher level because of the work of people over many years.
L: Now yours was one of the very first legal writing books that came out.7

R: Well, mine was the first book that made it big time. Mine was the first that connected writing, research and legal analysis. At the time I started teaching, the How to Find the Law book was maybe in the 3rd or 4th edition. Each chapter was written by a different law librarian at that time so that there was no connection in terms of a method.

L: Yes, I remember I taught from that book.

R: And there was the Price and Bitner book, Effective Legal Research. It had at the end of the book a chapter on how to research a problem. It was just a list of all the research books. I'm sure there was some basis for the organization, but it was just "here are all the books, why just start going!"

L: Now that Price-Bitner book, that was a book that was good for instructors to read. It wasn't all that good for students—difficult—because it was so detailed. It was more a librarian's book perhaps because it was librarians who wrote it.

R: And then there was the Harvard librarian, Morris Cohen, who published something in the Law Library Journal -- legal bibliography in an outline form. I ordered copies of the journal and used that to teach my course for a year. It was good for students in giving them the basics. By then I had the background detail provided by How to Find the Law and Price and Bitner. On the writing side, there was Judge Re's Writing Legal Memoranda and Briefs and that old Bobbs Merrill book by Cooper at Michigan.

L: It was called Writing in Law Practice.

R: It was useful. Well it was particularly useful for the samples it provided. The year I started teaching, the Weihofen book, Legal Writing Style, came out. An excellent book, really excellent. But again, not something that law students really liked. It was more like a dictionary of legal writing. It was really an excellent book, and I used that plus the legal bibliography book or the outline. I started to write the legal analysis part (influenced greatly by Llewellyn's Bramble Bush), and then I began to develop research strategies—how to connect all this and where to go when and that sort of thing. So my book described a process. It started out with introductory analysis and introductory writing

assignments, then longer analytical writing, then research, then
moot court briefs and trial memoranda and that sort of thing—
formal writing. The explanation of a process was what was really
unusual about it. I expected at the time I had it published, that
other publishers of law books would publish competitive books of
similar content, but they did not for a number of years. Mine
hasn’t been updated since 1991, so of course the research section is
hopelessly out of date, but there were still sales of the book in the
past year.

L: You felt compelled to write the book because there really
wasn’t anything else out there?

R: Yes, and here is the ironic thing. I submitted it to Bobbs
Merrill because I thought they might want a current successor to
the Cooper book. They acknowledged receipt and said that I would
be hearing from them. After a year I hadn’t heard from them, and
I wrote and asked them and they sent my materials back. “So
sorry, we’re not interested.” So I submitted it to West and they
promptly sent it back. They said “There is no market for this
because there is no course like this.” But that is why I wrote the
book! And so I had it locally published. We didn’t get it out until
August or September but still sold it to 13 schools that year.
Later, I went to a law teachers’ meeting in New Mexico. I ran into
Roger Noreen of West, and he said, “You know, I think we made a
mistake. And if you ever decide to change publishers, let me
know.” He said, “We’re not in the business of trying to get books
away from other publishers but ....” So I went back and I talked
to my local man. They had discovered that marketing to the law
schools was quite a different thing from marketing codes to
municipalities. And so I bought them out - I paid $7,000 to get my
book back.

L: Why, this is a fascinating story, Marjorie.

R: And then I sent it to West. I had no idea that I might make
money from this book, I just hoped to get my $7,000 back, but I did
profit from the book. The first edition was a little skinny thing, but
that or the second edition were probably the best from the
students’ viewpoint. I made a serious mistake as I developed
subsequent editions. I tried to answer every question that
students ever asked about analyzing cases, and I realize now I
should have put that detailed material in the instructor’s manuals,
I should have kept the student text skinny, the way it was about
the second edition.
L: Now, you talked earlier about process. And I would like to ask you what you mean by 'process.'

R: Well, you do not approach research in isolation. In the real world you have a problem for which you are searching for an answer, whether it's a factual question, a procedural question, or a substantive legal question. Before you go to the books, you have to do some analysis of the problem and try to identify whether this fits into certain subject matter background or if it doesn't, then you have to think about how to approach research. Now, in my book I call this "preliminary analysis." Thinking about the problem, and giving your research some direction.

Then, you begin your research—but you do not do pure research in isolation. All the time your view of the problem is changing and shaping the direction of your research efforts. I tried to give some structure to this research stage by my steps of research, which had some built-in redundancy so you wouldn't miss anything when you're researching problems for which you have no background. Sort of, "Here if you follow this model, you are going to find the most significant material." It's not a process model for an exhaustive scholarly piece.

All the time you're doing this research and analysis, you are also forming in your mind what you're going to say to your audience, and then when you finally start writing, you're pulling it all together. There may be some back and forth—you may have to go back and check something as you realize, "Oh, this is the direction I should have followed." And so there is back and forth. If a problem isn't too complex, you should be able to do research and then be able to sit down and write, right away, a full draft, because you've reached the necessary conclusions as you go along. You can isolate analysis from research and writing in an artificial sense—

L: But it doesn't work really.

R: No, you can't learn to do effective research by just finding an answer to a question somebody else gives you. You must learn the whole, integrated sequence of thinking and developing the question, and that is the process I think we should be teaching. When I was trying to sell this to the faculty they were saying, "We're teaching analysis in all of the classes." And I would say, "No, you're not. You are teaching how judges look at cases. We are teaching how lawyers look at cases."

L: Good for you.
R: “I am teaching how a practicing attorney or a scholar—more a practicing attorney—works. In your classes, you start with the end result - the law. And you back up and try to build problems around it. I start with a problem and try to find, ‘this is a possible solution, this is a possible solution, this is a possible solution.’ And you do not—in most classes—talk about the mental process.”

L: That is correct.

R: “You go on, you say, ‘But what about this?’ You get the students thinking about it. But you’re not teaching them how to fish out these questions in relation to a specific problem.” And I think I finally persuaded them I was right. I still have a file, and I probably should send it to you and then you can see some of the memos I wrote to advance my theory. I had a chart for my theory about what’s the difference between our teaching and their teaching. The chart now seems quite unsophisticated, but at the time I prepared it, many other faculty members thought it was heresy.

L: Many teachers would still think it heresy to suggest that legal writing teachers can teach analysis better than “regular” faculty members do. That chart is something that people, especially directors, could use, so I will attach it as an appendix. [Appendix 2] Now that’s something that we could use, if not incorporate and at least let people know you’ve got it. Because that’s quite significant.

R: Well, I’m not sure, if this model—my idea of teaching the process, is do-able in the framework of many legal writing courses.

L: Oh, I think it is. I know it is.

R: You can build the framework for the students and take them through it once in steps. You teach some writing experience, some research experience, some analysis and synthesis experience, but at least once they should do it all by themselves.

L: Now how does that dovetail with your comment earlier, that you think the librarians because of their specialized knowledge, should be teaching research? Because what happens in many cases, as you know, when the librarians in some schools teach research they teach bibliography. They teach about books. Their teaching is not usually problem based.

R: Well, see this is my concession to reality. I taught research and there were three other people who were teaching research too. We did all of it—analysis, research, and writing—and all of us were doing a good job. Later teachers, they were not interested in
teaching the research component. They did it, but realistically, I began to think—how many people can you expect to become experts on legal materials, to be able to know the bibliography, to know all of the features of research and to be able to teach it in plain language—all of it, not just what you need for a current problem—as well as legal writing. Over a period of years, you can find a few of these people. But I decided if you have to back off from my ideal model, then you should have two people who are working so closely together they are almost one.

L: What you are talking about is teamwork as opposed to separate courses, separate components.

R: Not just in the legal writing field but between the analysis and the research. What happened with our program after I ceased to be the director—we had a first-rate director but there were problems with the dean and other problems in the school and the director quit. For a while we had legal writing teachers being hired and supervised by a conscientious associate dean. When a new associate dean came in, the teachers ended up with little supervision. They were just on their own, and the whole research component dropped out. The library finally realized what was happening and they picked it up. The library program has a good relationship and part in the program now.

L: You have many, many accomplishments. Of which are you the most proud?

R: Certainly, getting that first West edition of my book ranks right up there.

L: I think that’s a great one, especially now that I know the full story.

R: It was sort of, “Ah, hah!” I was right, and you were wrong.

L: I like that one.

R: Certainly, I was very proud of developing the program at the Law School. There was one member of the faculty who used to say there were three things that put the University of Washington Law School on the map: one, our librarian, Marian Gallagher; two, our Asian Law program, and three, our legal analysis program.

L: What a wonderful compliment to you. And well deserved too.

R: And our legal analysis program became an integral part of the Asian Law program. I guess that would be the second thing. I am very proud of my work with our Asian graduate students, all our foreign graduate students, in introducing them to our legal system.
L: Tell me a little bit more about your work with the Asian students and the non-American students, I guess.

R: Well, our Asian Law program was established about 1965. The man whose memorial service I attended on Monday was Dan Henderson, who established it. My first connection was when my Dean said, "We have two Japanese students coming into the program—our first class. One of them has arrived, but although he has had 10 years of English study in the Japanese school system, he couldn't understand a word when he got off the plane. Would you work with him a month before school starts?" I was around the school—so, I would have him read a chapter in a textbook or something. He'd come in and we'd discuss what he had read. It helped develop his vocabulary and give him some background as well as giving him confidence in his English skills. Then, Dan, the Director, asked me if I would develop a Legal Analysis and Research course for them. Initially, I combined this course with my first year course for my weekly meeting, the whole class. And then I had small section meetings for the second class in the week. It worked very well. The Japanese students loved to get into the first-year class to see how American students responded to what I was trying to teach them.

Then in the late 70s I stopped teaching the first-year course, and I developed a course with the unwieldy name, "Legal Analysis for Students Not Trained in the Common Law System." We were getting students from all over the world. John Haley, who later became the Director of the program, would tell entering students, "You may feel like you can just come over here, take her course, go back home, and you've got it all." The course was taught on the basis of my theory of the 'process.' And I wasn't just teaching legal research. It was very rewarding because I had fresh minds to teach case analysis, problem analysis and statutory analysis. That class grew from my initial two students to, at one point, more than 20. Not only from the Asian Law Program but from the Marine Law Graduate Program as well. It was just a very rewarding class to teach. I continued teaching it until I retired. The students were so wonderful. And Linda Hume is now teaching the course and doing a really great job, I'm sure.

L: Was that when you started learning Japanese?

R: I started learning Japanese in 1976 when the graduates from my course invited me to Japan as their guest for seven days. I didn't want to go. I thought, "How can I take a week out of my Spring Quarter?" Edgar said, "You have to go." And so I went.
The minute I stepped off that plane, I fell in love with Japan and I wanted to go back. They had everything so laid out for me, I was never alone until I went to Kyoto with one of my students and he was called back to Tokyo about a legal matter. He left me with a detailed instruction sheet: “7 o clock, get up, 7:20 go to such and such a place for breakfast, be in the parking lot for a car that will deliver you to the train at such and such a time.” I followed all the instructions, but when I went down into the parking lot, there was no car waiting in the parking area. I went back into the hotel, and I couldn’t find anyone who spoke English. I was frightened, because I know how their trains operate. They leave when they’re supposed to! And there I was alone. At the last minute a man with a familiar face came running across the parking lot. It was our driver from the day before, and he had been instructed to watch for me and get me to the right car. I just barely made it to my train. I thought, “I want to come back, but I want to be able to communicate.” So I started studying basic Japanese, and then I hired a tutor. When she went back to Japan she said, “You’re never going to learn Japanese unless you learn the written language.” So she sent me some elementary school readers. And I started reading my way through elementary school. I got into middle school—I had tutors all of that time—and it’s just like—maybe it’s like doing crossword puzzles, or any other kind of puzzle—it just kept me intrigued all the way along. I now can read only at middle school level, but I can read almost anything by looking through a Japanese-English dictionary and a cawing (character) dictionary, cannot speak very well, and I hear even less well. But it is just one full branch of interest for me—both the language and the culture.

L: That was another kind of bridge that you went over.

R: That was the first thing that pulled me out of the law school. I never worked less than 6 days a week during the school year, and I often worked from 7 to 7 or from 8 to 8. I had big push times when I would work really late. I remember going to the school to work on an Easter Sunday even. The visit to Japan was the first thing that got me to look outside the law school, besides my family life and my life with my husband, so it was very good for me and I became less provincial.

L: That was a wonderful opportunity.

R: Oh, indeed. My husband and I returned together. I taught summer seminars over there, two summers in a row, and my husband joined me at the end of those periods. We traveled one
time in Japan for a month and the other time we took six weeks to tour Japan and then go into Southeast Asia. And then I also went to Japan and Korea with a group of other faculty members for a lecture tour. I've been back on my own, but not for ten years.

L: Now, anything else that you can think of that you are particularly proud of? You've given me your book, your writing program, your Japanese Asian program?

R: Well, I'm certainly proud of Linda Hume. There were three of us teaching the Legal Analysis course for a time. Ginny Lyness was my first long-term teacher in development of the course, and she was great. Later, Linda was hired under the tenure track plan. She's taught the Legal Analysis course, was its director one year, and now is teaching the Legal Analysis course for foreigners. She tried different experiments with the first-year course. At least two times she's taught first-year property and taught Legal Analysis as an adjunct to the property course, integrating the two, which I think is a wonderful way to go, now. I didn't always think that, but it's good as long as you have one teacher (preferably experienced in teaching legal writing) and not a situation where the legal writing teacher is subordinate to the substantive teacher. So, I am very proud that my program brought her to the school and I saw her develop into such a great teacher—in commercial law as well as in legal writing. I'm very proud of what Kate O'Neill is doing now, carrying on a tradition, having a splendid program. Certainly, I'm proud of my connection with the development of the AALS section, although it is no longer as important as it was when we developed it.

L: But that section was the genesis for the Legal Writing Institute and the Association of Legal Writing Directors.

R: It brought us all together for the first time.

L: Marjorie, one of the things that you have contributed to the legal writing community in a way that probably nobody else has or could, was that you developed a kind of family in legal writing, a mentoring system—I don't mean an organized one, you set the standards there, one of caring for each other and helping each other. Trying to help out those people who were in crisis situations. And you were incredibly influential in that development within legal writing. So, I think the legal writing profession owes that characteristic more to you than anybody else. And it's one that I think makes it worth being part of. It's different from a lot of other professional groups because we don't
have and I hope we won't have that level of competitiveness that you see in other groups.

R: Well, if that is all true then I am very proud of that too.

L: Well, I think you should be. I think you should be. Now, a minute ago you were talking about incorporating your analysis process ideas into a doctrinal course such as property. You did say there is a potential for legal writing program people who are working with faculty who teach other first year classes to become subordinate. Do you want to expand on that a little bit?

R: Well, it goes back to the status of the legal writing teacher in most schools. I think there are some doctrinal faculty members who would make it a cooperative effort, but the tendency may be for them to think, "I'm in charge here. I'm doing most of the work." I'm sure there are two people who could work together very well, but I was always wary of the subordination of legal writing teachers in such an arrangement. In the beginning, we had some spring quarter cooperation between civil procedure and legal writing teachers and that was quite successful because the civil procedure teachers were very sensitive to us. At the same time, we were subordinate. They were deciding on the problems, how we should grade the student papers, and so on, so I was always leery of making that connection. Now there are schools where they have the preferred model, with one person teaching both the course subject and legal writing. Tom—he was at Puget Sound initially—

L: Oh, Tom McDonnell? He's at Pace now.

R: Yes. His school has (or had) that model where teachers are teaching the substantive course and the legal writing. Yes, he teaches torts. And that's wonderful because it gives a subject for your problems. It makes the problems of greater interest in terms of students feeling that they're learning torts too as well as legal writing. James Bond, who was the Dean at the University of Puget Sound Law School, taught in a course with that model at Wake Forest. And I'm sure there are others. A very good model, but I fear, in general, the substantive teachers may just drop the legal writing. We tried it. When we first introduced small sections in first-year course at the University of Washington, the small section teachers were supposed to be doing something extra, giving writing problems and everything. The first year was just great, but then the teachers started dropping the extra projects.

L: It's a lot of work. And a great number of the doctrinal subject teachers really don't know how to put together a legal
writing problem that combines writing, organization and legal analysis. Their focus is on developing the substantive law and not on the process.

R: That's correct. So you lose that process orientation.

L: Now, when you were working in great isolation—how did you persuade your Dean to not only give you a salary increase, but how did you get your Dean to reduce the number of students?

R: They wanted me to come back to teach a second year. I agreed only if they would raise my salary and add a third instructor. I had a good teaching partner that year who was very dedicated. I suggested that they ask him to return also. I talked to him first, and he agreed to come back and then they hired a third teacher. I think they just wanted me back enough to do what I asked.

L: Marjorie, this is a problem which many schools face—the instructor student ratio being too high. At some schools the argument is made, we need more teachers because the teachers have to work too hard—this doesn’t fly because law faculty argue, “we all work hard.”

R: Perhaps a better response on my part would be how I persuaded the Dean and the faculty to go beyond having three teachers. At that point, I had Ginny Lyness and another of my former students teaching with me. I had each of us make out a time schedule. I listed all the things we did in addition to teaching classes: drafting and researching the problems, grading, conferences and everything. We each figured out how many hours we spent on each, given our teaching load (50-55 students each). You know, the smallest was not less than 60 hours a week during our intensive periods. So, I think giving concrete data was certainly very helpful. What else did I do? I think that time accounting was the most important. I also did charts on what we were teaching.

L: Yes. Because often, the faculty doesn’t know.

R: And how it was not being taught in the regular system.

L: Marjorie, sometimes the other faculty see writing teachers as teaching merely grammar, spelling, punctuation and maybe a little bit of research, but not much else. Citation form maybe.

R: Well, early on, I adopted the attitude that grammar, mechanics, the basic conventions are very important. Students should learn them. But if you have to make a choice between conventions and the larger thinking parts, we should be teaching the thinking parts: organization, sentence design, paragraph
design—all that goes into identifying your thoughts, presenting your thoughts, and then getting it on paper. The conventions can be taken care of later, if you can get their thoughts on paper. To me the dividing line was: Does this particular writing fault interfere with understanding what the student is trying to communicate? If it just distracts, surely that's important, but it's not important until you have some substance to worry about. So communicating thoughts is the first thing, and then cleaning it up comes next. Later, the legitimacy of the distinction I made was made clearer to me in my work with foreign students whose grammar and writing mechanics were sometimes deficient but whose excellent analysis were nevertheless quite clear.

L: What are the major changes from when you started teaching?

R: The changes that occur to me first are the organizations that are available to provide support. There was nothing when I started teaching. First, we had the new AALS section and then the Legal Writing Institute and now we have the Director's Association. SCRIBES has always been there, although it hasn't always been active in a way that was most useful to legal writing people. Bi-products of those changes are conferences that are now held, which are particularly important for people coming into the profession. The AALS workshops were the first and then of course, now the Legal Writing Institute's biennial institutes and the Director's conferences, which are a great benefit to teachers. Again, the SCRIBES organization in the early years was doing legal writing conferences from time to time that were useful, but really nothing can compare with the writing institutes, which have just been a godsend not only in bringing together people who are in the profession and want to stay there, but in providing an entry for the new people.

Changes in the treatment of teachers: Long-term contracts, instead of one-year-and-you're-out contracts. Tenure track for many of our people. Professional directors rather than an Assistant Dean or Associate Dean who has been assigned the task of finding the teachers and then very loosely supervising them.

I suppose we've had changes in our students, too. Oh, I don't just suppose, I know we have. From my early years, when admissions were pretty much open, we've become increasingly selective. If you're picking out 150 from 2500 applicants, you're taking the cream of the crop. If you're paying any attention to the
writing samples, you're getting much better students—much, much better and many more of them.

There are more texts now—a variety of texts that permit a choice in the approach that you want to take in teaching. And the modes of communications, in newsletters, the _Legal Writing Journal_, the SCIBES journal, the AALS newsletters, the material that comes out of the Legal Writing Institute and the Director's Association, and the communication.

An important recent change is the change in the ABA standard. This is not something that has suddenly burst forth, because there were people trying to lead the ABA into some good standards for many years. I recall, Ralph Brill and Susan Brody and Helene Shapo worked with that committee for years. Richard Neumann joined in with them in producing the most recent result.

And then, finally I would say the technology changes. The quality of work that the students can do was surely improved when they started to use computers as compared with their own typing of their papers and laborious retyping or their having to hire typists to do it. So the quality of the product they turn out, at least visually, is better. And I'm sure much more rewriting goes on. It's so easy to rewrite on a computer, that much more rewriting does happen, so the quality of the writing should also be better. I don't know whether the improvements in research, the availability of the Internet and the computer-assisted legal research, are really a great boon. It's just something more for students to learn. In my observation (I was still teaching Legal Analysis for foreign students, when I left teaching in '93), the temptation for the students was to try to do it all on the Internet, although my course didn't really permit that. They expected to be able to do it on the Internet. The faculty members expected them to be able to do it on the Internet, but in fact they could not accomplish what they wanted without using some of the manual research.

L: Of the changes that have taken place, which do you think are the most dramatic in the effect they've had on legal writing?

R: The organizations have had the greatest effect because they brought the people together. We were all individually out there doing our own thing and reinventing the wheel each time we got a new teacher or new director. The cooperation in developing ideas and the interchange of ideas has really been, I think, not only the most dramatic, but also the most useful. I think that the most unexpected change would have to be the way the Legal
Writing Institute developed just out of the blue and grew to such a big part of our profession. I wasn’t aware when it first started that Laurel Oates and Chris Rideout had actually signed the note guaranteeing some of the expenses for the first institute. They took a gamble. And they put tremendous effort into developing the first writing institute and subsequent ones. And then with Jill Ramsfield and Anne Enquist, they just made a tremendous contribution to the development of our profession. They were not only contributors, but they enabled others to contribute through the institutes and their planning and development of the early ones.

L: I know you attended the year 2000 Legal Writing Institute Conference. What impressed you the most at that one?

R: Well, I didn’t really attend, I attended dinner and lunch. I was not signed up for that conference. I had planned to, but something came up in my life—I just couldn’t. I was happy to be able to meet as many people as I did at the luncheon and the dinner. I suppose that from what I did observe, however, it looked more like an AALS meeting with the number of participants, the vendors that were present and the advertising that was going on.

L: I’d like you tell me a little bit more about your plan for staffing your legal analysis course.

R: Well, it was the grandest scheme of all. It was just at the opposite end from what I started out with there. The plan was very status-oriented, though I also thought that it would be the basis for long-range improvement of the legal writing program. My idea was this: that both for the benefit of the teachers, in terms of their feeling about their status and the importance of the work they were doing, and from the viewpoint of the students, who tended to rate a course on the status of the teachers, I thought that the ideal would be to have legal writing teachers on tenure track with exactly the same rules for them as for regular faculty members. And that included responsibility for more than one course. As I developed it, we needed teachers whose teaching load would be one-half legal writing program and one half other course—substantive, procedure or whatever they were interested in. Then I was asked to tell the Dean and the faculty, how many tenure track teachers are you talking about? The two other instructors and I did careful figures on how many hours we spent doing each of our tasks, as I previously discussed. I put those together and I decided that each of us could handle a maximum of 30 students—fewer would be better, but 30 was the absolute
maximum. So that came out to five-tenure track people teaching legal writing and as one-half their course load.

I was able to persuade the faculty that this was a good idea at the time. As I've indicated before, I had a supportive Dean, and we ultimately had five tenure-track people teaching the course. I still think that the tenure-track model is the ideal. But there is one major flaw—and that is if you start hiring legal writing teachers as "regular" faculty members who will from the outset teach doctrinal courses, the quality of the program will probably go down. The reason is that you have—let me back up and say that—with a program that has a good director you can generally have a program in which all of the teachers are doing at least the minimal work that is necessary. The students are getting the minimal exposure, actually, most will be getting much better than minimal. With "regular" faculty, at least at our school, there were some faculty members you couldn't tell anything, and if they didn't want to teach this, they wouldn't. That's one thing that developed in this course, there was diversity in what was being taught - not necessarily a bad thing. But if you get someone who is very jurisprudentially oriented who wants to teach from that viewpoint, and wants not to do much paperwork, who doesn't want to teach problem solving, that's a flaw in the program.

That was my grand scheme. I had it running for—it took a number of years to develop, but it lasted for only three years with the five tenure track people. All ended up with tenure and that's when the system broke down.

L: When did you propose it? Almost immediately after you started teaching?

R: Oh, no. I started teaching and I taught for two years just as an instructor (we didn't have a Director other than the Assistant Dean). And in the third year or the fourth year faculty members and the Dean began to treat me like a Director. They took my advice on who to hire and who to rehire and that sort of thing. And in my fourth year I was put on tenure track and promoted to an Assistant Professor and this was a—well I'll stop there.

At that point, I began developing ideas on how to improve the program, and initially I was doing this by working with the instructors and getting their support because the other teachers were still instructors with one-year contracts that could be renewed if I recommended them. We began to develop ideas about what type of programs were best and the better timing for
assignments. Then the big thrust at first was to get credit. I got credits one at a time—I got up to five credits (remember this is quarter credits). And the sixth credit, interestingly enough, was dropped in my lap by a student. We had a first-year course called Legal Processes. The faculty member who taught it was no longer teaching it, so we were abandoning that first year course—and the question was, "What should happen to the four credits?" Of course, one, two, three, the credits were grabbed off, and there was one left. At the meeting of the committee that was dealing out these credits, the student member spoke up and said, "I think that last credit should go to the Legal Analysis course," and made an impressive speech on how important the course was. And so, we got up to six credits. I forget how that's translated into semester credits.

Once I had the credit, then I began working on the staffing ideas and by this time we had two experienced teachers. We had one woman teacher, Ginny Lyness, who had come back several years, so she was getting modest salary increases, but still had no assurance of a contract. We knew she'd be renewed, there was never any question about that. I finally came up with our grand scheme of what our goal should be—five tenure track teachers. We reached that goal in '74 or '75, fourteen years after I started teaching.

L: I would like to follow up on what you just said, you said the faculty in the beginning would listen to what you had to say and they were paying attention to your recommendations about hiring and rehiring—now that leads me to the question: What advice would you give people today, in terms of who should be making the decisions about hiring and rehiring?

R: Well, if you have a director, that director should have the primary responsibility. Her or his recommendation should be accepted unless some information is introduced that makes the recommendation seem unwise. And I would suspect if that happened, then the director would back off from the recommendation. Obviously the institution has to have some input (through the dean or a committee), has to have an opportunity, and they will—I suppose in most schools—have a vote about it, at least with long-term contracts. But that's the best answer I can give you to that question.

L: In some schools, the hiring and rehiring of legal writing instructors, is pretty much done by committee, and the director isn't always on the committee.
R: That’s ridiculous.
L: There are some schools where that is the case.
R: I would prefer committee involvement, yes. And the committee with the director’s assistance can identify the candidates. Ideally they would be interviewed, at least to some extent, in the way tenure track faculty members are. The director should make a recommendation as to which ones would best fit into the program and which seem to have the best qualifications—the committee would discuss it with the director. And if anyone has objections or questions they can be raised in the committee. Only if there is something significant that is brought out to make the director’s recommendation questionable should the director’s recommendation not be accepted. And, in the end, you’re going to have to trust your director. Otherwise, maybe he or she shouldn’t be director. If too few faculty members trust the person, the person’s evaluations of candidates, why then you have another problem. I am speaking here in reference to a director-led program with short-term, non-tenure track teachers.
L: How should a legal writing director be evaluated? Now, I’m not talking about teaching evaluations by students - let’s assume we’ve got a director who’s relatively new, and is on a tenure track, and the institution feels it needs to evaluate the director. What criteria would make sense? What would you advocate?
R: Evaluating a director should be done in the way regular faculty members are evaluated. If the director is teaching, there should be class attendance, reports on classes taught by the teacher, there should be an evaluation of her or his written work and if this written work consists of problems, directions, an instructor’s manual, whatever, that should be evaluated. And if there is no one on the faculty who has experience teaching legal writing, why then ideally outside reviewers. We use outside reviewers for other faculty members.
L: You mean outside reviews of their publications, or do we also use outside reviewers on the program?
R: At this point I’m speaking of writing. Often, in the early years, the director does not have to try to prepare traditional publications. Instead, what they produce are problems, instructions to the students, instructor’s manual, an outline as to how the program works. These things should be reviewed. That is the equivalent of the—well, the alternative to—the kind of writing that other faculty members are able to have reviewed.
As for the quality of the program: in part, faculty members, a committee, input from the students. I think I mentioned before, I’m not wildly in favor of the anonymous questionnaires that are distributed—of course they can be used. But, I think it’s much better to have a committee, or a group of students in whose judgement you have confidence—get them together as a group and talk about their experience in the course.

L: Should those be people who are currently in the program, or people that have completed the program?

R: Upperclass would be more what I’m thinking of. Now, here again I’m—I’ll just stop there.

L: You said that you might need to have outside reviewers for a publications. Outside review of the program itself in terms of its structure and its content?

R: Yes. Now, at what point is this review taking place? I’m thinking we have a director who's moving on to tenure track. Then that kind of review would be appropriate. But I think it would be equally appropriate if a director starts out on a long-term contract when the question is whether to renew that contract.

L: If you were to have outside review on content, and the process involved and the quality of the program—who would you select?

R: Professionals. And, I suppose that means from among directors of programs at other schools. The way our outside reviewing works is that the a person being reviewed may suggest a name or names, and at least one of those persons will be selected as a reviewer. And then, through the Dean’s contacts or other faculty’s contacts, or from the reputation of a program, directors at good programs could be identified.

L: What role should legal writing professionals play in the accreditation process for law schools?

R: Well, I think their program should be described along with everything else that is being described in the school’s report. I once brought down the scorn of a law school dean by saying at a conference, “If you need more money in your program, need more teachers, mention it to the people who come through for the accrediting inspection.” He said, “Not if I’m the dean.” But this can be done with the knowledge of the dean. Inspection reports are padded with—rife with—criticisms that are really initiated at the school to be used as ammunition in dealing with the university president or whoever makes decisions for distribution of funds. Certainly you should not rashly do this without your dean
knowing about it, if you want to stay at that school. That would, well—enough said.

L: If you were thinking in terms of hiring—we talked about who should be the ultimate decision maker—and if you were asked: What kind of a personality is the ideal, or at least the desirable personality for a legal writing director, what would you say?

R: [laughter] I don’t want to answer that one! Because I think anyone who answered that question will answer in terms of themselves. All kinds of different backgrounds can be important for legal writing. I think it is good to have a background in English, or in logic or linguistics, anything related to writing and thinking. Psychological studies in the area of thinking could be very useful—just having that background—psychological background would be useful. In terms of the personality, you need someone who is not thin-skinned, someone who can take a lot of criticism and insensitive remarks and complaints, and not internalize them and get bitter about it. They just have to let that stuff roll off and go right ahead doing what they think is right. You need someone who is truly dedicated, who will put in the hours that are necessary in getting started. I think that’s about as far as I want to go.

L: In terms of hiring a legal writing director or instructors, you know, whether in long-term contracts, tenure track, whatever—some schools, are very averse to hiring their own grads. Do you have any thoughts on that?

R: I’m in favor of it. I was hired by my school. Over the years we hired other graduates of our school. It’s essentially the same question with reference to other faculty members: Do you have enough confidence in the quality of students you’re turning out to want to hire them? And do you have confidence in the quality of your law school program?

L: Exactly.

R: And if you don’t, why, that’s your problem, it’s the school’s problem.

L: Yes, it seems to me there is something insulting about being told, that if you were a graduate of “X” Law School you really shouldn’t teach there, because no one will respect you.

R: Well, that reflects an inferiority complex about the quality of the school if it comes from somebody who is a member of the faculty. If it comes from the outside, then that’s a reflection of their evaluation of the school.
L: Directors often complain that they are constantly having to prove themselves and the program with the rest of the faculty. What advice do you have for people on that issue?

R: I know the problem, and I doubt that I have an answer. I think one of the most important things that people in Legal writing can do is to establish contacts with other faculty members, social and intellectual. I would counsel new teachers, from the time they join the faculty, never to feel inferior even if they are treated as inferior. Act like one of the faculty members. And that means you try to lunch with one more or them, you try to have coffee with them if there is a coffee room or a lounge where you can go and talk with them. Ideally, just set out a program. Once you find someone you are compatible with, establish a good relationship and then reach out for somebody else. Engage in sports activities. At our school, there was a group that went swimming daily for exercise. If there is a swimming group at your school, join them. Or there were some who played tennis at our school. Whatever they do for sports or exercise, and particularly if it’s done right after school hours, join them. If you like to go to movies and you find somebody else who likes to go to movies, if it’s a married couple, get together with that couple. Or if you’re unmarried, then get together with another unmarried faculty member. If you like classical music, find out who is going to the concerts and try to go to concerts together. Whatever your interests are, try to identify members of the faculty who have similar interests. Building a base of support is dependent on building relationships with individual faculty members. That’s not going to cut off the constant necessity to prove yourself—because I suspect there is no school where you will have the ability to reach a majority of the faculty members in this way, not even in the best of schools. But do the best you can.

L: You said there are two kinds of connections: one was social and the other one you said was intellectual and you gave some examples of the social connection. Can you give some examples of the second kind? Is there a way to make the connections which would help, if not get rid of, at least alleviate the notion that people in legal writing just do simple-minded things, and write about simple-minded topics?

R: Well, there, that’s what I’m talking about at the intellectual level. On one level, the working level, when I was doing research on a problem, I would come upon a very intriguing
issue and I'd talk to the faculty member teaching in that area about it. Whenever I was developing a problem in their areas, I'd talk to them about it and tell them, but not until after I was pretty well on top of it: number one, to let them know that I was going to be doing something in their area, in case they wanted to object, and number two, just to let them know I was thinking about something more than split infinitives. Also, attend faculty colloquia and lectures, ask questions, and discuss points with other faculty members. Don't be intimidated into remaining silent.

L: I think that latter, I think is increasingly important to people who are going to advocate tenure track positions for all legal writing faculty members. Because there is a sense, at least among some top doctrinal faculty members, that legal writing people don't really do anything intellectually challenging.

R: I dealt with that assertion over the years. I don't know how many faculty members I convinced to the contrary, but perhaps it does depend on the program. Someone who is doing only the simplest kind of writing assignments with given content and never gets beyond, "Here are five cases, write a synthesis" or "Here, write a letter"—just never gets beyond the very basic, never gets involved where the students really have to think through a problem themselves and find the materials and work their way through it, then, maybe, other faculty can say that, but that does not mean that the teacher's mind is not working in a very sophisticated way to a point where she or he can design these very simple things. The assertion that was always made to me was that there is no discipline called "legal writing." And my response would be, "No, but there's a discipline called 'logic' or 'semantics' or 'linguistics'—there's a discipline called this that and the other thing." We deal a great deal with that and certainly there is a discipline called English.

L: And rhetoric.

R: Rhetoric, yes. For a time there was great interest in rhetoric in teaching legal writing. At one time I had a whole list of these things, of the kinds of academic background I wanted for my teachers because I thought then they'd be making contributions to scholarship that related to their background in what they're doing with the students. And educational theory is an excellent background because you can work with how the students are thinking and learning and that sort of thing.
L: When students first come to Law School they're usually extremely excited and enthusiastic because they're entering a new world, so to speak, and they've been accepted and they are often quite pleased with themselves. How do you capitalize on that initial excitement? How do you get good quality work?

R: This reminds me of something that we haven't talked about, and that was the Introductory Program that we presented in the '60s. The initial idea came from the dean who was first supportive of me. He said, "Why don't you take a case and just take all the entering students through all the steps of that case. From the parties' initial consultation with counsel to the final decision on appeal. Then let their first briefing assignment be the opinion that came out in that case." So, I spent the first summer I was on the payroll looking for a case I could use, and I finally found a wonderful misrepresentation case. We worked up a three-day program in which we had upperclass students role-playing for us, starting out with the plaintiff consulting the attorney, telling her side of the story. Then we provided a complaint. The next role-playing would be the defendant's consultation with an attorney. Then we would have discovery and other pleadings and the trial. The first two years we did it, we actually went down to the courthouse and used a real courtroom. We had some really outstanding presentations by upperclass student counsel in the trial. Then we would have the appeal argued and finally the opinion would be distributed and they'd be asked to brief it. Well, we started this all before they even entered school because we sent out a mailing to them with a suggested reading list and a short explanation of briefing, how to analyze a case. Very simple: Just identify what you think are the important facts and so on. They brought their first brief with them when they registered. The opinion assigned provided background for the case that was the subject of the introductory program. Well, that certainly capitalized on their interest in the beginning. Carrying it on, we were often able to use little offshoots of problems from the introductory case subject for legal writing assignments that kept them interested.

Apart from that kind of program, though, I think you do have to try to get subject matter for programs that they will perceive as important. If they perceive what you're doing as artificial, "Mickey Mouse," then the excitement level goes way down. Some things must be very simple, but if you can relate it to something important, so they understand why they are doing this and what it
will contribute to something else that's bigger and whose importance they can recognize, that's helpful. But you can't always get what one faculty member called "sexy problems." You just do the best you can and keep the educational objectives uppermost in your mind.

L: Another question. Which may be one of the hard questions: What does the legal writing profession still need to accomplish—I mean what should we be aiming for? We've come a long way since the beginning.

R: I guess I would have to go back to what was my goal. The idea would be what I envisioned: development of a group of people really interested in this area, interested in working one on one with students and their analysis and exposition, and interested in exploring and writing about it. Doing it as a regular member of the faculty on tenure track, subject to the same expectations, same rewards as regular faculty members get.

Before we finish this, I want to come back to what may be a prejudice of mine. I think that using the very term, "legal writing" encourages other faculty members to say, "Well, you're not doing very much." This is one reason why I adopted the name that I did for my course, which was Legal Analysis and Research. I didn't even mention writing, because writing turns students off, just the word. If you are teaching research, of course, or if you're not - you can just have a Legal Analysis course or just an Analysis course. And this does not cut out writing; it does not cut out any level of instruction in writing or any level of critique or expectations in writing, but it does re-focus from the idea that you're doing something mechanical and grammatical only. Faculty members must be persuaded that you are dealing with thought processes along with writing processes, which are thought processes—sustained analysis and exposition. I don't know if others would agree with me enough on that point to make a cooperative decision—that maybe we should stop talking about legal writing and talk more about analysis or legal reasoning. Others thought that was a better term.

L: Probably, legal analysis is the better term because legal reasoning has some affiliation with older courses that used to be taught, which were not particularly intellectually stimulating.

R: And which do not parallel our courses. The name of the course at our school now is Basic Legal Skills, and that is a good course name. For my book, I chose "Legal Problem Solving," which encompasses all we teach.
L: Marjorie, technically you retired in 1993, but you have been very active professionally after retirement as well as before.

R: Well, I was motivated to retire, in part, after I spent five months as Acting Dean of our school in 1991.

L: Yes, I saw your portrait at the University of Washington Law School.

R: That stint earned me a sabbatical year. I spent the fall quarter teaching at the Law Department of National Taiwan University, and then I had time to think about what do with my future. At the time, I was the chairperson of the Washington Law Revision Commission, and I was interested in integrating the commission’s legislative drafting activities in the curriculum in some manner. So, I spent my first year of retirement working full time on commission affairs to try to broaden its activities. Unfortunately, no one else at the school was really interested in my goal, and the legislature eliminated the commission when its creator (an influential former legislator) died. I spent the next few years writing. I participated in revising Legal Writing in a Nutshell with a new co-author (though in the end we retained substantially all that Lynn Squires had written). I began work on two volumes on creditor-debtor law for West’s Washington Practice Series, but that project was slowed when my husband’s health declined and I became a caregiver. I finished those volumes in 1998.\(^8\) I wrote a short history of the law school administration and did some consulting work. Since my husband’s death in 1999, I have concentrated primarily on preparing his and his father’s memoirs for publication. I have also learned how to say, “No!” to requests on other projects. I now intend to spend much of my time transcribing orchestral and piano classical music for accordion and making music with my accordion, synthesizer and computer.

L: For what would you most like to be remembered in the legal writing community?

R: Hmmm. My first response would be trite, that I made a difference.

L: Well, you did! There is no doubt about that.

R: And that I raised the level of quality of teaching in this area.

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\(^8\) Creditors’ Remedies--Debtors’ Relief.
APPENDIX 1

EARLY SALARIES

(Salaries given are for 1966 unless otherwise indicated)

Michigan $7,800 (1967-68)
Stanford $6,750 (1967-68)
California $6,612
UCLA $6,612 ($6,754 for 1967-68)
Chicago $6,500
Harvard $6,500 (for graduate with one year of experience; more for additional experience)
Washington $6,003
Harvard $6,000 (Graduate without experience)
Boston College $5,900 (1967-68)
N.Y.U. $4,000-$5,000 (1967-78)
George Washington $4,000

APPENDIX 2

DEFICIENCIES OF THE "CASE METHOD" IN DEVELOPING OPINION AND PROBLEM ANALYSIS SKILLS

HOW THESE DEFICIENCIES MAY BE OVERCOME IN THE LEGAL ANALYSIS COURSE
"CASE METHOD"

1. An instructor can focus on only one student at a time in class discussion. (How many of the other students are following the discussion?) Rarely is an individual student led through use of a minimal progression of the skills (analysis of opinions, synthesis, application) to solve a single hypothetical problem. Students are frequently left wondering what was wrong with their snubbed contributions.

2. In the "substantive" courses, many students focus on acquisition of "knowledge" of subject areas. (What are the rules? What are the reasons?) A course may produce understanding of opinions and other materials in an area of law without developing the basic skills for some students. (How many students rely on commercial or former students' briefs and syntheses and on what can be drawn from class discussion to acquire "knowledge" without really participating in the distillation process and even without appreciating that they have not participated in the most important part of the process?)

3. Class discussion must revolve around relatively uncomplicated factual patterns directed to rather clear-cut issues, because oral discussion does not permit reflection. The necessity for dealing with uncomplicated factual patterns tends to cripple students in dealing with the type of un-patterned factual collections with which they must ultimately learn to deal; they learn to deal with absolutes rather than with probabilities or possibilities and with neat, complete (for purposes of a single issue) fact patterns rather than with inconsistent and incomplete fact collections.

4. The subject matter and materials dictate what skills can be emphasized and when they can be emphasized.

5. The course compartmentalization tends to give students unrealistic view—of tort problems, contract problems, property problems—rather than of "problems," which require dealing with many of the artificial subject compartments or with the overlapping areas of the artificial compartments.
THE LEGAL ANALYSIS COURSE

1. Each student is forced to solve a minimum of three problems requiring repeated use of at least the minimal progression of skills with selected other skills. Each student’s work is individually evaluated and students are advised of their major weaknesses. There are opportunities to try again (and sometimes, yet again).

2. Even the least discerning student is aware that “knowledge” is not the objective. What a student does with what he finds may reveal skill weaknesses which can at least be identified for him before it is too late.

3. Students can be led through a short series of increasingly complex factual situations, requiring greater care in dealing with all possibilities and requiring increasingly greater skill in identifying the precise issues which must be dealt with. They learn skills necessary to deal with complicated fact patterns (including irrelevant facts, for example) and issues which must be broken down into several separable questions.

4. Particular skills can be emphasized in a logically developing sequence through choice of subject areas which permit emphasis on the skills desired to be emphasized.

5. Students can be forced to recognize that collections of facts do not come to them labeled “contract problem,” etc. They can be required to classify problems or issues and to work in overlapping, unfamiliar, developing or non-existent “subject” areas.

6. Students are forced to deal with raw legal materials—misleadingly classified, unclassified, rambling—and to select relevant materials on the basis of their own tentative classification and identification of issues.
6. The course materials cultivate an unrealistic view of raw legal materials—classified, selected and excerpted to focus on narrow problem areas.
Of Golf and Ghouls: The Prose Style of Justice Scalia

*Love him or hate him, Antonin Scalia demands attention*.1

Yury Kapgan

INTRODUCTION

Well-written prose is a rare commodity. And it receives little attention in the law profession. Legal writing beckons for uniformity, often obscurity, and suffers from general dullness. It is the rare legal writer who leaves an audience with a particularly memorable impression. One commentator has observed that a “bland, homogenous style . . . dominates” the Supreme Court today.2 Another has noted a similar trend in the lower federal courts as well, observing that “the ever-expanding shelfloads of the Federal Reporter supply little nourishment for the linguistic gourmet.”3

Scholars have generally considered only a handful of Supreme Court Justices to possess “good” writing style. Typically at the top of the list are Benjamin Cardozo, Oliver Wendell Holmes, and Robert Jackson. All of them happen to be long dead. There is one jurist, however, who remains alive and well, whose writing combines metaphors with witty aphorisms and sharp turns of phrase, and who, it might be said, has as “good” a writing style as any other jurist, past or present: Justice Antonin Scalia. Justice Scalia’s “easy, literate, lively, hard-hitting style” makes him “probably the best writer on the Court.”4

Countless commentators have written about the merits of Scalia’s judicial philosophy, but few have examined at any length the style he uses to express his thinking.5 Without defining good writing style, and with the thought that showing is better than simply telling, my task in this Article is to relate, by way of

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3 David Franklin, *Judge Bruce Selya, Resipiscent Recidivist*, 1 Green Bag 2d 95, 95 (1997).
5 One notable exception (and the only one I know of) is Charles Fried, *Manners Makyth Man: The Prose Style of Justice Scalia*, 16 Harv. J.L. & Pub. Policy 529, 529–536 (1993). However, Fried’s short essay devotes only four pages of text to discuss Scalia’s style.
example, the strength of Scalia's rhetorical power. I ask the reader to join me in this quasi-literary journey of sorts.

Lest one ask why writing style is important in a judicial opinion, I offer the following observation by Richard Posner, a federal court judge and a law and literature buff of sorts: "The power of vivid statement lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought." In another judge's view, "[s]tyle must be regarded as one of the principal tools of the judiciary[,] and it thus deserves detailed attention and repeated emphasis." Cardozo long ago recognized that style and substance are intimately connected. Judicial opinions that are thought-provoking tend to be the ones that are well written, most like literature. One might go so far as to say that "[l]egal writing is literature, even though the writing may be merely factual or expository. Ideally, a writing is elevated to literature if it is of an enduring quality." In the end, it may be that style is important because "[t]he literary judge wears best over time."

If style and substance are inextricable, then it should come as little surprise that Scalia's most memorable writing embodies both stylistic clarity and his substantive preference for clear rules. Likewise, his most literary moments harbor criticism for stylistic ambiguity and what he believes to be the Court's preference for unclear rules. In sharply worded dissents, Scalia persistently

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6 See Huntington Brown, Prose Styles 15–16 (U. Minn. Press 1966) ("The nature of our subject [defining 'a style'] is that of eternally unfinished business. There would not seem to be any harm in designating as 'a style' something of which we can furnish only a meager description. . . . [N]o critic can hope to describe any style exhaustively.").

7 Richard A. Posner, Cardozo: A Study in Reputation 136 (U. Chi. Press 1990). I do not propose to canvass the entire law and literature (or law as literature) landscape in this Article.


9 See Selected Writings of Benjamin Nathan Cardozo 339–340 (Margaret E. Hall ed., Fallon Pub. 1947) ("Form is not something added to substance as a mere protuberant adornment. The two are fused into a unity."); see also Bell, supra n. 8, at 219 ("[T]here can be no substance without form. Form holds and preserves substance, and for that reason judges must pay close attention to form.").

10 Elliott L. Biskind, Simplify Legal Writing 1 (Arco Publg. 1975).

11 Posner, supra n. 7, at 143.

12 See e.g. Fox & McAllister, supra n. 679 at 309 (noting Scalia's "preference for clear rules, clear lines, and clear text").
admonishes the Court for adopting vague legal standards that cater to judicial discretion.\(^\text{13}\)

Though the linchpin of Scalia's philosophy is the advocacy of clear legal rules that minimize judicial discretion,\(^\text{14}\) my focus is on Scalia's prose style. I leave it up to the reader and legal commentators to debate the merits of his jurisprudence. Undoubtedly, that jurisprudence would be decidedly less seductive and more tiresome absent his command of language. The passages I have chosen from Scalia's opinions illustrate how he uses his command of language to make what Charles Fried calls "a moral and political point about judging, about the law, and about the kind of institution the Supreme Court should be."\(^\text{15}\)

How did I choose excerpts to discuss? Call it "a built-in literatometer"\(^\text{16}\)—I selected "[w]riting which manages to move, to instruct, or to entertain in such a way as wholly to engross a reader . . . ."\(^\text{17}\) To be sure, selection necessarily engenders exclusion, and to select particular passages within Scalia's vast repertoire of writing is to overlook text that may be equally noteworthy or more so. Indeed, perceptions of written style can vary as much as perceptions of fashion style; what is stylistically noteworthy to one individual may be ordinary to another. The passages I selected are the more stylistically unusual ones Scalia has written, for usual ones would scarcely demand comment. They are unusual in the sense that the word choice, the particular metaphors, the turns of phrase are uncommon not only among the writings of the Court's Justices, but also among legal writing more generally. They are about as close to literature as court opinions come.


\(^{15}\) Fried, supra n. 5, at 536.

\(^{16}\) Louis Blom-Cooper, Introduction, in The Language of the Law: An Anthology of Legal Prose xxi (MacMillian Co. 1965) (internal quotations omitted).

\(^{17}\) Id. at xx.
Scalia's memorable writing defies tidy organization. The emphasis throughout this Article is on the clarity and novelty of Scalia's prose style. To that end, Part I introduces several examples of the novel—and often metaphorical—language Scalia employs to criticize the reasoning of his colleagues on the Court. Part II reflects, in its excerpts, what may be considered the climax of both Scalia's vitriolic dissenting language and his persistent admonition to be wary of judicial discretion. In Part III, I touch on the psychological effect of Scalia's rhetoric and lay some foundation for the notion that Scalia's style should, and probably does, have a measurable effect on his audience. Part IV ties together the relationship between dissenting opinions, metaphors, and Scalia's writing style. I argue that dissenting opinions are particularly suited to Scalia's style as well as his message—his sharp wit, biting critiques, elaborate use of metaphors, and preference for bright-line rules find refuge in dissent.

I. MEMORABLE LANGUAGE

Different styles of writing may be equally memorable for different reasons. For example, the eighteenth-century English style of Justice Cardozo's writing is marked by inversion of standard word order, witty maxims, and pithy phrases. On the other hand, Judge Friendly's writing completely avoids any hint of literary or rhetorical devices. Justice Robert Jackson's writing “had a jaguar's power, swiftness, and agility.” Judge Selya of the First Circuit is best known for his flowery language and arcane word choice, while Judge Kozinski of the Ninth Circuit is known for his humor.

To understand what makes Scalia's prose compelling—demanding of attention—we need to understand what makes certain language memorable and others forgettable. First and

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20 Domnarski, supra n. 2, at 69.
21 See id. at 105–106 (“Ironically, for someone with significant writing gifts, Selya's weakness as a writer is his propensity for flashiness that too often betrays even that questionable objective and creeps into cuteness. The dominant impression Selya's prose creates is that he wants it to be noticed. He consistently and frequently uses obscure diction, for no other apparent reason than to show off.”); Franklin, supra n. 3, at 95–96.
foremost, Scalia's use of metaphors deserves attention. Part of what makes his style persuasive, even as criticism, is its novelty. Clichés are the archetypal use of outworn language and the bane of bad legal writing. In the words of one judge, a "cluster [of clichés] robs the opinion of the sudden insight which imparts persuasion." But even clichés can leave a memorable impression with the reader if they are used in an unexpected way. Take this lone dissent by Scalia:

That is what this suit is about. Power. The allocation of power among Congress, the President, and the courts in such fashion as to preserve the equilibrium the Constitution sought to establish. . . . Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.

The Biblical allusion to a wolf in sheep's clothing is a metaphor that has been used countless times to convey the message that appearances can be deceiving. In this case, however, the metaphor conveys just the opposite: there is no disguise here, no sheep's clothing, appearances are what they are—clear.

Scalia conceded that the kind of issue before the Court will often be "clad . . . in sheep's clothing." After the colon he explained that the disruption of equilibrium between the branches of government may not be "immediately evident," and only through "careful and perceptive analysis" can the wolf be revealed for what it is—effecting an unconstitutional change in the balance of powers. Yet in that lengthy space of prose Scalia deliberately avoided using the term "wolf," leading the reader to believe that the metaphor of "sheep's clothing" was over. And so it is with some surprise that the reader stumbles upon the next sentence that clinches the metaphor: "But this wolf comes as a wolf." Its


brevity stands in stark contrast to the immediately preceding sentence: seven syllables in seven words compared to seventy-nine syllables in forty-seven words. The last sentence sneaks up on the unsuspecting reader just as the sly wolf catches its prey by surprise. Scalia thus rescued the familiar metaphor from certain death by employing it in an unfamiliar way, and thereby made his substantive point clear.25

As this excerpt indicates, Justice Scalia is a professional among his peers when it comes to using metaphorical language. Take another example:

I think the Court errs, in other words, not so much because it mistakes the degree of commingling, but because it fails to recognize that this case is not about commingling, but about the creation of a new Branch altogether, a sort of junior-varsity Congress.26

The novelty in Scalia’s language is immediately evident: as Charles Fried points out, the Supreme Court has used the term “junior-varsity” only once before, in a case involving the real thing.27

Fresh metaphors like these can imbue the clarity that legalese typically shuns. Well-conceived metaphors convey ideas clearly. A wonderful example of such clarity appeared in a case dealing with the ability of corporations to contribute money to candidates in elections for state government.28 In that case, the majority reasoned that a state law banning independent corporate expenditures for candidate elections was a reasonable means to prevent corporations from engaging in “corruption” by amassing wealth and distorting elections.29 The Justices were persuaded by the corporation’s ability to amass wealth because of certain state-conferred “special benefits.”30

In dissent, Scalia attacked the logic of the majority opinion, arguing that it attempted “to make one valid proposition out of two

27 Fried, supra n. 5, at 536.
29 Id. at 659–660, 668–669.
30 Id. at 661.
invalid ones." The majority cited "corruption" and "special privilege" as two reasons that corporations should be denied certain expenditures, but Scalia believed both reasons to be unpersuasive. He wrote:

When the vessel labeled "corruption" begins to founder under weight too great to be logically sustained, the argumentation jumps to the good ship "special privilege"; and when that in turn begins to go down, it returns to "corruption." Thus hopping back and forth between the two, the argumentation may survive but makes no headway towards port, where its conclusion waits in vain.

Scalia analogized the majority's reasoning to two different ships: "the vessel labeled 'corruption'" and "the good ship 'special privilege.'" The majority held out the corporation's potential for corruption as one reason that its spending should be curbed, a reason that Scalia found unconvincing. Not only is it unconvincing, though, but it verges on the illogical, Scalia intimated. The burden of irrationality weighs so heavy that the argument begins to sink under its own weight. The majority must jump ship—or abandon this line of reasoning—to the "good ship" and cling to the corporation's alleged "special privilege." It is this corporate "special privilege," Scalia related, that provided the majority with adequate reason to deny corporations the right to contribute certain funds.

Yet Scalia found this reason as unconvincing as the first. It, too, begins to sink, and the majority has no choice but to return to its first haven, which in fact turns out to be no haven at all. Both lines of reasoning are sinking, Scalia argued, but the majority is resigned to "hopping back and forth between the two." Both ships are inevitably doomed from a gash in their woodwork, as both arguments suffer from a fatal flaw.

Interestingly, Scalia conceded that "the argumentation may survive" even though he tells us there is no conclusion to be drawn from it. Usually, one puts forth an argument to support a particular conclusion, unless it is an illogical argument that can bear no conclusion. And it is this latter affliction that Scalia suggested the Court suffered from. Two sinking ships do not make

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31 Id. at 685 (Scalia, J., dissenting).
32 Id.
a seaworthy one, just as “one valid proposition” cannot be had “out of two invalid ones.”

This maritime metaphor is especially compelling because of the personification of language that it employs. What is nothing more than some words on a page, a few thoughts by some judges, is an argument that “makes no headway towards port, where its conclusion waits in vain.” The very notion of an argument drifting aimlessly, but unable to reach its conclusion that waits in port, is sheer linguistic beauty, for Scalia makes his point metaphorically clear: the majority’s argument never reaches its conclusion because its line of reasoning cannot support the proposition that corporations should be banned from spending money a certain way. The conclusion waits uselessly—“in vain”—while the Court’s arguments sink under the burden of their own illogic. Scalia gives us a sort of legal poetry: the language is clear and the metaphor is sublime.

The description of a conclusion waiting in vain—though not overtly funny—may have brought a smile to the faces of some readers. At the very least, it catches attention. Humor does have its place among court opinions. “A touch of humor in a judicial opinion succeeds because it is a rare flower blooming in a desert of dry legal prose.”33 It personalizes the message the judge conveys, making it less formal and more conversational. For that reason, however, its place in court opinions is somewhat odd considering that formality and authority usually go hand-in-hand. Seriousness generally characterizes pronouncements from a court; humor might be seen as inappropriate.34

Yet in the context of court opinions, humor’s informality may be its very strength. “Humor can be an exceedingly persuasive

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device." It is a sort of aside, an indication to the reader that the judge is more than a mere automaton caught up in the humdrum of the judicial machinery.

In perhaps the most humorous passage in his oeuvre, Scalia created an elaborate, extended metaphor that surprises through its utter strangeness:

As to the Court's invocation of the Lemon test: Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under . . . . Over the years, however, no fewer than five of the currently sitting Justices have . . . personally driven pencils through the creature's heart . . . .

The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.

Scalia employed the playful metaphor to compare his colleagues' application of precedent to a wicked but obedient monster. His critique is of unworkable tests that cater to judicial discretion. But ever the one for drama, Scalia eschewed making that point so bluntly, lest its effect be tempered by its staleness. After all, if one wants to criticize a thing, why not call the thing a ghoul, a creature, or a monster? And so Scalia looked for a new way to express a worn point, setting a strange scene indeed: the Lemon test stalks the constitutional landscape of religion, so menacing in its gait that it scares "little children" and "school attorneys" alike. Its perpetual resurrection, despite repeated stabbings through the heart, confirms the unfettered discretion of

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35 J.T. Knight, Student Author, Humor and the Law, 1993 Wis. L. Rev. 897, 907.
36 Lamb's Chapel, 508 U.S. at 398-399 (Scalia, J., concurring in the judgment) (internal citations omitted).
judges who employ it ("we can command it to return to the tomb at will"). The monster remains entirely at the judges’ mercy.

Scalia’s farcical horror story is memorable not for its truth, but for its ability to create a kind of truth out of metaphor. In the words of one commentator, "[Y]ou’ve got to wonder: are little children really frightened of the Lemon test? ‘Mommy, there’s something hiding under my bed—and it has three prongs!’" The passage impels the reader to believe the Lemon test is as unworkable as the story he tells is imaginary. Once again, novelty is the hallmark of Scalia’s language: no other reference to a “ghoul” exists in the history of Supreme Court opinions.

The monster metaphor in particular catches attention because Scalia seems acutely aware of his audience; in fact, he refers specifically to the Court’s “audience.” It is no wonder that humor in a judicial opinion is useful as "a means to make the unfamiliar humane"—especially to an audience for whom legal rhetoric may be unfamiliar.

This style is also effective at least in part because Scalia often writes for less than a majority of the Court. As one judge notes, “The strategy of personalization in dissent is to separate the dissenter from the cold, impersonal, authoritarian judges of the majority, who impliedly do not take the human condition into account when they mercilessly impose ‘the law.’” One might say that humanness engenders credibility, and credibility engenders persuasion.

Often a judge’s language catches attention simply because of its incongruous placement in a judicial opinion. In his familiar

39 I discuss Scalia’s audience in infra Pt. III.
40 I elaborate on this point in infra Pt. IV.
42 One commentator has noted these types of moves in the writing of opinion by which the author will suddenly, and apparently pointedly, lapse into a homely or popular mode of diction . . . . [T]he mere lapse itself is a rhetorical move . . . induc[ing] a kind of rhythmic change . . . . As if one were suddenly speaking. Rather than writing. It is as if this not only operated aesthetically on the attention but rhetorically in the realm of pathos (to the degree that the author might want to make the reader relax, smile, or even giggle) and thereby, perhaps, of ethos: The essential humanity, good humor, sincerity, or whatever of the writer would be claimed by what was a sort of stage aside.
diatribe against the Court's use of amorphous legal tests, Scalia in one opinion accused his brethren of creating "endless, uncertain, case-by-case, balance-all-the-factors-and-who-knows-who-will-win litigation."\(^{43}\) The comical effect of this line lies in its elementary-school-like use of hyphens between words that should have a concise substitute. Yet in this case the style can hardly be separated from the substance: Scalia suggested that the Court engaged in elementary-school-like reasoning.

Interestingly, the adjectival catch phrase connected by hyphens is not an aberration in Scalia's writing. Over the years, Scalia has unleashed these hyphens against his colleagues on the Court as well as litigants in the particular case. Take these examples:

- "throw-in-the-towel approach"\(^ {44} \)
- "look-alike-but-inapposite cases"\(^ {45} \)
- "a fiction of Jack-and-the-Beanstalk proportions"\(^ {46} \)
- "catch-as-catch-can approach"\(^ {47} \)
- "we'll-look-at-all-the-circumstances-and-see-if-it-looks-dangerous' approach"\(^ {48} \)
- "it-is-so-because-we-say-so' jurisprudence"\(^ {49} \)
- "I am in an I-told-you-so mood"\(^ {50} \)
- "the original-meaning-is-irrelevant, good-policy-is-constitutional-law school of jurisprudence"\(^ {51} \)
- "whatever-it-takes proabortion jurisprudence"\(^ {52} \)
- "give-it-a-try litigation"\(^ {53} \)


\(^ {43} \) *Bd. of County Commrs. v. Umbehr*, 518 U.S. 668, 711 (1996) (Scalia, J., dissenting).


\(^ {45} \) *Steel Co. v. Citizens for a Better Envt.*, 523 U.S. 83, 100 n. 3 (1998).


\(^ {48} \) *Id.*

\(^ {49} \) *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 552 (1989) (Scalia, J., concurring in part and concurring in the judgment).

\(^ {50} \) *Stenberg v. Carhart*, 530 U.S. 914, 955 (2000) (Scalia, J., dissenting).


\(^ {53} \) *Lehnert v. Ferris Faculty Ass'n.*, 500 U.S. 507, 551 (1991) (Scalia, J., concurring in the judgment in part and dissenting in part).
• “standard of ‘grossly-excessive-that-means-something-even-worse-than-unreasonable’”


• “whatever-the-industry-wants standard”

• “this new, keep-what-you-want-and-throw-away-the-rest version”

• “the real question is whether a jury can tell the difference—whether Solomon can tell the difference—between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is lawful and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is unlawful.”

Form and substance are intimately connected in these examples. The hyphen-filled adjectival phrase is a peculiar stylistic manifestation of Scalia’s criticism and, often, his substantive philosophy. Scalia employs hyphens to embody the naiveté of the object of his criticism, luring his audience into implicit agreement through oversimplification. Opposing arguments or interpretations are reduced to childish-sounding catch phrases lacking authority. Often the object of his criticism is what he believes to be a group of unelected, life-tenured and therefore unaccountable judges who resolve questions of policy under the guise of legal reasoning.

The gaggle of hyphens is precisely the kind of “homely or popular mode of diction” that grabs and amuses the reader largely because of its apparent incongruity. The informality is Scalia’s way of comforting his audience by reminding them of his own humanity, invoking the very same formative thought process that engages his audience—namely, that step between thought and communication. He writes as if he spewed his thoughts onto

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59 See Casey, 505 U.S. 833, discussed in Part II. B, infra.

60 Hollander, supra n. 42, at 184.
paper without thinking enough to form the appropriate words. Yet his witticisms are certainly deliberate.

Because Scalia is so interested in linguistic detail, his diatribes rarely become monotonous. In one notable passage Scalia distilled into a single sentence his most direct criticism of what he viewed as the Court's elitism:

> When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains—and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn.\(^{61}\)

The *Oxford English Dictionary* reveals that the peculiar spelling of “villeins” is not scrivener's error; villeins, sometimes spelled “villains,” were a class of serfs in the feudal system of the Middle Ages.\(^{62}\) “Templars” refers to the Knights Templar, a religious military order of knighthood established during the twelfth century and divided into four classes: knights, sergeants, chaplains, and servants.\(^{63}\)

Interestingly, Scalia associated the Court with the first and highest class: the knights. His words were carefully chosen as he painted a picture of class conflict: surely the Court would have nothing to do with the peasants (American society), Scalia suggested, since its interests are those of the elite Middle Ages knight caste (the contemporary “lawyer class”). The implication is that the Court's decision is biased and elitist, more appropriate to a feudal system than a democracy.

Along with this implication Scalia planted another: that the Court delved into the “culture wars,” far removed—in fact, poles apart—from its proper legal function. He ended the arcane metaphor with a subtle but important grammatical twist, referring to the Court's “Members” rather than “members.” The purposeful use of a capital letter produces an effective stylistic parallel to “Templars” and is meaningful in the context of the sentence

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because it reinforces the Court’s elitism, separating its Members from the lower-case (and lower-caste) "villeins." The message would have been decidedly less powerful absent the metaphor and Scalia’s attention to linguistic detail such as word choice, spelling, and even capitalization.

Patricia Wald has observed that Scalia also “uses conceptual phrases sarcastically, always set out in capital letters." In a recent case that received a fair share of media attention, Scalia belittled the Court for requiring the Professional Golfing Association to allow golfer Casey Martin (who suffers from a rare circulatory disorder) to play golf with the aid of a golf cart (instead of adhering to the usual “walking rule”). Deploying capital letters to heighten the sarcasm, Scalia wrote:

If one assumes . . . that the PGA TOUR has some legal obligation to play classic, Platonic golf—and if one assumes the correctness of all the other wrong turns the Court has made to get to this point—then we Justices must confront what is indeed an awesome responsibility. It has been rendered the solemn duty of the Supreme Court of the United States, laid upon it by Congress in pursuance of the Federal Government’s power “to regulate Commerce with foreign Nations, and among the several States,” U.S. Const., Art. I, § 8, cl. 3, to decide What Is Golf. I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would some day have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: Is someone riding around a golf course from shot to shot really a golfer? The answer, we learn, is yes. The Court ultimately concludes, and it will henceforth be the Law of the Land, that walking is not a “fundamental” aspect of golf.

64 Wald, supra n. 41, at 1416.
Either out of humility or out of self-respect (one or the other) the Court should decline to answer this incredibly difficult and incredibly silly question.  

Sarcasm is indeed par for Scalia’s course. The contrast between the authoritative and the ridiculous make an effective mockery of the Court’s approach. Scalia introduced in the first sentence what he called the Court’s “awesome responsibility” in ruling on the PGA’s “legal obligation to play classic, Platonic golf.” Scalia juxtaposed essentially incongruent roles for the Court, making the sarcasm all the more conspicuous — interpreting the Americans with Disabilities Act, passed by Congress through its constitutional power to regulate commerce, and answering the more lofty and ultimately metaphysical question of “What Is Golf?” Scalia continued the conflicting analogy with the quaint (and alliterative) thought that the authors of the Constitution rationally contemplated “the paths of golf and government, the law and the links” traversed centuries earlier by King James II of Scotland. “[T]he judges of this august Court would,” in similarly authoritative fashion, “wrestle with that age-old jurisprudential question” of who is “really a golfer?” The final sarcastic phrase set out in capital letters ridiculed the Court for decreeing “the Law of the Land, that walking is not a ‘fundamental’ aspect of golf.” Scalia ended his opinion by calling the Court’s determination “Kafkaesque,” “Alice in Wonderland,” and “Animal Farm” (all used as adjectives), and quoted from Orwell’s Animal Farm: “The year was 2001, and ‘everybody was finally equal.”

II. SCATHING CRITICISM

Although “Scalia has distinguished himself for his quick tongue and acerbic wit,” in some cases he may have “crossed the line between lively language and impermissibly caustic speech.” I devote this section largely to one case that straddles that line: Planned Parenthood of Southeastern Pennsylvania v. Casey. It

66 Id. at 705.
67 Id.(quoting Kurt Vonnegut & Harrison Bergeron, Animal Farm and Related Readings 129 (McDougal Littell 1997)).
68 Delgado & Stefancic, supra n. 34, at 1977.
69 Id. (referring to two environmental standing cases).
contains one of the most unusual passages in the history of the Court’s opinions.71

A. A Crescendo to Casey

Scalia has reserved some of his most scornful criticism for cases that have revisited *Roe v. Wade,*72 the case establishing a woman’s constitutional right to an abortion. As one commentator has noted, “Scalia’s rejection of abortion rights has been clear, but at times it has swelled over banks and turned into a torrent of abuse submerging the ordinarily depersonalized language of opinions.”73 Because Scalia believes that the Court should explicitly overrule *Roe,* he is critical of members of the Court who (in his view) chip away at *Roe*’s foundation but cling to what remains of the landmark case.74

In a notable example preceding *Casey,* Scalia criticized the Court for carving out an exception to *Roe* without explicitly reconsidering the decision:

> It thus appears that the mansion of constitutionalized abortion law, constructed overnight in *Roe v. Wade,* must be disassembled doorjamb by doorjamb, and never entirely brought down, no matter how wrong it may be.75

Scalia’s main point is apparent to lawyer and layman alike: the Court stubbornly picks apart “abortion law” piecemeal instead of eliminating it entirely. He analogized a court case to no ordinary mansion, but one that was “constructed overnight”—immediately denying it any integrity. Bolstering the metaphor is the adjective used to describe the mansion: it is not “constitutional” but rather “constitutionalized abortion law”—Scalia suggested abortion had undergone an implicitly illegitimate process of becoming constitutional, especially evident in its “overnight” construction.

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71 One commentator calls *Casey* “one of the most striking judicial texts in the history of American constitutional law.” Lawrence Joseph, *Theories of Poetry, Theories of Law,* 46 Vand. L. Rev. 1227, 1241 (1993). For a discussion of the language used in *Casey,* see *id.* at 1241–1250.

72 410 U.S. 113 (1973).

73 Brisbin, supra n. 14, at 277.

74 See e.g. *id.* at 277–281 (describing Scalia’s approach to abortion rights).

75 *Webster,* 492 U.S. at 537 (Scalia, J., concurring in part and concurring in the judgment).
Because over time various court cases have steadily undermined Roe's provisions, Scalia tells us that the mansion has become "disassembled doorjamb by doorjamb," though its foundation seems to remain intact and is "never entirely brought down." The tedious repetition of the image—"doorjamb by doorjamb"—reinforces what Scalia believes to be the futility of the Court's efforts. When combined with the thought that the mansion must be "disassembled," the consequent alliteration serves notice to the reader that Justice Scalia is perhaps as much concerned with the sound of language as with its meaning.

Linguistic imprecision is one of Scalia's most favored targets of contempt, and it is part of his more general criticism of amorphous legal tests. On the same page of the mansion metaphor Scalia inserted a footnote criticizing one of his colleagues for the way she phrased her sentence:

Similarly irrational is the new concept that Justice O'Connor introduces into the law in order to achieve her result, the notion of a State's "interest in potential life when viability is possible." Since "viability" means the mere possibility (not the certainty) of survivability outside the womb, "possible viability" must mean the possibility of a possibility of survivability outside the womb. Perhaps our next opinion will expand the third trimester into the second even further, by approving state action designed to take account of "the chance of possible viability."

Time and time again in dissent, Scalia has criticized the majority for introducing "new," "novel," or otherwise "unprecedented" reasoning into its opinion. Scalia is clinical in his dissection of the phrase employed by Justice O'Connor. Courtesy of his translation, we are struck by the sense that what O'Connor meant is not exactly what she wrote, and Scalia would have us believe that the imprecision is fatal to her argument. Whether fatal or not, the attention to linguistic detail is more than an exercise in high school grammar; it is Scalia's message to the Court that it must choose its words carefully and deliberately.

76 Id. at 537 n. * (citations omitted emphasis in original).
B. The Casey Climax

It was in Planned Parenthood of Southeastern Pennsylvania v. Casey that Scalia unleashed a torrent of criticism probably unmatched in the history of court opinions. He took the unprecedented step of quoting, in boldface type, portions of the Court’s opinion which he felt “beyond human nature to leave unanswered,” and responding to each in succession. To the Court’s pithy observation that “Liberty finds no refuge in a jurisprudence of doubt,” Scalia mocked, “Reason finds no refuge in this jurisprudence of confusion.” Scalia was critical of the Court’s use of stare decisis. While claiming to adhere to Roe, the Court had actually abandoned a major underpinning of that decision, the trimester framework. Scalia wrote:

The Court’s reliance upon stare decisis can best be described as contrived. It insists upon the necessity of adhering not to all of Roe, but only to what it calls the “central holding.” It seems to me that stare decisis ought to be applied even to the doctrine of stare decisis, and I confess never to have heard of this new, keep-what-you-want-and-throw-away-the-rest version.

Scalia flippantly accused the Court of so misunderstanding the very concept of stare decisis that it should have reviewed precedent to learn how the Court applied precedent in those cases. This foregone recursive opportunity of sorts introduced what Scalia called the Court’s novelty in applying stare decisis: taking only one part of a preceding case and ignoring the rest. Scalia confessed—as if he were going to concede a point—but the point was not a concession, for it only introduced criticism, that he had “never . . . heard of this new” procedure. To paraphrase, instead of saying, “I admit I am wrong,” Scalia said, “I admit you are wrong.” The rhetorical device is a subtle but effective way of passing blame. The stylistic rifle of hyphens in the final clause supports Scalia’s substantive point that the Court’s “version” of stare decisis is somehow defective or unsophisticated.

77 505 U.S. at 981 (Scalia, J., concurring in the judgment in part and dissenting in part).
78 Id. at 844 (plurality opinion).
79 Id. at 993 (Scalia, J., concurring in the judgment in part and dissenting in part).
80 Id.
Responding to another section of the Court opinion in *Casey*, Scalia was incensed by the Court’s belief that *Roe* “call[ed] the contending sides of a national controversy to end their national division.”\(^{81}\) On the contrary, Scalia was sure that the decision by the Supreme Court on the issue of abortion only provoked more controversy:

[T]o portray *Roe* as the statesmanlike “settlement” of a divisive issue, a jurisprudential Peace of Westphalia that is worth preserving, is nothing less than Orwellian. *Roe* fanned into life an issue that has inflamed our national politics in general, and has obscured with its smoke the selection of Justices to this Court in particular, ever since. And by keeping us in the abortion-umpiring business, it is the perpetuation of that disruption, rather than of any *Pax Roeana*, that the Court’s new majority decrees.\(^{82}\)

Historical and literary references effectuate Scalia’s criticism in this passage. He explained the striking contrast between what he believed were the consequences of *Roe*—namely, controversy—and what the Court believed were its consequences—namely, peace. The reader will note, however, that it was no simple lilliputian peace, as one between squabbling siblings might be; no, it amounted to the Peace of Westphalia, a far more momentous occasion, which in the seventeenth century brought an end to the Thirty Years’ War in Europe and inaugurated 150 years of relative stability. For the Court erroneously believed, Scalia related, that *Roe* represented just that kind of occasion. And for the Justice who thinks *Roe* signified precisely the opposite, such a decree is simply Orwellian.

Significantly, while Scalia employed the Westphalia metaphor to emphasize what *Roe* was *not*, its effect continued past the first sentence. The metaphor firmly anchors the rest of the passage: while the Peace of Westphalia was agreed upon between contending sides of a controversy, Scalia implied that in both *Roe* and the present case it was a third party—the Court—that “decrees” in Orwellian fashion the proper resolution. The purposeful tension created between “jurisprudential” and “Peace of Westphalia” belies the inherent contradiction between the two

\(^{81}\) *Id.* at 994–995.

\(^{82}\) *Id.* at 995–996.
terms. Hence, what the Court viewed as a “Pax Roeana” (a sarcastic jibe Scalia apparently could not resist) Scalia argued is more properly a faux Pax Roeana. By latinizing Roe, Scalia poked fun at the Court’s interpretation of the landmark case by lending it an air of authority and meaning he thought undeserved. Scalia also suggested the presumably illegitimate (and decidedly unglamorous) role the Court acquired for itself as abortion-umpire.

But Scalia’s criticism did not end there. He quoted another portion of the Court’s opinion that expressed fear that the legitimacy of the Court would be undermined if it were to “overrule [Roe] under fire”83—popular pressure. He then proclaimed:

The Imperial Judiciary lives. It is instructive to compare this Nietzschean vision of us unelected, life-tenured judges—leading a Volk who will be “tested by following,” and whose very “belief in themselves” is mystically bound up in their “understanding” of a Court that “speak[s] before all others for their constitutional ideals”—with the somewhat more modest role envisioned for these lawyers by the Founders.84

History, incredulity, and innuendo combined in this passage to form a critique pointedly aimed at ridiculing what Scalia perceived to be an arrogant and elitist Court. He effectively interspersed quotations from the Court’s opinion in an attempt to show how its arguments became foolish—and Orwellian—when combined. The proclamation in the first sentence casts the judiciary as an institution of illimitable authority, kingly and “Imperial,”85 suffering from a “Nietzschean vision” of themselves

83 Id. at 996.
84 Id. (quoting id. at 867–868). Scalia responded to the following quotes from the Court’s opinion (which he recited in boldface type): (1) “To overrule under fire . . . would subvert the Court’s legitimacy . . . .”; (2) “To all those who will be . . . tested by following, the Court implicitly undertakes to remain stead-fast . . . . The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and . . . the commitment [is not] obsolete . . . .”; and (3) “[The American people’s] belief in themselves as . . . a people [who aspire to live according to the rule of law] is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court’s legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals.” Id.
85 The term “imperial judiciary” apparently was first coined in Nathan Glaser, Towards an Imperial Judiciary?, 41 Public Interest 104 (Fall 1975) (see In re Hayes, 608 P.2d 635, 646 (Wash. 1980) (Rosellini, J., dissenting); Alderwood Assocs. v. Wash. Envil. Council, 635 P.2d 108, 120 (Wash. 1981) (Dolliver, J., concurring)). The term may owe its
as a superior and elite group of justices—"unelected" and "life-tenured" and therefore unaccountable. They lead a mass of followers, a "Volk"—evoking the Oxford English Dictionary's definition of that word as "[t]he German people, esp. in the ideology of National Socialism." The metaphor brings to mind images of Hitler (as the Court) leading his Nazi party (as American society—the Volk) who will be "tested by following." The analogy is extreme, but for Scalia a little (or a lot of) metaphorical exaggeration never hurts. The particular phrase "mystically bound up" lends a kind of metaphysical aura to the Court's ruling, depriving it of integrity and placing the Court squarely on a pedestal no higher than one occupied by seers and soothsayers.

The quotes from the Court's main opinion were taken out of context, and their meaning was somewhat changed by Scalia's own embellishment. But persuasion often calls for forceful rhetoric, which itself is quite at home with exaggeration. It simply verifies one commentator's observation that "in legal writing, fact and fiction can become bedfellows." Scalia may be guilty of oversimplifying matters, but the exaggeration goes far towards convincing the reader that, as Scalia noted in an earlier opinion, "[s]omething must be wrong here," and perhaps "it is the Court."

In the final section of the Casey opinion, Scalia prophesied a rather bleak future for the Court, crowning his lengthy diatribe with a startling extended metaphor. "There is," Scalia wrote, "a poignant aspect to today's opinion. Its length, and what might be called its epic tone, suggest that its authors believe they are bringing to an end a troublesome era in the history of our Nation and of our Court." Scalia's incredulous tone is altogether evident, a tone that is itself perhaps as epic as the one he speaks of. Not one to simply dismiss the Court's contention, Scalia

origin, however, to Arthur M. Schlesinger, Jr., The Imperial Presidency (Houghton Mifflin 1973) (see U.S. v. Meyers, 432 F. Supp. 456, 459 (W.D. Pa. 1977) (first court case to use the term "imperial presidency"; attributing its possible origin to Schlesinger)).


67 See e.g. David Franklin, Of Style & Substance, Law & Lore, 2 Green Bag 2d 323, 324 (1999) (noting Justice Robert Jackson's "occasional penchant for overstatement" and examining one opinion where "Jackson's rhetoric may have outflown his reasoning"); D.W. Stevenson, Writing Effective Opinions, 59 Judicature 134, 135 (1975) (noting that the written judicial opinion "is a persuasive essay directed outward toward specific audiences. Thus the writer's task is to select that information which is necessary to accomplish his rhetorical purpose.").


69 I return to this quotation at note 107, infra.

70 505 U.S. at 1001.
instead created an elaborate metaphor, casting in stark relief what he believed to be the Court's gross error. He analogized the Court's opinion to the infamous *Dred Scott* decision,\(^\text{91}\) which in 1856 held that African-Americans could not be citizens of the United States within the meaning of the Constitution (the ruling was later effectively overturned by the Thirteenth and Fourteenth Amendments). Chief Justice Taney wrote for the Court in *Dred Scott* that it was the Court's duty to interpret the Constitution "according to its true intent and meaning when it was adopted,"\(^\text{92}\) which considered African-Americans "a subordinate and inferior class of beings, who had been subjugated by the dominant race."\(^\text{93}\)

Responding to the Court in *Casey*, Scalia wrote:

There comes vividly to mind a portrait by Emanuel Leutze that hangs in the Harvard Law School: Roger Brooke Taney, painted in 1859, the 82d year of his life, the 24th of his Chief Justiceship, the second after his opinion in *Dred Scott*. He is in all black, sitting in a shadowed red armchair, left hand resting upon a pad of paper in his lap, right hand hanging limply, almost lifelessly, beside the inner arm of the chair. He sits facing the viewer and staring straight out. There seems to be on his face, and in his deep-set eyes, an expression of profound sadness and disillusionment. Perhaps he always looked that way, even when dwelling upon the happiest of thoughts. But those of us who know how the lustre of his great Chief Justiceship came to be eclipsed by *Dred Scott* cannot help believing that he had that case—its already apparent consequences for the Court and its soon-to-be-played-out consequences for the Nation—burning on his mind. I expect that two years earlier he, too, had thought himself "calling the contending sides of national controversy to end their national division by accepting a common mandate rooted in the Constitution."\(^\text{94}\)

Scalia described the painting in some detail. Chief Justice Taney sits in black—usual court attire. What is interesting, though, is what he sits on: "a shadowed red armchair." Shadowed,
because there is something dark and sinister going on in the portrait, and conspicuously red, because there is blood. Shadowed red, because the bloodshed is imminent, but not yet evident. Though Scalia only described what he saw in a portrait, the reader might suspect that he emphasized and embellished certain features agreeable to his own metaphor, a suspicion supported by Scalia’s description of Taney’s “right hand, hanging limply, almost lifelessly.” The distraught look on Taney’s face and his telling body language are, as Scalia described them, a foreboding of impending doom. That doom, manifest in the “soon-to-be-played-out consequences for the Nation,” unfolded with the start of the Civil War. And Taney sits on top of the impending carnage. The element of time is crucial to the metaphor, and Scalia knew it: the year of the painting is 1859, midway between the Dred Scott decision and the Civil War, both profound harms to the nation’s psyche.

But it is the last sentence that clinches the metaphor: Scalia quoted the current Court’s opinion, and surmised that Justice Taney had precisely the same thoughts running through his head—namely, that he, too, believed he was successfully ending a national controversy. The quotation of the majority opinion is a subtle psychological ploy: Scalia used the Court’s own authority—presumably legitimate—against it, deflating that very legitimacy by equating it to the authority underlying Dred Scott.

The analogy between Dred Scott and Casey rests on the implication that the error in both cases is of the same sort or of equal measure: on the one hand, Dred Scott labeled the entire African-American race inferior and therefore undeserving of citizenship; on the other hand, Casey confirms that the Court should decide the constitutionality of abortion. While Scalia claimed the effects of the two cases to be commensurate, the parallel is hardly obvious. But in a sense, one does exist: just as Dred Scott perpetuated the national controversy over slavery with legal sanctification, Scalia seemed to say that Casey perpetuated the same sort of controversy (that started in Roe), only this time the dispute centered around the proper resolution of abortion rather than slavery. Abolitionist versus slaveholder. Pro-life versus pro-choice. And in both cases, it is the Court that resolves the issue for both sides.95

95 For a scathing critique of Scalia’s analogy, see Jamin B. Raskin, Roe v. Wade and the Dred Scott Decision: Justice Scalia’s Peculiar Analogy in Planned Parenthood v. Casey, 1
C. Revisiting Casey

Years after the *Casey* decision Scalia reminded the Court of his notable words. Nostalgia, sarcasm and humor assembled in *Stenberg v. Carhart*, which struck down a state statute criminalizing partial birth abortions. Scalia ironically claimed victory in yet another dissent, quoting liberally from his familiar words in *Casey*: “Today’s decision is the proof” that *Casey* is “as doubtful in application as it is unprincipled in origin,” “hopelessly unworkable in practice,” and “ultimately standardless.”

Scalia explained the Pyrrhic nature of the majority’s victory in his familiar refrain to what he called a “5-to-4 vote on a policy matter by unelected lawyers,” noting blithely that “we disagree with the majority on their policy-judgment-couched-as-law.”

A nostalgic Scalia opined tongue-in-cheek:

While I am in an I-told-you-so mood, I must recall my bemusement, in *Casey*, at the joint opinion’s expressed belief that *Roe v. Wade* had “called the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,” and that the decision in *Casey* would ratify that happy truce.

The obvious sarcasm is so thick it’s almost palpable, for Scalia’s point is that neither *Roe* nor *Casey* ever fashioned a “happy truce,” but instead engendered quite the opposite—more controversy. Scalia seems particularly giddy in alluding to his “bemusement” in *Casey*, perhaps evoking childhood memories he shares with his audience of being a kid on a playground pointing at another kid and shouting “I told you so.”

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Id. at 955 (Scalia, J., dissenting).

Id. (quoting *Casey*, 505 U.S. at 985).

Id. (quoting *Casey*, 505 U.S. at 986).

Id. (quoting *Casey*, 505 U.S. at 987).

Id.

Id.

Id. at 955-956 (quoting *Casey*, 505 U.S. at 867).
This catch phrase is more than mere showmanship—Scalia is playful with his words but serious with his commentary. That he can pull this off in a judicial opinion to make a distinct substantive point demonstrates his exceptional command of the English language; he appears as concerned with how he says something as with what he says. His deliberate choice of words makes his commentary clearer—what, after all, could be clearer than “I told you so”?—and therefore more memorable. The final two paragraphs of his dissent end with the same sentence: “Casey must be overruled.”

III. PERSUASIVE IMPACT AND SCALIA’S AUDIENCE

Scalia employs one of his most effective techniques of persuasion through storytelling, a technique that his colleagues in Casey neglected.105 His emotional appeal in the story of Dred Scott rivets the attention of his audience—whichever audience it happens to be. As one author of legal writing has noted, “the main purpose in structuring a legal narrative is to persuade an audience of its truthfulness. Yet, success at persuasion requires a certain skill, such as recognizing the psychological (sometimes unconscious) reception of a narrative by the audience.”106 Whether or not the effect on his audience is unconscious, Scalia at least seems acutely conscious of the psychology involved in his narrative. Let us not repeat the grave errors of the past, the narrative cautions, especially anything as deplorable as racism.

The psychological effect of rhetorical tropes in Scalia’s writing is particularly noteworthy because his technique is deliberate. If the persuasive pull of Dred Scott’s story is subtle, the psychological impact of an excerpt I alluded to earlier is perhaps

104 Id. at 955, 956; see also id. at 953 (“I am optimistic enough to believe that, one day, Stenberg v. Carhart will be assigned its rightful place in the history of this Court’s jurisprudence beside Korematsu and Dred Scott.”); Lawrence v. Texas, 123 S. Ct. 2472, 2488-2419 (2003) (Scalia, J., dissenting) (revisiting Casey again)


106 Procopiow, supra n. 88, at 88; see also Robert A. Prentice, Supreme Court Rhetoric, 25 Ariz. L. Rev. 85, 88 (1983) (noting that the Supreme Court “is constrained by the fact that it has no guns, no planes, no troops, and no power of appropriation to enforce its judgments. . . . Having little coercive power, the Supreme Court is painfully vulnerable unless its opinions not only settle disputes but also persuade the American public, or other relevant audiences, that the decision is correct.”).
even less obvious: “Something must be wrong here, and I suggest it is the Court.”107

The quotation appears in a dissent and is typically Scalia-esque. There is something out of place—something positively wrong—the Justice innocently suggests in the first clause. What is wrong (and indeed what is the subject of the sentence), is only revealed in the second clause,108 heightening the sense of drama. Scalia suggests “it is the Court,” as if he were open to other views, though we know full well that he is sure in his suggestion. The phrase’s very innocence and unpretentiousness strengthens the criticism.

Note the psychological effect: the thought is purposefully subdued to humble Scalia’s opinion to the reader and cast suspicion on the majority. Scalia’s claim would have been far less convincing had he simply written, “The Court is wrong” or “The Court errs—as most judges usually do when expressing that view. Instead, Scalia chose to focus the reader’s attention on what is “wrong,” and the placement of this crucial word at the end of the first clause lies parallel to “the Court” at the end of the next clause. It is reminiscent of Shakespeare’s line from Hamlet, “Something is rotten in the state of Denmark,”109 only Shakespeare, to increase the suspense, left out the second clause identifying the source of such rottenness.

If Scalia seems as aware of his audience as Shakespeare certainly was, one might wonder how his style influences this audience. The effective use of language in a court opinion might amount to how successfully it persuades its readers. In the words of one judge, the judicial opinion “is an essay in persuasion. The value of an opinion is measured by its ability to induce the audience to accept the judgment.”110 Moreover, a “judge’s choice of language and style may in the end determine whether the opinion and decision are perceived as persuasive and acceptable.”111

But if persuasion is one measure of style in a judicial opinion, who is it that needs persuading? “Much of the art of being

108 I sometimes imitate the subject of my discussion. See also text accompanying supra n. 43. Is that life imitating art—or the other way around?
109 William Shakespeare, Hamlet act 1, sc. 4.
110 Hopkins, supra n. 23, at 49.
persuasive lies in knowing who it is that must be convinced."112 Certainly the audience whom a writer addresses influences his writing style,113 whether or not that writer is a judge. For judges in particular,

the audiences from which assent must be won are often multiple. In many a Supreme Court opinion . . . one can detect the Court's attempts to address different listeners: dissenting Brethren first of all, then lower court judges, then state legislatures and the police forces of the nation, then the public at large.114

But how does one assess to what extent an opinion has influenced any of these audiences? Or whether style had anything to do with it? If Cardozo's intuition that style and substance are "fused into a unity"115 is right, it may be hard to know for sure.

If, as one commentator suggests, "Judges presumably pick and choose their primary audience, depending on the case,"116 other Supreme Court justices are often Scalia's most apparent audience. Strangely, given this focus and his linguistic prowess, persuading his colleagues has not been one of Scalia's strengths—or even an objective with which his style seems concerned.117 His written opinions are almost evenly divided between majority opinions and

113 See e.g. Posner, supra n. 18, at 290 ("The choice of styles is influenced by the nature of the audience at which the judge is aiming."); Hopkins, supra n. 23, at 49 ("The focus of the opinion will be as narrow or broad as the nature of the audience. The style responds to the focus of the opinion—that is, the style is adapted to the audience.").
114 Peter Brooks, The Law as Narrative and Rhetoric, in Law's Stories: Narrative and Rhetoric in the Law 14, 21 (Peter Brooks & Paul Gewirtz eds., U. Chi. Press 1996); see also Hopkins, supra n. 23, at 49 ("The nature of the audience is defined by the case. When the issue is essentially factual, the audience usually consists of the parties and their attorneys. When the issue is essentially legal, the audience usually consists of the parties, their attorneys, and the bench and bar. When the issue has public implications, the audience includes the legislature, public officials, the news media, and the community."); Abner J. Mikva, For Whom Judges Write, 61 S. Cal. L. Rev. 1357, 1366 (1988) ("It is clear . . . that the audiences for judges' opinions have gradually grown in both size and diversity.").
115 Selected Writings of Cardozo, supra n. 9, at 339–340.
117 But see Thomas F. Shea, The Great Dissenters: Parallel Currents in Holmes and Scalia, 67 Miss. L.J. 397, 397–425 (1997) (citing instances in which Scalia's rationale in a dissenting opinion was subsequently adopted in a majority opinion).
dissents. Of the justices currently on the Supreme Court, only Justice Stevens has written a greater proportion of dissenting opinions.

As followers of the Court’s opinions have observed, Scalia’s vitriolic dissents have likely alienated his colleagues. "While Rehnquist and the other conservatives were building a bridge between themselves," one commentator has remarked, "Scalia was tossing gasoline on the bridge and igniting it." Scalia bucks a trend noted by one observer, who took a survey of nearly four dozen appellate court judges and concluded that “by far the most important audience is the opinion writer’s colleagues; he may tailor his opinion to get their votes or simply to please them.” Scalia seems utterly comfortable in dissent.

Although Scalia’s style differs markedly from those of his colleagues on the Court, it may be similar to that of some of his predecessors, especially Justice Robert Jackson. William Domnarski writes that “[m]ore than the other Justices, Jackson would unleash his formidable writing skills—in prose that had a jaguar’s power, swiftness, and agility—and go after brethren he wanted to wound or tweak.” Indeed, in referring to his favorite opinion of Jackson’s, Sanford Levinson writes that “it may be that the decision of Jackson to write so much in his own voice . . . is what explains the fact that none of his colleagues joined the opinion.” Scalia’s penchant for writing in his own voice may likewise explain his difficulty in garnering consensus.

Though his success at winning over his colleagues has been mixed at best, Scalia’s impact on other readers is apparently more

118 As of October 10, 2001, Scalia had written 168 majority opinions and 164 dissents (including partial dissents).
119 See e.g. Christopher E. Smith, Justice Antonin Scalia and the Supreme Court’s Conservative Moment (Praeger 1993); David M. O’Brien, Scalia’s Increasing In civility Debases the Supreme Court, His Arguments Are More About Sarcastic Dissent Than Reasonable Debate, Star Trib. (Minneapolis) 9A (July 22, 1996); David G. Savage, Scalia Virtually Alienated from Supreme Court Circle, He’s the Last Voice of Conservatism among Justices Who Vote Differently, Austin Am.-Statesman A29 (July 28, 1996).
120 Smith, supra n. 119, at 95.
121 Thomas Marvell, Appellate Courts and Lawyers 111 (Greenwood Press 1978); see also Prentice, supra n. 106, at 101 (“The collegial nature of the Supreme Court’s decisionmaking process also affects the style and content of the opinions issued. Variations in individual writing style are moderated by the necessity of each Justice to write the opinion in such a way as to please at least four colleagues.”).
122 See Fried, supra n. 5, at 531 (commenting on similarities between the styles of Jackson and Scalia).
123 Domnarski, supra n. 2, at 69.
124 Levinson, supra n. 116, at 203.
pronounced. According to two commentators, "Justice Antonin Scalia's flamboyant judicial rhetoric and colorful writing style more than occasionally make headlines. Seemingly alone among the justices, Scalia is the master of the eminently quotable turn-of-phrase, the arresting quip, the provocatively expressed legal argument." Discussions of this flamboyant rhetoric have made their way into popular newspaper commentary as well as more specialized legal journals.

The table below compiles data to numerically compare Scalia's written opinions with his those of his colleagues. 

<table>
<thead>
<tr>
<th>Year</th>
<th>Scalia's Written Opinions</th>
<th>Justice O'Connor's Written Opinions</th>
<th>Justice Stevens's Written Opinions</th>
<th>Justice Kennedy's Written Opinions</th>
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</thead>
<tbody>
<tr>
<td>1987</td>
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<tr>
<td>1988</td>
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The table was compiled through a search of Westlaw databases, using the JLR database (referencing law reviews, bar journals, and Continuing Legal Education materials) and the NPMJ database (referencing more than forty of the most widely circulated daily newspapers as provided by Dow Jones). The search I used included the title "Justice" followed by that judge's last name, so that I could include common names such as "Stevens" and "Kennedy." Although this search does not catch all references to the judges' names, it might still prove useful in comparing the number of citations between the judges using the same type of search. Note that the dissenting opinions column includes partial dissents (e.g., "concurring in the judgment in part and dissenting in part"). The statistics for Justice Kennedy begin in 1988 when he took office; other justices currently sitting are not included because their terms began substantially after Scalia's term commenced in 1986.

We could also look to judges in lower courts as Scalia's audience. However, simply measuring citations to his majority opinions might be of limited usefulness in assessing the impact of his language, since his most memorable writing occurs in dissent, as I discuss in Part V, infra. Neither LEXIS nor Westlaw record citations to dissenting opinions. Incidentally, the databases do reveal that references to "ghoul in a late-night horror movie" appear fifteen times in subsequent federal court opinions.

In addition, the audience inevitably includes the litigants. See Prentice, supra n. 106, at 95 ("The litigants will normally follow the Court's decision without question, so the Justices' only concern will be to treat them fairly and (if possible) make even the loser feel as though he has been fairly treated."). Justice Scalia, in particular, "has established a reputation for incisive and persistent questioning of attorneys during oral argument." William H. Rehnquist, The Supreme Court 259 (1987) (quoted in Michael P. King, Justice Antonin Scalia: The First Term on the Supreme Court—1986–1987, 20 Rutgers L.J. 1, 5 (1988)).
As an initial matter, there would probably be little reason to expect that Scalia should receive any more attention than Stevens, who authored almost three times as many dissenting opinions as Scalia and wrote a greater number of majority opinions. Yet Stevens had significantly fewer citations in law review articles than Scalia and fewer citations in the press than all of his colleagues. What might explain this difference?

Undoubtedly, Scalia’s judicial philosophy is a more fertile target of debate. “Given his strong and clear approach,” one scholar has noted that Scalia “has presented an unusually broad target for academic and journalistic critics.”

Clearly, something in those opinions accounts for the noticeable difference in impact between the writings of Scalia and Stevens. Whether this difference is due more to style or more to substance would be a foolhardy determination to make. Might writing style account for part of this difference? Probably, especially if Posner is right that “rhetorical power may be a more important attribute of judicial excellence than analytical power.” Notably, Stevens’ collection of opinions appears to turn few heads.

Among his colleagues Scalia is what Posner would call an “impure stylist,” in the same league with Justices Holmes and Jackson:

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Table:

<table>
<thead>
<tr>
<th></th>
<th>Law Review and Journal Citations</th>
<th>Major Newspaper Opinions (written)</th>
<th>Majority Opinions (written)</th>
<th>Dissenting Opinions (written)</th>
<th>Concurring Opinions (written)</th>
<th>% of written opinions that are dissents</th>
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<tr>
<td>Scalia</td>
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<td>1,640</td>
<td>187</td>
<td>185</td>
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<td>212</td>
<td>121</td>
<td>117</td>
<td>36%</td>
</tr>
<tr>
<td>Stevens</td>
<td>17,144</td>
<td>1,033</td>
<td>206</td>
<td>496</td>
<td>157</td>
<td>71%</td>
</tr>
<tr>
<td>Kennedy</td>
<td>10,072</td>
<td>1,068</td>
<td>162</td>
<td>71</td>
<td>107</td>
<td>30%</td>
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* Does not include concurring opinions.

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127 Fried, supra n. 5, at 529.
128 Posner, supra n. 7, at x.
129 See Posner, supra n. 18, at 287–291. For a discussion of interesting similarities between the dissents of Holmes and Scalia, see Shea, supra n. 117, at 397–425.
Impure stylists like to pretend that what they are doing when they write a judicial opinion is explaining to a hypothetical audience of lay persons why the case is being decided in the way that it is. . . . They write as it were for the ear rather than for the eye, and avoid long quotations from previous decisions so that they can speak with their own tongue—make it new, make it fresh.\(^{130}\)

Posner’s comment about the “hypothetical audience of lay persons” is probably literally true. The general populace surely never read court opinions, except for what quotes they glean from a newspaper.\(^{131}\) Domnarski writes that the judicial opinion, “when used effectively, is a vehicle of communication between the Court and the people. In other words, the Justices see the people as their audience.”\(^{132}\) Well, judges might see them as their audience, but that doesn’t make it so. One might even stretch to say that legal academics “appear ever less interested in reading the opinions written by judges.”\(^{133}\)

Although Scalia’s style is often directed at criticizing his colleagues on the Court, his style caters as much to audiences outside the legal profession, whether real or imagined. His tone is personal and conversational rather than detached and formalistic, certain rather than tentative, rhythmic rather than stilted. He speaks with his own tongue, employing metaphors that help connect him to this audience.\(^{134}\) “At their best,” one commentator has noted, “legal metaphors draw on common experience to illustrate concepts that might otherwise be confusing, especially to

\(^{130}\) Posner, supra n. 18, at 289–290.
\(^{131}\) See e.g. Prentice, supra n. 106, at 97 (“The public is not knowledgeable about complicated legal matters and seldom reads opinions of the Court.”).
\(^{132}\) Domnarski, supra n. 2, at 88.
\(^{133}\) Levinson, supra n. 116, at 200.
\(^{134}\) See Chad M. Oldfather, The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions, 27 Conn. L. Rev. 17, 21–22 (1994) (discussing the ability of metaphors to make complex concepts more understandable); Eileen A. Scallen, Book Review, 10 Const. Comment. 480, 481 (1993) (reviewing Haig Bosmajian, Metaphor and Reason in Judicial Opinions (1992)) (“Metaphors and other figures of speech have a wonderful power to make the abstract concepts and doctrines of the law become concrete, and thus real, to those who must understand and apply them.”); Prentice, supra n. 106, at 89 (noting that “because technical legal arguments are among the most difficult for a lay public to grasp, the Justice, perhaps even more than the politician, must be aware of rhetorical factors in attempting to persuade the public to accept an unpopular decision on a controversial issue.”).
nonlawyers.” Seeing a “ghoul in a late-night horror movie” might be one example of such common experience.

Where Scalia chides his colleagues in sarcastic fashion and metaphoric monologue, a lay person might question whether a squabbling Court decides the case on personal rather than legal grounds. But for most cases, the fact that a nonlegal audience would even ask this question indicates that the language has succeeded, at least, in riveting their attention.

Empirically, it is hard to know how much weight to ascribe to his style, but the foregoing examples of his prose might indicate that the impact should be discernable. What circumstantial data is available lends credence to Posner’s observation that “[t]he judicial opinion that provokes thought by the force of its rhetoric may also advance thought,” and the belief of another judge that “[t]he style of an opinion may . . . govern the frequency with which the opinion will be cited in other cases and thus determine the influence the opinion will ultimately have.” The biting sarcasm and metaphorical exaggeration all heighten the effect of Scalia’s rhetoric. Just like Jackson, Scalia may have an “occasional penchant for overstatement.” And just like his predecessor, Scalia’s writing may very well place him among “the Court’s most legendary stylists.”

IV. DISSENTS

We have seen two very different sides of Scalia, we might say, even within the same opinion: the humble rhetorician and the scolding pedagogue. The first persona is certainly the more

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135 Ed Walters, Not-So-Bright Lines, 3 Green Bag 2d 93, 93 (1999).
136 See Hammond, supra n. 105, at 701–702 (arguing that communication technology makes criticism within a judicial opinion more important because of its ability to mislead a nonlegal audience). Hammond observed: “One . . . criteria one might use to judge the success of a controversial case in the electronic age is whether the opinion is written in a manner which connects with a nonlawyer audience.” Id. at 703. He considered “whether prose saturated with such blatant, condescending sarcasm should be injected into a court opinion, particularly one likely to be read by nonlawyers whose unfamiliarity with the law may lead them to miss the hyperbolic qualities of Scalia’s opinion.” Id. at 701.
137 Posner, supra n. 7, at 137.
138 Bell, supra n. 8, at 214; see also Bosmajian, supra n. 111, at 34 (“Indeed, the language and style may ultimately determine whether the principles and doctrines stated in an opinion are subsequently cited by other courts.”); id. at 13 (“what becomes very clear as one examines the tropes of the law is that what is often quoted from a court opinion to support a subsequent decision is the tropological passages”).
139 Franklin, supra n. 87, at 324.
140 Id. at 323.
common among court opinions. But Scalia is more known for the second, which usually makes its appearance in dissent. Scalia’s most memorable writing tends to appear when he writes for less than a majority of the Court, perhaps in part because, as Justice Blackmun once said, “[i]t is much easier to write a biting dissent than a constructive majority opinion.”

A. Concreteness

More satisfying than Blackmun’s comment, however, is the explanation that garnering a majority of votes on the Supreme Court usually requires sedate—or downright dull—language. As then-judge Ruth Bader Ginsburg once wrote about majority opinions, “one must be sensitive to the sensibilities and mindsets of one’s colleagues, which may mean avoiding certain arguments and authorities, even certain words.” Avoiding certain words may mean neglecting precise thought and suppressing rhetorical effect. Posner may have been on to something when he wrote that “avoidance of the concrete is ubiquitous in legal prose.”

If majority opinions tend to avoid the concrete, it is entirely fitting that Scalia’s most memorable writing is in dissent and often focuses on what he perceives to be the excessive judicial discretion supplied by imprecise legal tests of the majority. Majority opinions typically eschew bright-line rules in favor of more amorphous standards of reasonableness. Vague statements allow infusion of meaning and foster agreement, and therefore majority opinions; precise statements foster more precise disagreement, and therefore dissents. But it is precision (those bright-line rules) that remains more memorable than imprecision (those standards of reasonableness). And so it is understandable that Scalia’s style as well as his philosophy leave more permanent marks in dissent.

Justice Souter, writing for the Court in a recent case, commented that “Justice Scalia’s first priority over the years has been to limit and simplify. The Court’s choice has been to tailor

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143 Posner, supra n. 18, at 286.
144 One commentator who calls for clearer metaphors in legal writing humorously observes: “Lines may be clear or crisp or sharp, but they certainly are not bright.” Walters, supra n. 135, at 93.
145 See e.g. Prentice, supra n. 106, at 97 (“in forming a majority coalition, a Justice may write in general terms, omitting details which might be criticized by other Justices needed to form the majority”).
deference to variety." Scalia responded in the same opinion with a lone dissent (longer than the Court’s opinion) that accused the majority of adopting a “test most beloved by a court unwilling to be held to rules (and most feared by litigants who want to know what to expect): th’ ol’ ‘totality of the circumstances’ test.” Although he admitted that his own approach “may not be a bright-line standard,” Scalia argued that “it is infinitely brighter than the line the Court asks us to draw.” This dialogue crystallizes the ongoing debate—stylistic as well as philosophical—between Scalia and his opposition.

B. Use of Metaphors

Contributing to the memorable nature of Scalia’s incisive prose is his expert use of metaphors in dissent. Whether a metaphor is effective in conveying a particular message may largely depend on its author. “Because of its very complexity, its multiplicity of meaning, a metaphor is hard to control — to keep from saying things you don’t want to say, along with the things you do want to say.” Scalia’s metaphors remain memorable because he seems utterly in control of the imagery. Remember the wolf who wasn’t in sheep’s clothing? The frightening ghoul who scared schoolchildren? Scalia even turned the ready-made image of Justice Taney into his own allegory, a story of good versus evil that the unadorned painting itself could hardly supply for its audience. It is this kind of strong and clear imagery that contributes to the lasting impression Scalia’s prose leaves with its readers.

The clarity that typically accompanies Scalia’s metaphors hints at their useful function in dissents rather than majority opinions. Dissents are the embodiment of judicial individuality. When compelled to write separately and in opposition to the

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147 Id. at 241.
148 Id. at 258.
150 One commentator has noted that “[m]etaphors, regardless of whether they relate to the central analytical thrust of an opinion or article, may improve it stylistically, making it more persuasive by making it more pleasant, thus leading the reader to return to its discussion in thinking about an issue, or to quote its language in her own writing.” Oldfather, supra n. 134 at 21.
majority, the dissenter does so forcefully and lucidly.\textsuperscript{151} Justice Cardozo (creating his own metaphor) once compared the dissenter to "the gladiator making a last stand against the lions."\textsuperscript{152} The dissenter wants to make a point in vivid detail, in no uncertain terms. Metaphors are wonderful vessels for the freshness that dissents breed. "In a dissenting opinion . . . the judge is on his own, and can express his personality, his philosophy and his uncensored convictions."\textsuperscript{153} Justice Holmes, for example, "liked the freedom of the dissent. He said that 'one of the advantages of a dissent is that one can say what one thinks without having to blunt the edges and cut off the corners to suit someone else.'"\textsuperscript{154} Metaphors thus cater to the forcefulness and clarity of prose that is typical in dissents.

Moreover, just as majority opinions often avoid bright-line rules, they also avoid the simplification that metaphors often bear. Legal reasoning and metaphors have a sort of love-hate relationship. As clear as they may be, metaphors can obfuscate or oversimplify. Posner wrote that "[t]he metaphor elides the reasoning process that might indicate both the aptness and the limits of the analogy . . . that the metaphor conveys."\textsuperscript{155} We might say that majority opinions distrust metaphors for their oversimplified clarity. By their nature, therefore, metaphors have a more comfortable relationship with dissents than with majority opinions.

Still, novel metaphors remain memorable and increase an opinion's impact despite the fact that their uses in biting dissents are particularly susceptible to oversimplification.\textsuperscript{156} "Even a metaphor that has no virtue apart from being memorable can

\textsuperscript{151} See e.g. Wald, supra n. 41, at 1412 ("Judges write in a different voice when they concur or dissent.").

\textsuperscript{152} Selected Writings of Cardozo, supra n. 9, at 353.

\textsuperscript{153} Jesse W. Carter, Dissenting Opinions, 4 Hastings L.J. 118, 119 (1953).

\textsuperscript{154} Domnarski, supra n. 2, at 71–72.

\textsuperscript{155} Posner, supra n. 18, at 279; see also Oldfather, supra n. 134, at 24–30 (discussing how metaphors obscure meaning); Scallen, Supra n. 134, at 481–482 ("[W]hen we are unconscious or forgetful of the suggestive power of language, we risk becoming limited by the images that we have selected in the past or, more ominously, by the images that others have selected for us."); Leval, supra n. 19, at 207–208 ("The deliberate adoption of rhetorical devices to strengthen the persuasive power of an opinion very likely conceals either a failure to perform the analysis or a failure to clarify the resulting rules.").

\textsuperscript{156} See Richard A. Posner, The Federal Courts: Crisis and Reform 233 (Harv. U. Press 1985) ("The abusive dissent characteristically exaggerates and distorts the holding of the majority opinion, to the confusion of the bar and lower court judges.").
increase the impact of an opinion.” Posner wrote that “metaphors, because of their concreteness, vividness, and, when they are good, unexpectedness, are more memorable than their literal equivalents.” Biting dissents may facilitate overstatement or exaggeration, but metaphors themselves are not the culprit; it is only where they substitute for reasoning rather than supplement it that metaphors are misplaced.

C. The Case of Justice Musmanno

In that vein, it bears mentioning the name of a little-known judge whose metaphors are, if not a substitute for reasoning, then certainly a comfortable addition to the repertoire of frustrated college English majors. Probably few judges have written more dissenting opinions than Justice Michael A. Musmanno of the Pennsylvania Supreme Court, or any more eloquently. The impression conveyed by his many dissents supports his belief that “[i]f there is one thing a court should not have, it is monolithic solidarity.” Indeed, Musmanno once brought a mandamus petition against other members of his court to compel them to publish a dissenting opinion of his, delivering an oral argument before his own court that must have been a strange proceeding indeed. “Without the checks and balances of dissenting opinions,” he once wrote, “error could be exalted, mistakes glorified, indifference encouraged and eventually injustice become commonplace.”

157 Oldfather, supra n. 134, at 21–22.
159 One legal commentator has noted: “Metaphors . . . are useful and are even, at some level, inescapable. In the long run, though, they are not a substitute for theory.” Burr Henly, “Penumbra”: The Roots of a Legal Metaphor, 15 Hastings Const. L.Q. 81, 100 (1987).
160 A search on LEXIS reveals that of 1064 written opinions, Musmanno wrote 599 majority opinions, 434 dissents (including partial dissents), and 31 concurrences.
162 Musmanno v. Eldredge, 114 A.2d 511 (Pa. 1955), affg 1 Pa. D. & C.2d (Pa. Common Pleas 1955). The court denied the petition on the ground that Musmanno did not follow proper court procedures, and commented: “In the little more than three years that the appellant [Musmanno] has been a member of this court he has filed and has had published in the official State Reports, with this court's full approval, more dissenting opinions than all the other members of the court combined.” Id. at 512.
163 Musmanno, supra n. 161, at 416.
Musmanno’s opinions do make for fascinating reading. Pick almost any of the hundreds he wrote during the 1950s and 1960s at random, and you are bound to find a witty aphorism, an interesting twist on language, and a metaphor. I did just that and discovered, to my surprise, a wolf in sheep’s clothing of sorts:

Stock values are not unchangeable. On the contrary, they are as variable as the weather, as inconstant as the waves of the sea, as unpredictable as Latin-American politics. To convict a man on so unstable a foundation is to build a policy of law on quicksand.

The section of the statute under which this conviction has taken place is a scattershot weapon. While presumably aiming at a specific target it can hit anybody. Today it strikes Mason [the defendant] who may be a wolf in sheep’s clothing. Tomorrow it may hit a real sheep. 164

In another passage that sounds as if Scalia could have authored it, Musmanno wrote:

The Majority Opinion in this case is legalism run riot, it is conjecture ballooned into theory, theory stretched into assumed facts, imagined facts made the basis for non sequiturs, and non sequiturs built into a decision which makes a mockery of the law, a travesty of justice, and one which will cause laymen to wonder if the courts are intended to seek truth or to play charades with the safety of the people. 165

Like Scalia, Musmanno’s linguistic legerdemain was impressive at times. But unlike Scalia, Musmanno’s legal reasoning often surrendered to metaphorical language. Take the following example: “This type of reasoning rips from the ship of dutiful performance the rudder of responsibility; it tears from the ordnance of correction the guiding sight of accuracy.” 166 Or this one: “The Court . . . has failed to throw a lifeline to the good ship Cause-and-Effect which collided with the submerged rock of

Technical-Subserviency. I disclaim any responsibility for the foundering of due process which followed and, therefore, dissent." Domnarski’s criticism of Judge Selya of the First Circuit may apply equally to Musmanno: “Ironically, for someone with significant writing gifts, Selya’s weakness as a writer is his propensity for flashiness that too often betrays even that questionable objective and creeps into cuteness. The dominant impression Selya’s prose creates is that he wants it to be noticed.”

Rather than supplying the clarity or precision that accompanies strong language in dissent, unnecessarily flowery language is more likely to be confusing. Justice Cardozo recognized this potential pitfall long ago: “Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.” Those in whose hands prose flourishes—as it often did in Musmanno’s as well as Scalia’s—are keenly aware of linguistic niceties. Attention to such detail leaves lasting memories in the minds of those who become the judge’s audience.

V. CONCLUSION

Tellingly, Scalia’s language remains fresh and vivid though his point is often the same. His passion and writing meld. Justice Brennan once wrote that “[t]he most enduring dissents . . . soar with passion and ring with rhetoric. These are the dissents that, at their best, straddle the worlds of literature and law.” For the savvy reader of Supreme Court opinions, the preceding excerpts from Scalia’s writing might suggest that his style is unique among current and even former dissenting voices on the Court.

One can almost sense in Scalia’s writing that he takes away a certain pride from penning a fresh metaphor or a peculiar phrasing. That Scalia has a distinguishable voice while he takes on the role of the embattled dissenter showcases a sort of written personality. That personality is central to what makes his writing memorable. He has that certain signature, that piercing wit, that fresh language—that style.

168 Domnarski, supra n. 2, at 105-106.
A Challenge from the Future: Legal Writing, 2009

Terri LeClercq*

Eight years ago, in the summer of 2001, the Association of Legal Writing Directors met for an annual conference at the University of Minnesota. There, Elliott Milstein, past president of the Association of American Law Schools, described the documented status change of law school clinicians. Twenty years before, they had been hired as part-timers; they had no voting rights; they were not considered for tenure. Milstein explained that the professional life of clinicians changed when clinicians comported themselves as legal professionals: writing articles and getting them published, attending faculty seminars and joining the discussions, and asking for increased academic responsibilities. He admitted that they had "schmoozed" their way from the bottom into the integral fold of the legal academy, and now enjoy de facto tenure—Clinical Professorships. Those of us listening to Milstein decided we wanted the same privileges and rank. Thus, the Legal Writing Institute sponsored its first week-long planning retreat, with seven representatives who focused on strategies for our own Operation Schmooze.

The representatives returned to their campuses and contacted schools close to them and colleagues they knew from legal writing conferences. They hosted regional conferences and explained the new strategies, which included nominating themselves and each other for major positions in the state bar, and in the American Bar

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*Senior Lecturer and Fellow, Norman Black Professorship in Ethical Communication in Law, School of Law, University of Texas.

1 This Paper represents the final third of the 2002 plenary address before the Tenth Biennial Conference of the Legal Writing Institute in Knoxville, Tennessee, May 29–June 2, 2002. The address was multimedia, using powerpoint to trace the history of the Institute and its members, and film clips to divide the three decades from each other. After Dr. LeClercq explained the history of the Institute and its effects on the academic field of legal writing, she brought the audience up to date and then turned to the future, visualizing what positive changes we might make by 2009. This essay is the third section: speaking from the future, she summarizes changes that might occur, perhaps even should occur, by 2009.

2 The conference was intense, with everyone analyzing the non-hiring (thus firing) of legal writing professor Molly Lien at Chicago-Kent. She had won student teaching awards, received strong positive reviews of her scholarship from those in her field, as well as a strong positive vote from her tenured colleagues. Nevertheless, Dean Henry Perritt, Jr. denied her tenure, and President Lewis Collens refused to overturn the dean’s veto. To those watching from the outside, the issue was electrifying: if Molly Lien couldn’t get tenure, then who could?

3 He estimated that more than three - fourths of the reporting clinicians told AALS that they enjoy 405(c) status.

4 Admittedly this retreat is part of my fiction; but it could have happened, and, I argue it should have happened.
Association. They decided to volunteer for important faculty committees on their campuses. Those already on AALS committees nominated others from the Institute. They determined before the next annual AALS meeting which members to nominate for treasurer, secretary, and even chair of the sections. They put themselves forward as delegates to the AALS House of Representatives and supported the nomination process. From that careful but deliberate base building, we see the reward. This next year, 2010, one of our own Institute members will be president of the AALS.

The political process of integrating into the legal academy took several avenues, but we never abandoned the initial Schmooze approach. Among those people we approached were:

- teaching librarians—We had traditionally invited librarians into our classes to introduce aspects of traditional and electronic research; now we invited them into the Institute and offered to co-author articles and projects with them. They added their technical knowledge to our group, and they benefited from our teaching techniques and energy. When the time came, they voted with us and for us.

- clinicians—Oddly, before Operation Schmooze, it was rare for the legal writing faculty to work with clinicians. Now, we offered to co-teach classes. We worked with them to develop cross-disciplinary journals, professional formats for moot court, and community outreach writing. From the clinicians we absorbed an understanding of the larger legal world and a hands-on practicality that has improved our teaching. In turn, we have helped clinicians integrate process writing in their courses and have helped their public image through community writing projects.

- feminists and critical theorists—Many of our female colleagues used to agree, theoretically, that women should receive better treatment within the legal academy; somehow, though, many of them did not realize that most legal writing teachers are women, forced into a ghetto where they receive disparate treatment. Through the thoughtful writing of several Institute members,5 we articulated the larger issues that bind us together, and the feminists became vocal supporters of the writing programs within their schools. Similarly, we talked informally and presented faculty colloquia on language and its nuances of

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5 See, for example, the scholarship of Kathryn M. Stanchi.
interpretation, thus joining forces with colleagues who are interested in linguistics, meaning, and abstraction as they affect judicial opinions and statutory language. Establishing our academic credentials with the feminists and critical theorists gave us a solid voting block for both our institutional and national positions.

- adjunct faculty—Law schools differed in their treatment and education of teaching adjuncts. As part of Operation Schmooze, the Institute created and disseminated teaching materials that, for instance, emphasized the similarities of and differences between the professional roles of practicing attorneys and teaching attorneys. They incorporated information on learning differences\(^6\) and offered options for exams and seminar papers. Importantly, they provided advice on reading, commenting on, and grading papers. When these faculty members discovered that their temporary-but-useful roles had a nationally defined structure, they turned quite naturally to their allies—us. In faculty meetings, ABA conferences, and bar association meetings, they supported us because we had reached out and supported them.

- our own deans and faculty—Although individual members of the Institute had indeed pierced the abstract veil between writing/analysis professors and doctrinal faculty, these doctrinal colleagues had the most immediate impact on our lives. So we schmoozed. If they went out to lunch, we joined them. If they stayed after a colloquium to extend the discussion, we stayed. We talked about our research topics; we let them know that someone in the Institute had been recognized for a project, or for excellent teaching, or for publishing. We increased their awareness of the Institute’s positives, in part by creating a task force that wrote to deans, lauding that school’s writing faculty’s accomplishments. We did not whine; we schmoozed. Oh-so-gradually, more and more of the doctrinal faculty learned our value and, among other things, voted with and for us.

- active practitioners and the ABA—The end product of law school is a practicing attorney. We approached our own alumni and let them know we were ready for work. We joined state bar and ABA drafting committees and moved Institute members into important committees, for instance, professional responsibility and

\(^6\) For instance, see the scholarship of Paula Lustbader, M. H. Sam Jacobson, and Christine Kunz.
business corporation committees that make state policy. Now, visiting accreditation teams always include a writing professor, and ABA conferences usually offer writing, drafting, and editing segments. Today all ABA conferences include an obligatory research update and current writing/analysis materials tailored to the substantive topic by an Institute committee.

Operation Schmooze has produced concrete changes:

1. **Retreating 7.** Each year, the Institute sponsors a week-long retreat for seven members. The first-ever retreat established the guidelines for the retreat, which include a rotating, varied membership. They focus on goals and action plans for the coming year, and report directly to the Board and Institute membership.

2. **Semester page limit.** Through committee work, members encouraged the AALS to issue first a suggested, then a preferred, limit on the number of pages any instructor has to grade each semester. The Institute framed the Reasonable Work-Load Standard around empirical evidence that an intolerable work ratio diminishes student learning, writing faculty development, and retention. Deans used the empirical facts to help faculty committees develop the Reasonable Work-Load Standard.

We now use that released time for scholarship (our rate of publications has zoomed), for preparing of doctrinal courses, and for developing and coordinating team teaching with doctrinal and clinical professors.

3. **Publications—We are our own market!** Back in 2000, a Stetson student, a journal editor, approached the Institute’s Board with a proposal to begin a publishing company devoted specifically to legal analysis and research. The Board concluded that the traditional presses had done as much as they could for the Institute, but could not meet the growing needs of the discipline.

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7 The Institute Board attempts to choose, from annual applications, a representative of private and public law schools; large, medium, small schools; tenure-track, long-term contract, adjunct programs; 5+ years, 2–5 years, novice; north-east, southeast, west, south, central schools. Only one “Retreater” may return the following year for continuity; no one can return a third time. Those chosen make their own arrangements of place and time and are required to report their plans and goals to the Board after the retreat. These plans are published in *The Second Draft* and distributed by list serves.

8 When the Institute first began, legal publishers had produced only a few research texts and legal writing and analysis texts. From the beginning of the Institute, though, they solicited manuscripts and published more titles each year. They also underwrote many of the Institute expenses, from dinners and trips to handouts. So the Board was initially uncomfortable looking beyond the traditional presses, but when they examined the possibilities of small monographs and empirical studies, they came to believe that an alternative press would provide opportunities for new writers, for upper-division classes,
They voted to become the major stockholder in Legal Angle Publishing. Traditional royalties were six to ten percent; Legal Angle can provide forty percent to the author, with additional profits to the Institute. This press has been able to produce teaching materials and skills manuals, as well as updates. The press allows members to reach for the stars, too — if they see a need in contract drafting, for instance, or for a comparative text, they can now research it through Institute grants funded by profit from the press. Plus, they know that the manuscript will receive an educated review and edit, with an eye to quality rather than merely mass sales.\(^9\)

A second benefit of Legal Angle is a renewed focus on technology and research. Our publisher brought the Board an animated DVD created by a student at Catholic University; it was an admission promotion that integrated animation with film clips of the school and its personnel. The Board voted to provide money for the now-graduated lawyer/filmmaker to create a virtual library tour that includes a set of research tasks with interactive professors and answers.\(^{10}\) This set of research materials replaced a difficult and tedious task and invented a universe of exciting, imaginative steps that have changed the nature of legal research. Because the technology evolves constantly, our publisher frequently updates the disc, inexpensively. Its annual market is enormous and apparently unlimited. It is from this innovation in research that most of the press’ profits come, and they are immediately turned into summer research grants for our members, who are able to research and publish even if their home institutions cannot provide summer stipends.

4. Status options. The Institute struggled with status issues from its inception: some teachers of legal research and writing were hired semester by semester and paid a substandard wage. Others were on three-year contracts; a few held tenure-track positions. Disparity in status among Institute members complicated its politics; our collective inferior status outside of the

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\(^9\) Even the design of the monographs signals a major shift. Accepting the thesis and suggestions of Janeen Kerper, Let’s Space Out: Rethinking the Design of Law School Texts, 51 J. Leg. Educ. 267 (2001), our editor produces readable, informative texts that students choose over traditional printings.

\(^{10}\) In 2001 James B. Levy had anticipated just such a course in Escape to Alcatraz: What Self-Guided Museum Tours Can Show Us About Teaching Legal Writing, 44 N.Y.L.S. L. Rev. 387 (2001).
Institute, from school to school, stigmatized us and kept us from contributing fully to the legal academy.

We schmoozed within the AALS and the ABA. Slowly but certainly, we pushed for, and now have finally solidified, four AALS-recognized levels of professional employment for Institute members: entry-level contracts; long-term contracts; traditional tenure-track; and Clinical Professorships. Ironically, the level of employment offered writing faculty is a frequently cited factor for rankings. The inclusion of Clinical Professorships allowed ABA schools to reward legal writing professionals with the perks of tenure, without rewriting the tenure requirements and without applying for curriculum changes. The ABA was persuaded that many legal writing teachers were eligible for Clinical Professorships under the criteria already in place: skills, publication, and community involvement.

5. Exchange-ships. Some years ago, two legal writing professionals approached their deans for permission to trade jobs for the semester. They kept their original salaries and benefits, and were in constant contact. The Exchange-ships went so well that other legal writing professionals informally asked each other, over the listserv, for positions in cities they desired, or near libraries they needed. Despite a flurry of typical administrative hassles, the exchanges were such a win-win that the Institute has formalized them and created a central clearinghouse of names, positions, work load, and geographic preferences.

Interestingly, most of us who wanted out-at-any-cost to Anywhere, U.S.A. returned generally content with our home institutions! Thus the impact of the exchange-ship has been a few permanent placements, but more consistently, a relatively content faculty member. Although no one has studied this empirically, anecdotal evidence is that the deans also develop a new respect and appreciation for their own legal writing faculty who had been overlooked or undervalued. While in exchange locations, members have met new co-authors, have team-taught classes that provided material for articles and books, and of course gained a more balanced perspective on their home institution.

6. 5th & ½ pro-bono sabbatical. When we took our proposal to the ABA, the leadership immediately put it into effect: experienced legal writing professionals can leave the ivory tower for a semester and choose a practice, a court, or even their own university’s general counsel office to put their skills to work. The law schools contribute half (and some schools, more) of the salary,
and the supporting agencies the other half. This pro-bono work allows writing professionals to gather useful materials and anecdotes; the agencies get a professional writer and editor for only a fraction of the price they normally pay — and we can take on their interesting projects that they had no time to focus on, e.g., jury instructions, CLE materials, and form client letters. The law schools generate positive publicity that has proven to generate new alumni giving.

7. **The spirit of fun.** Not every improvement has been all pedagogy and status. At one of the retreats, participants focused on songs that connect us, within our community and out into the larger community of strugglers, with songs from the labor movement, civil rights movements, and even hymns. The music lifts our spirits. Some of the Institute conferences have videotaped the songs, and they are available now on our web site.

Artists in our midst focused on the Institute logo\(^\text{11}\) and the design of the *Journal*. Since then, Institute members have created covers for monographs and ABA materials. Those with special computer knowledge re-designed our web pages and our links to research engines.

**CONCLUSION**

Of course change is painful. Of course anyone with something to lose (or who thought she had something to lose) opposed each innovation. Innovation is naturally upsetting, even to those who have the most to gain. So we fought ourselves while fighting the legal academy. Along the way, we lost some of our members over issues of contracts, ranking, voting, work load — but not many.

Naturally, some schools are determined to remain in the Stone Age of the academy. But, also naturally, year by year that number drops.

* * *

It’s time for us to return to our 2002 Institute conference, where we can only imagine the glorious year of 2009 with all its improvements. As we meet in breakout sessions and informally, we must begin to articulate our goals for our profession and our

\(^{11}\) The outdated logo was a young male scribe, using a quill pen, bent over a desk. No kidding.
own professional lives. What can we make happen by 2010, by 2015?
Generation X in Law School: The Dying of the Light or the Dawn of a New Day?

Tracy L. McGaugh

I. INTRODUCTION

All good legal writing teachers extol to their students the virtues of carefully considering the writer’s audience. Many teachers also tell students that good writing is, at its heart, good teaching. However, when it comes to considering our audience—our students—we tend to teach them as we believe they should be rather than as they really are. This has become increasingly more frustrating as more and more students in the generation not-too-affectionately dubbed Generation X pass through the halls of our law schools. The divide seems to be growing between what students should be and what they actually are.

The good news is that the students of Generation X are reachable. The problem has not been that we have placed expectations on Gen Xers that they are not willing to meet; the problem is that we have been communicating our expectations in a foreign language. If we can frame our expectations in terms they can understand, they can meet them — and they do so much more enthusiastically than we would have imagined.

This article will attempt to help teachers begin bridging the gap between themselves and their Gen X students. Section I of this article gives some background about the generations currently in legal education. Section II addresses the myths of Generation X and tries to put each one into perspective by explaining the reality behind the myth. Knowing what has shaped Generation X makes their values and motivations (or lack of motivation) more understandable. Finally, Section III describes some teaching methods that capitalize on Xers’ strengths and minimize their weaknesses while not sacrificing course content.


2Assistant Professor of Legal Research & Writing, South Texas College of Law. I would like to thank Candyce Beneke, Gena Lewis, and Sheila Hansel for their comments on early drafts of this piece. I would also like to thank Professor Mary Garvey Algero of Loyola University New Orleans School of Law, Professor Philip Frost of University of Michigan Law School, and Professor Tobi Tabor of University of Houston Law Center for their considered and thorough comments.

3Although this generation has been called many things—MTV Generation, Baby Busters, and 13th Generation, to name a few—the name that seems to have stuck is “Generation X,” a term coined by author Douglas Coupland. Neil Howe & William Strauss, 13th Gen: Abort, Retry, Ignore, Fail? 12, 17 (Vintage Books 1993). Although Coupland used the term in the title of his novel Generation X: Tales for An Accelerated Culture (St. Martin’s Press 1992), he later tried to disclaim it. See Douglas Coupland, Generation X’d, Details Mag. 72 (June 1995).
II. WHAT'S IN A GENERATION?  

Before getting into the specifics of who Generation X is and how we can teach them, we need to start by defining the generations whose members are either students or teachers in legal education.

<table>
<thead>
<tr>
<th>Generation</th>
<th>Birth Years</th>
<th>Age on Dec. 31, 2002</th>
</tr>
</thead>
<tbody>
<tr>
<td>Silent Generation</td>
<td>1925–1942</td>
<td>60 to 77</td>
</tr>
<tr>
<td>Baby Boomers</td>
<td>1943–1960</td>
<td>42 to 59</td>
</tr>
<tr>
<td>Generation X</td>
<td>1961–1981</td>
<td>21 to 41</td>
</tr>
<tr>
<td>Millennials</td>
<td>1982–?</td>
<td>under 215</td>
</tr>
</tbody>
</table>

Each generation is shaped by the historical events that took place during its members’ critical development stages. Although many generations may live through a particular event, one generation’s reaction will differ from another’s reaction because of the difference in their ages at the time of the event. For example, while Woodstock symbolized freedom to the young adult Baby Boomers, it symbolized the adult world turning upside down to Generation X. Generations are defined by shared values, experiences, and world views.

For the Silent Generation, the events that shaped them marked some of the most difficult times in United States history. They were born into the stock market crash and the Great Depression. Although Charles Lindbergh successfully made the first transatlantic flight, his son was

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4 Obviously, it is not possible to do justice to the complex social and historical events that shaped a generation or to the complexity of the generation itself in a single paragraph about that generation. This section is meant as only a very general overview to put the discussion about Generation X into a broader context.

5 Chart adapted and updated from Howe & Strauss, supra n. 3, at 42.


7 Id.

8 Id.

9 Ron Zemke et al., Generations at Work: Managing the Clash of Veterans, Boomers, Xers, and Nexters in Your Workplace 64 (AMACOM 2000).
kidnapped five years later. The 1930's brought FDR, the Dust Bowl, the New Deal, and Social Security. The 1940's brought Hitler, Pearl Harbor, D-Day at Normandy, and finally, victory in World War II in Europe and Japan. As many Silents entered the workforce, the Korean War began. This strife in their formative years created a generation that craved consistency and uniformity.\(^\text{10}\) They valued conformity, logic, and discipline.\(^\text{11}\) They were conservative in dress, spending, and politics.\(^\text{12}\) This generation understands, perhaps better than any other in legal education today, the value of “putting your nose to the grindstone” and “your shoulder to the wheel.” Sacrifice today for the good of the firm/company/community, and you will benefit in the long run.

Because the Silents' sacrifices produced war victories and a prosperous economy, the childhood of the Baby Boomers was marked by optimism, growth, and opportunity.\(^\text{13}\) The Boomers' parents had lived through turbulent times, trying to preserve a way of life that seemed destined to disintegrate. The Boomers also experienced turbulence, but it involved building things up and making life better. In the 1950's, their experience included the McCarthy hearings, polio vaccine, the first nuclear power plant, and the beginning of movements for civil rights, women's rights, and Indian rights. In the 1960's, they got birth control pills, JFK, MLK, the Peace Corps, NOW, Vietnam, a lunar landing, Woodstock, and Kent State. These events shaped a generation that is optimistic and believes in growth and expansion.\(^\text{14}\) Boomers can easily see themselves at the center of everything, both because the Silents sacrificed so much for them and because the sheer size of the generation commands the attention of government and business alike.\(^\text{15}\) Although the Boomers grew up amidst an educational philosophy that encouraged them to share and work in teams, they have also mastered the art of pursuing their own gratification—material, spiritual, sexual.\(^\text{16}\)

Enter the Xers. If the Boomers had a front row seat to America's greatness, Xers have had a front row seat to its decline. Some of the seminal events for Xers were Watergate, the energy crisis,\(^\text{17}\) the introduction of the personal computer, Three Mile Island, the Iran hostage

\(^{10}\) Id. at 37.

\(^{11}\) Id. at 38–39.

\(^{12}\) Id. at 40.

\(^{13}\) Id. at 63–64.

\(^{14}\) Id. at 66.

\(^{15}\) Id.

\(^{16}\) Id. at 67–68.

\(^{17}\) Born almost in the very middle of the Xer birth year span, I remember the television commercials of my childhood warning that there would no energy, natural resources, forests, or social security left for me. I fully expected my adulthood to look a lot like Planet of the Apes.
crisis, the Challenger disaster, the stock market crash of 1987, the savings and loan scandals, the fall of the Berlin wall, the Rodney King beating, the L.A. riots, and the O.J. Simpson criminal and civil trials. In the words of Dennis Miller (a Boomer): "It's no wonder Xers are angst-ridden and rudderless. They feel America's greatness has passed. They got to the cocktail party twenty minutes too late, and all that's left are those little wiener's and a half-empty bottle of Zima."18 How these seminal events have affected Generation X and how we can use this information to reach them is the focus of the rest of this article.

Although the concept of a "gap" between each generation is widely accepted, the distance between the Baby Boomers and Generation X seems less like a generation gap and more like a generation chasm, with the Baby Boomers and everyone who came before them on one side of the chasm and the Xers and their followers on the other side. The most common explanation for this is the technology revolution, which has required a major paradigm shift in how we acquire and sort information.19 Because education is, of course, all about the acquisition and sorting of information, the chasm has been especially salient for teachers.

III. WHO IS GENERATION X?

We grew up with single parents, divorced parents, both parents working to maintain a threatened standard of living. Our friends and loved ones are vegetarians, coming out of the closet, customizing everything, joining therapeutic movements, New Age churches, and Eastern religions, losing their jobs, losing their health insurance, terrified of AIDS—or flirting with it or dying of it—getting new jobs, shopping for better health care, and electing a president whose first inauguration included an MTV inaugural ball.20

The span of birth years from 1961–1981 is the largest span assigned to Generation X. Some biographers of generations begin the span as late as 196521 and others terminate the span as early as 1977.22

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18 Zemke, supra n. 9, at 93 (quoting Dennis Miller).
19 See Arthur Levine & Jeanette S. Cureton, When Hope and Fear Collide: A Portrait of Today's College Student 11 (Jossey-Bass 1998) (noting the shift in the United States from an industrial economy to an economy based in services, information, and technology).
20 Bruce Tulgan, Managing Generation X: How to Bring Out the Best in Young Talent 60 (W.W. Norton & Co. 2000).
21 Although the rise in fertility rates that gave the Baby Boomer generation its name did end in 1964, the generation itself is defined by a set of shared values rather than simply having been born during the exact span of years the country experienced increased
Assuming, however, that the last of the Xers were born in 1981, the last of them will begin entering law school in 2003 as new or "first career" students. After that, they will begin law school as returning or "second career" students. The time is coming when we cannot even rely on our older students to reassure us that some students still value education the same way we do.

Although almost no one will confess to being a member of Generation X, everyone has an idea of what an Xer is like. The following statements should look familiar to those who have either taught or worked with an Xer.

"They have short attention spans."

"They don't know much (certainly not as much as Boomers) and aren't interested in learning much more."

"They are arrogant and don't respect authority."

"They won't pay their dues. They want to do 'important' things from the beginning."

Although each of these statements contains a kernel of truth, they are more myth than reality. Xers really are more than just lazy, arrogant slackers with an attention deficit. These qualities just scratch the surface of a generation that has come of age in complex times and is, as a result, complex.

1. Myth #1: The Short Attention Span

[Think of music videos, VCRs, satellite dishes, the Internet, and MTV, CNN, CNBC, MSNBC. Vivid images of constant change: revolution, war, terrorism, diplomacy, politics from Carter to Reagan to Clinton and beyond, from Heath and Wilson to Thatcher to population growth. While the Birth Boom continued until 1964, the identifying characteristics of the Baby Boomer generation tend to trail off with those born around 1960. See Howe & Strauss, supra n. 3, at 12.

22 In Managing Generation X, Bruce Tulgan closes Generation X with those born in 1977. Tulgan, supra n. 20 at 37. However, Tulgan seems to define both Generations X and Y more narrowly than other biographers of those generations. For example, Tulgan limits Generation Y to those born between 1978 and 1983. Id. Most other authors include in Generation Y those born between about 1980 and 2000. See e.g. Strauss & Howe, supra n. 6, at 335; Zemke, supra n. 9, at 127.

23 I will confess to being a member of Generation X, but only in a footnote.
Major to Blair and beyond, famine, fire, earthquakes, floods, violent crime, sicko crime, kangaroo courts, urban riots, oil spills, nuclear accidents, New Coke, Coca-Cola Classic, Tab, Caffeine-Free Diet Coke, Pepsi One, the fall of the Berlin Wall, the freedom of Nelson Mandela, Michael Jackson, Tonya Harding, O.J. Simpson, the making and unmaking of heroes, the making and remaking of meaning.

In Peter Sacks's book *Generation X Goes to College*, he describes giving to his community college journalism students a questionnaire that asked, among other things, what the two most important qualities were in an instructor (after "being knowledgeable" of course). The most popular first choice was "entertaining." For Peter Sacks, this seemed to confirm a notion he considered distasteful: Xers always want to be entertained, even in higher education.

While the idea that education should be entertaining may be distasteful to Silents and Boomers, that is largely because education and entertainment have been two separate endeavors for those generations. The assumption, then, is that if a student asks for entertainment, she is not asking for education. This is not necessarily so for Xers. For Xers, education and entertainment are inextricably intertwined. They are not asking for entertainment instead of education, they are asking for more of the same entertaining education that they began receiving as preschoolers in the form of *Sesame Street, The Electric Company, Zoom,* and *Schoolhouse Rock.*

The flip side of wanting to be entertained is not wanting to be bored. This "right" not to be bored may seem ridiculous to the Silent or Boomer. However, Xers have come of age in an era when information and services can be accessed more and more quickly. The board games that children and teenagers used to play have been replaced by desktop computer versions with slick graphics or handheld versions that they can take anywhere so they are never at risk of boredom. Thanks to remote control and an explosion in the number of cable channels, few Xers have ever had to sit through a commercial or a slow moment in a program until the programming either returned or got more interesting. Powerful

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24 Tulgan, *supra* n. 20, at 67.
26 Id.
27 See *id.* (categorizing "entertaining" as a "soft" trait).
28 See Howe & Strauss, *supra* n. 3, at 64. Ask any Xer to recite the Preamble to the Constitution, and you will notice her humming under her breath before each sentence as she tries to recall the words as set to music by *Schoolhouse Rock.*
desktop computers allow them to download a program from the Internet while simultaneously writing an e-mail. Xers have not considered boredom as a possibility and rejected it. They simply do not know what it is or how to handle it.

However, to say that their attention spans are short reflects a misunderstanding of what they are doing. Xers are not doing one task at a time for a short period and then moving quickly to something else. They are instead multitasking, doing many things at once. This is how information has been presented to them—from the television, the Internet, and the telephone all at once. They have learned to process as much information as possible at one time for maximum efficiency. Their attention span is not short so much as it is wide, encompassing a number of things at once. Criticism that they have short attention spans is lost on Xers. The alternative presented to them as preferable is the long attention span. To an Xer, focusing on a single thing for a prolonged period of time is a waste of time and energy. Why read a book when you could read a book, talk on the phone, and watch television?

If we want to compete for their full attention, we have to let go of the myth of the short attention span as well as the idea that an entertaining education is inherently less valuable than a "dry" education. When we do this, we can address the reality: Xers need a lot of stimulation to be fully engaged.

2. Myth #2: The Apathetically Uneducated

_I do have a test today. . . . It's on European socialism. I mean, really, what's the point? I'm not European. I don't plan on being European. So who gives a crap if they're socialists? They could be fascist anarchists. It still wouldn't change the fact that I don't have a car._

Two factors have contributed to the myth that Xers are uninformed and, worse, apathetic about it. The first is that educational reforms of the 1960's and 1970's significantly changed what teachers expected from students and what students expected from an education. The second factor is the filtering mechanism Xers have developed to manage the overwhelming amount of information that comes to them from multiple sources simultaneously.

In the early 1970's, the Boomers believed that they had found the

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30 See Zemke, supra n. 9, at 112.
solution for reforming schools so that children would be smarter and more socially aware than even the Boomers had been. The solution was "open education." The emphasis shifted from mastery of traditional school subjects to mastery of the self. Rather than being provided an education, the students would be provided with an educational experience. The theory was that traditional grammar and math, for example, confined students. Students needed to be given choices and then each child trusted to select what she needed to realize her potential. The teacher's job was simply to help the child go where she wanted to go, promoting the child's self-esteem along the way. While this kind of education did help children to be more sensitive to people who were different from themselves and made them proficient diarists of their own feelings, it failed to instill a sense of discipline or accountability. Students had learned neither to tackle difficult subjects nor to respond to grades or feedback with increased effort.

The death knell for this educational reform was sounded by the 1983 report on the quality of education, *A Nation at Risk*, commissioned by the Secretary of Education. The National Commission on Excellence in Education found that school curricula had been "homogenized, diluted, and diffused to the point that they no longer have a central purpose. In effect we have a cafeteria style curriculum in which the appetizers and desserts can easily be mistaken for the main courses." The Commission also found that academic standards had been lowered by insufficient minimum requirements of competency exams as well as textbooks that had been "written down" to lower reading levels. In response to their findings, specifically in the teaching of English, the Commission recommended that:

The teaching of English in high school should equip graduates to:
(a) comprehend, interpret, evaluate, and use what they read:

32 Howe & Strauss, *supra* n. 3, at 71.
33 *Id.* (citing A.S. Neill, *Summerhill* (Penguin 1968)).
34 *Id.* at 71-73.
35 *Id.* at 73.
36 *Id.* at 71, 73.
37 *Id.* at 73.
38 *Id.*
39 *Id.*
42 *Id.*
(b) write well-organized, effective papers; 
(c) listen effectively and discuss intelligently; and 
(d) know our literary heritage and how it enhances imagination and ethical understanding, and how it relates to the customs, ideas, and values of today's life and culture.\(^{43}\)

If school children were leaving school without these skills, then this change would certainly seem necessary. However, what to do in the meantime about those whom the skills had eluded? The Commission did not make any recommendations about what to do with the Xer students who had been educated during the failed reform and those who would be educated while schools sorted out how to implement the new reform recommendations.

Ever since elementary school, they had constantly been told that there weren't any standards, that they were doing well, and that they had to listen to their feelings. Now, after all those years, they heard that there had indeed been standards, that they had failed to meet them, and that no one much cared how they felt about that failure.\(^{44}\)

Although Xers failed to learn on their own many of the things that the 1983 report claimed they should have been taught, they did learn one thing on their own: how to filter information. At the same time the educational reform of the early 1970's was gaining steam, so was the technology revolution. And the same overwhelming information stream that turned Xers into multitaskers also turned them into skillful managers of information.\(^{45}\) Because Xers have managed more information at every stage of their lives than any generation before them, they have developed the new skill of quickly sorting information into three categories before they ever let it sink in to their memories: (1) information needed now, (2) information definitely needed later, and (3) information that can be found later if needed. This has given rise to the distinction between “just in case” learning and “just in time” learning.\(^{46}\)

“Just in case” learning focuses on acquiring information that the student may need sometime in the future; this is the traditional educational model. “Just in time” learning focuses on learning information-acquisition skills so that the student can find any information

\(^{43}\) Id. at Recommendation A: Content

\(^{44}\) Howe & Strauss, supra n. 3 at 75.

\(^{45}\) Tulgan, supra n. 20, at 68.

she might need in the future when the need arises. The "just in time" model of education has already been accepted in a variety of educational contexts. For example, many academic librarians are beginning to adopt a "just in time" approach to acquisitions — rather than build the largest possible collection based on anticipated patron needs, they develop systems to acquire materials quickly when they are needed. Businesses are beginning to adopt a "just in time" approach to employee training, both because of its flexibility and its cost efficiency.

Xer students have long since moved to a "just in time" model of learning. They mastered the technology for acquiring information early in life. However, they are inclined to disregard pieces of information they do not currently need or do not see an impending need for. Although it may seem that the affinity for "just in time" learning means that Xers are less interested in learning, the converse is actually true. Xers expect to be lifelong learners, constantly acquiring information as they need it. Because of the volume of information that bombards them constantly, they know that no school can possibly teach them all of the information they may someday need. Instead, they expect to learn in school the most efficient skills for continuing to acquire information on the subjects that are relevant to them.

If we expect Xer students to leave law school with the information they need, we must first understand that they may not have some of the basic skills or information they need to succeed. However, they are enthusiastic consumers of skills training — good news for skills teachers — and will willingly make up for gaps in their education if the missing information's immediate relevance is made clear to them. So while the myth is that Xers are uninformed and apathetic, the reality is that they want the skills necessary to acquire information "just in time" throughout their careers, and they need to understand the "just in time" value of everything they learn if they are expected to retain it.

3. Myth #3: The Arrogance and Lack of Respect

Boomers are finally growing up, and we don't hold it against them that they forced so many of us to beat them to it.49

47 See Barbara Baruth, Cutting-Edge Technologies Can Assure Our Place in the Big Picture, Am. Libs.58 (June 1, 2002); Martin Riash, Academic Librarians Offer the Crucial Element in Online Scholarship, Chron. Higher Educ. B4 (Apr. 21, 2000).
48 See e.g. Robert Buckland, West Link-Up to Exploit Rapid Growth in Field of E-Learning, Wes. Daily Press 39 (Aug. 13, 2001) (suggesting that compliance training and refresher courses can be provided at an employee's desktop rather than requiring off-site training).
49 Howe & Strauss, supra n. 3, at 46 (quoting Kate Fillion, Xer from Toronto).
While it is true that Xers do not regard authority the way that past
generations might, this is largely the result of understanding themselves
and those in positions of authority differently. This different
understanding stems from their lifelong relationships to adults and
information.

Xers growing up had very different relationships with adults than
previous generations. Because of the rising divorce rate, nearly half of all
Xers were raised in single-parent households. Even in two-parent
households, an increasing number of families had two parents working
outside the home. While their parents worked, Xers took care of
themselves. They developed their own homework, hygiene, and feeding
schedules. Having been left to fend for themselves, Xers became self-
reliant. They were accustomed to taking care of themselves and unaccustomed to being told specifically how to do it. This self-reliance
was reinforced by the lack of structure and abundance of choices that
"open education" offered. Because they were left to themselves during so
much of their childhoods—both at home and school—they drew the
conclusion that they were competent to take care of themselves, that they
did not need anyone to supervise them. Having been given some adult
responsibilities, they came to view themselves as on a par with adults in
many ways.

At the same time Xers were becoming more and more confident
of their competence with adult-type responsibilities, they were becoming
less and less confident about adults' competence with adult-type
responsibilities. Many of the seminal historical events that shaped Xers
involved public failure of authority figures—Watergate and Nixon's
resignation, the Iran hostage crisis, savings and loan scandals, and the
effort to impeach Bill Clinton, just to name a few. Xers quickly got the
message that being in authority did not require any special set of
characteristics—people who lacked intellect, character, or both were in
positions of authority. It seemed to Xer children that they might actually
be better at taking care of themselves than adults were at taking care of
them.

Even if events had not helped change the traditional view of
authority, the technology revolution would have done so. With increased
access to television and the Internet, the power to provide information has
lost its mystique. Throughout Xers' lives, they have been accustomed to

50 Lawrence J. Bradford & Claire Raines, Twentysomething: Managing & Motivating
51 Id; see Strauss & Howe, supra n. 6, at 325.
52 Strauss & Howe, supra n. 6, at 329.
53 See id. at 317.
viewing television skeptically. Television programs have commercial sponsors. Television networks have commercial sponsors. Actors and athletes have commercial sponsors. Politicians have commercial sponsors. Even news organizations are businesses. Information is inherently untrustworthy because of the agenda, hidden or obvious, of the provider of information. The Internet has only reinforced what Xers already believed about information: anyone can provide it. On the Internet, information is provided by experts and amateurs alike, with little guidance for most users in determining which is which.\textsuperscript{54} Ask a question on a discussion board\textsuperscript{55} about a complex legal issue, and you are just as likely to get an answer from a fifteen-year-old boy as you are from a partner in a law firm.\textsuperscript{56}

All of these factors have created a generation that relates to authority differently. What may be perceived as disrespect is, in fact, a lack of recognition. Xers do not see people in positions of authority as fundamentally different from themselves. To use the Xers’ own politically correct jargon, those in authority may be “differently abled” by having skills and education that the Xers do not yet have themselves, but this does not necessarily make those in authority inherently more intelligent, moral, or valuable. It is especially difficult to disabuse an Xer of this notion when she is the “go to” person for technology questions for everyone from her parents to her boss. Because Xers perceive a much more level playing field than Boomers and Silents did before them, Xers are much more likely to communicate with teachers and supervisors in a way that is considered challenging or confrontational. In particular, Xers are very comfortable making suggestions to and questioning those further up in a hierarchical structure. They are very uncomfortable with heavy-handed supervision that lays down rules or gives instructions but gives little or no explanation for them.

This seems to be the cause of the most contentious conflicts between generations. Silents and Boomers give instructions and do not understand why the Xers cannot simply carry them out without comment. Xers, on the other hand, have been left to their own devices for most of their lives and are perplexed, and sometimes offended, that Silents and Boomers want to step in at this late stage in the game with some guidance. The reality is that Xers simply do not relate to a hierarchy. If we want to have more productive relationships with Xer students, we

\textsuperscript{54} See Laura Sessions Step, As Students Rely on the Internet for Research, Teachers Try to Warn of the Web’s Snare, Wash. Post C01 (July 16, 2002).

\textsuperscript{55} A discussion board is the computer equivalent of a bulletin board. These boards are usually devoted to a specific topic, and anyone with an interest in that topic can pose questions or answer them.

\textsuperscript{56} See Michael Lewis, Faking It, N.Y. Times § 6, 32 (July 15, 2001).
have to be willing to shift from a top-down model of the student-teacher relationship to a lateral model.

4. Myth #4: The Slacker

It's not that I'm angry at you for selling out to the system. It's that there won't be a system for me to sell out to, if I want to...57

One way in which the Xer students seem fundamentally different from previous generations' students is that Xers seem unwilling to sacrifice for a long-term goal. They do not seem willing to postpone recreation or personal relationships for the three short years they are in law school.58 When they get to law firms, as either clerks or associates, they seem to want to jump right in to something "important." They seem to scoff at "menial" tasks.59 How, we ask ourselves, did they derive this underdeveloped sense of the importance of law school and overdeveloped sense of their own importance?

The truth is that an Xer's desire to keep one eye on his personal life while simultaneously trying to leap to the top is not born of a sense of importance. It is born of a sense of fear. Xers learned two things from being raised by adults who poured themselves into careers. First, they learned that the price of pouring yourself into your career is paid by your family. Second, they learned that the institutions that their parents spent their lives building and supporting can no longer promise the future they once could.

By and large, the parents of Xers who both entered the workforce and divorced in record numbers believed that both of those decisions were positive changes.60 The consensus seemed to be that children benefit when parents are professionally fulfilled and emotionally satisfied, thus justifying single-parent households and those in which both parents work. Xers, however, take a different view of having been left to take care of themselves.61 It is no secret to Xers that the experiments in

57 Howe & Strauss, supra n. 3, at 46 (quoting Daniel Smith-Rowsey, Xer student).
58 Despite first-year orientation admonitions to maintain balance, spend time with loved ones, and maintain hobbies that give them joy, we seem to be offended when they actually do it.
60 Strauss & Howe, supra n. 6, at 324.
61 Id.
hands-off parenting and open education failed. While Xers value the resulting self-reliance and independence, they do not value them enough to repeat the experiment with their own families. Therefore, Xers are far less willing to sacrifice time with their families for career goals.

The equation involves more, though, than Xers' concern for the damage to their families that an intense career focus might cause. In the past, when previous generations' workers focused on careers, the sacrifice was an investment in the family. When employees were loyal to an institution, the institution rewarded the employees with lifelong employment and security through retirement. This is no longer a promise that institutions can make to their employees. Even if institutions could make this promise, Xers would not believe it. Xers are as familiar with the public failure of institutions as they are with the public failure of those in authority. During the course of their lifetimes, Xers have watched government, the banking industry, major law firms, and major corporations become damaged or destroyed by greed, inattention, or incompetence. The recent accounting scandals at Enron and WorldCom have only confirmed what Xers already knew: no matter how great an institution is, it could be gone tomorrow. Therefore, Xers are far less willing than previous generations to "pay dues" to an institution, because the institution no longer has anything to offer in exchange for an up-front sacrifice.

For the most part, we have dismissed a student unwilling to "put her nose to the grindstone" as a slacker. However, we have failed to take into account the need that Xers have to carve out time for the people and non-law-school activities that are important to them. We can approach them much more productively when we understand that they are not simply being lazy when they refuse to devote themselves fully to the study of law. They are simply reluctant to invest in an institution without some assurance that they will get something in return that will justify rethinking their current balancing of personal and academic/professional lives.

IV. WHAT'S A TEACHER TO DO?

The fact that there are reasonable and complex reasons for Xer characteristics does not change the fact that we are responsible for teaching and they for learning a specialized body of knowledge in three years. At the end of the day, they still have to pass the bar exam and function in law practice. Understanding how Xers got to be Xers is easy.

62 Id. at 111.
63 Howe & Strauss, supra n. 3, at 98–99; Tulgan, supra n. 20, at 159–160.
64 Tulgan, supra n. 20, at 159–160.
The challenge is figuring out what to do with that information.

Faced with that challenge, we have three choices. Our first choice is simply to continue doing exactly what we have been doing. We can refuse to accommodate the ways in which Xer students are different from previous generations of students. We can insist that they receive their education in the way we are most comfortable delivering it. We can continue to try, in effect, to mold the audience to the teaching.

Our second choice is to pretend to adapt by using the same teaching methods but with visual aids. However, a lecture accompanied by a PowerPoint presentation is still a lecture. While using a PowerPoint presentation makes the lecture more interesting, it does not fundamentally change the way the students are receiving information. Although students expect to be entertained and are accustomed to impressive graphic images, graphics alone are not sufficient to fully engage an Xer's attention. To be engaged on all levels, students need to interact with information.

Our third choice is to actually adapt the delivery of education to the needs of the students receiving the education. This is, of course, the most difficult in the short run, but it does pay off in the long run. Fortunately, this difficult task is required of a profession whose members largely come from generations that excel at frontloading effort and delaying gratification.

If we choose the third option, the questions that come to mind for many are, “Aren't we selling out? Don't we have a responsibility to hold the line?” The answers are no, we are not selling out, and yes, we do have a responsibility to hold the line. This is the future of education. That law schools are among the last, if not the last, to catch on, does not make it any less the future. If we refuse to change, the frustration level of most faculties and students will simply continue to increase. Law teachers will become increasingly less in touch with how their students process information, and legal education will consequently become less and less effective while students and faculties point fingers of blame at each other. Alternatively, if some law schools are willing to change but others are not, students may begin to gravitate to the law schools that have adapted. Certainly, some schools are sufficiently prestigious to attract students regardless of the quality of teaching, but most law schools do not fall into that category.

Choosing to adapt will mean two things: (1) educating students about generational issues they will face in practice and (2) developing teaching methods that capitalize on what we know about Xers. The first one is easy enough. While we need to be able to adapt to our students in order to teach them, they need to understand what the expectations are in practice. Just as Xers' perceptions of the world are foreign and illogical to Silents and Boomers, the way Silents and Boomers perceive the world
is foreign and illogical to Xers. Just as ethics training can be woven throughout the fabric of law school, discussions of generational differences can also be woven throughout. This will help students better understand what they can expect from supervisors, judges, juries, and clients.

So now the trick is to merge what we know about Xers with what we know about legal education so that we can turn Xers into lawyers. Some relatively simple techniques capitalize on each characteristic discussed in this article.

1. Teaching Methods For Reality #1: Xers Need Stimulation

If Xers in your class are balancing check books and checking e-mail, they are not doing it instead of listening to you; they are doing it while they are listening to you. They require multiple and varied stimuli so they can fully engage. This does not mean you have to sit by while they balance their checkbooks and read their e-mail. If you want them to stop, you will need to engage them in a variety of ways on the topic on which you want them focused. To meet the Xer need for stimulation, use teaching methods that help students do many things at once while still focusing on a single topic.

Although a lecture format is not appropriate for many skills topics, it can be very effective at times. Visual tools can be used to keep students’ attention better than just the lecture alone. PowerPoint and document projectors are great tools for presenting information in a way that is visually stimulating. But do not stop at just adding visuals. Because the goal is to engage as many of the students' senses as possible at once even during a lecture, another tool to consider is guided note-taking in conjunction with visuals when you need to use a lecture format. Guided note-taking involves giving students a handout that looks something like this:

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65 For additional ideas on different visual aids available and how to use them, see Gerald Hess & Steven Friedland, *Techniques for Teaching Law* 81–104 (Carolina Academic Press 1999).

66 This is the same technique bar review courses use to keep student attention during lectures. Thanks to Dr. Mark Steiner, South Texas College of Law, for introducing this to me as a teaching tool for any class, not just bar reviews.
The student fills in the blanks as she listens to the presentation of material. Handouts like this take some time to create, and they require that you stick closely to the presentation of information in the handout. For example, if you indicate on the handout that there are four elements of negligence, students tend to get very confused if you end up combining two elements like "causation" and "harm." One way to avoid this problem is to simply print out your PowerPoint slides as handouts with three slides per page and lines next to each one. This method gives the students some structure while still leaving you some flexibility.

The most common objection to this method is that it is hand-holding or spoon-feeding. This would be true if Xers already knew how to take notes. Remember, they know how to keep journals that chronicle their feelings about their educational experiences; they do not necessarily know how to organize information as it is given to them. Guided note-taking has the dual advantages of making sure they take down what you believe is important for them to take away from class while also helping them see what clearly-organized notes look like. Obviously, this method will not work with every topic. However, it can be very effective with the types of topics that are most effectively handled through lecture. A lecture accompanied by both a visual presentation and a handout requiring that students take down information will keep the Xer stimulated on a number of different levels at once in a way that straight lecture cannot.

In general, the more students are required to interact with the information, the less likely it is that something else will occupy their attention simultaneously, whether they are preparing for or participating in class. In-class exercises that require students to use information to solve a problem, draft something, or edit something all require that the students stay focused on the topic so they can participate. Consider
posting instructions or other helpful information for the exercise on a PowerPoint slide or transparency. This method keeps important information in a convenient place for students and can also help keep students with wandering attention focused on the exercise.

Computer tutorials can help students absorb information that might otherwise be presented in a conventional reading assignment. Even though reading in law school generally requires more concentration than any other reading students have done, many Xers simply do not have the concentration skills necessary to stay focused on something that is presented only in print, so their legal reading does not get much more attention than any other kind of reading. A simple computer program that requires students to interact with the information by answering simple questions or completing exercises will help keep their attention so they can absorb the information in the reading.

Fortunately, free web-based tutorials abound for law teachers. The Center for Computer Assisted Legal Instruction (CALI) provides free computer tutorials on an array of law school subjects, including legal research and writing. In addition, CALI provides free software called CALI Author so professors can create their own tutorials. LexisNexis has tutorials available on legal research and citation. In addition, the Chicago-Kent College of Law Legal Writing Program site contains web-based research and legal writing exercises.

2. Teaching Methods for Reality #2: Xers Want Information “Just in Time”

Accommodating the Xers’ need for “just in time” learning does not mean widespread curriculum reform in American law schools. Everything students learn in law school already lays the foundation for a lifetime of “just in time” learning. A profession that requires ongoing training throughout the life of its members fits perfectly into the Xers’ “just in time” paradigm. Law schools have never pretended to teach students everything they will need to know to practice law. We teach a

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69 Writing exercises are found at Mark A. Grinker, The Legal Writing Teaching Assistant: The Law Student’s Guide to Good Writing <http://www.kentlaw.edu/academics/lwgrinker/> (accessed Nov. 20, 2002). Legal Research exercises are found at Illinois Institute of Technology, Legal Research & Writing Resources: Tutorials & Self-Paced Exercises <http://www.infoctr.edu/lrw/> (last modified Sept. 27, 2002).
broad base of specialized knowledge combined with the skills to expand that knowledge on an as-needed basis. Therefore, providing information "just in time" will not require that we change anything that we teach. It will only require that we make explicit the relevance of the information.

We have no reason to believe that past generations immediately saw the relevance of what they learned in law school any better than Xers do. However, previous generations' students would learn it whether they understood the relevance or not. In contrast, Xers will disregard information unless they are given a framework for understanding how this information is relevant to them now and how it will continue to be relevant in the future. Skills professors have an edge in this respect. Unlike legal theory, which may be more difficult to present as immediately relevant, skills professors can tie each piece of information to a concrete task that students will be asked to perform in the skills class, in doctrinal classes, on the bar exam, and in practice.

Present information "just in time" as much as possible. Tie the topic of each class into an assignment for which students currently are or will very soon be responsible. Explain why they are doing what they are doing. Explain to them how each skill or concept fits into a particular piece of the assignment, the assignment as a whole, the course as a whole, their legal education as a whole, and, when appropriate, their needs in practice, both as a clerk and practicing attorney. An explanation for every piece of information that covers all of those bases would probably be overkill. You might choose several of the most relevant uses for the information. For example, you could tell your students at the beginning of a class, "Today, we're going to cover drafting the Issues Presented for a memo. By the end of this class, you should be able to draft the Issues Presented for the memo due on October 4. After you get some feedback on the Issues Presented from this memo, you will be expected to demonstrate some mastery of Issues Presented in the final memo of the semester. As a bonus, being able to precisely identify and state issues will also help you write better exams in your other classes." A short introduction like this that makes the relevance of the topic clear can do wonders to focus Xer students' attention at the beginning of class.

Another way to make the information in each class relevant is to give students very concrete goals for each assignment, and then connect skills covered in class to the goals so they can clearly understand specifically which skills and information must be mastered to successfully meet each goal. After giving students very clear written goals, make sure that any feedback they get specifically addresses how they performed on each goal. While past generations of students may have appreciated having such specific goals to meet, they certainly did not need them. Everyone worked to meet the unwritten goal, "do your best." In contrast, Xer students are not inclined to do their best unless
they understand why it is important. Without specific information on what they are trying to accomplish and why, Xers feel as though they are operating in the dark, leading to the ever-constant refrain of "you're hiding the ball." However, even Xers have a hard time making a case that a professor is hiding the ball when she gives specific goals when the work is assigned, points out at each turn how the topic covered in class meets one or more of those goals, and then uses the goals as grading criteria on the final product.

One final way of making information immediately relevant to Xers is to give written quizzes that cover reading or class discussion. A quiz is essentially the manual version of a computer tutorial that gives students questions to answer during the course of the reading; but instead, these questions are posed after the reading. Quizzes can be used in a variety of ways. For example, they can be scheduled for the same day every week and students told that all material covered in the week prior to the quiz is fair game for the quiz. They can be scheduled for every class for which the students are required to complete pre-reading. Or they can be given randomly (the dreaded "pop quiz") and cover whatever was assigned for the day the quiz is given. To avoid taking up class time, quizzes should be short—two or three questions. Because the goal is to check whether students have read the material rather than whether they have mastered it, questions should be easy enough that anyone who read the material could answer them. If you choose the two or three most significant points from the reading, going over the quiz can segue smoothly into your class plan for the topic.

In classes where the Socratic method is not used and cannot serve as a check on student preparation, quizzes can be an effective way of making sure that the reading for the class is still considered a priority.70 Depending on the personality of the individual teacher, though, quizzes can seem pragmatic, heavy-handed, or a waste of time. "Pragmatic" is probably the most constructive tone to set. ("I'm a realist and I know you need incentive to read beyond just the quest for knowledge—this is meant to serve as that incentive, not punishment.") Xers will likely resent quizzes they see as heavy-handed ("I'm giving you a quiz to catch you unprepared.") or a waste of time ("I don't believe anything will get you to read, but I don't know what else to do.").

3. Teaching Methods for Reality #3: Xers Don't Relate to a Hierarchy

70 Brad Thompson, If I Quiz Them, They Will Come, Chron. Higher Educ., Chron. Rev. 5 (June 21, 2002) (reporting positive reactions of students and an increase in the number of students prepared for class).
Although Xers do not relate to a hierarchy, they can acknowledge that they came to law school to learn something. Xers respond well to having someone coach them. They do not respond well to being closely supervised. If you frame your role as that of a coach, you can avoid all of the baggage that comes with being the supervisor of Xers unaccustomed and resentful of supervision. Although some skills professors like to teach in a "law firm" model—where the professor is a partner or senior associate and the students are summer or first-year associates—consider whether the "law firm" is Xer friendly. If the fictional law firm is built around a coaching model, then Xer students may have fun with the fiction. If the fictional law firm is more traditional, though, Xers may resent the added layer of supervision and authority from having their professor as both a teacher and supervising attorney.

As a coach, the professor's role is to give feedback. Even though Xers do not see themselves as fundamentally different from their professors, they can at least recognize that professors have expertise in an area that they, as students, have not yet mastered. Xers want to be coached in how to perform a skill and then given feedback on how well they performed. However, they expect feedback to be gentle and respectful. They will respond to constructive reactions to their work and suggestions for improvement. They will respond less favorably to being told what they "cannot" or "must" do. While Xers do not expect teachers to pull punches to spare their feelings, they do expect teachers to give them feedback as they would to a colleague, not a subordinate.

Although Xers want gentle feedback, they want professors to be generous in the amount of feedback they give. The Xers' chorus of "I worked so hard on this!" is a plea for recognition that their effort was substantial and worthwhile rather than insistence that you label the work as flawless. To justify the time they spent creating the work, they want to know that you put time into evaluating it. To the extent possible, consider giving them your own work product such as a separate document with detailed comments and specific suggestions for improvement. For example, if indiscriminate use of passive voice permeates the document,

71 Reader reaction such as "I had trouble following several sentences, because the subjects and verbs were far apart from each other" tells them how their audience rather than their boss might view their work. Comments such as "In a firm, I would assign this project to someone else" will not be considered constructive reaction. I will confess to having given both kinds of comments and having been much happier with the reaction I got to the former as compared to the latter.

72 On a related note, many professors who defer grading until the end of the semester report that their students are generally more satisfied with the course and the professor. This may be because early assignments are for the stated goals of receiving feedback and improving rather than grading. Because those are goals that can usually be met by sheer effort, students are not as frustrated with the results.
take one or two of the sentences and revise them so the student can see how the suggestion to "use less passive voice" could be implemented. Although this type of comment sheet can be labor intensive, comments can be re-used when they apply to other students. To eliminate the need to create comments from scratch for each student, teachers can use word processing macros or clipboards to store frequently-used comments for repeated use.

Once Xer students have received feedback from you, you can expect they will want to share some feedback of their own. Try to be as generous in receiving feedback as you were in giving it. Many teachers are dismayed by the number of students who are comfortable making suggestions for how the class could be improved and what content might be covered in more or less detail. In Xers' minds, though, they are just holding up their end of the bargain. You shared with them what you know about their performance, and they accepted your feedback as graciously as they could. Now they want to share with you what they know about your performance, and they expect you to accept that feedback graciously. Simply by listening to students' feedback, a teacher increases the likelihood that they will pay more attention to hers. And, of course, the obvious benefit of frequent student feedback is that teachers do find out if the students are getting from the course what the teacher intended.

4. Teaching Methods for Reality #4: Xers Want Balance

Many Xers will not postpone a satisfying personal life to pursue the kind of excellence that we believe every student should strive for. This does not mean, though, that they are disinterested in their education. It only means that they need more flexible expectations so they can maintain a sense of balance in their lives. Law firms are already catching on to this reality and offering more flexible work "packages." Some are beginning to allow part-time work; some allow an alternate non-partner track for the associate who wants to be assured that he will not have to work evenings and weekends. The payoff to the law firms is that Xers who see that their employers care about their need to maintain balance are more loyal to the employers, more productive, and more satisfied.

Just as Xer lawyers will forego a certain amount of compensation and status in order to maintain balance, Xer students are willing to forego a certain amount of success in law school so that they, too, can maintain

73 For ideas on how to solicit student feedback, see Hess & Friedland, supra n. 63, at 261–283.
some balance between their personal and academic lives. Just as law firms offer flexible compensation and promotion schemes, law teachers can similarly offer a flexible "compensation" scheme. Rather than insist that every student perform to meet her maximum potential, teachers can offer guidelines up front as to what kind of work receives what kind of grade. Each student can then make an informed decision about which grade is worth the sacrifice.\footnote{Students are already trying to do the calculus of how much time they can spend in other areas of their lives if they are willing to accept B's or C's, or whatever grade each student is willing to accept. The key is to give them the information they need to make informed calculations. A student who is not willing to try for less than a B may put in more effort if she knows what your expectation is for B work as opposed to what she thinks your expectation might be.} Some students will, of course, always want the top grades. However, some students are satisfied doing only what is necessary to pass the class. In that case, tell them explicitly what the minimum expectation is so they can plan their work accordingly.\footnote{A word of caution to students might also be in order that they may not be as good as they think they are at gauging whether they can meet a particular standard in such a new academic setting. First-year students who opt for "reduced compensation" should probably try to overshoot the mark a little until they have a feel for what level of effort yields what kind of grade for them.} While a teacher's goal should still be to give each student the feedback she needs to make the maximum improvement and, therefore, the best possible grade, Xers will appreciate teachers who allow them to opt for something less without judging them. Law teachers will likely discover the irony that Gen X-savvy employers have discovered: allow an Xer the flexibility to do less, and she will do more.\footnote{See Tulgan, supra n. 20, at 87.}

Even if you are not willing to participate actively in the Xers' "reduced compensation package" theory of effort in exchange for grades, try to communicate concretely the minimum standards and consequences for falling below them. Until they are told differently, Xers will assume that they are free to reduce their effort in school as much as they need to in order to accommodate other areas of their lives. While they understand that there may be a consequence, they will assume that the consequence is negotiable. For example, while students understand that completely substandard work will receive reduced credit, many are shocked to find out that there is an absolute minimum standard below which they will receive no credit. Because Xers believe everything is negotiable, they are caught off guard when something is not. Any action or lack of action that will result in any consequence that you impose should be spelled out in writing. This will save time arguing about it later—even a first-year law student Xer can understand an estoppel argument.

Once the policies and consequences are set and the students have
been made aware of them, avoid judging Xer students for the choices they make. A consequence that is spelled out must be imposed (lest you give the impression that everything is negotiable after all), but it can be imposed without a lengthy lecture on professionalism. In many cases, the student has weighed the cost of coming late to class or failing to turn in an assignment and decided that the consequence is better to them than the alternative, such as not spending time with family or not getting to go to a movie. In those cases, you gain some ground with the student by acknowledging that he is an adult with his own priorities. While you may not necessarily share those priorities, there is usually no need to give the student any flack about them. Just impose the consequence and move on.78

5. What Won't Work

In Peter Sacks’s *Generation X Goes to College*, he conducted what he called the Sandbox Experiment with his community college journalism students.79 The Sandbox Experiment basically involved two strategies: (1) lowering standards and (2) inflating grades.80 I would argue that those strategies were not effective for his students, even though they served his short-term goal of receiving more favorable evaluations.81 However, even if those were effective strategies, they are simply not possible for law teachers.

First, we cannot lower the standards for legal education. Regardless of the characteristics of the generations passing through our law schools, we have an obligation to the profession to set and maintain high standards. So while I do suggest that we can teach differently, I do

78 This approach assumes, of course, that the student is not perpetually in trouble in a way that indicates he might have difficulty complying with basic ethical rules like keeping clients informed and complying with deadlines. For that type student, a discussion about professionalism is warranted.

79 Sacks’s course evaluations were not positive for the first several quarters he taught. Sacks, supra n. 25, at 45–50. He concluded that his low evaluations were the result of establishing high standards for student performance and not keeping the students “sufficiently amused and entertained.” Id. at 83. Therefore, he believed that the best strategy for better evaluations was to placate students. See id. at 82–83.

What I should do is to become like a kindergarten teacher and do everything possible to make my classes like playtime. I'll call class the Sandbox. And we'll play all kinds of games and just have fun, and I'll give all my students good grades, and everyone will be happy. Students will get what they want – whether they learn anything or not doesn't matter. The College will get what it wants, which are lots of happy students. And I'll get good evaluations, because students are happy and contented.

Id.

80 Id. at 83, 85.

81 Id. at 82, 93.
not mean to suggest that we can teach less. When Xers graduate from law school, they must have the same body of knowledge that every generation of lawyers before them had.

In contrast, the strategy of grade inflation differs in that we can inflate grades, arguably with no damage to the profession so long as other standards are maintained. But I do not believe that Xers simply want good grades in exchange for nothing. They want their effort rewarded with feedback, and they want the option to choose whether or not to put in the time for the best possible grades. When they do receive good grades, they want them to mean something. While lowering standards and inflating grades are easier than the alternative of fundamentally altering our perception of our students and adapting to how they learn, they will not satisfy teachers or students in the long run.

6. The Next Wave

Teachers reluctant to adapt to the learning style and world view of Generation X should know that it will not end with them. The next generation, dubbed Generation Y or Millennials, will be similar to Xers in that they are accustomed to constant visual and auditory stimulation.\(^82\) Millennials will not only be accustomed to constant stimulation and activity, they will be far less accustomed than Generation X to print resources and non-computerized activities. The disconnect between teacher learning styles and student learning styles is only going to become more pronounced if teachers shun technology. The good news, though, is that if we develop techniques meant to provide a more stimulating educational experience, these techniques will be useful for many, many years to come.

Additional good news comes in the ways in which the Millennials are different from Xers. Millennials were the beneficiaries of the backlash against the educational reform that failed to adequately educate Xers.\(^83\) Because the Xers’ education was lacking in fundamental skills—math, science, writing—the new educational reform focused on making students more proficient in those areas.\(^84\) Test results for Millennials also indicate that they are writing better than the Xers, likely as a result of greater emphasis on fundamental skills.\(^85\) The downside of the Millennial education is that schools may have overcompensated for perceived inadequacies in the Xer education, resulting in students who are less

\(^{83}\) Id. at 145–148.
\(^{84}\) Id.
\(^{85}\) Id. at 162–164.
proficient at tasks requiring creativity than at tasks requiring information recall. All in all, though, Millennials promise to bring to law school the best of the past several generations.

V. CONCLUSION

Generation X has definitely caused a ripple in the legal education pond. While Xers certainly are different from previous generations' students (and, therefore, from law faculties) in the way that they learn and see the world, they are just as eager to get an education and become professionally successful. Still, coming of age during the beginning of the technology revolution has made the gap between Generation X and its predecessor generations more pronounced than past generation gaps. Unless we begin understanding the ways in which the changing social structure and quickly-progressing technology affect students, this gap will grow wider with each passing year and each new generation. If we can start by understanding how best to connect with Generation X, we can begin to bridge the gap before it gets so wide that we finally fall into it. It is a new day in legal education.

86 Id.
Teaching Legal Skills In South Africa: A Transition From Cross-Cultural Collaboration To International HIV/AIDS Solidarity

Brook K. Baker*

I. INTRODUCTION

Over the last five years I have spent eleven months in South Africa teaching on two law faculties, the University of Durban-Westville (UDW), a formerly all-Indian university, and the University of Natal-Durban (UND), a formerly all-white elite university, both of which have substantially integrated with Black African students in the 1990's. When I first arrived for a six-month sabbatical in 1997, I was politically and culturally naïve about my prospective students, the two law schools, and the South African legal system, all of which bore the wounds of apartheid and all of which were struggling, despite limited resources, to transform themselves and South African society. Over time, my planned focus of adapting a U.S.-based legal skills and legal writing pedagogy to the South African context transitioned to a focus on culturally competent collaboration with my new colleagues. As I struggled with cross-cultural challenges arising from working in a law school clinic where I supervised students who were advising clients from Indian and Zulu communities, my focus shifted again as I came to learn, slowly, about the HIV/AIDS pandemic that was decimating sub-Saharan Africa. By the end, my stances as a legal educator and a global citizen had shifted from cross-cultural collaboration to international solidarity and I have since become a HIV/AIDS treatment activist.

During my sabbatical, I taught undergraduate law students at UDW who had their initial exposure to legal skills and legal writing in their last (usually fourth) year of law school. In addition to classroom teaching, I worked in the law clinic with last-year students who provided advice and counsel to impoverished clients. As their clinical supervisor, I assisted students on their cases and on their clinic-based writing assignments. In four subsequent visits to South Africa, while

*Professor, Northeastern University School of Law. I would like to thank my colleagues from South Africa, especially Yousuf Vawda, T.P. Pillay, Peggy Maisel, Leslie Greenbaum, Asha Ramgobin, Cati Vawda, Bheki Sikhakhane, and Mtholephi Mthimkhulu. I would also like to thank my many colleagues in the worldwide HIV/AIDS treatment campaign, especially those from the S.A. Treatment Access Campaign and from Health Global Access Project.

1 Other clinicians and skills teachers have worked in Africa and reported on their
continuing my work in the law clinic, I also worked with colleagues who were introducing a first-year skills course at the University of Natal, and eventually collaborated with them on the first legal skills and legal writing text published for South African law students.²

My sabbatical to South Africa was in many respects a pilgrimage for a more global legal perspective³ and for a renewed sense of engagement with international issues of race⁴ and justice.⁵ South Africa shared pieces of our shameful history. It too had a legacy of conquest, subordination, and racial supremacy every bit as virulent as our own, but, unlike us, it was currently undergoing a radical and still hopeful process of social and political transformation. However, the early exuberance of a relatively nonviolent liberation and the euphoria of democratic elections were giving way to the hard pragmatic politics of limited resources and global capitalism. Heroes in struggle were not necessarily wellsuited to administer a government; the rage of unemployable former comrades was all too often channeled by criminal syndicates; the sustainability of rural and township economies remained in doubt; and the long-checked tides of human expectation were rising—it was a good time to cross the ocean.


where I would have to be radically less reliant on first impressions and habituated responses, but where I could not be content to be a spectator or a disinterested legal anthropologist. Because I would be experiencing many unfamiliar cultural practices, because I would be working in a radically different educational and legal system, and because I would be working with people whose patterns of interaction were new to me, I anticipated that I would have to be a better listener, that I would have to ask many more questions, and that I would have to seek multiple perspectives to make sense of what I was doing. At the same time, however, I anticipated, and surely wanted to avoid, the characteristic error of considering South Africa to be "exotic"—my sabbatical to be a safari. South Africa was by no means, even in my imagination, an uncharted "native" land. It has a First World formal economy, First World cities, and U.S. sitcoms and cop shows playing on every channel. True, its formal economy is interpenetrated with a vibrant informal economy; true, its characteristic cities are white enclaves surrounded by black townships; true, ER is followed by Zulu broadcasts and Hindu dances. But I would have to learn how to accommodate the all too familiar as well as the unfamiliar.

To state this perspective differently, I anticipated that I could not be unengaged in South Africa—with its struggles, its private debates, and its public disputes—based on liberal guilt (evinced by "tolerance"), a self-centered wish to "understand" (and therefore to appropriate), or my natural reticence (compounded by a festering political pessimism). Nor could I become the reviled American "expert" who recolonizes his field of engagement with Olympian convictions and understandings. On the other hand, no matter what I did, I would be implicated, helpfully or unhelpfully (or both), in the project of transformation. Thus, I had to assimilate and integrate familiar intellectual, social, and cultural resources from home and unfamiliar ones from abroad and use both in pursuit of emancipatory goals—or, at least, this was my hope.

To contextualize this article, I will initially describe some of the key differences between teaching law in South Africa and the U.S. These include: (1) teaching undergraduates; (2) teaching students for whom English is a second, third, or fourth language;

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6 Jill Ramsfield has written about our U.S.-centrism in legal writing, but unfortunately I did not have the benefit of her article before my first trip to South Africa. Is "Logic" Culturally Biased? A Contrastive, International Approach to the U.S. Law Classroom, 47 J. Leg. Educ. (1997).
(3) teaching students who, because of Bantu education, have had limited exposure to reading, analysis, and writing; (4) teaching students from tribal and religious backgrounds, e.g., Zulu, Muslim, and Hindu, with which I have little familiarity; (5) teaching students in a legal system that blends Roman-Dutch law, English common law, customary/tribal/religious law, and a new human rights constitution; (6) teaching students within a legal system and a legal academy that have historically used legal formalism to mask judicial power; (7) teaching diverse students who have had very limited cross-racial interaction; (8) teaching students under severe resource constraints; (9) teaching students in an educational culture that is not student-centered, that is lecture-based, and that favors passivity and deference; (10) teaching in a society where cultural traditions generate unfamiliar legal disputes; and (11) teaching in cultures that value oracy over literacy.

After briefly contrasting U.S. and South African legal education, I will describe four cases that I worked on while I was in South Africa: two cases involving lobola, a maternity leave dispute, and the case of a missing baby. For me, each case raised cross-cultural uncertainties, prejudices, and challenges. In describing my cross-cultural conundrums, I will necessarily expose and reflect upon my own cultural perspectives, particularities, and privileges. While in South Africa, I was forced to reexamine—to triangulate—that which seemed familiar or resonant with my culture of origin and that which seemed novel or even "exotic." All the systems of oppression, racism, sexism, homophobia, and class, in South Africa had a family resemblance to inequalities in the U.S. and in U.S. legal education but also an international and colonial twist. Our privileges as a nation, and mine as an individual, especially in wealth, education, and in access to health care, were exposed, requiring me to resituate myself as a world citizen. As I became increasingly aware of the intensifying HIV/AIDS pandemic that was eviscerating the African continent, my sense of collaboration as a teacher transformed to that of an activist acting in solidarity with those struggling for access to the same medicines that have saved and extended lives of people living with HIV in the U.S. Therefore, I will describe ways in which my South African experiences have transformed my teaching and my political commitments, activism, and understanding of the world. In my conclusion, I will urge other legal writing professors to engage in the HIV/AIDS human
rights/public health struggle outside the U.S., literally and figuratively, in their courses, their service, and their scholarship.

II. CONTRASTING LEGAL EDUCATION AND SKILLS PEDAGOGY IN SOUTH AFRICA

A. The Basic Structure of South African Legal Education

Legal education in South Africa is almost unrecognizable compared to the degree programs, pedagogy, and resources in United States. In 1997, the initial law degree (either a B-Proc or B-Juris) was an undergraduate degree of three- or four-year duration (though actual matriculation often took longer). There were no first-year skills programs. Instead, students took a regime of full-year, huge lecture courses (200-500 students in a class) in which they passively took notes. Many could not afford course materials, the library resources were scandalous, and frequently students could not understand the dialect of the instructor. Although students had smaller, subject-matter-oriented tutorials in some courses and participated in an embryonic academic support program, for the most part students had few opportunities to actively engage in legal analysis or to discuss the material they were studying. As a consequence, the failure rate for written exams was extraordinarily high—in some classes, such as Roman Law, as high as seventy-five percent! Professors graded very harshly. An 80 was unheard of and most students who did pass fell into the 60–69 range. As a result, the average law student in South Africa took five to seven years to complete the undergraduate degree program.

At UDW, students took required courses only, and it was not until the final year that they had a skills course, called Professional Legal Training, which included some copycat legal drafting and a two-week moot court program. This program required unguided library research and unguided writing of Heads of Argument in preparation for a fifteen-minute oral argument before a faculty member. Students were not permitted to collaborate with each other or to seek advice from faculty, there was no library instruction, there were no research and writing textbooks. The judges graded the Heads of Argument, but provided no written feedback.

Some students opted out of the moot court program by participating in the law school clinic, where they could advise
clients and work on cases, though they could not appear in court. Many students in the clinical program had never done any legal writing other than exam-writing, and so the clinical instructor was an ad hoc writing instructor as well.

The absence of a writing pedagogy was incapacitating for Black African students, most of whom spoke English as a second or third language and had had little opportunity under Bantu education to learn basic English, let alone to have any real experience in critical reading, textual analysis, and composition. As a consequence, some students tried to compose their exams mentally in Zulu and then simultaneously translated back into English with predictable, disastrous results given the enormous incongruities of grammar, diction, and syntax. Even worse, students were not exposed to the rigors of sustained legal analysis that comes from the discipline of writing.

After graduating, some students continued with a one- or two-year LL.B. program, which generally was a requirement for practicing in the higher courts. After that, an elaborate system of apprenticeship (or articling) was required for certain levels of practice. This apprenticeship system operated as an impassable bottleneck for the vast majority of African, Indian, and Coloured law graduates who could not secure postgraduate positions with the white and business-oriented bar. To help ease the bottleneck, a limited number of six-month, practice-oriented post-graduate institutes substituted for one year of articling. Even after articling, students faced a rigorous bar examination that many failed.

Because of multiple barriers to entry for poor Black African students, legal education in South Africa has recently undergone a dramatic yet contradictory transformation. Under recent legislation, the first four-year undergraduate LL.B. permits one to practice after an additional period of practical training. Although this accelerated LL.B. degree will undoubtedly speed up integration of the profession, it will decreases the time that students have to master the disciplines of legal reasoning, legal discourse, and practical skills necessary to the practice of law. In an effort to compensate for reduced time, most courses have become semesterized, a few more courses have become electives,

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and some skills training has been introduced. But, reformers are not planning to change the fundamental pedagogy at most law schools, UND being the exception, from lecture to more active engagement with text, instructors, or peers. Nor are they planning to teach interviewing, counseling, negotiation, or trial practice skills.

B. Formalism Even in the Wake of the New Constitution

As a skills instructor who specializes in legal writing, I wondered what I could do in this unfamiliar educational context. My bewilderment grew as I apprehended the enduring legacies of legal formalism and the belated response of law schools to the newly drafted South African Constitution. Accordingly, it was not just the contrast between the structure of legal education in the U.S. and South Africa that challenged my participation, it was the contrast in interpretive traditions with respect to the authority of text and the impact of constitutional norms.

Just after I started at UDW, the new South African Constitution came into effect, a constitution that provides much more explicit protection against multiple forms of oppression, much more support for socio-economic transformation, much more tolerance of cultural pluralism, and much more encouragement for political participation and institutional transparency. Given the adoption of the world’s preeminent human rights constitution, I came to South Africa expecting that law students would be politically active and that their activism would extend to challenging the surface meaning of legal text. I also expected that they would be eager to creatively challenge unjust laws using the new constitution to address myriad legal problems.

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9 For example, unlike limited protections against discrimination in the equal protection clause of the U.S. Constitution, the South African Constitution directly prohibits direct and indirect discrimination against anyone on the grounds of “race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.” Id. § 9(3).
10 Again, unlike the U.S. Constitution, the South African Constitution grants positive socio-economic rights, including the right to fair labor practices, id. § 23, a healthy environment, id. § 24, the progressive realization of housing, health care, food, and water, id. §§ 26–27, and to a basic education, id. § 29.
11 One of the most fascinating provisions for me was the one that promised to preserve customary law, except where such law violated fundamental provisions of the new constitution. See id., § 39(2).
To the contrary, I found that legal educators had socialized students to be extremely passive and uncritical in the classroom, despite the turbulent struggle for liberation in which many of them, or at least their older brothers and sisters, had been involved. Admittedly, much of their socialization has occurred under Bantu education—imported from Jim Crow schools in the South—an education designed to pacify a servant class. Accordingly, students' law school experience continued rather than transformed their socialization to subservience; it drew on the master's educational project much more than on the struggle's theories of empowerment, emancipation, and transformation.

Students still primarily listened. They still primarily learned the authority, determinacy, and coherence of text—the formalism of law—by attending black letter lectures. Moreover, students were still tested on memorized content. If they challenged and rejected what was said in class (and I assume and hope they did), they did so in the dormitories or in their daydreams during classes. Given the necessity of transforming the legal profession, students needed a much more active, demanding, and critical pedagogy, but no such pedagogy was in sight.12

Despite the promising textual plasticity of the new constitution, it was painful to see how little preparation law students had received for doing any creative constitutional analysis. Reacting to a tradition of Roman-Dutch law, under which judges still seriously discussed Roman statutes enacted 1400 years ago, and internalizing an English common-law tradition, in which the allure of rule-based stare decisis was equally strong, students found it hard to overcome the

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misconception that law is determinate. That rebellious, interpretive step was even harder given the mesmerizing education that they received—one of attending black-letter lectures in which they were supposed to memorize that law in order to regurgitate it on an end-of-the-year exam. Sadly, many students would never study the new constitution that was enacted while they were in law school! They would never learn about the legal imagination and transformative legal arguments necessary to challenge colonialism's age-old laws. Even more sadly, on the day the new constitution came into effect, the law school at UDW did nothing to commemorate that historic occasion. As a consequence, I was not confident that my alternative and more critical skills pedagogy would make much of an impact in this passive sea of textual dependency.

C. The Clinic at the University of Durban-Westville and University of Natal-Durban

Fortunately, instead of being confined to the textual determinacy of the tradition classroom, I was recruited by Yousuf Vawda, the only clinician on staff, to supervise legal writing and to act as a supervisor in the UDW law clinic. This recruitment turned out to be the most fortuitous aspect of my experience in South Africa, though I also greatly valued my collaboration with clinicians at the UND, where I co-taught a five-week simulation on interviewing, counseling, and negotiation. Yousuf, who had been an important African National Congress leader in the Indian community, was a gifted teacher, a skilled practitioner, and a willing confidant; without him, I would have learned, and contributed, far less.

The clinical program at UDW was staffed and resourced on a shoestring. Yousuf supervised forty-five students who worked intake in teams of six, with each student getting to work on four to six cases a year, individually or with another student. “Working on cases,” however, was a misnomer as most matters were resolved via advice rather than through court proceedings—if for no other reason than because students could not appear in court and Yousuf could not pursue the three hundred cases that came into the office each year. Because students could not practice in court, their role was ordinarily limited to interviewing and counseling, investigation and correspondence, and occasionally negotiation. Although the bulk of the clinic work was done on campus, at quite
a distance from the impoverished communities served by the clinic, students also attended two three-hour Saturday clinics in outlying townships. Here too, students and supervisors mainly provided advice; for more complicated matters, clients were given an interview slot back at school.

While I was at UDW, the typical clinic case was handled in the following fashion. The student conducted the initial interview and then met midstream with his or her supervisor while the client sat in the waiting room. The supervisor would explore the basic contours of the problem, discuss the additional information the student needed to uncover, and discuss preliminary legal assessments and advice. Depending on the complexity of the problem and the competence of the student, the student, or the student and supervisor, would then meet with the client, who had been waiting for as long as an hour, to give initial advice and to discuss terms of representation. After the interview, students would do preliminary research and write an interview summary that I critiqued. Students would continue to work on each of their assigned cases until completion, drafting another assignment that reported their legal analysis of the client's problem.

In addition to having designed these two new writing assignments, I suggested to Yousuf, and he agreed, that we institute a practice of "grand rounds" during which the six students who worked in the clinic in the morning would meet in the afternoon to discuss their respective cases. Grand rounds became the most valuable and fascinating part of my work because they permitted true cross-cultural exchange between students (sixty percent African and forty percent Indian) and instructors.

During my sabbatical, I also worked with clinicians at UND, which was much better funded than UDW and had six-eight clinicians at a time, including a director, a visiting Fulbright scholar, two or three full-time clinicians, and two or three recent graduates who were articling. At UND, I developed a six-week simulation based on a real case\textsuperscript{13} and then collaborated with the staff on having students role-play interviewing, counseling, case evaluation, and negotiation. At the same time, the clinic was representing multiple clients in a major urban land-reform case and I was able to collaborate with staff on client counseling strategies.

\textsuperscript{13} While in South Africa, I consulted with the Legal Resource Center in Durban on a maternity leave case that entailed several constitutional issues.
Both clinics handled an amazing variety of cases, many of which were grounded in unfamiliar cultural terrain. Despite the variety of disputes, I was surprised at the degree of substantive similarity between the U.S. and South African private law regimes. Accordingly, I found it relatively easy to supervise students on home-improvement scams, various tort (delict) claims, and employment cases. On the other hand, the novelty of cultural issues was extremely challenging but resulted, with some pain and miscues, in valuable cross-cultural learning. To illustrate this learning, I will introduce four vignettes that raised perplexing cross-cultural challenges.

III. CONCRETE CROSS-CULTURAL DILEMMAS

A. Lobola: Two cases involving interfamilial and gender justice

On a Thursday in May 1997, a Zulu client came to the UDW Clinic seeking legal advice about how he and his mother should proceed with respect to some “missing” cows. Specifically, the case involved “lobola,” the reverse dowry that Zulu grooms or their families must pay to the bride's family. Ordinarily, lobola is paid in cows and usually in multiples of eleven, though many families cannot afford such a steep price.

The marriage in this case involved the client's younger brother, and lobola had been agreed upon as six cows. The groom's family only had four cows so they gave an equivalent amount in cash for the other two. The in-laws did not take the four cows immediately because it was inconvenient for them to do so. Instead, they asked the groom's family to keep the cows for them. Subsequently, the groom's father became gravely ill, so the groom's family contacted their in-laws again and asked them to take the cows; but, the in-laws still did not come to collect the lobola. After additional inquiries, the groom's family eventually sold the cows because they needed the proceeds to move closer to a hospital to pay medical expenses for the mortally ill father. Quite recently, the in-laws had contacted the mother and the groom asking, “Where are our cows?” The groom's elder brother came to the clinic and asked, “What should we do?”

According to principles of Roman-Dutch and English law, the old roots of colonial South African law, the client’s family no longer owned the cows and was holding them for the benefit of the in-laws. The family had no right to sell the cows and had even less
right to use the money from the sale. There was even an argument that this sale constituted criminal conversion or theft. However, the widow was a pensioner and could not pay even a small amount toward this debt, even though she personally “sold” the cows and applied the proceeds for her husband's benefit. Because the older brother was now the eldest male and because by tradition his reputation and the reputation of the entire family at stake, he came to seek “legal” advice about this dispute both with respect to his mother's and his own obligations.

In a second case involving lobola, a young man came to the clinic on behalf of his girlfriend who was pregnant and who had been expelled from church boarding school and sent home because of her pregnancy. The young man wished to get her back in school, but the situation was complicated—the young woman had told her mother, but not her father, about the pregnancy. Even worse, in terms of her safety, the young woman had not formally introduced her boyfriend to her father because the boyfriend could not afford to pay lobola. As the young man described the circumstances, it became clear that there was some substantial risk of violence to the young woman from her father for becoming pregnant at all, but even more so for becoming pregnant by an unannounced suitor.

Under existing South African law, we did not yet have a client in this second case. Clearly the young man could not be a surrogate for the young woman. Moreover, because she was a minor, South African law would require the parents to be her legal guardians. Yet, the new constitution directly prohibited pregnancy discrimination and arguably had “horizontal” application to a religious school receiving state subsidies as well as vertical application to purely public schools. Moreover, the concepts of constitutional standing in the South African Constitution are much broader than in the U.S. and might in fact permit the boyfriend to challenge the pregnancy discrimination either on his own behalf or for the benefit of the unborn child.\textsuperscript{14} To make things even more complicated, paying lobola was not the only option; the young man could pay a smaller number of cows as “damages” to the family for having impregnated the young woman. Thus, in the midst of seeking advice about how to help get his girlfriend back in school, something we could not undertake until we actually met with the young woman, the young man was indirectly seeking

\textsuperscript{14} Constitution of the Republic of South Africa § 38.
advice about how to meet his lobola or damages obligation and how to face up to the now irate father. For Yousuf, the students, and me, this seemed like a case in which the assertion of constitutional rights might be conditioned on the payment of lobola.15

In each case, the perplexed clinical student brought this matter to afternoon grand rounds and asked fellow students and the supervisors how to advise the client. My first reaction was one of cultural incompetence, confounded by strong intuitions (and prejudices) about the gender politics of lobola. Although I wanted to respect and preserve cultural expressions that had sustained traditional communities for many generations, the cattle-based economy of rural Zulu villages was clearly giving way to massive urbanization with the consequence that cows and crowded townships did not actually mix very well. Thus, the “tradition” of lobola, particularly expressed through the exchange of cows, was making less and less sense even to those who valued it as a cultural practice. On the other hand, and in opposition to my respect for tradition, I had deep reservations about the subordination of women in South African tribal traditions, though I by no means intend to suggest that there is subordination only in tribal communities or that there are not equal degrees of gender hierarchy in other South African communities, whether Indian, English, or Boer. Confirming my reservations, early on in South Africa, I had heard several African feminists describe lobola as a patriarchal bride’s price that was being used to justify men’s domination of woman, escalating patterns of spousal abuse, and male dominance in the household. Pointing to the increased incidence of domestic violence, some feminists were arguing that men believed they could damage what they believed they “owned.” Other cultural critics challenged the practice of lobola because it now had a negative impact on marriage rates. Many rural and township people never married because they could not afford to do so, leading to disruption of intrafamilial ties and even less economic security for women and children.

Because we had a diverse group of students, Yousuf and I could rely on Zulu students to inform us, and their non-Zulu colleagues, about the cultural practice at issue. I supplemented students’ accounts with an extended discussion with my principle

15 By the time I left South Africa, neither the client nor his pregnant girlfriend had come back to the clinic.
Zulu host, Mtholephi Mthimkhulu, a respected community leader who had negotiated lobola for others on many occasions. And, of course, these multiple cultural explanations of lobola were not monolithic. Zulu students and Mthimkhulu had differing understandings and different degrees of support for the practice of lobola. Both agreed, however, that lobola is very important in Zulu culture, and many other Southern African cultures that have similar marriage traditions. According to our informants, although some people interpret lobola as the practice of buying and selling a bride, this interpretation becomes complicated when one weighs all the economic factors, gifts, and contributions involved. For example, under Zulu custom, which is patrilineal, the wife becomes a member of the groom’s family and after marriage is the financial and moral responsibility of that extended family. Thus, for example, if the woman is widowed, the groom’s family remains financially responsible, and, if she is of child-rearing age, she would ordinarily remarry one of her husband’s brothers. In addition, after marriage, the bride ceases to contribute economically to her family of origin. Accordingly, any costs that her birth family incurs raising and educating her would be “lost” unless the groom’s family contributes economically to the bride’s family. Moreover, the bride’s family usually contributes furnishings for the newlywed’s household. Therefore, in many respects, the payment of lobola is designed to compensate for lost costs of raising a daughter, for her diminished duties to care for her family of origin, and for the her family’s contributions to the the wedding and a new household. When added up, the two families jointly subsidize the new union and the entire community enjoys several days of feast and celebration in return.

In the first “missing cows” case, by sharing baseline cultural information and additional information about traditional forms of dispute resolution, we learned that these matters should be handled through discussion between elders of both families under Zulu customary law. In such a forum, the in-laws might very well forgive an “emergency” sale, though the underlying “debt” would not be extinguished. In the second case, we also confirmed that the young man might be well served by seeking advice and intervention from elders in his family and that time was of the essence because the risks of violence became much greater when the young woman began to “show” in public. On each occasion, we were able to use the students’ cultural knowledge to inform our discussion on whether to apply customary law or formal law and
whether to provide advice about public legal forums or about customary channels of dispute resolution. Likewise, we were able to engage the students in a discussion about the gender politics of lobola and about whether those politics played any role either in their advice in the instant cases or in their future work as lawyers and citizens.

Based on the vibrancy of grand round discussions of these two lobola cases, I used the "pregnancy" fact pattern in training clinical students at UND. In that context, many students raised concerns about the pregnant woman's obligations as a mother and most argued that she should be expelled or separated from school, particularly a Christian boarding school where the example of her "loose" morals would be detrimental to other girls. Students also strongly felt that a mother's first and foremost obligation would be to her infant and that her bonding obligations required a full-time commitment. As a result, several students expressed reservations about the morality of even representing the young woman in this context. Although I was initially perplexed by the near unanimity of opinion on this topic, I was later reminded how prevalent the same views had been in the U.S. only forty years earlier. During a faculty colloquium at Northeastern, my colleague Judith Brown recalled how female teachers in the U.S. were often required to be unmarried well into the twentieth century and how pregnant teachers (and students) were usually required to leave school as soon as their pregnancy was discovered.

B. Paid Maternity Leave: Choice versus Custom

While in Durban in 1997, I consulted with the Legal Resource Center (LRC) on a teacher's case involving paid maternity leave for the birth of her third child. I later used the same case as a case study for a counseling and negotiation segment at the UND clinic. Under South African law, "confinement leave" for late pregnancy, childbirth, and postpartum recovery is mandatory. It is a criminal offense for an employer to permit a pregnant employee to work during the last four weeks of pregnancy or to return until eight weeks after the birth of the child; it was also a crime for the employee to do so. In the private sector, women could collect unemployment insurance, forty-five percent of their wages, for their period of confinement for multiple pregnancies. In the public school system, however, women received one hundred percent pay for the first two pregnancies but zero percent for subsequent
pregnancies, though they could use accumulated vacation leave. The LRC decided to bring a constitutional challenge to this law, arguing that the mandatory unpaid leave constituted gender discrimination, pregnancy discrimination, a violation of reproductive freedom, and discrimination against public-sector employees.

While working on this case, I received valuable cross-cultural information from my students about customary confinement (maternity) practices in African and Indian communities. I was told that it was quite common for women in both communities to separate completely from their husbands and other men for a period of three weeks to three months postpartum depending in part on when the umbilical cord fell off, in part on how long local culture favored total maternal access for breast feeding and infant bonding, and in part on the traditional period of sexual abstinence. As a result, few women had experienced a situation in which women exercised free choice about confinement or about their degree of postpartum contact with men in public spaces.

Although I lobbied at the LRC that teachers should have freedom of choice with respect to the length of the leave and that this choice option should be openly discussed with the client, I was unsuccessful on both counts. During debates with my co-counsel, I was told that the vast majority of South African women wanted an even longer period of paid maternity leave, evidenced by proposed legislation requiring a mandatory four-month leave with pay with an optional two months without pay. I was also gently chided that choice and autonomy were "Western" feminist preoccupations in the context of this case.

Despite this reassurance about a cultural and political consensus respecting mandatory confinement leave, I had a nagging sense of uneasiness because women did not experience the same freedom of choice and autonomy that men did with respect to reproduction, parenting, and work. My dilemma was how to raise this uneasiness in a challenging yet respectful way with my students. Ultimately, I decided to do so by including the "choice" option in a mock client counseling session. In discussing the "choice" theme beforehand with my students, I acknowledged that I was raising this issue from my perspective as a "pro-feminist" U.S. academic, disclosing, as well, that choice was a key concept in liberal American jurisprudence. What was most interesting to me in the discussion that followed was that students were engaged much more intensely than in many of our previous discussions. In
one of the most interesting exchanges, a handsome young African man, purporting to speak on behalf of all African societies, argued that African men wanted their women to be confined postpartum, that women wanted it also, and that the Western "feminist" insistence on choice was a colonialist imposition. To the best of my memory, I said, "That's interesting—I wonder if all the women here feel that you can speak on their behalf?" Several women immediately spoke in favor of more freedom for African women in general and more freedom for women with respect to work in particular. However, other women forcefully argued for the value of maternal bonding, for the primacy of parental responsibilities, and for a mandatory policy that preserved traditional values concerning maternity/confinelement leave. In other words, they echoed the strong cultural theme about maternity I had heard in their earlier discussion of the school-girl pregnancy case.

An equally robust discussion focused on whether the teacher should receive full pay for her confinement leave. Some students expressed concern whether the school would have money to hire a substitute teacher. But a larger concern was the proportion of education money that goes to "wealthy" teachers versus poor students. As one particularly eloquent young man put it.

Our schools do not have toilets, they do not have running water, they do not have desks, they do not have books. Why should we pay money to a relatively wealthy woman who has chosen to become pregnant? Why should we pay her not to work? That money should be paid to improve the schools and to educate our children not to make her financial condition even more secure.

I must admit I did not have a ready answer to this class-based argument. Coming from a country where public school teachers are middle class (and underpaid), I was unprepared for the perspective that teachers were class privileged and that their high earnings came directly at the expense of student learning.

C. A Missing Baby: Chaos at a Pediatric Morgue and Administrative Justice

In April of 2002, during my most recent visit to Durban, I worked again in the UDW law clinic as a clinical supervisor. On April 16, a young man came to the clinic with the following,
devastating story involving a missing baby, the AIDS pandemic, and institutional chaos in a pediatric mortuary.

The client, a young man in his early twenties, told his student interviewer that his girlfriend and he had had a baby the previous year and that the baby was born very sick and had been kept in the hospital. The mother stayed with her baby as much as possible, contributing to his care in a crowded and under-resourced pediatric ward. The client visited the hospital once to bring his girlfriend a change of clothes and some baby clothes. At that time, he acknowledged his paternity to the hospital staff. As the baby’s condition worsened, the baby was transferred to another public hospital where he died at the age of six weeks on Easter weekend, April 12, 2001.

The client and his girlfriend were inconsolable, but they went home to plan the funeral. Having scraped together money for a coffin and burial ceremony, planned atypically for a Wednesday rather than a Saturday, they contacted a funeral home to prepare the body for burial. On Tuesday morning the funeral home told the young couple that there was a problem at the hospital and that they should go to the morgue to identify their baby. Upon arriving at the morgue, the mortician took the couple that there had been a mix-up and that they would have to return on Thursday.

Accordingly, the parents rescheduled the funeral and returned to the hospital as directed. The mortician took them into the morgue, opened a drawer and asked the couple if the baby inside was theirs. Instead of a small dark-skinned, six-week old baby boy, the body in the mortuary drawer was that of a much larger and much lighter-skinned six-month old. When the couple said that that was not their baby, the mortician told them that there must have been a mix-up and that their baby had been given mistakenly to another family for burial. Although the mortician had the other family’s last name and the distant township in which it lived, he did not have an address.

At this point the mother was crying hysterically and kept saying that she wanted her baby. The mortician suggested that the couple “bury this baby because the other family has buried yours.” When the couple expressed outrage at this suggestion, they were referred to the hospital’s medical superintendent. The superintendent promised to investigate the matter and get back to them. Although nearly a year had passed, the couple had heard nothing further from the hospital.
During a break in the interview, the student interviewer brought this story to his clinical supervisors, T.P. Pillay and me. As we explored the case with the student, we tried to find out more about the mother and why the unmarried boyfriend was there by himself. In response, the student told us that the client had said that his girlfriend was too upset to come to the office and that she still cried all the time over her missing baby. The client had told the student that his girlfriend wanted him to handle the matter because “he was the man.” When we asked the student what relief the client wanted, we were told that he wanted compensation for the missing baby, but that he was no longer interested in discovering the current whereabouts of the baby or in giving his son a proper burial. We were curious about the client’s desire for compensation only, given the importance of a proper burial in Zulu custom and given the mother’s reported grief. T.P., and I decided that we would have to follow up these issues with the client directly.

In addition, we would have to investigate the father’s relationship to the child and whether he had sufficiently acknowledged paternity to bring a claim on his own behalf. According to South African law, the mother of a child born out of wedlock is the natural guardian and would stand as the legal representative for this kind of claim. Thus, we anticipated that we would have to explain to the client that his girlfriend might have to become involved, at least as a witness and possibly as the nominal client. Complicating the matter even further, we learned that the mother was not yet twenty-one, meaning that she too had not yet reached the age of majority. Technically, therefore, as discussed earlier in the pregnancy case, the young woman’s parents would ordinarily be the formal clients, acting for their daughter. The case was becoming increasingly complex, even more so because the one-year statute of limitations was set to expire in seven days.

After discussing these issues among ourselves, T.P. the student, and I collectively re-interviewed the client, who fortunately spoke a little bit of English. The client confirmed the information that the student had given us and reiterated his position that he and his girlfriend could not stand the trauma of digging up their baby’s body only to rebury it. He assured us that his girlfriend would come to the office, but that she would want him to handle the case. Accordingly, we arranged for the client to return with any documentation he could find about the
hospitalization, the cause of death, and the inquiries he had made at the hospital morgue.

During the afternoon grand rounds, we discussed this case at length. We tried to brainstorm how the mix-up could have occurred. For example, given the physical differences between the babies, we could not figure out how the other family had not recognized that the baby they took was not theirs. We asked students whether burial customs for a child included an open or closed casket and were told that practice varied. Based on the presence of the second body in the mortuary drawer, it seemed clear to us that there had been more than one baby's body at a time. Therefore, we asked students why they thought there might have been such dramatic overcrowding at the morgue. Finally, to understand our client's wishes more clearly, we asked about the strength of tradition that the child be properly buried to "appease the ancestors."

When asked whether he had made any effort to comfort the distraught father, the student said that he had not and that he felt it was his job to remain "strong" so that he could give the client dispassionate legal advice. When asked whether he had felt it would be appropriate to acknowledge the client's sadness through "active listening" and by naming the client's emotions, the student said he had not done so because it would be embarrassing to the client: it had been a sign of weakness for the client as an African man to cry in the presence of another man. This permitted us to discuss how both the father and the interviewer were enacting a gender role of "strength" to handle adversity and how men react when their culture says they "can't cry."

As part of this line of inquiry, we asked students to try to identify with the client more directly, to imagine how they would feel in like circumstances. I told them that I was reacting strongly because my own younger son is a cancer survivor and I had faced the threat of a child's death. After that somewhat nervous revelation, I asked the students whether any of them were parents; and five of them promptly said no. The interviewer smiled uneasily and looked down. I asked him directly whether he had any children. He said yes, and admitted that he too could

imagine what it might feel like to lose a son, but that he still felt that he must “stay strong” for the client.

Of course, we also discussed the legal basis of the claim. The students recognized that it was a delict (or tort) claim, but they had difficulty classifying it further as negligence or infliction of emotional distress or some other even more inchoate wrong. They had to be pushed to consider whether there might be a constitutional claim given that a public hospital had not only misdirected the baby’s body, but had also failed to deliver any modicum of administrative justice in responding to the parents’ request that the child’s body be located. These issues and the practicalities of dealing with such a complicated case in just seven days would have to be weighed before we took on the case.17

Throughout our post-mortem grand round, the student who handled the missing baby case seemed shell-shocked into a state of denial, but he was not alone. His three supervisors were also highly distressed at the client’s story and the larger context in which it arose. It is to that context that I now turn.

IV. WAKENING TO THE AIDS PANDEMIC

For me, in 1997, South African AIDS started as a rumor, a whisper, a tremor in the body politic of the post-apartheid state. Human Immunodeficiency Virus (HIV), historically the scourge of gay communities in the U.S., a localized epidemic among IV drug users, and a disease mistakenly linked to Haitians, was on South Africa’s heterosexual threshold, knocking but unacknowledged. When I returned in 1998, the rumor was more persistent, but the public and private discourse of AIDS continued to be hushed. By 1999, the Treatment Action Campaign (TAC), a new cadre of activists, was pressuring the South African government to use anti-retrovirals to prevent transmission of HIV from sero-positive mothers to their newborns, and Nkosi Johnson, an HIV positive ten-year old, had become a national symbol of children living with AIDS. But still, the extent of the disease was shrouded by stigma and silence.

In July 2000, the reality of the disease in South Africa was revealed not just to me but to millions of others, not just in South Africa but worldwide. Durban hosted the XIII International AIDS Conference, and some of my friends in TAC were organizing a

17 In the end, the case was referred to a private practitioner.
sophisticated campaign for HIV awareness and, more significantly, for treatment. On July 9, on the eve of the Conference, 6,000 persons chanting Zulu slogans marched for access to affordable treatment.

Although many facts, scenes, and stories that summer affected me strongly, the figures that struck hardest were those from UDW, where I had worked with hundreds of students. There, a voluntary HIV testing survey revealed infection rates of twenty-six percent in women and twelve percent in men, aged 20–24, and thirty-six percent in women and twenty-three percent in men, aged 25–29. Suddenly, my classroom was not filled merely with future professionals and leaders, the hopes of small villages and extended families. One out of four students would be dead in ten years—in the prime of their lives. They would have little or no access to medicines or medical care; they would face social stigma within a culture of denial; and they would leave aging parents and young children behind.\(^{18}\)

There is no doubt that South Africa in particular, and sub-Saharan Africa as a whole, are in the middle of an HIV/AIDS crisis of catastrophic proportions. Each day, more than 6,500 Africans die of AIDS, twice the number who died at the World Trade Center on September 11, 2001.\(^{19}\) Available data indicates that five million South Africans were infected with HIV as of December 2001, approximately twenty percent of the adult population ages 15–49.\(^{20}\) One year later, on December 1, 2002, 29.4 million people are infected throughout sub-Saharan Africa, seventy percent of the worldwide total of forty-two million.\(^{21}\) Because the pandemic has exploded within the past decade, the inevitable death toll is

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\(^{18}\) More recent national figures predict that by the year 2005, one third of university students will be HIV positive. Mail & Guardian (Johannesburg), \textit{Varsities to Mount Huge Aids Campaign} <http://allafrica.com/stories/printable/200110250665.html> (Oct. 26, 2001).

\(^{19}\) In 2002, 3.1 million people died of AIDS worldwide, 2.4 million in sub-Saharan Africa. UNAIDS, \textit{AIDS Epidemic Update: December 2002} 36 <http://www.unaids.org/worldaidsday/2002/press/update/epiupdate_en.pdf> (Dec. 2002) (hereinafter UNAIDS Update 2002). Doing the math, 6,575 people died, on average, each day. There has been some controversy about the accuracy of UNAIDS estimates of HIV incidence and AIDS death statistics. Rian Malan, \textit{AIDS in Africa: In Search of the Truth}, Rolling Stone 71 (Nov. 22, 2001). All estimates are based on incomplete sampling and projection models based on relatively small numbers; this does not mean that the numbers are made up.


\(^{21}\) UNAIDS Update 2002, \textit{supra} n. 19, at 34.
mounting—360,000 AIDS funerals in South Africa in 2001, 2.2 million in southern Africa, three million worldwide. 22

A disproportionate number of HIV infections occur in late teenage and young adult years, especially in Africa. 23 Although HIV/AIDS in Africa affects both men and women, women now have a higher overall infection rate than men, largely because of heightened biological vulnerability to transmission if HIV during heterosexual sex. 24 As a result, fifty-eight percent of adult HIV infections in Africa are now female. 25 Women also contract the virus at a much younger age, five to ten years earlier, 26 because of numerous co-factors, including cross-age sex between younger teenage women and older, already infected men, 27 the effects of young age and sexually transmitted diseases on vaginal susceptibility to viral transmission, 28 and lack of power of younger

25 UNAIDS Report 2002, supra n. 20, at 190 (reporting that fifteen million out of twenty-six million adult infections are in women). Among young people, the disparity is even more pronounced: 7.3 million of 11.8 million infected youths are female. Kiragu, supra n. 23, at 6.
28 UNAIDS, Report on the Global AIDS Epidemic 46–9 [hereinafter UNAIDS Report 2000] <http://www.unaids.org/epidemic_update/report/Epi_report/css/Epi_report_3.htm.> (June 2000). Younger women are particularly vulnerable to reproductive tract infections that contribute to HIV vulnerability because adolescent women have fewer protective antibodies than older women and because the immaturity of their cervixes increases the likelihood that exposure to infection will result in the transmission of the disease. Recent studies have found that fifty-two percent of women seen in public health clinics in KwaZulu Natal province on any particular day are likely to be suffering from an untreated STD. A.W. Strum, Pregnant Women as a Reservoir of Undetected Sexually Transmitted Disease in Rural South Africa: Implications for Disease Control, 88 Am. J. Publ. Health 1243 (1998). This is an important factor in the escalating incidence of HIV infection in sexually active women. In addition to STDs, other untreated reproductive tract infections can increase susceptibility to transmission.
women to negotiate safer sex practices. Even though 2001 South African statistics reveal a national infection rate of roughly 24.5% in women at antenatal clinics, the rate is considerably higher in KwaZulu Natal, ground zero of the pandemic, where more than thirty-six percent of pregnant women tested HIV positive. Likewise, the infection rate spikes much higher in mining communities where prenatal screening programs show an infection rate as high as sixty percent. At these rates of infection, a fifteen year-old South African has more than a sixty-five percent probability of dying eventually from AIDS; for teenagers living in KwaZulu Natal or in neighboring Botswana, the likelihood of dying from AIDS exceeds eighty-five percent.

A particularly devastating aspect of the disease is that it can be transmitted vertically from mother to child during pregnancy, delivery, or breast-feeding. In South Africa alone, 70,000 to 100,000 cases of mother-to-child transmission occur each year, another 600,000 in the rest of Africa. Although effective and low-cost anti-retroviral therapy protocols can reduce mother-to-child transmission by as much as fifty percent, these preventative measures are just now become more widely available in South Africa as a result of a successful TAC lawsuit, but such therapy remains virtually unavailable elsewhere in Africa.

HIV/AIDS affects all racial groups in South Africa, but the infection rate for Black Africans is by far the highest because of cofactors associated with poverty, including reduced nutrition,
reduced access to primary health care, increased exposure to opportunistic and debilitating diseases, and disrupted family structures. The infection rate is high, but not as high in Coloured communities and lower yet in white and Indian communities, where the general state of health, access to health care, and more stabilized family structures decreases exposure to HIV and increases resistance to the disease and its progress.

Currently, antiretroviral drugs (ARVs) and drugs for opportunistic illnesses (OIs) are not readily available in Africa largely as a result of price. Although the marginal cost of producing triple ARV therapy may be as low as $201 per year, the full private sector price in Africa still hovers in the $10,000 to $15,000 per year range, the same as in the U.S., though some limited and highly conditional discounts have been offered to the public and NGO sectors through the patent drug industry's Accelerating Access Initiative. At the end of 2001, out of 28.1 million infected Africans, four million of whom should have been on ARVs, only 30,000 were receiving ARV therapy. That number had increased to 50,000 by the end of 2002, still meeting only one percent of treatment need. Even in South Africa, sub-Saharan

36 Sun. Times (Johannesburg), From Despair to a Gleam of Hope <https:llwww.sundaytimes.co.za/20011125/insight/in03.asp> (Nov. 25, 2001) (reporting research by Mark Colvin of the Medical Research Council showing infection rates of thirteen percent for Black Africans, three percent for Coloureds and two percent for whites and Indians). As more recent report from a study commissioned by the Nelson Mandela Foundation and conducted by the Human Sciences Research Council, found racial infections rates of 12.9% among Black Africans, 6.2% among whites, 6.1% among Coloureds, and 1.6% among Indians. Anso Thom, HIV/AIDS Shock New Findings <http://www.health-e.org.za/view.php?id=20021206&print=Y> (Dec. 9, 2002). Note that the racial composition of South Africa is 78.3% Black, 12.7% White, 8.8% "Coloured," and 2.2% Indian. U.S. Dept. of State, Background Notes: South Africa <http://www.state.gov/www/background_notes/southafrica_0004_bgn.html> (last updated Apr. 2000).


38 The Accelerating Access Initiative was announced in May 2000 as a partnership between UN organizations and five major pharmaceutical companies to increase access to HIV/AIDS care and treatment in developing countries primarily through voluntary price reductions ranging from 80-90%. As of March 2002, 35,500 people in Africa were being supplied by the companies involved in the Initiative. WHO & UNAIDS Progress Report, Accelerating Access Initiative: Widening Access to Care and Support for People Living with HIV/AIDS 1-2 (June 2002).


Africa’s richest economy, it is estimated that fewer than 20,000 patients, a tiny subset of the population in the private health sector, were receiving ARVs as of June 2002. For the vast majority of South Africans living with HIV, their only access to health care is through the public health sector, which is poorly resourced, overtaxed, and disorganized. More to the point, persons living with HIV/AIDS and using the public health sector do not have any legally authorized access to anti-retroviral medications nor, until recently, to many of the treatments and medications used against killer opportunistic infections. Once they are diagnosed, the vast majority of South Africans with HIV/AIDS, men, women, children, and babies, mostly Black, are told not to come back for treatment. In effect, they have been told to go home and die.

The consequences of the HIV/AIDS pandemic for the development and transformation of South Africa are truly frightening. Economically, there will be dramatic losses of life resulting in higher labor turnover rates and training costs, both of
which will negatively impact growth in domestic production and job creation. Likewise, absenteeism will increase among the ill and their caretakers. The incapacity of a smaller and less productive workforce will be particularly devastating in the agricultural sector exacerbating food insecurity, leading to increased rates of starvation and malnutrition, in turn leading to increased susceptibility to disease including HIV. Finally, the internal market for goods will be negatively impacted as the number of consumers, and their buying power, is reduced and as a growing percentage of the gross domestic product is diverted to medical, care-taking, and funeral costs.

Socially, the impact will be even more devastating. Certain communities will experience drastic losses of population, especially of young and middle-aged people in their most productive years, including teachers, medical workers, community activists, and political and traditional leaders. Because of the death of young parents in the prime of their lives, there are currently hundreds of


46 See Jonathon Simon et. al., Response of African Businesses to HIV/AIDS in


thousands of children orphaned by AIDS in South Africa\textsuperscript{50} and 11 million in sub-Saharan Africa\textsuperscript{51} – children who live without the benefit of parental supervision, support, and nurture, frequently without the benefit of further education, exposed to the uncertainty of living in fragile extended families,\textsuperscript{52} in child-headed households, or on the streets. By 2010, it is estimated that there will be nearly forty-two million orphans in Africa, more than twenty million of them orphaned by AIDS,\textsuperscript{53} a number roughly equivalent to the number of school-age children in the U.S. who live east of the Mississippi.

V. MOVING FROM PEDAGOGICAL COLLABORATION TO INTERNATIONAL SOLIDARITY

A. Why Did the Baby Die? How Was He Misplaced?

In this context, burdened with this knowledge about the growing South African AIDS catastrophe, I learned about the client’s missing baby. As the story unfolded, my body and soul filled with dread, not just for the tragedy that had overtaken this one young man and his girlfriend, but the greater tragedy of which it was part. Although the client had not said one word about AIDS, nor had the student, I had a growing suspicion, shared by Yousuf, that HIV had not only killed this baby but that HIV also explained the overcrowding at the morgue in which this mix-up occurred.

Yousuf and I were familiar with the rising death toll among children born HIV-positive, many of whom died before six months of age. We had heard of bodies piling up in morgues as families,
HIV-positive themselves, struggled to borrow money for funerals. We had also heard that many of these babies were abandoned at the hospital, abandoned by parents who couldn’t cope because of distance and dismay, and abandoned by parents, especially mothers, who may well have died in the interim. Even more regrettably, we had heard about mass graves near some hospitals where corrupt morticians and fly-by-night funeral homes had begun to bury young bodies illegally. Over lunch and later well into the night, Yousuf and I discussed the probability that AIDS was at the center of this horrible and callous tale.

Our suspicions were confirmed when the client and his girlfriend returned to the clinic with a one-page record from the hospital indicating the baby’s death was “AIDS-related.” Seeing the mother in the waiting room, painfully thin, listless, and jaundiced, I had little doubt that she too was dying of AIDS. Even though the boyfriend appeared healthier, it seemed likely that he too could be HIV positive. Perhaps this unacknowledged illness explained the client’s interest in monetary compensation; perhaps the couple wanted money for medicine instead of the certainty of a shared grave with their child. Given that the client had not come to us to discuss his HIV status, however, we now faced the moral and ethical dilemma of whether to raise the cause of death with him and whether to refer him and his girlfriend for voluntary HIV counseling and testing. Alternatively, if the couple knew their status, we might need to help them try to access palliative treatment for opportunistic infections since antiretrovirals were not available in the public sector. As we considered these options, we were frankly overwhelmed by the task of representation and by the disease at the heart of the client’s dilemma.

B. Activism Against Complicity in Medical Apartheid

This sense of being overwhelmed by a disease, the enormity of which I discovered while teaching legal skills in South Africa, has been with me many times during my return to the relative privilege of Northeastern University and of the U.S. health care system. Although I had begun my work in South Africa as a pedagogical collaborator and although I had recalibrated my role over time to focus increasingly on cross-cultural issues, I have since decided to join a new movement, one seeking access to affordable medicines for our African brothers and sisters living with HIV/AIDS. I also decided to address HIV/AIDS much more
explicitly in my teaching and to introduce legal academics to the crisis I had witnessed. This Article is one such effort.

Accordingly, in September 2000, upon returning from the Durban AIDS Conference, I co-founded an African AIDS Project among anti-globalization forces in Boston. After helping to organize a series of demonstrations against Pfizer, Inc., a representative of a drug industry that was blocking access to more affordable AIDS medicines, I started working with Health GAP (Global Access Project), an outgrowth of ACT UP treatment activists and other globally oriented public health activists. I have turned to this activism out of a sense of solidarity with people suffering a pandemic that I have directly witnessed. I have also done so out of a growing awareness that our government, our pharmaceutical industry, and our multinational corporations have played a calamitous and complicitous role in intensifying this new plague. Although this is neither the time nor place to discuss this complicity at length, I will briefly outline the U.S. government’s misfeasance and the campaigns that activists have launched to secure affordable and sustained access to life-saving HIV treatment and care.

In contrast to a recent rhetoric of concern, the actual practice of the U.S. government with respect to the global AIDS pandemic consists of fiscal neglect, programmatic incompetence, and ruinous trade policies. Fiscally, the U.S. has moved from a period of malign indifference in the 1990’s, during which it ignored the growing crisis and gradually reduced its health expenditures on

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54 In teaching an upper-level negotiation class, I now always use a contemporaneous access-to-medicine problem. I tell my students if we collectively develop something useful while role-playing solutions to real-life dilemmas, I will pass our lessons on to activists in the field. Similarly, for my first-year legal writing program, I have drafted a complex simulation situated the in AIDS pandemic. In Singh v. Expanded-Care, Inc., a 200-page case file, a bio-statistician blows the whistle concerning suspected adverse anemia affects in ongoing clinical trials of a new AIDS medicine. Using this simulation, I can expose students to the urgency of the AIDS epidemic and the urgency of developing new antiretroviral therapies. At the same time, I can acquaint them with the widespread disregard of human subject safety in clinical trials overseas, the impact of intellectual property rules, and the viability of discount pricing schemes as one solution to the growing crisis of inadequate access to treatment.


AIDS in developing countries, to the current period, during which it still offers a trickle rather than a torrent of money. Experts estimate that nearly ten billion dollars a year needs to be spent on HIV/AIDS prevention, care, and treatment each year, a sum that will grow over time. By this standard, the current level of U.S. spending on international AIDS programs, based on the size of its economy, is less than a third of what it should be—a billion dollars instead of three billion dollars. Most appalling to activists is the U.S.’s covert effort to undermine the Global Fund to Fight AIDS, TB, and Malaria, a bold new initiative designed in substantial part to fund comprehensive new HIV/AIDS programs


59 Kofi Annan, General Secretary of the United Nations, in proposing a Global Fund to fight HIV/AIDS, TB, and Malaria, estimated that an initial response to AIDS, TB, and malaria in low- and middle-income countries would cost between seven and ten billion dollars a year, with half of those resources needed in sub-Saharan Africa. A UNAIDS report published in Science Magazine on June 22, 2001, estimated that the world’s poorest 135 countries would require $3.2 billion dollars in 2002 and $9.2 billion dollars by 2005 for a comprehensive AIDS prevention, treatment, and care program. Of the $9.2 billion, $4.8 billion would be spent on prevention efforts and $4.4 billion on treatment, including $1.13 billion for the purchase and distribution of antiretroviral medicines at rock-bottom prices. Expenditures for treatment would expand over time as health care delivery capacity increased and as more people living with HIV reached the clinical threshold for ARV therapy. Other researchers have proposed similar levels of funding. See Individual Members of the Faculty of Harv. U., Consensus Statement on Anti-retroviral Treatment for AIDS in Poor Countries <http://www.hsph.harvard.edu/hai/conferences_events/2001/consensus.htm> (Mar. 2001). In the Consensus Statement, 128 Harvard faculty members endorsed a proposal for fighting AIDS in sub-Saharan Africa that would cost $4.1 billion a year during the first three years and then expand the program to $6.3 billion in 2005 as more African receive anti-retroviral therapy. It recommended that the U.S. government’s initial funding be $1.5 billion a year. Similarly, in its recent report, the World Health Organization proposed dramatically increased expenditures in health care funding. World Health Org. Commn. on Macroeconomics & Health, Macroeconomics and Health: Investing in Health for Economic Development <http://www3.who.int/whosis/cmcb/cmh_report/e/pdf/001-004.pdf> (Dec. 20, 2001). With respect to the Global Fund, the Report endorsed a scaling up to eight billion dollars by 2007 and significant expenditures on HIV/AIDS prevention, treatment and care in developing and impacted countries (six billion, five billion, and three billion dollars respectively by 2007).
in developing countries. Unfortunately, the U.S.'s paltry initial contributions have set a standard that has already essentially bankrupted the Fund.

In addition to withholding needed donor resources, the U.S. has also pursued policies that have reduced African countries' ability to spend their own resources on HIV/AIDS and other health care programs. For example, after engaging in policies that have burdened Africa countries with over $227 billion in debt, requiring massive debt repayments of more than $14.5 billion a year, the U.S. has provided virtually no meaningful debt relief. As a

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60 The concept for an international funding mechanism to fight HIV/AIDS, TB, and malaria began at the Okinawa G8 Summit in July 2000. At the urging of UN Secretary General Kofi Annan and many national leaders, the concept of the Fund was unanimously endorsed in June 2001 at the first UN General Assembly Special Session to focus on HIV/AIDS. In July 2001 at its meeting in Genoa, G8 leaders committed US $1.3 billion to the Fund. The Global Fund to Treat AIDS, TB, and Malaria: FAQ <www.globalfundatm.org/faq_gfund.html> (Feb. 2002).


62 See Francisco G. Pascual, Jr., The Development and Historical Context of the Debt Crisis <http://jubileeisouth.net/summit/19991119/address_pascual.html> (1999). According to Pascual, Africa has been buried in debt starting in the late 1960's, culminating with $227 billion in debt by 2000. Although much of that debt was at one point private debt, frequently debt of private industry to private banks used in the capitalization of productive capacity, the debt increasingly became multilateral and bilateral, debt owed by African governments to individual governments and/or to the World Bank and International Monetary Fund. As the value of export products plummeted in the 1980's and as the costs of luxury and capital imports increased, African countries needed to borrow more and more money to refinance their foreign currency reserves. Similarly, as the World Bank lent money to governments to build physical infrastructure appropriate to an import/export economy and as First World governments bilaterally lent money to finance purchase of excess goods, military and non-military, from same-nation producers, the African debt burden became more and more bloated. Fundamentally, Africa is now permanently indebted as a result of an inherently imbalanced pattern of trade between the under-priced agricultural and pre-industrial economies of the South and the overpriced industrial economies of the North. In 2000, annual debt servicing charges equaled nearly $14.5 billion a year, nearly five percent of GDP and fifteen percent of export earnings (less now because of some modest debt restructuring pursuant to the World Bank's Highly Indebted Poor Countries Initiative).

63 See Oxfam Briefing Paper, Debt Relief and the HIV/AIDS Crisis in Africa <http://www.oxfam.org.uk/>
result, many African countries spend more on foreign debt payments than they do on domestic health care. This debt burden has combined negatively with U.S.-backed structural adjustment policies, imposed by the World Bank and International Monetary Fund, that cap public spending and that require cost recovery (user fees) for health care goods and services. These structural adjustment policies have required even steeper reductions in health care spending and decreased usage of public health services.

Programmatically, the U.S. has primarily funded ABC (abstain, be faithful, condomize) prevention programs and until the summer of 2002 had never delivered a single anti-retroviral pill to a single African living with HIV. Even with respect to prevention, U.S. interventions have become increasingly flawed because of a increased reliance on faith-based abstinence messages...
at the expense of condoms and safe-sex messages. In addition, the U.S. has defunded some international family planning services because they counsel women re lawful abortion services.

In terms of trade policy, the U.S. government has consistently pursued the commercial interests of the hugely profitable U.S. patent pharmaceutical industry at the expense of access to more affordable medicines in developing countries. The prime example of this warped sense of priorities occurred in multilateral negotiations that established a uniform system of international intellectual property rights, the World Trade Organization's Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS). Even after the passage of TRIPS, the U.S.

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68 Pharmaceuticals have ranked as the most profitable sector in Fortune 500 rankings for the past three decades. The top ten U.S. drug makers increased their profits by thirty-two percent from twenty-eight billion dollars in 2000 to thirty-seven billion dollars in 2001. Together these ten companies report profits of 18.5 cents for every dollar of sales, eight times higher than the median for all Fortune 500 industries. Scott Gottlieb, Drug Companies Maintain “Astounding” Profits, 324 B.M.J. 1054 (May 4, 2002). Worldwide sales in 1999 were $315 billion, more than the gross domestic product of all Southern African Development Community countries combined. Similarly, the combined worth of the five largest companies is twice the GDP of all of sub-Saharan Africa.

69 Art. 8(1), Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 I.L.M. 81 <http://www.wto.org/english/docs_e/legal_e/27-trips.pdf> (1994). The TRIPS Agreement introduced minimum global standards for protecting and enforcing nearly all forms of intellectual property rights, patents, copyrights, and trade secrets, including those applying to pharmaceuticals. The Agreement covers basic principles, standards and use of patents, enforcement, dispute settlement and multiple other subjects, many of which are tilted in favor of intellectual property owners and against the interests of consumers. Under key provisions in TRIPS, member countries must provide patent protection for a minimum of 20 years from the filing date of a patent application, for any invention, including a pharmaceutical product or process, that fulfills the criteria of novelty, inventive step, and usefulness. Although preceding patent-rule pluralism in both the developed and undeveloped world had allowed discrimination between fields of invention, for example by excluding medicines, TRIPS expressly outlawed such discrimination. Similarly, it was no longer permissible to discriminate against imports in favor of locally produced products, thus allowing major pharmaceutical companies to control the place of production. Because of TRIPS, the major pharmaceutical producers succeeded in consolidating their monopoly power internationally – they have exclusive rights under Article 28 to exclude others from “making, using, offering for sale, selling, or importing” patented pharmaceutical products or products made with a patented process. In addition, the Agreement has provisions protecting undisclosed information (including clinical test data) that impede registration of generic drugs. For a longer discussion of the impact of the
continued a heavy-handed trade policy that threatened developing countries such as Thailand, South Africa, and Brazil with trade sanctions because they refused to grant even greater TRIPS-plus rights to patent holders. More recently, after initially agreeing in the Doha Declaration on the TRIPS Agreement and Public Health to give developing countries increased leeway to utilize loopholes in TRIPS to access cheaper generic medicines, the U.S. has reneged on its binding commitment and blocked meaningful efforts to liberalize access to generics despite several mechanisms


\[71\] At the WTO Ministerial meeting in Doha, Qatar, on November 14, 2001, the U.S. government signed The Declaration on the TRIPS Agreement and Public Health (Doha Declaration), declaring that:

4. We agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all.

5. In this connection, we reaffirm the right of WTO Members to use, to the full, the provisions in the TRIPS Agreement, which provide flexibility for this purpose.

(b) Each Member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted....

(d) The effect of the provisions in the TRIPS Agreement that are relevant to the exhaustion of intellectual property rights is to leave each Member free to establish its own regime for such exhaustion without challenge, subject to the MFN and national treatment provisions of Articles 3 and 4.

Ministerial Conference, Fourth Session, Doha, Nov. 9-14 2002, WT/MIN(01)/DEC/2 (Nov. 20, 2002).

In addition to clarifying these key flexibilities within the TRIPS Agreement, the Doha Declaration also promised to resolve the so-called production-for-export problem:

6. We recognize that WTO Members with insufficient or no manufacturing capacities in the pharmaceutical sector could face difficulties in making effective use of compulsory licensing under the TRIPS Agreement. We instruct the Council for TRIPS to find an expeditious solution to this problem and to report to the General Council before the end of 2002.

Id.

Finally, despite trade authorization legislation to the contrary, the U.S. Trade Representative continues to seek enhanced, TRIPS-plus intellectual property protections in bilateral and regional trade negotiations, including those affecting the Southern Africa Development Union.\textsuperscript{74}

\textsuperscript{73} For a discussion of several TRIPS-compliant means of accessing cheaper generic medicines, see Brook K. Baker, \textit{Producing HIV/AIDS Medicines for Export/Import under TRIPS}, Articles 31(f), (k), and 30 <http://www.tacd.org/cgi-bin/dv.cgi?page=view&config=admin/docs.cfg&id=165> (Nov. 6, 2001).

In paragraph 6 of the Doha Declaration, all WTO members, including the U.S., recognized that countries with insufficient manufacturing capacity and/or market size will not be able meet their needs for cheaper pharmaceutical products by internal production even where they had overridden a patent through the issuance of a compulsory license. However, key provisions in the TRIPS agreement will soon require worldwide protection for pharmaceutical patents and thus dramatically reduce the current practice of lawful generic production. Instead, generics produced in any WTO member country (except hypothetically in least developed countries) will ordinarily have to be produced pursuant to compulsory licenses. Unfortunately, Paragraph 31(f) of the TRIPS Agreement limits such production predominantly to supply the domestic market. This is the essence of the production-for-export dilemma – desperate demand but no source of supply.

The terms of a fair and expeditious solution are obvious and have been repeatedly put forth by the Africa Group and an affiliated coalition of developing countries and NGOs. The production-for-export accord should cover a broad range of diseases and public health needs, so that medicines for multiple debilitating and deadly conditions can be accessed more cheaply. Countries should be able to import a broad range of medical products including medicines, vaccines, diagnostic tests, and other medical products. Any country should be able to make use of the Declaration’s public health provisions, even though it is undoubtedly true that developing countries have the greatest need.onerous diversion rules should not be imposed to address the illusory risk of re-export and sale in rich countries like the U.S. and Europe that are perfectly capable of reducing or eliminating product diversion on their own. And finally, procedural requirements should be minimized, meaning that a limited exception under Article 30 of the TRIPS Agreement, as proposed by the WHO and many other countries is vastly superior to the proposed U.S. solution requiring hundreds of product-by-product, country-by-country compulsory licenses in the exporting country. A solution with these terms, articulating definite and enduring rights, would be a huge step in addressing the crisis of access to affordable medicines in the developing world.

\textsuperscript{74} Pursuing this end-run strategy, on November 5, 2002, United States Trade Representative Robert B. Zoellick formally notified Congressional leaders of the Administration’s intent to initiate negotiations for a free trade agreement with the nations of the South African Customs Union: Botswana, Lesotho, Namibia, South Africa and Swaziland. With respect to intellectual property rights, the negotiations would:

-- Seek to establish standards that reflect a standard of protection similar to that found in U.S. law and that build on the foundations established in the WTO Agreement on Trade-Related Aspects of Intellectual Property (TRIPs Agreement) and other international intellectual property agreements, such as the World Intellectual Property Organization Copyright Treaty and Performances and Phonograms Treaty, and the Patent Cooperation Treaty.

-- Establish commitments for SACU countries to strengthen significantly their domestic enforcement procedures, such as by ensuring that government agencies may initiate criminal proceedings on their own initiative and seize suspected pirated and counterfeit goods, equipment used to make or transmit these goods, and documentary evidence. Seek to strengthen measures in SACU countries that provide for compensation of right holders for
V. CONCLUSION

I went to South Africa thinking of myself primarily as a legal writing instructor and anti-apartheid ally who might collaborate with my new colleagues to construct a more vigorous legal writing and legal skills curriculum and who might also somehow assist, modestly, in the post-liberation transformation of South Africa's fledging democracy. Initially, I struggled as a skills teacher because of the dramatic differences between law schools in South Africa and the U.S., particularly with respect to students' literacy skills and reliance on doctrinal formalism. Luckily, I was recruited to the law school clinic at both UDW and UND, where I confronted a culturally unfamiliar set of client problems that required even greater attention to cross-cultural issues than I had anticipated. In the ordinarily course of this pedagogical collaboration, I gradually awakened to the HIV/AIDS pandemic that was sweeping through the sub-continent, not just because of the frightening infection rate among my students but also because

infringements of intellectual property rights and to provide for criminal penalties under the laws of SACU countries that are sufficient to have a deterrent effect on piracy and counterfeiting.


To meet "standards of protection similar to that found in U.S. law," SACU nations would be required to limit compulsory licenses to national emergencies or to governmental, non-commercial use only. They would be required to bar parallel trade, to extend patent monopolies for administrative delays, and to link drug registration rights to patent status. Finally these nations would be required to enhance protections for clinical trial testing data and to adopt criminal enforcement for patent violations, including improvidently granted compulsory licenses. In sum, the proposed negotiation objectives would completely eviscerate the Doha flexibilities, dramatically increase IP protection, and shamefully reduce access to more affordable generic products.

These intellectual property negotiation objectives also directly violate the principal negotiating objectives in the Trade Act of 2002, which requires the U.S. "to respect the Declaration on the TRIPS Agreement and Public Health, adopted by the World Trade Organization at the Fourth Ministerial Conference at Doha, Qatar on November 14, 2001." 19 U.S.C. § 3802(b)(4)(C) (2002). Similarly, by seeking TRIPS-plus provisions found in U.S. law, the U.S. Trade Representative is also directly violating Executive Order 13155, 3 C.F.R. 268 (2000), which in relevant part, reads:

(a) In administering sections 301-310 of the Trade Act of 1974, the United States shall not seek, through negotiation or otherwise, the revocation or revision of any intellectual property law or policy of a beneficiary sub-Saharan African country, as determined by the President, that regulates HIV/AIDS pharmaceuticals or medical technologies if the law or policy of the country: (1) promotes access to HIV/AIDS pharmaceuticals or medical technologies for affected populations in that country; and (2) provides adequate and effective intellectual property protection consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) referred to in section 101(d)(15) of the Uruguay Round Agreements Act (19 U.S.C. 3511(d)(15)).

Id. at 268.
of the AIDS-related problems clients began to bring to the clinic. In one case, involving a missing baby, it was immediately apparent that chaotic overcrowding at a pediatric morgue was a direct result of the virus. But with hindsight, I also reexamined the other cases I had worked on through AIDS-colored glasses: What illness had the groom’s father contracted that prompted his family to sell the lobola cows and to move to seek better medical treatment? What was the fate of the young high school senior who had become pregnant, in a province where over thirty-six percent of young women where testing HIV-positive? Likewise, what was the fate of the teacher, pregnant with her third child, in a teaching corps that was also wracked with AIDS? Finally, what was the fate of parents of the missing baby; have they too succumbed to the endgame of untreated opportunistic infections?

As a witness to the HIV/AIDS pandemic, to the greatest human rights crisis of our time, I could not remain neutral. The worldwide campaign for access to treatment, of which I am now a part, is organized around the bedrock principal that the human right to health, and to life itself, trumps intellectual property rights and the right to maximize profits. Our campaign includes demands against the U.S. government for greatly increased bilateral and multilateral aid for comprehensive HIV/AIDS prevention, care, and treatment in developing countries. It includes demands for debt forgiveness and for an end to ruinous trade policies that privilege pharmaceutical profits over human life itself. Activist campaigns also target pharmaceutical companies demanding deeply discounted prices, voluntary licenses for generic producers, and relaxation of patent right in developing countries. Even more recently, our campaign has made successful demands on multinational corporations like Anglo-America, the mining conglomerate, and Coca-Cola, the world’s ultimate consumer product, that they provide ARV and OI treatment for their workers and workers’ dependents overseas. Finally, our campaign tries to hold multilateral institutions like the World Bank, the IMF, the WHO, the Global Fund, and UNAIDS accountable for their obligations to respond to the pandemic.75

Fortunately, a comprehensive and coordinated campaign is now mobilized towards increasing access to affordable drugs and medical care in the public and private sector. All the structures that preserve and maintain a system of medical and

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75 See Health GAP webpage <http://www.healthgap.org/index.html>.
pharmaceutical apartheid—inadequate funding, crushing debt, intellectual property regimes, and neo-liberal economic policies—are under attack. This solidarity campaign has captured the commitments of at least one legal writing specialist—I hope my story of personal transformation will inspire the compassion and engagement of many others in years to come.
From Cooperative Learning to Collaborative Writing in the Legal Writing Classroom

Elizabeth L. Inglehart, Kathleen Dillon Narko, and Clifford S. Zimmerman

Andy and Steve were the odd couple of Communication and Legal Reasoning in fall 2000. Andy came to Northwestern University School of Law ("Northwestern") from Iowa, and Steve hailed from Louisiana. Andy was tall and quiet, while Steve effused Southern politeness. They did not know each other before their professor randomly assigned them to rewrite their open research office memorandum—together—and for a grade. Each came to the task with Bs on his own memo, but they received a grade of "A" on their joint rewrite. The difference was collaboration, which allowed them to draw on their complementary strengths and minimize their weaknesses.

1 This Article is based on a presentation titled "Cooperative and Collaborative Learning Made Simple" that the Authors made at the Tenth Biennial Conference of The Legal Writing Institute, held on May 29–June 1, 2002, at the University of Tennessee College of Law in Knoxville, Tennessee. Our presentation at the national conference did not address in detail the theory behind the use of cooperative and collaborative learning techniques in the legal writing classroom. However, this Article provides us with the opportunity to elaborate somewhat on the foundational aspects of each. Many of the supporting studies cited here are recent literature. For a longer explication with more extensive resource citations, see Clifford S. Zimmerman, "Thinking Beyond My Own Interpretation": Reflections on Collaborative and Cooperative Theory in the Law School Curriculum, 31 Ariz. St. L.J. 957, 986–1001 (1999). See generally David W. Johnson & Roger T. Johnson, Learning Together and Alone: Cooperative, Competitive, and Individualistic Learning (4th ed., Allyn & Bacon 1994).

2 Elizabeth L. Inglehart is Clinical Assistant Professor of Law at Northwestern University School of Law. Kathleen Dillon Narko is Clinical Assistant Professor of Law at Northwestern University School of Law. Clifford S. Zimmerman is Clinical Associate Professor of Law at Northwestern University School of Law. The authors would like to thank our colleagues Grace Dodier and Susan Provenzano for their insightful comments on an earlier version of this article and our director, Judith Rosenbaum, for her encouragement and support throughout the process.

3 Steve and Andy were actual students in Communication and Legal Reasoning in 2000–2001.

4 Their joint paper showed strengths that neither student's prior work had shown. Both students reported to their professor that collaboration was the key factor in improving their work. They felt that they both performed at a higher level when each had to defend his analysis to his partner. Both reported that when working in teams each had to respond immediately to the other's comments. They felt that this practice forced them to consider their writing more carefully than if they had waited to receive the professor's comments days later. E-mail from Steven Doe, Student, to Kathleen Dillon Narko, Clinical Asst. Prof., Nw. U. Sch. L., Information for Article (July 2, 2002) (copy on file with Professor Narko); E-mail from Andrew Roe, Student, to Kathleen Dillon Narko, Clinical Asst. Prof., Nw. U. Sch. L., Information for Article (July 30, 2002) (copy on file with Professor Narko).
Together, they produced work of a quality that neither had been able to achieve alone. Steve had a knack for telling a compelling story with the facts. He knew which facts and points of law were most important, but his structure was not always clear. Andy, in contrast, had a strong grasp of organization. He understood how to arrange the law and facts in the most logical order, but his writing style needed improvement. By working together, they each learned about writing in a way that improved their later individual work. As another benefit of working collaboratively, the former strangers became close friends.

Over the past two years at Northwestern, the Communication and Legal Reasoning ("CLR") faculty, with the full support of the law school administration, has dramatically increased the integration of both cooperative and collaborative learning (often jointly termed “group” work) into the CLR curriculum. This culminated in the CLR faculty's adoption of graded, co-authored writing assignments: a memo in the 2000-2001 academic year and both a memo and an appellate brief in 2001-2002.

This Article traces the theory and practice behind our use of collaborative work at Northwestern. Section I summarizes the academic theory underlying the use of collaborative work, including the pedagogical and other benefits for students and faculty. Section II addresses our use of graded and ungraded cooperative and collaborative work—both inside and outside of the classroom—and how this work provides students with a context for the graded collaborative writing they perform later in the semester. Section III focuses on our methods with respect to the collaboratively written graded assignments. In Section IV, we report the results of our survey of the students’ collaborative writing experience. Finally, in Section V, we look to the future

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5 They received higher grades on subsequent papers than on their pre-collaboration work.

6 In 2000, our director, Judith Rosenbaum, in consultation with Dean David Van Zandt, renamed the legal writing program “Communication and Legal Reasoning” to reflect more accurately our program’s mission, curriculum, and pedagogy. See generally David Van Zandt, The Northwestern Law Approach to Strategic Planning, 31 U. Toledo L. Rev. 761 (2000) (describing the overall goals of the law school, including increased teamwork and communication skills).

7 For definitions of both, see text accompanying infra notes 15–17.

8 In the fall semester, our graded assignments are a citation exercise, a closed universe memorandum and a rewrite, and an open research memorandum and a rewrite. In the spring semester, our graded assignments are a short advocacy piece (usually a portion of an appellate brief), an appellant's brief, and an appellee's brief all in the same case.
and discuss our planned changes. We conclude that collaborative work serves a useful and important purpose in our law school curriculum and should continue to play a role in the future.

I. COOPERATIVE AND COLLABORATIVE LEARNING: DEFINITIONS, THEORY, AND APPLICATIONS

Hundreds of studies document the benefits that accrue from using cooperative and collaborative learning and trace that use back several centuries.\(^9\) While implementation of and research on both pedagogies originally were introduced in elementary and secondary education,\(^10\) their use in higher education, including graduate and professional education,\(^11\) has increased dramatically over the past few decades.\(^12\) The documented pedagogical benefits

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\(^9\) Zimmerman, supra n. 1, at 988–993 (collecting and tracing studies); see infra n. 33.


that flow from cooperative and collaborative learning directly coincide with our legal writing teaching goals. Cooperative and collaborative work benefit both students and teachers. The student-focused benefits include building judgment, increasing analytical ability, gaining greater subject matter understanding, sparking genuine, life-long subject matter interest, and easing anxiety, worry, and fear. Teachers also benefit from cooperative and collaborative learning. These benefits include enabling students to work with others toward common goals, increasing student class participation and subject matter interest, and keeping students on task.

A. A Definitional Framework

Cooperative and collaborative learning share many common points, but are theoretically distinct. Cooperative learning focuses on individual mastery of the subject through group work. Cooperative learning involves a structured framework for the group work in which the teacher defines the students' roles, tasks, and responsibilities, as well as the form of the final product. However, each student individually produces the final product. Thus, cooperative learning is group work with a shared goal; this creates the foundation for each student to then create his or her own final work product, which is individually evaluated. In contrast, collaborative learning focuses on group work toward a unified final project that is all or partially group-produced and all or partially group-graded. In a collaborative project, group members negotiate tasks, roles, and responsibilities. In essence, the goal of collaborative learning is a group project in which the group process will produce a better final product through the


14 See e.g. Slavin, supra n. 13, at 64 (staying on task), 65 (liking class and school).

students' discourse. Thus, cooperative and collaborative learning are not completely distinct, but rather "more like an arbor of vines growing in parallel, crossing, or intertwined."

B. The Theory

The academic justification for both pedagogies comes not just from educational philosophy but also from areas as diverse as cognitive psychology, social psychology, and humanist and feminist pedagogy. The confluence of these disciplines, often labeled constructivist or social constructionist theory, is highlighted by the works of Jerome Bruner, John Dewey, Karen Burke LeFevre, Jean Piaget, and Lev Vygotsky. It is based on


the argument, supported by studies, that learning is an interpretive act that occurs in the context of relationships. Thus, knowledge is a social construction,23 invention is a social act,24 and social interaction and conversation are necessary in the learning process as well, not just to achieve learning but to maximize that learning.

While lectures dominate traditional education, cooperative and collaborative pedagogies, in contrast, have shown that students often learn better indirectly from teachers (through constructed group work) and directly from other students (in the discourse associated with that group work).25

Kenneth Bruffee spells out the underlying theory in a more logical fashion. "To the extent that thought is internalized conversation, then, any effort to understand how we think requires us to understand the nature of conversation; and any effort to understand conversation requires us to understand the nature of community life that generates and maintains conversation."26 Thus, an inherent power exists in conversations our students generate. To use the power of conversation, then, we have to encourage a classroom community that allows this conversation to start, flourish, and persist.

In addition, group work reaches a broader range of students than traditional teaching methods, reaching across race, gender, class, and learning style differences.27 These pedagogies work because students, through the conversation, are more actively engaged with the material. The cooperative and collaborative pedagogies have been proven successful in a wide range of disciplines.28 They are not exclusive to particular fields, however,

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24 LeFevre, supra n. 22, at 33–47.
25 Zimmerman, supra n. 1, at 995–998.
26 Bruffee, Conversation of Mankind, supra n. 16, at 640; see Bruffee, Collaborative Learning, supra n. 16, at 15–27.
27 Shor, supra n. 18, at 164 (race and low-achieving students); Slavin, supra n. 13, at 52 (race), 54–60 (academically handicapped).
28 While the number of studies addressing higher education has been relatively small, a review of those published in 1999 and 2000 reveals an increase in the number addressing higher education. Of the 168 found studies published in 2000, 66 address higher education. See Millis & Cottell, supra n. 12. The disciplines include chemistry, sociology, geography, communication, science, math, engineering, technology, English, and adult education. See e.g. Susan Imel, New Views of Adult Learning, Trends & Issues Alert No. 5 (ERIC Doc. No.
because these pedagogies merely change the context, not the content, of learning.

A legal writing course, like other writing courses, offers a genuinely strong environment in which to spur this knowledge-creating conversation and use these vibrant pedagogies. As Bruffee notes, "Our task must involve engaging students in conversation among themselves at as many points in both the writing and the reading process as possible." We must guide them through these conversations keeping in mind not only what we want them to cover substantively, but also how we want them to express their analytical conclusions. This is so because "[t]he way they talk with each other determines the way they will think and the way they will write." The hundreds of studies on group work identify very real pedagogical benefits. Figure 1, below, categorizes these benefits

429211, 1999).

29 For writings on cooperative and collaborative learning in legal writing courses and academic support programs, see Collaboration, 8 Second Draft 6 (Terri LeClercq ed., Apr. 1993); Leslie Larkin Cooney & Judith Karp, Ten Magic Tricks for an Interactive Classroom, 8 Persp. 1 (Fall 1999); David Dominguez et al., Inclusive Teaching Methods Across the Curriculum: Academic Resource and Law Teachers Tie a Knot at the AALS, 31 U.S.F. L. Rev. 875 (1997); Vernellia R. Randall, Increasing Retention and Improving Performance: Practical Advice on Using Cooperative Learning in Law Schools, 16 Thomas M. Cooley L. Rev. 201 (1999); Judith Rosenbaum & Clifford Zimmerman, Fostering Teamwork through Cooperative and Collaborative Assignments, 15 Second Draft 7 (June 2001); Melissa Shafer, Shakespeare in Law: How the Theater Department Can Enhance Lawyering Skills Instruction, 8 Persp. 108 (Spring 2000).

30 Bruffee, Conversation of Mankind, supra n. 16, at 642.


32 Bruffee, Conversation of Mankind, supra n. 16, at 642.

33 Johnson, Johnson, and Smith reported that over the first ninety years of the twentieth century, "over 575 experimental and 100 correlational studies [of the effects of group work] have been conducted by a wide variety of researchers in different subject areas, and in different settings." Johnson et al., supra n. 12, at 28. For a complete list of these studies, see David W. Johnson & Roger T. Johnson, Cooperation and Competition: Theory and Research (Interaction Book Co. 1989). The studies measure the benefits of group work by several methods, including qualitative analysis, quantitative analysis, and some combination of the two.

Most qualitative analysis has involved either student self-reporting or teacher assessment of the process. In the first instance, some studies solicited students' responses through a survey or interview. See e.g. Carol L. Colbeck, Susan E. Campbell & Stefani A. Bjorklund, Grouping in the Dark, What College Students Learn from Group Projects, 71 J. Higher Educ. 60 (2000) (students were interviewed and their responses then categorized). In other studies, teachers reported and assessed their experiences using a comparative experiential approach. See e.g. Donald R. Paulson, Active Learning and Cooperative Learning in the Organic Chemistry Lecture Class, 76 J. Chem. Educ. 1136 (1999) (teacher used same review session method for twenty-eight years and found significant difference in student engagement and participation using cooperative learning).

The quantitative analysis has included both traditional or typical methods and
as either primarily cognitive, primarily substantive, or primarily emotional/psychological. Figure 1 also indicates whether there were additional, substantial benefits extending to the other categories. A benefit that is primarily cognitive advances the students' ability to know or understand, including their awareness, perception, reasoning, or judgment, and is distinct from their understanding of the subject matter at hand. A benefit that is primarily substantive advances the students' understanding of the subject matter. Finally, primarily emotional or psychological benefits are those that enhance the students' mental or emotional well-being, as opposed to their core understanding or ability to understand. These categories provide a conservative examination of the depth and breadth of the advantages that flow from cooperative and collaborative learning.\textsuperscript{34}

others. For traditional methods, see, for example, Lois V. Browne & Edward V. Blackburn, Teaching Introductory Organic Chemistry: A Problem Solving and Collaborative-Learning Approach, 76 J. Chem. Educ. 1104 (1999) (used an objective survey, then compared the results from students in cooperative and individual settings); Jeffrey Kovac, Student Active Learning Methods in General Chemistry, 76 J. Chem. Educ. 120 (1999) (used an objective survey and assessed those results without comparing). See Johnson & Johnson, supra; Johnson et al., supra n. 12. Some quantitative assessment was based on student responses to end of semester course evaluations. See e.g. Rinehart, supra n. 31. For a mix, see, for example, James M. Hurley, James D. Proctor & Robert E. Ford, Collaborative Inquiry at a Distance: Using the Internet in Geography Education, 98 J. Geography 128, 129 (1999) (teachers established criteria by which to assess student research).

\textsuperscript{34} Citations within Figure 1 are to studies that show the existence of the particular benefit, not the categorization of that benefit by the studies' Authors. The categorizations are our own.
FIGURE 1
Benefits of Collaborative and Cooperative Learning

<table>
<thead>
<tr>
<th>More cognitive:</th>
<th>Substantive</th>
<th>Cognitive</th>
<th>Psychological/Emotional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Students learn how others write and learn</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Students learn how others reason</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Students hear different opinions</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>More substantive:</th>
<th>Substantive</th>
<th>Cognitive</th>
<th>Psychological/Emotional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Results in a higher level of individual achievement</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Results in greater analytical ability (higher level of thinking)</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>- Increase reflective thinking</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Develop problem-solving techniques</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Grasp relationship between background information and tasks in carrying out the process</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>- More readily embrace the task of learning</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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36 Johnson et al., *supra* n. 12, at 31–34.

37 Cooper & Mueck, *supra* n. 15, at 69–70; Hillebrand, *supra* n. 35, at 72.


39 Johnson et al., *supra* n. 12, at 31–34; Cooper & Mueck, *supra* n. 15, at 71.

40 Muir & Tracy, *supra* n. 38, at 33.


42 Browne & Blackburn, *supra* n. 33, at 1106.

43 *Id.*
Benefits of Collaborative and Cooperative Learning
(continued)

<table>
<thead>
<tr>
<th>Substantive</th>
<th>Cognitive</th>
<th>Psychological/Emotional</th>
</tr>
</thead>
<tbody>
<tr>
<td>-Students’ questions change from need for step-by-step instruction to more general guidance</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Results in better retention of subject matter</td>
<td>X</td>
<td>X</td>
</tr>
</tbody>
</table>

More emotional/psychological:
- Students get to know each other better
  - Students work together to overcome disagreements
  - Students receive & provide support to each other
  - Passivity disappears
  - Students feel less anxiety
  - Students gain greater self-esteem
  - Students learn how to work with each other

44 Id.; Muir & Tracy, supra n. 38, at 34.
48 Johnson et al., supra n. 12, at 31.
49 Rinehart, supra n. 31, at 216.
50 Johnson et al., supra n. 12, at 32, 37; Muir & Tracy, supra n. 38, at 33; Russo, supra n. 41, at 18.
51 Browne & Blackburn, supra n. 33, at 1106; Johnson et al., supra n. 12, at 52–55; Rinehart, supra n. 31, at 227; Slavin, supra n. 13, at 60–62.
52 Cooper & Mueck, supra n. 15, at 70; Johnson et al., supra n. 12, at 42–44.
Benefits of Collaborative and Cooperative Learning (continued)

<table>
<thead>
<tr>
<th>Greater teaching value:</th>
<th>Substantive</th>
<th>Cognitive</th>
<th>Psychological/Emotional</th>
</tr>
</thead>
<tbody>
<tr>
<td>Allows teacher to adjust for varied learning styles⁵³</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Results in students sharing knowledge⁵⁴</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Produces a higher level of individual accountability (to peers)⁵⁵</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Produces a higher motivation to learn⁵⁶</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Encourages student participation⁵⁷</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Results in students having a more positive feeling about school, subject, and self⁵⁸</td>
<td></td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>-More positive feeling about group work than traditional lab⁵⁹</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

With these benefits available,⁶⁰ the next question is how professors can incorporate these pedagogies into the classroom.

⁵³ Through group composition the teacher can take into account factors such as academic ability and learning style. See Laurel Currie Oates, Collaborative Learning: Learning through Structured Conversation 7 (unpublished ms. on file with Authors); see generally Barbara Gross Davis, Tools for Teaching 151 (Jossey-Bass 1993).

⁵⁴ Hillebrand, supra n. 35, at 72.

⁵⁵ Putnam, supra n. 45, at 17.

⁵⁶ Hillebrand, supra n. 35, at 72; Johnson et al., supra n. 12, at 35–36.

⁵⁷ Johnson et al., supra n. 12, at 46–47; Slavin, supra n. 13, at 64–65.

⁵⁸ Johnson et al., supra n. 12, at 42; Slavin, supra n. 13, at 65.

⁵⁹ Browne & Blackburn, supra n. 33, at 1106.

⁶⁰ To be sure, weaknesses exist. Primary among the weaknesses is student fear of a free-riding partner, a group member who does not do his or her fair share of the work. See Slavin, supra n. 11, at 19 (discussing problem). Another common potential problem is schedule conflicts that prevent students from coordinating and carrying out their work together. These problems can be addressed by setting a positive class tone toward group work, building up the group work over time, and making the work divisible such that responsibility can be distributed. Slavin, supra n. 13 (addressing "diffusion of responsibility" and grading techniques to raise individual accountability); see generally infra § III(B). Cooperative and collaborative learning may be problematic in settings in which large class size limits the effectiveness of professors in overseeing all groups or groups taught by teaching assistants. Cooperative and collaborative learning may also be
C. Potential Group Applications: A General View

Our examination of cooperative and collaborative learning in the classroom begins generally, and then moves to the legal writing classroom in particular. Active classroom environments using group work engage students in solving problems, use visual formats, teach learning through exploration, and allow for better assessment of students' performance. In these environments, cooperative and collaborative group learning dominate as students work primarily in groups. An examination of these classrooms finds many other interesting curricular characteristics as well. The curriculum is presented as a whole, and the pursuit of student questions is highly valued. The activities rely heavily on primary sources of data and manipulative materials, students are viewed as thinkers with emerging theories about the world, and teachers generally behave in an interactive manner mediating the environment for students. Teachers seek the students' points of view for use in subsequent lessons, and assessment of student learning is interwoven with teaching as teachers observe students at work as well as student exhibitions and portfolios. Many of these curricular characteristics are found in the legal writing classroom as well: Legal writing classes typically are small, and professors commonly assign students to work in groups on oral or written exercises. These activities result in active learning and foster a strong sense of community.

Recent literature identifies curricular areas in which group work commonly is used at many educational levels, including law school. These areas include brainstorming and idea generation, problem solving, role playing, research, citation, peer review, conferences, writing, and even assessment. A brief examination problematic where English as a second language creates an unequal impediment to communications between students, or where the professor lacks commitment to the pedagogy.

61 See e.g., Hurley et al., supra n. 33, at 129 (citing M.D. Roblyer et al., Integrating Educational Technology into Teaching 72 (Merrill 1997)).
62 Id. (citing Brooks & Brooks, supra n. 22).
63 Id.
64 In general graduate education, the literature also provides more specific examples including essays, Paulson, supra n. 33, at 1137, problem solving, id., in-class questions to answer, id., unstructured, multiple response tasks, Rinehart, supra n. 31, at 223, and research, Hurley et al., supra n. 33, at 134. Many students already use these methods in study groups. Kovac, supra n. 33, at 121 (he encouraged his chemistry students to form study groups and found them replicating these groups in other classes). For the most recent
of these curricular areas in the law school context reveals great advantages for the legal writing classroom. First, faculty can use brainstorming and idea generation in class to focus students' thoughts on the subject matter at hand. Faculty can also assign students to brainstorm as an out-of-class exercise; for example, student groups can be assigned to generate ideas for appellate brief arguments. Next, problem solving often involves short written work in which groups may have to answer a question, develop a set of rules, develop an argument, or draft a portion of a larger written document. For example, on a memo assignment, groups can draft a rule synthesis or draft an outline. Similarly, while working on a brief, groups can draft point headings, draft questions presented, and draft or edit a statement of facts.

Role-playing typically involves taking sides on a case. From there, groups can present opposing perspectives on the facts, simulate oral advocacy, or even re-enact Supreme Court oral arguments. On research and citation assignments, student groups can complete exercises, as well as complete research pertinent to their memorandum or brief assignments. Professors may hold group conferences to cover brainstorming, research, and outlines, as well as writing.

Finally, students may work collaboratively at any and every stage in the process of writing a legal document: issue development, brainstorming, research, outlining, writing, editing, rewriting, critiquing, and proofreading. Further, collaborative writing can occur on any assignment, whether it be a memo (or any part of one, for example the statement of facts) or a brief (or any part of one, such as one argument in a brief). Even if students write individually, they can enhance their learning through peer review. Peer review can occur on any written assignment and can be done through a read aloud, exchange and critique in class, or more formal critiques (taken home and written).65

65 There are several competing approaches to peer review. For example, one approach is to start peer review early in the first semester, understanding that while students may not yet feel substantively comfortable with the material, the students need to build their comfort level with giving peer feedback. The theory behind this approach is that after some time spent becoming comfortable with the critiquing process, they will also feel comfortable with the substance they are critiquing. Alternatively, one can wait until the students are comfortable with and understand the substance of the legal material and then have them begin peer review. Both are valid approaches. See Jo Anne Durako, Brutal Choices in Curricular Design . . . Peer Editing: It's Worth the Effort, 7 Persp. 73 (Winter 1999); Judith
With this background, we now shift our focus from the theoretical to the practical and our experience with cooperative and collaborative learning in our classrooms at Northwestern.

II. COOPERATIVE AND COLLABORATIVE EXERCISES AND HOW THEY PREPARE STUDENTS FOR GRADED COLLABORATIVE WRITING

In our CLR program, over the past two-to-three years we have increasingly incorporated cooperative and collaborative writing and exercises into our curriculum. We have done this for two reasons. First, Northwestern has been moving toward a more cooperative learning environment for the law school as a whole, to prepare students for the work environment they will face after graduation. Second, and even more important, experience has shown us that students cannot fully learn legal research, analysis, and writing by listening passively to lectures. While lectures can be useful ways to introduce many of the concepts we want students to learn, the students will fully internalize these important legal skills only with repeated practice on their own. Accordingly, many of us have replaced more and more of our lecturing with active learning activities, particularly cooperative and collaborative work. Because our class periods are ninety minutes long, we have time during most class periods to introduce concepts, allow student groups time to work together in class, and then come together as a class to discuss the results.

In this section, we describe how we have moved from theory to practice in our curriculum. Subsection A discusses issues a professor should consider in deciding how to introduce cooperative and collaborative work into the curriculum. Subsection B discusses how we introduce cooperative and collaborative work to our students through classroom activities. Subsection C discusses how we then move group work outside of the classroom and grade some of this work. Section III addresses our use of graded collaborative writing. For the authors, assigning graded collaborative writing is the natural culmination of all of the group work we have done both inside and outside of class up to that time.\textsuperscript{66}

\textsuperscript{66} Essentially, we start with cooperative work in class, then move to cooperative out-
A. Considerations in Assigning Cooperative and Collaborative Work

Professors need to consider a range of issues to implement effectively the theory of cooperative or collaborative learning in the classroom. These include the development of the assignment, the appropriate time and method to introduce the concept of group work to the class, group size, group selection methods, the appropriate level of teacher intervention during group work, and assessment of group work.

1. Developing Group Assignments

The first step—which actually occurs before the start of the semester—is ensuring that the group assignments to be used, whether in class or outside of class, will work well in groups and within the curriculum. Because students working in groups ideally will advance farther in their understanding of an exercise presented to them, that cooperative or collaborative assignment must be even more perfectly crafted than one that they will complete individually. Effective crafting of a group assignment requires vigilant assessment of the foundation, the process, and the ultimate goal of the exercise—essentially, the professor must think ahead more clearly and comprehensively than when crafting an individual assignment. In addition, the professor should plan for each group exercise to take longer than if individually completed. The group will need additional time to consider and discuss the variety of alternatives that group members will raise. Finally, the teacher must consider what, if any, part of the exercise should be conducted outside class. For example, any lengthy reading should be completed before class.

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of-class work, and, eventually, have students working collaboratively on written documents. For clarification on the distinction between cooperative and collaborative learning, see supra § I.A.

67 For a discussion of the difference between cooperative and collaborative learning, see text accompanying supra notes 15–17.

68 See supra nn. 38–45 and accompanying text.

69 Kovac, supra n. 33, at 121; Muir & Tracy, supra n. 38, at 35; Rinehart, supra n. 31, at 224.
2. Introducing the Concept of Group Work

Students should become comfortable with group work as early in the school year as possible. For example, Professor Zimmerman explains to his students on the first day of fall term that his pedagogy includes a great deal of cooperative and collaborative work. Further, he explains how group work will enhance their law school experience, their individual understanding of the law, and their well being as law students. He also distributes a handout that summarizes the general theory behind group work. He does all of this to foster from the start a class atmosphere that is conducive to group work.70 In addition, throughout the term we attempt to develop the class rapport, educate the students about cooperative and collaborative learning,71 meet with our students,72 remain flexible,73 and understand the time demands inherent in group work.74

3. Methods for Choosing Student Groups

The next consideration is how to group the students for the exercise. Here, there are three choices: random selection, teacher selection, or self-selection.75 In the Northwestern program, many of us prefer to allow students to self-select to maximize the benefit to group rapport (since we assume that they will choose to work with students whom they know, like, or believe that they can work

70 Professor Zimmerman believes that absent this effort, those students who have not had previous exposure to group work or who do not have a good understanding of why group work is beneficial might become skeptics of the pedagogy from the start and might be more likely to become slackers or otherwise struggle against the pedagogy as the semester progresses. For another experience addressing this issue in legal education, see Nim Razook, Some Order and Some Law: Cooperative Norms, Free Riders, and Bridge Burners in Student Teams, 47 J. Leg. Educ. 260 (1997).

71 Rinehart, supra n. 31, at 221.

72 Kovac met weekly with his students to discuss his pedagogical tools. Kovac, supra n. 33, at 122. He learned from these student meetings that, in constructing his assignments for group work, he had eliminated more straightforward exercises that the students needed (particularly the “algorithmic learners,” who are those students who need exercises that more directly apply to examinations). This student feedback enabled him to correct this mistake. Id. at 122–123.

73 Id. at 120.

74 Id.; Paulson, supra n. 33, at 1139 (it takes a great deal of class time).

75 Muir & Tracy, supra n. 38, at 35. Rinehart argues in favor of avoiding self-selection, to break up cliques, to remove peer pressure in selections, and to prevent default pairings (the necessity for the teacher to pair students who did not find a partner). Rinehart, supra n. 31, at 223.
with). However, many of us also require students to choose new partners for each succeeding group assignment, to promote a greater breadth of interaction among students and to limit peer pressure in the selection process. Any method is pedagogically sound, with its respective advantages and disadvantages. Group size may vary with the nature of the assignment. Each CLR class at Northwestern has twenty-seven to twenty-nine students. For a lengthy writing assignment, the group should be limited to a pair, although a trio is workable. For research or citation exercises, we limit groups to four or five students. For in-class exercises, we aim for group size to be three to four.

4. Appropriate Teacher Intervention

Next, the teacher must consider how to facilitate the group work. For in-class work, facilitation involves deciding how much to intervene in the groups’ activities. In using group work the professor shifts responsibility to the students and releases control. Thus, the professor must decide how much latitude to give the student groups. This question involves two considerations: whether to assign group roles and whether to facilitate the group work actively or passively. These considerations are matters of personal preference and pedagogical needs. For example, the professor may know that some groups need more direction or that the assignment requires that students quickly realize a particular point, both of which necessitate some form of professorial intervention to keep the groups on task. This consideration is counterbalanced by our knowledge that merely visiting a group can silence the conversation as the students immediately tend to look to the professor for direction or guidance.

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76 Our director has about sixteen students in her class, to allow her additional time for program administration.
77 Rinehart, supra n. 31, at 217.
78 Kovac, supra n. 33, at 121; Rinehart, supra n. 31, at 224 (both favoring the rotation of roles). Kovac talks about assigning a manager (to keep the group on task), a reporter (to prepare written results), a spokesperson (to present the results), and a strategic analyst (to assure participation and understanding of all group members, and to identify problems and need for improvement). Kovac, supra n. 33, at 121. There is some disagreement over changing the group membership. See Zimmerman, supra n. 1, at 1014–1015; compare Muir & Tracy, supra n. 38, at 35 (favors changing roles after assessment) with Rinehart, supra n. 31, at 223 (maintain same groups).
79 Rinehart, supra n. 31, at 224 (active); Zimmerman, supra n. 1, at 1014–1015.
5. Methods of Assessing Group Work

While much group work in our course is in-class and ungraded, some collaborative work done outside of class is graded. Thus, an additional consideration is whether and how to assess the group work. Here, the choices include whether the assignment is graded or ungraded; if graded then what percentage weight should be given to that assignment; if graded and there is a curve, how the elimination of lower quality work will affect efforts to comply with the curve; and whether the professor or the

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80 We tend not to grade cooperative work early in the semester, to establish foundation and comfort in practical skills without consequences. As the semester progresses and the work advances, we grade the larger, written assignments, such as the office memorandum and the appellate brief. Determinations about grading or not, and about how to grade, are beyond the scope of this article. For insights, see Assessment of Writing: Politics, Policies, Practices (Edward M. White, William D. Lutz & Sandra Kamusikiri eds., MLA 1996); Richard J. Stiggins, Student-Centered Classroom Assessment (2d ed., Prentis Hall 1996); Edward M. White, Assigning, Responding, Evaluating: A Writing Teachers Guide (3d ed., St. Martin's Press 1999); Rebecca S. Anderson & Bruce W. Speck, Suggestions For Responding to the Dilemma of Grading Students' Writing, 86 English J. 21 (Jan. 1997); Brian J. Glenn, The Golden Rule of Grading: Being Fair, PS Online www.findarticles.com/cf_dls/m2139/4_31/53520034/p1/article.jhtml (Dec. 1998); Shelley Peterson & Joyce M. Bainbridge, Teachers' Gendered Expectations and Their Evaluation of Student Writing, 38 Reading Research & Instruction 255 (1999); Mary Jo Skillings & Robbin Ferrell, Student-Generated Rubrics: Bringing Students into the Assessment Process, 6 Reading Teacher 452 (2000 Amy T. Surmann, The Effects of Race, Weight, and Gender on Evaluations of Writing Competence, 137 J. Soc. Psychol. 173 (1997); Iris I. Varner & Paula J. Pomerenke, Assessing Competency in Business Writing, 61 Bus. Commun. Q. 83 (Dec. 1998).

81 Kovac, supra n. 33, at 121 (out-of-class group work, in-class exams individual) see infra n. 91 and accompanying text; Rinehart, supra n. 31, at 224 (group work — twenty percent, individual work — eighty percent).

82 Having a curve places competitive pressure on the assignment. Kovac, supra n. 33, at 120; Paulson, supra n. 33, at 1137.

At Northwestern, we are not required to follow strictly a curve in assigning grades. The law school curve is mandatory — for semester grades — for classes of forty or more students. As noted above, our CLR classes usually have twenty-seven to twenty-nine students, so we are encouraged to follow the curve, but not required to assign strict percentages of each grade. In practice, we follow the curve to a large extent (and most of us have found that the grades students “deserve” largely do fall naturally into the curve), but use our discretion to deviate from it where merited.

The need for strict compliance with a curve presents unique issues with respect to graded cooperative and collaborative work in legal writing courses. As the theory sets forth and we have experienced, group work increases the quality of the final student product and effectively eliminates the weakest papers. See infra § III(C). Thus, teachers who use group work and must apply a curve will face the quandary of how to comply with the curve and not punish students whose work legitimately has improved beyond the bottom of the curve. For example, if you have a curve that requires you to give a certain percentage of “C”s, or you must give some “C”s in order to give any “A”s and your “C-worthy” papers are no longer present or are far fewer in number as a result of group work, then you will only be able to comply with the curve by giving the lowest papers (albeit ones that do not objectively deserve the grade) Cs.
students will assess the contribution of other members of the group.83

In addition to assessing the students' product, the professor will want to assess the success of the learning process that occurred during the group work. The professor should debrief the class as a whole after the group assignment to bring everyone to the same level of understanding before the class moves on.

6. Improving Group Assignments for Future Use

Finally, every group assignment can be tweaked for the next use. The need for adaptation of assignments and of the assignment process itself is inherent in using group work.84 The professor must review the process with a critical eye toward improvement next time.85 The purpose of the preparation described in this section is to give students the context for their out-of-class collaborative written work to be done later in the semester. All of the in-class cooperative and collaborative work is vital preparation for out-of-class work to be done collaboratively.

An alternative at such schools would be to discuss with your administration that, where professors believe that particular student work is of sufficiently high quality, this should justify exception from, or non-compliance with, the curve. While some may argue that this is "grade inflation," the theory and our experience indicate, rather, that this is the by-product of good, sound, and successful teaching that justifies rewarding improvement in performance.

Of course, even with administration backing, CLR professors should (and no doubt will) be careful to give a grade distribution above the curve only in cases in which the student work truly merits it and not for political reasons or in an attempt to please students. For a discussion of academically unjustified practices of assigning high grades based on considerations other than merit, see generally Peter Sacks, Generation X Goes to College (Carus 1996).

Kovac, supra n. 33, at 121 (teaching assistant assessed group work and added points if group worked well together).

83 "Continual revision and invention is necessary to make collaboration genuine. For me, the temptation to get the collaborative version 'in the can' is just as great as the desire to have beautifully organized and comprehensive lecture notes." Rinehart, supra n. 31, at 226 (constant adaptation); see Paulson, supra n. 33, at 1139 (adapt slowly).

B. Implementing In-Class Cooperative and Collaborative Work

At Northwestern, in-class cooperative and collaborative exercises give students many opportunities, from early in the semester, to analyze legal materials and apply them to fact scenarios in an active way, rather than attempt to learn legal analysis and writing merely by having someone tell them how to do it. These exercises also get students accustomed, from early in the semester, to working with partners, to writing collaboratively with other people, and to seeing perspectives beyond their own. We have found that these experiences prepare students well for the graded collaborative work that we ask them to do outside of class. Having done in-class cooperative work, they are comfortable working with others and integrating their ideas with the ideas of others.

For example, Professor Inglehart has students start in-class group writing and oral presentation exercises beginning the first week of class in fall semester and tries to make such group work a part of nearly all of her classes. For most class meetings, she assigns the relevant portion of our legal writing or research texts before class. In addition, she sometimes gives the students short cases and/or fact scenarios to read and prepare before the class meets. She begins class by lecturing briefly on some of the more complex points, then may lead the class through verbally answering some of the exercises in the text, and then usually assigns some kind of writing or oral argument exercise for students to work on in small groups. The groups usually are given about thirty minutes to work together, and the class then comes back together either for oral presentations from each group or to examine (by viewing on a screen) and discuss the product that each group has written.

The specific in-class exercises include the following types: 1) students are given a case, asked to write a case brief, and then are questioned on the case; 2) students are given a fact scenario and several short case blurbs and/or descriptions of relevant statutes and are assigned to prepare a short oral argument for one of the sides; 3) students are asked to reorganize and rewrite a poorly organized and incomplete discussion section of a memo; or 4) students are asked to write a Question Presented, Statement of Facts, or portion of a memo's Discussion section based on a fact scenario and case and/or statutory materials. All of these in-class
cooperative exercises prepare students for out-of-class collaborative work.

C. The Next Step: Collaborative Citation and Research Exercises Outside Class

At Northwestern, we have found over the past year or two that citation and legal research skills are excellent candidates for group learning. Once our students have become accustomed to group work in class, we give them their first graded collaborative assignment: a citation exercise.\(^86\) We use the *ALWD Citation Manual* for legal citation.\(^87\) To teach citation, we ask them to read the *ALWD Manual* before class and we then teach a lecture class using a PowerPoint presentation to explain the key citation rules and to highlight the most often-used portions of the *ALWD Manual*. We then assign them a graded exercise in which they have to correct a series of incorrect citation sentences. They work in groups of three or four students on this graded exercise.\(^88\)

As for research, in Fall 2001 after introducing the major research sources via the textbook and lecture, we had students work in groups of three or four to complete research exercises using the digests, treatises, Shepard's, law reviews, encyclopedias, and other manual research sources. In the 2001–2002 school year, we used the Kunz\(^89\) research text, which, like many research texts, has extensive hands-on research exercises. While the student groups were working on the Kunz research exercises, we held some classes in the library so that each CLR professor could help the groups in his or her class use the sources to complete the exercises.\(^90\) We have found that this active learning approach is

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\(^{86}\) We also assign research exercises to be done in groups. In 2001, we used exercises from Christina L. Kunz et al., *The Process of Legal Research* (5th ed., Aspen L. & Bus. 2000). The Kunz research exercises were not given a letter grade, but students were required to complete and submit them. If students did not do a satisfactory job on the research exercises, their semester grade could be lowered.


\(^{88}\) Some CLR professors have the student groups begin work on these citation exercises during class, while others have the groups do all of the work outside of class. See Thomas Michael McDonnell, *Joining Hands and Smarts: Teaching Manual Legal Research through Collaborative Learning Groups*, 40 J. Leg. Educ. 363 (1990).

\(^{89}\) Kunz et al., supra n. 86.

\(^{90}\) This time can be during class periods, office hours, or other times that the professor deems appropriate. Faculty research assistants also may hold office hours in the library to help students.
an effective way to help students become comfortable with using the research sources. The students are then prepared to research independently, with little professor assistance, for their open research memo problem.

In assigning the Kunz exercises, some CLR professors instructed the student groups not to split up the research problems, but to work through every question as a group; other professors did not require group work on every question. The professors who required students to work through each problem together found that the class as a whole gained a better understanding of how to use the research sources. In groups where students split the work, students tended (not surprisingly) to learn to use only the sources for which they had personally done the problems. Professor Zimmerman required those students in his class who divided the research then to regroup and teach each other the research process that they personally had completed. The results of this were quite positive.

In the end, our collective experience has borne out that our students progress extremely well on the learning curve as a result of this group work. While it is more difficult to assess whether students who collaborated learned as much or more than students who did not, we found that students who did collaborate learned the relevant skills and material as well if not better than first year students in the past. Our assessment is based on the students’ apparent depth of understanding, breadth of comprehension, and level of comfort with the skills learned. Our resulting confidence with the pedagogy led us naturally to attempt graded collaborative writing.

III. EXPERIENCE WITH GRADED COLLABORATIVE WRITING AT NORTHWESTERN UNIVERSITY SCHOOL OF LAW

Our experience with collaborative writing is best understood in the context of the assignment (Subsection A), how we prepared our students to work together (Subsection B), our personal assessment of the process (Subsection C), and our students’ assessment of the process (Section IV).
A. The Task

Graded collaborative writing has become a significant component of our CLR course at Northwestern over the past two years. Various CLR faculty members assign collaborative work that constitutes from ten to fifty percent of the students' final grade, depending on the CLR section. During the 2000–2001 year, those professors who assigned graded collaborative writing had students rewrite their closed memorandum collaboratively during the fall term; during spring term they had students research and write collaboratively a short portion of the Argument section of an appellate brief. During the 2001–2002 year, in fall term most of us assigned students to research and write the first graded draft of their open research memorandum collaboratively. Each student then individually rewrote the open memo. During Spring 2002, most of us assigned students to write collaboratively an appellate brief for the appellant's side. Each student then wrote the appellee's brief in the same case individually. Students wrote the collaborative papers in teams of two (or a few groups of three, in classes with an odd number of students). Most CLR professors allowed students to choose their own partners, requiring that the partner pairings be reported to the professor by a certain date. Any students in the class who did not choose a partner were then assigned to each other.

B. Preparing Students to Write Collaboratively for a Grade

Each CLR professor took several steps to prepare students to write collaboratively. First, students participated in frequent in-class cooperative and collaborative work, described in Section II(B). We found that these in-class exercises gave students the context for how to work together effectively and were a critical step in preparing them to write together outside of class. Second, as described in Section II(C), we assigned students to work collaboratively on graded citation and ungraded research exercises, which further acclimated them to the give and take of collaborative work.92

91 Those CLR professors who did not make the closed memo rewrite a collaborative assignment in Fall 2000 had their students do all of their graded assignments individually that term.
92 We encourage our students to come to us with any inter-partner issues. We also try to discern, during meetings with students, any potential issues between partners. Thus far,
Third, in addition to the normal level of in-class group work and before students began working together on a collaborative paper, many of us set aside class time (up to a full ninety-minute class period) to discuss issues unique to writing together. In this class session, we went into greater depth explaining the theory behind the collaborative pedagogy and its benefits. We also discussed the difficulties that the students might encounter and gave them concrete suggestions on how to avoid the common pitfalls. The CLR faculty even created (collaboratively!) a document that we distributed to students outlining some of the common concerns about collaborative writing and suggestions for completing the project successfully.

Fourth, some of us invited former students to class to discuss their experience with collaborative writing. Professor Narko invited the two former students described at the beginning of this Article, who had worked together very well. Without any prompting from her, these former students reinforced the points that she had sought to impart over the entire semester, such as the benefits of working together on all parts of the project rather than dividing the research and writing. The current students found these peer comments quite persuasive.93 Similarly, in Professor Zimmerman's class, two former students who had written together came to class to discuss their perspective on the experience. They started by discussing the range of potential approaches to writing together. This spectrum includes, at one end, the divide-and-conquer approach in which the students actually divide the writing in half, then continually trade and edit the piece until it is one cohesive, single-style work. At the other extreme, which was the method this pair of students used, the writers sit down together (at a word processor) and write every word, sentence, and paragraph together, stopping to discuss any and all questions and disagreements as they go. Professor Zimmerman's former students reported that they found that this latter approach, while daunting in terms of the time and patience necessary, usually yielded the strongest output. In sum, the students discussed the pros and cons of each approach, why they chose their course, and how some of their classmates who chose other methods fared. Further, they stressed to the student

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93 In student-teacher conferences, students reported that they actually adopted methods described in this class session.

we have been able to satisfactorily address all concerns.
audience the need to start working on the project as early as possible because collaborative writing takes more time than they probably would anticipate based on writing individually. These preparations for the collaborative project worked very well in getting the students into the proper frame of mind to write together.

One point that should be highlighted is that our students who collaboratively wrote the first graded draft of a memo or brief (as assigned in the 2001–2002 school year) had a better experience than our students who collaboratively RE-wrote a memo for which each student had already individually written a first draft (as assigned in the 2000–2001 school year). Initially it might appear that students would perform better on a rewrite because they would have already devoted considerable time and thought to the topic and could then concentrate more on the collaborative writing process. In practice, however, collaborating on the closed memo rewrite in Fall 2000 created significant tension for some teams. With the collaborative rewrite assignment, many students reported more frustration in working together and more difficulty in arriving at a mutually satisfactory product. Most students felt that this stemmed from the fact that, having already submitted a full draft of the memo, they were quite emotionally invested in the reasoning, result, organization, and style reflected in that personal draft, and therefore found it difficult to compromise in preparing the rewrite where their ideas clashed with those of their partner. This difficulty was exacerbated if one person had received a significantly higher grade on the first memo than his or her partner. The students also found it difficult to decide whether to try to meld the two existing memos or to try to write a new “joint” memo from scratch.

By contrast, when students were assigned to research and write collaboratively the first graded draft of a memo or brief, they found that they entered the process without loyalty to their own already formed ideas and that they therefore could readily work together to identify the issues and the relevant law and to write a memo that reflected the understanding of the law and facts that they had reached together. They were able to remain open to the input of their partners, because that input came as each student’s own ideas about the issues were still forming. Overall, then, students reported more positive experiences when they created the first graded draft of a memo or brief together, rather than a graded rewrite.
C. Faculty Perspective on Graded Collaborative Writing

In general, we were very pleased with the results of our students’ collaborative written assignments. Particularly on the assignments in which the students researched and wrote the first draft collaboratively, we felt that working with another person had a number of advantages for the students’ writing process. They tended to get started earlier on researching and writing the assignments. Working together, they were able to fill in holes in each other's research abilities. Because the final written product had to satisfy both of them, they had to put more thought into justifying their analysis, and their analysis tended to become more thoughtful and sophisticated as a result of discussing it at length with each other. They also acted as editors to improve each other’s writing and as proofreaders to eliminate typos. As a result, their joint written products were, on average, better than their individually written products.94

Perhaps the most remarkable result was the disappearance of the lowest grades in the class.95 Through the group writing process, the weaknesses that typically pervade the weakest papers were addressed and corrected. Best of all, the students reported that they felt that they had learned a great deal from each other; they felt that the presence of an additional viewpoint helped them to see perspectives that they would not have come up with on their own and helped them to understand the legal analysis better than they would have working on their own.

Overall, then, these collaborative research and writing projects have helped the students to learn more about legal analysis and legal writing than they would have learned on their own. Further, the collaborative work has helped them to develop the general skill of working together with professional colleagues, which they will be called upon to do in some (though perhaps not an identical) manner in law practice. Based on the research supporting cooperative and collaborative work, this experience should advance our students’ learning preparing them better for

94 This assessment is based on our years of experience. It would be impossible to track grades to prove this while controlling for all variables.
95 See supra n. 82. We did not change our grading criteria, but rather markedly noticed the lack of weaknesses that pull down the grades in weaker papers.
future learning, whether in a similar or different classroom, in a firm, or in a courtroom.

IV. THE STUDENT SURVEY

Following the collaborative writing of the open research memo in Fall 2001, five of the CLR professors at Northwestern decided to survey our students to understand better what they thought about writing together and how we might be able to improve the experience next time. We crafted a survey with open-ended questions (to which students were invited to respond in essay form) in an effort to learn their feelings about the experience without imposing our own predeterminations on their thought process in responding. We asked the students to answer the survey immediately after they had submitted the open research memo assignment.

Section IV describes the survey process and the results. The survey results included the students' discussion of their expectations before embarking on their first graded collaborative writing assignment, whether their expectations were met, their work methods, and their suggested changes for future collaborative writing assignments.

96 Some of us offered our students credit of up to five percent of their term grade in CLR for answering the survey. In classes with letter grading, students were told that they would receive an "A" on their survey answers regardless of the content of their answers, if their responses reflected a good faith effort to provide thoughtful answers to the survey questions. (We told students that we felt that thoughtful answers to the three survey questions would require writing a total of at least two to three pages). If a student did not answer the survey or if the student's answers were not thorough enough to merit an "A," response to the survey would not be considered at all in determining that student's term grade. In these sections, every student who answered the survey did so thoughtfully and received an "A" for his or her response.

In classes with numerical grading, students were given one (1) point of extra credit for each question to which they made a good faith effort to provide a thoughtful response. In these classes, students did receive a range of credit for their survey responses.

The survey was distributed in five of our eight CLR sections (to a total of 128 students), and ninety-two students submitted written responses.

While this data collection method utilized a reward, we did so in an effort to ensure a good response rate. To ensure untainted data, we assured students that the content of their answers would not affect their grade on the survey.
A. The Survey Process

The first question in our Fall 2001 survey of our students sought to ascertain their general feelings about the experience. Thus, the first question asked:

1. What were your expectations about working on a collaborative memo assignment? Among the things you might consider in answering this question are: what concerns you had; what you looked forward to; and what details you thought would need to be ironed out. Finally, how did the process itself meet or fail to meet those expectations? Include here any concerns or difficulties in time management as well.

The student responses to this question naturally fell into one of four areas: negative expectations, negative expectations met, positive expectations, and positive expectations met.

The second question sought to learn about the students' collaborative experience in specific stages in the writing process and how effective students found this to be. Thus, the second question asked as follows:

2. Identify which of the following types of collaborative activities you and your Memo Three partner(s) used. For each one you used, evaluate how it worked, including whether and to what extent it worked well or not so well.

Brainstorming
Strategizing
Research
Conferencing with me [professor]
Writing a first draft
Editing
Rewriting
Proofing

Here, the answers naturally fell into the general categories of whether each stage was done collaboratively and whether the students perceived collaboration at that stage as effective.

The final survey question sought opinions about how we as teachers could improve the use of collaborative writing in the curriculum. Thus, we asked the students this question:
3. As you know, the law school is very committed to encouraging teamwork for a variety of reasons, including the hope that this will give our students a competitive edge in the job market. We want this course to complement that mission, but we also want this course’s collaborative experiences to foster a sense of pride and accomplishment. Based on your experience working on this collaborative memo, identify four (4) to six (6) recommendations as to how to make the process work as well as possible if we assign collaborative papers again in the future. Please be sure to explain why you are making these recommendations.

As noted above, the question format was open-ended to ensure that the results were not predetermined. The survey was distributed in five of the eight CLR sections\(^{97}\) (four sections of twenty-seven to twenty-nine students and one section of sixteen students), and yielded a total of ninety-two responses.\(^{98}\)

**B. The Survey Results**

The most useful results of the survey were, first, the students’ comments on their main positive and negative expectations for researching and writing a memo collaboratively and whether those expectations were met, and second, the students’ comments on which particular activities the student teams actually did collaboratively while working on their memoranda, and which of those activities they found effective or ineffective. We also considered the students’ recommendations for administering future collaborative writing assignments (see infra § IV(C)).

\(^{97}\) Graded written collaboration took place only in these sections.

\(^{98}\) To code these responses, one of the Authors read through a sample of responses and established a set of answer codes for each question. Then, using another sampling of responses, the three Authors each separately read the responses and coded the results. We three then compared our coding to assess both the consistency of our coding and the reliability of the coding categories. After some adjustments to the answer codes, we delivered the ninety-two survey responses to the CLR research assistant, a third-year student, who coded all ninety-two responses according to the codes we had established and tabulated the results. The three Authors then examined the results, double-checked the coded responses where the answers appeared unexpected, and double-checked a random selection of the coded responses to ensure the accuracy of our coding. Once satisfied with the accuracy of the results, we examined them for their significance.
1. Positive and Negative Expectations and Expectations Met

The following charts (in Figure 2) show the students’ main positive and negative expectations before doing the collaborative open research memo in fall 2001\(^9\) and the main positive and negative expectations they reported actually were met by the process. We included in these charts any expectations mentioned by ten percent or more of the ninety-two students who answered the survey.

**FIGURE 2**

**Main Negative Expectations**

- Disagreement in writing style/process 41%
- Worry about potential “free rider” problem 22%
- Partner rapport/working closely with someone else 19%
- Loss of efficiency/burden of extra class time 17%
- Disagreement in logical/analytical process 15%
- General unspecified negative expectation 15%
- Need to compromise could compromise quality 13%
- Prior bad experience with group work 13%

**Main Negative Expectations Met**

- Hard to write together 22%
- Group work took time/did not save time 17%
- Partner did not do enough 10%

**Main Positive Expectations**

- Share/challenge/criticize each other’s ideas/work 43%
- Improve writing process/skills 20%
- Opportunity to receive feedback 20%
- Share work load 15%
- General unspecified positive expectations 15%
- Good/high quality final product 12%
- Improve research/research skills 11%

\(^9\)We are doing the Fall 2002 survey in two stages. Before the groups began work together, we surveyed their expectations. Once they are done we will assess how they felt about the process.
Main Positive Expectations Met

- Engaged in healthy/helpful disagreement/debate/brainstorming 33%
- Good rapport with partner 28%
- Less able to procrastinate/kept to schedule 26%
- Never felt frustrated 25%
- Rewarding/positive writing process 21%
- Better research than individual research product 15%
- Saw different (partner’s) approach 13%
- Considered new ideas 12%
- Better final product than individual product 11%

We were pleasantly surprised by these results, as they indicated in several ways that most students found the collaborative memo process to be more positive, less negative, and more useful than they had expected to before beginning the project. First, there were about an equal number of categories of negative and positive expectations felt by at least ten percent of responding students before they actually did the collaborative memo assignment. However, after they had finished the assignment, the students expressed only three categories of negative expectations actually met, as compared to nine categories of positive expectations actually met, at or above the ten percent level. Second, the categories of negative expectations met were, for the most part, felt by fewer students than the categories of positive expectations met. That is, while only one category of negative expectations met ("hard to write together") was raised by more than twenty percent of the students, five categories of positive expectations met were raised by more than twenty percent of the students.

Moreover—and perhaps most importantly—even the main negative expectations met did not seem, for the most part, to be directed to the students' perceptions of the value of researching and writing collaboratively. The top two ("hard to write together" and "took a lot of time") are characteristic of the task and pedagogy, but do not suggest that the students did not find the collaborative assignment to be a good learning experience or to result in better understanding of the issues or a better memo.100

100 These results seem especially significant given that students were not given
To the contrary, in many positive categories students reported that they felt that the collaborative process helped them to engage in beneficial debate or brainstorming (thirty-three percent), that the collaborative process made them less able to procrastinate in preparing the memo (twenty-six percent), that they found the writing process rewarding or positive (twenty-one percent), that their collaborative research product was better than their individual research product would have been (fifteen percent), that the collaborative process helped them to consider new ideas (twelve percent), and/or that they felt they reached a better final written product than they would have if working individually (eleven percent), all of which are core tasks or skills that we seek to teach in our CLR course.

Finally, before beginning the project twenty-two percent of the students worried that there would be a free rider problem with their partner. In the end, ten percent of the students reported that they felt their "partner did not do enough." A comparison of these results can lead to several different interpretations depending on one's view of the similarity between the two response categories. The first interpretation assumes that this latter ten percent figure similarly reflects the free rider or slacker concern. In this instance, and quite positively, fewer than half of those students who had feared being paired with a free rider saw that negative expectation come to fruition.

A second, and alternative, explanation is that not all of the responses within the ten percent figure uniformly reflect the free rider concern. As articulated by the students, the initial fear of a free rider problem that students felt before doing the project encompassed a concern not only that there would be an unequal distribution of the workload, but also that this distribution would be unfair. For instance, one student reported, "These group projects [done by the student in high school and college] were the unfortunate byproducts of teachers who seemed to think their methods were forward-looking, where in reality they provided a straightforward method for the laziest of us to coast on the labors of the most industrious of us." 101 Certainly, the majority of the ten predetermined answers to choose from on the survey, but could give any responses they wished.

101 Other responses expressing concern (before beginning the project) about free riders also expressed this in terms of unfairness: "I am usually wary of doing group assignments, because it is difficult to get everyone together at the same time and because group members often do not do their fair share of the work."; "My expectations about working on this
percent who felt after the assignment that their partners did not do enough articulated a concern regarding unfairness. 102 However, some of those students who actually reported (after finishing the assignment) that their partner did not do enough work perceived an inequality, but did not mention any unfairness. 103 The difficulties these students reported seemed to focus more on an unequal distribution of work and not so much on perceived unfairness of that unequal distribution. Other examples involved more of a clash of writing styles when one person did a great deal of work first because that was that person’s approach and the other partner did more work later for the same reason. For instance, one student stated that because his “team member refused to outline or go over the details of the paper before writing,” they had difficulty making their paper “read as if it was written by one author.” In this alternative reading, the “partner did not do enough” negative expectation met was not consistently a concern over a free rider problem, but at times was a reflection of the difficulties of working with another, an articulation of how work progresses when the partners have different strengths, or a reflection of the fact that the work did not neatly divide into two equal halves for each partner.

collaborative assignment can be summarized by one word—misgivings. . . . The individual’s grade depends in some measure on the performance and commitment of other people which has always raised issues of fairness to me.”; “[M]y experience had always been that one person always pulled weight in the groups and others did not take it as seriously”; and “I was concerned that there would be an unequal distribution of work with an unfair burden left for me.”

102 Responses expressing a concern about unfairness included the following: “I felt that I did most of the work on the project and that the quality of my partner’s work was not on the same level as mine. I did not feel supported by my partner. . . . I would have planned this project, my studies, and my extracurricular activities differently if I had known that I had to significantly compensate for my partner’s portion of the assignment.”; “I did not have any concerns at first, however, as the deadline approached and I had done a very large amount of the work, I became concerned and frustrated. Although we both agreed on which position to take, I was very concerned that I had spent much more time thinking about our position and developing the arguments to fruition, while my partner did nothing.” For a discussion of ways that perceptions of unfair distribution of work can be addressed, see infra § V.

103 For example, one student said the following [in the context of difficulty coordinating schedules due to midterms and the fact that one partner was a commuter]:

The workload, by the end of the paper, was not equally distributed, resulting in some members doing more substantive work on the memo than others. I don’t think that the team “jelled” the same way that we did in the Kunz Research Exercise or the Citation Exercise. Perhaps the amount of work, the amount of time, and the larger percentage of the class grade made Memo Three more important in the eyes of the team, resulting in a more professional attitude between members. In the end, I’m grateful for the experience in the [sic] working with others on Memo Three.
Regardless of the interpretation, less than half of the number of students who had feared having a free-rider problem expressed any feeling of unfairness of workload in the end. After finishing the project, ninety percent of the students expressed no problem with the amount of work performed by their partner. We anticipate that the ninety percent figure will increase as we fine-tune our teaching of collaborative writing.

2. Students' Perceptions of Collaborative Activities Performed and Their Effectiveness

The second question in our survey listed a number of activities and asked students to comment on which particular activities they did collaboratively with their partners and which of these activities they thought were effective or ineffective. The results are shown in Figure 3. Figure 3 indicates the percentage of students who said that they and their partner did each particular activity collaboratively and out of that population of students, the percentage who reported that they found doing that activity collaboratively to be effective, the percentage who found it ineffective, and the percentage who did not comment on its effectiveness.

![Figure 3: Perceived Efficacy Of Group Activities](image)

The activities that the largest number of students said they did collaboratively were research (ninety-one percent), writing (eighty-seven percent), editing (eighty-three percent), conferencing
with the professor (eighty percent), and brainstorming (seventy-two percent). Other activities that the students said they did collaboratively included rewriting (seventy-one percent), proofreading (sixty-five percent), strategizing (sixty-one percent), and outlining (thirty-two percent). The low percentage of students who reported that they outlined together may be relatively insignificant because many students have reported to us that they do not outline at all (whether working alone or collaboratively) when writing papers. As a result, the pair may not have outlined collaboratively, even if one student in the pair did so alone.

In terms of effectiveness, the highest percentage of respondents (ninety-two percent) reported that they found conferencing with the professor collaboratively to be effective, followed by brainstorming (eighty-two percent), proofreading (seventy-two percent), strategizing (sixty-eight percent), rewriting (sixty-five percent), editing (sixty-three percent), research (sixty percent), outlining (fifty-two percent), and writing (forty-three percent). In fact, more students may have found the listed activities to be effective than the numbers suggest, as many students said that they did an activity collaboratively but then did not comment on whether they found it effective or not.

These results lend themselves to several explanations. One explanation of these results is that the collaborative tasks that students identified as most effective are those, such as research and conferencing with the professor, that are easy to do in groups. By contrast, those collaborative activities that students saw as less effective are those (most notably, writing) that tend by nature to be more difficult to do in groups. These numbers then tell us where the students need more support from faculty in working together.

Another way to read the numbers is to examine the influence of the professor's guidance throughout the process. A perusal of the results shows that students perceived group work on the initial stages of the project (such as brainstorming, at eight-two percent) as being quite effective. However, from there the steps that occurred next chronologically in the process (strategizing, researching, and outlining) were perceived as increasingly less effective when done collaboratively. The level of perceived effectiveness did not increase again until after the mandatory group conference where the professor's feedback and direction apparently reinvigorated the group to act as one, and the perceived effectiveness of the subsequent steps (editing, rewriting,
and proofreading) rose as a result. This observation is bolstered by many students' suggestions in their surveys that their professor increase the number of group conferences and overall guidance for future collaborative writing assignments. These requests support the explanation that the effectiveness of certain activities was influenced by teacher input.\footnote{The group conferences were held for twenty to thirty minutes each. By necessity, due to schedule constraints, the conferences were held over at least a week-long period. The students' perceived effectiveness of their group's conference and of the activities that they did immediately before and after their conference therefore may have been affected by when their conference occurred in relation to where they were in the research and writing process. One way to deal with this differential might be to have two group conferences for each group and to direct students as to which activity they should be doing at the time of each conference (for example, brainstorming issues at the time of the first conference and writing at the time of the second conference). Prof. Zimmerman took this approach in Spring 2002.}

C. The Students' Suggestions for Change

As part of the survey, we solicited suggestions for ways to improve the collaborative writing assignments. The majority of the suggestions focused on requests that their professor provide more guidance to students through teacher conferences, guidance in how to work collaboratively, and guidance on how to choose a partner. Many students suggested that the professor play a greater role in the process.

The single most common suggestion was for professors to have more group conferences. Students suggested adding an additional group conference later in the collaborative process to update the professor on their progress and to receive suggestions and clarification from the professor. Students also suggested that additional conferences would help resolve conflicts within groups and motivate them to start their work earlier. On a related note, many students also suggested that the professor set more interim deadlines. Students said they would find it helpful to know when they should complete their research, outline, and/or a first draft. Some students believed interim deadlines would decrease stress, impose a schedule, and help even out the workload among group members. Some students suggested that the students themselves should agree on and submit their own timeline for tasks. They believed that such a process would force each group to establish its own goals for the project and would ensure that the group
considered time management issues. Students also suggested mandatory outlines or mandatory library research sessions.

Many students also requested more guidance on how to work collaboratively and how to overcome problems that might arise. They suggested that the professor discuss in detail the goals of collaborative work early on in the semester. Some students felt that they needed a clearer understanding of the objectives of collaborative work before writing together. Others stated that the professor should spend more time before the assignment discussing potential problems the teams might have and how students could resolve these in an efficient manner. Students also suggested that the professor direct students not to divide the memo writing by legal issue, as students had to rewrite both issues individually for the subsequent assignment.

Suggestions on how best to choose partners for assignments ranged from allowing students to choose their own partners without restriction to allowing students to review potential partners’ written work before making a selection. Others suggested that all partner assignments be random. These divergent suggestions reflected various concerns. Students who sought more information about potential partners and more control over partner choice generally also expressed concern that their partners would be incompatible in some way. They wanted some sort of safety valve to avoid free riders. Those who suggested random pairings did so because they sought a more realistic experience. In the workplace, they reasoned, they would have no choice in their assigned co-workers, and yet they would have to learn how to create a high quality product together. These opposing views on this topic may reflect the diversity of age and work experience within the first-year class.105

Some students also suggested modifying the collaborative element of the assignment by requiring students to research and outline a memorandum together but to write individually. Other students suggested that at the end of the project, students assess each other in how well each worked within the group.106 These

105 The first year class entering Northwestern in Fall 2001 ranged in age from twenty to forty years old, with an average age of twenty-five. Eighty-six percent had at least one year of work experience before entering law school, sixty-three percent had at least two years of work experience, and forty-two percent had at least three years of work experience. Statistics on file with Northwestern University School of Law admissions office.

106 Some also suggested that part of each individual's grade be based in part on this peer assessment.
suggestions to modify the collaborative nature of the assignment reflect these students' fear of being harmed by working with a poor partner. In response to the students' suggestions, we implemented some changes in the second semester of CLR. In Section V, we discuss how we responded to some of these recommendations.

V. IMPLEMENTATION OF CHANGES

As we stated earlier, one key to using cooperative and collaborative pedagogy is being open and flexible about making changes with each iteration or permutation of the assignment. We have been true to this guideline in several respects as a result of the students' comments in their surveys and of our own observations: by changing the fall collaborative writing assignment, changing the number of conferences, modifying methods of choosing partners, and providing written guidelines for collaborative work in Spring 2002.

A. From Collaborative Graded Rewrite to Collaborative Graded First Draft

All of us changed the fall collaborative writing assignment from the closed memo rewrite (in 2000) to the open memo first draft (in 2001). Our justification was twofold: first, that the students had not yet had enough law school experience to benefit from working collaboratively at the point when the closed memo is due, fairly early in fall term,\textsuperscript{107} and second, that trying to rewrite a document from two individually authored first drafts did not achieve our goal of writing in unison. For example, on the closed memo rewrite, some groups merely used the draft with the higher grade and revised that document to strengthen it. Therefore, in Fall 2001 we instead assigned students to research and write collaboratively the first, graded draft of their open research memo, and we were satisfied with this change (see \textit{supra} § III(A)–(B)).

B. Conferences and Other Pacing Mechanisms.

A crucial component of collaborative writing is the student-faculty conference. Based on student input discussed in Section IV, many of us instituted or increased the number of mandatory

\textsuperscript{107} See \textit{supra} n. 8 (describing assignments in our program).
conferences for each team. Several CLR professors in our program added a second group conference during the process of the collaboratively written appellant’s brief in Spring 2002. This sensible addition allowed the student pairs additional consultation time at one of two key times in the writing process (as opposed to just one). The additional teacher time required to hold thirteen or fourteen additional twenty- to thirty-minute conferences was well worth the added comfort to the students. Their unsolicited positive feedback on this underscored its importance to them as well.

For example, Professor Zimmerman met with each group twice in Spring 2002 while they were collaboratively writing the appellant’s brief: once while they were brainstorming and once while they were writing. He found that this conference schedule kept the students on task for a demanding assignment better than any other mechanism he had used.

Professor Narko changed from individual student conferences in Fall 2001 to group conferences in Spring 2002, in response to student suggestions in the Fall 2001 survey. Each team had to meet with her to report its progress after the team had completed its research and was beginning to draft its brief. Students found this to be more efficient than individual conferences, avoiding the necessity of relaying information to their partners second-hand. Also, students reported that the group conference increased accountability of partners and decreased cases of uneven effort. With both students in front of the desk, there was no blaming the other person for work not completed. Professor Narko also scheduled individual conferences on request.

With regard to group conferences, Professor Inglehart did not make any changes from fall to spring semester. In both semesters, she required each team to meet with her for one thirty-minute conference during the course of the team’s work on the collaborative assignment.108 These conferences were held at about the time the groups were finishing their research and completing their outlines. Her course evaluations for fall semester (which she did not receive until well into spring semester) showed that most students found these group conferences very helpful as a means of feedback and keeping the team on track in terms of doing relevant research and identifying relevant legal issues to be discussed. In

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108 Professor Inglehart allowed teams to schedule additional voluntary group conferences with her.
fact, many students commented in their evaluations that they felt that the group conferences were the most useful activity in the process of this collaborative assignment, and many commented that they would like to have two required group conferences while working on the assignment, one near the beginning of the process and one half to two thirds of the way through. Although Professor Inglehart received this feedback too late to implement the “mandatory two conferences” suggestion for the spring semester collaborative assignment, she plans to implement it for the next collaborative assignment in her class.

In addition to their suggestion of multiple conferences, students also suggested that the CLR professors institute other pacing mechanisms such as assigning interim deadlines. Many of us already had one or more pacing mechanisms in place, such as requiring groups to submit ungraded research logs and/or outlines, setting suggested dates for completion of a first draft, or holding class time as a research session in the library. Many of us at Northwestern may implement these other types of pacing mechanisms for future collaborative writing assignments. However, most of us have also found that conferences themselves are the most important pacing mechanism.

C. Partners

Northwestern CLR professors use various methods in matching our students with partners for collaborative assignments. Most of us let students choose their own partners, and others of us randomly assign partners to our students. In response to certain suggestions made in our student surveys regarding choosing partners (see supra § IV(C)), we considered appropriate methods of assigning partners. None of us has decided to let students view each other’s work before choosing partners, and despite some students’ desire to choose partners without restrictions, some of us have retained some restrictions, such as requiring students to choose new partners second semester.

For example, in Fall 2001, Professor Inglehart allowed students to choose their own partners. At the end of the semester, she asked the class whether they wanted to chose their own partners for collaborative work the following semester. All but one student—who said he did not know many of his classmates very well—emphatically requested that they be allowed to choose their
own partners again in spring semester. They felt that by being allowed to choose their own partners, they were able to work with other students whose schedules were similar to their own and with whom they felt a sufficient rapport to enable a good working relationship. Because of the strong student response on this issue, Professor Inglehart maintained the policy of allowing them to choose their own partners for the second semester, and felt that this worked out well both semesters. She did require that for second semester they work with a different partner than first semester, to prevent any actual or perceived advantage that might arise if students who had built a good working relationship on the fall term collaborative assignment were allowed to partner again.

D. Written Guidance on Collaboration

In response to students' requests for more guidance on the collaborative writing process, our CLR faculty created written guidelines \(^{109}\) for students on how to research and write together and how to work through potential problems. This document took into account the survey responses and included sections on choosing partners, managing students' time, coordinating and allocating tasks, conferencing with the professor, and resolving conflicts with one's partner. It also covered in detail various options for the actual writing process. We gave this document to students at the beginning of second semester, as they were beginning to research and write their collaborative brief for appellant. In the Fall 2002, we will give this document to our students as we prepare them for their collaboratively written memorandum.

VI. CONCLUSION

In teaching legal writing at Northwestern, the Authors' experience demonstrates that cooperative and collaborative in-class work logically complements the subject matter, our teaching styles, our relationships with our students, and our classroom setting. Once the Northwestern CLR faculty had become comfortable with in-class group work, graded collaborative writing seemed a natural, complementary step in our pedagogical

\(^{109}\) The first draft of this document was created by three of our CLR faculty. The document was then circulated to the rest of the CLR faculty, who made additions and edits.
development. All of the research supports this developmental process and its fruits, and our student survey findings bolster that conclusion. The Authors hope that the theory, experiences, findings, and advice presented here will help to make cooperative and collaborative learning beneficial parts of any legal writing curriculum.\textsuperscript{110}

\textsuperscript{110} An unplanned benefit of incorporating collaborative assignments into our CLR course has been the increase in our own faculty's awareness of the advantages of working collaboratively to produce a written product. Over the past year or two, our CLR faculty has written a number of documents collaboratively for our course. These have included our course syllabus and policy document, a mission statement for the CLR course, and a document giving students guidelines for effectively writing collaborative memos and briefs (see \textit{supra} § V(D)).
Continuing Development: A Snapshot of Legal Research and Writing Programs through the Lens of the 2002 LWI and ALWD Survey

Kristin B. Gerdy

I. INTRODUCTION

The annual Survey of Legal Writing Programs in the United States, sponsored by the Association of Legal Writing Directors and the Legal Writing Institute, has become a powerful tool for improvement and reflection of growth in the field of professional legal writing teaching. Legal writing program directors have used the survey to improve their programs, their status, and their salary.¹

Beginning with early articles giving anecdotal accounts of individual legal writing programs and continuing through the sophisticated surveys of the early twenty-first century, these surveys present a picture of a vibrant and growing new professional field.² The formal survey began in the late 1980s as an attempt by the young Legal Writing Institute to clarify and quantify information

¹ Director of Rex E. Lee Advocacy Program, J. Reuben Clark Law School, Brigham Young University. B.A., J.D. cum laude Brigham Young University. I would like to thank Jo Anne Durako, who has diligently overseen the survey for the past four years and who has been a mentor and example to me throughout the last few years; I have been privileged to serve as her survey co-chair. Much of this article is based on the 2002 Survey Report, the organization and base text of which Professor Durako authored for earlier versions of the survey. This Article and the survey itself would not have been possible without the help of the 154 legal writing directors and administrators who completed the surveys included in the 2002 survey report and this Article. Thanks also go to Lance Long, a legal writing faculty member at BYU, who spent much of his summer working on the survey report, and to Lovisa Lyman and Jane H. Wise, whose suggestions and insights were invaluable. Finally, this Article and the survey would not have been possible without the expert technical assistance of James Cooper at Seattle University and the financial and moral support of the Legal Writing Institute and the Association of Legal Writing Directors.

² Marjorie Dick Rombauer, First-Year Legal Research and Writing: Then and Now, 25 J. Leg. Educ. 538 (1973); Jill Ramsfield, Legal Writing in the Twenty-First Century: The First Images, 1 Leg. Writing 123 (1991); Jill Ramsfield, Legal Writing in the Twenty-First Century: A Sharper Image, 2 Leg. Writing 1 (1996). Jo Anne Durako, A Snapshot of Legal Writing Programs at the Millennium, 6 Leg. Writing 95 (2000); Association of Legal Writing Directors, 1997 Survey Results (conducted by Louis J. Sirico, Jr.); Association of Legal Writing Directors, 1998 Survey Results (conducted by Louis J. Sirico, Jr.); Association of Legal Writing Directors/Legal Writing Institute, 1999 Survey Results (conducted by Jo Anne Durako); Association of Legal Writing Directors/Legal Writing Institute, 2000 Survey Results (conducted by Jo Anne Durako) (copy on file with author) [hereinafter 2000 Survey]; Association of Legal Writing Directors/Legal Writing Institute, 2001 Survey Results (conducted by Jo Anne Durako) (copy on file with author) [hereinafter 2001 Survey].
about legal writing programs in law schools around the country. In the early twenty-first century the now-annual survey continues to present an important picture of legal writing programs in the legal academy. This article attempts to summarize the findings of the 2002 survey and to highlight significant changes and trends in the operation of legal research and writing programs across the country.

II. BACKGROUND ON THE 2002 SURVEY

The 2002 Survey was conducted in early April 2002. Information about the survey, an online password, and a request for response was sent to each of the 186 schools in the solicited pool. Respondents logged in to a secure website on the Legal Writing Institute website to enter their data. A record 154 schools participated for an 83% response rate (up from 82% in 2001) thanks to the cooperation of legal writing program directors throughout the country. This marked the fourth straight year of increased response rates.

A. Organization and Content of Survey Questions

The 2002 Survey followed the organization and content of earlier surveys. The 100 questions were divided into eleven subject-oriented sections: 1) Submitter Profile; 2) Law School Information; 3) Staffing Model; 4) Curriculum; 5) Upper-Level Writing Courses; 6) Technology; 7) Directors; 8) Full-time LRW Faculty Members; 9) LRW Adjunct Faculty; 10) Teaching Assistants; and 11) Survey. Respondents were given a set of definitions to guide their answers and to help attain consistency in survey results.

The content of the 100 survey questions remained relatively unchanged from 2001; however, new questions about how directors and faculty spend their teaching time and how much time they

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4 2002 Survey. The 2002 Survey report includes complete results from the 2002 survey as well as data from the 2001 survey to aid in comparison. When 2001 data was not available (generally due to technical problems with the 2001 survey data), data from the 2000 survey was provided for comparison. The 2002 Survey includes minor modifications of the 1999, 2000, and 2001 surveys conducted by Jo Anne Durako. Those surveys were built on earlier surveys conducted by Louis Sirico of Villanova Law School.
5 In 1999 68% of solicited schools responded to the survey; in 2000 that number grew to 78% and to 82% in 2001.
spend in preparation were added in order to expand the picture of faculty workload.

B. 2002 Survey Respondents: Law School Information Submitter Profiles

The 2002 survey includes information from the vast majority of American law schools, representing schools from every region of the country, all geographic settings, and all school sizes. Slightly more than two-thirds (64%) of law schools responding to the 2002 survey were located in urban settings, with 18% set in suburban areas and 6% set in rural areas. Slightly more private law schools than public law school are represented in the 2002 Survey data.

More than half of the law schools included in the 2002 Survey had first year class sizes between 151 and 250 students. Another quarter had first year classes larger than 300 students.


7 Question 7.

8 Question 8: 41% public and 59% private.

9 Question 9: 21% class size of 151-200; 25% class size of 201-250.
The profile of respondents to the 2002 Survey shows that the average respondent was a white, female, legal writing director who has been out of law school for 18 years, who has been teaching for more than 11 years, and who has been directing her legal writing program for almost 7 years. The vast majority of survey respondents classified themselves as directors of the required legal writing programs at their law schools. Other responses came from associate or assistant directors or from faculty members in directorless programs. Seventy-five percent of 2002 Survey respondents were women, which was up three percent from 2001 figures. Minorities comprised less than one percent of survey respondents, consistent with figures from 2001. Respondents graduated from law school an average of 18 years ago, but as recently as 6 years ago and as long as 44 years ago. The average respondent has been teaching in law school on a full-time basis for 11.38 years. The least experienced respondent has only been teaching full-time for 1 year; while the most experienced has 32 years of full-time teaching experience. Respondents to the 2002 survey not only have significant years of law school teaching experience, but they also have considerable experience as writing directors at their present schools. The average director has directed the writing program at the present school for almost seven years.

The remainder of this Article will describe the findings of the 2002 Survey and highlight changes in legal writing programs since the 2000 and 2001 surveys. Part III will examine trends in salaries for legal research and writing directors and faculty. Part IV will describe the variety of staffing models employed in law school writing programs and the status issues involving writing faculty. Parts V and VI will highlight curricular trends and common practices in legal writing programs. Part VII will summarize the average workload of legal writing directors and faculty as well as examine their role in law school governance, voting rights, and scholarship. Finally, Part IX will examine the role of gender on

10 Question 9: 23% class size of more than 300 students.
11 Question 1: 120 of 154 responses.
12 Question 2: 111 of 150 responses.
13 Respondents to the 2001 survey included 72% female respondents.
14 Question 2: 6 of 150 respondents identified themselves as a race other than “white.”
15 Question 3.
16 Question 4.
17 Question 5: average 6.82 years.
III. SALARY DATA

A. Directors' Salaries

For the fourth consecutive year, salaries of legal writing directors in American law schools rose. The average director salary in 2002 was $82,010, up 4% from 2001.

Directors on twelve-month contract terms averaged salaries of $85,389, while directors with contract terms less than twelve months averaged $79,563.

Average directors' salaries increased in half of the eight geographic regions surveyed. The largest percentage increase was in the Great Lakes and Upper Midwest region, which saw its average director salary rise to $82,190 in 2002 from $70,951 in 2001. In the New York City and Long Island region, the 2002 average director salary was $121,167, up from $114,050 in 2001. Mid-Atlantic region salaries rose to $92,427 from $85,118. Finally, the Northwest and Great Plains region's average salaries rose to $69,100 from $68,900; however that region still lags behind the national average with the lowest average salary in the country.

Four regions found their average director salary lower in 2002. The largest drop affected the Southeast region, falling to $76,218 from $79,708. The Northeast region fell to $82,236 from $84,116, while the Far West fell to $80,924 from $81,639. The smallest decrease was in the Southwest and South Central region, which saw its average director salary drop a mere $64 from $73,269 to $73,205.

B. Legal Research and Writing Faculty Salaries

Full-time legal research and writing (hereinafter “LRW”) faculty base salaries also rose in 2002 from an average low of $46,741 to an average high of $54,316, an almost 6% increase from the

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18 Question 49.
19 AIn 2001, the average director salary was $79,209, up 4% from 2000. In 2000, it was $75,806 up 7% from 1999, and in 1999 it was $71,016 up 3% from 1998.
20 Question 49.
21 Question 6 by Question 49, chart and graphical depiction in 2002 Survey Report. Figure 1 illustrates the regional salary differences for the four years 1999-2002.
2001 average low of $44,011 and a 2.5% increase from the 2001 average high of $53,012.\(^{22}\)

Average LRW faculty salaries went up in seven of the eight geographic regions in 2002. The largest increase came in the Mid-Atlantic region, and the only region seeing a decline in the Far West.\(^{23}\)

C. Other Variables Related to Salaries

As expected, salaries for directors and faculty increased as they have more years of experience. Factors such as length of time since graduation from law school, length of time teaching full-time in law school, and length of time at the present institution, all affected salary.

Geographic setting and institution type also influenced salaries. In 2002, salaries were higher for directors and LRW faculty in the suburbs than in urban or rural areas. This is a change from 2001 when salaries for directors and LRW faculty were higher in urban than in suburban or rural areas, but is consistent with trends from 2000 and earlier. In 2002, salaries were higher for directors at private law schools ($84,605) than they were for directors at public law schools ($78,379).\(^{24}\)

The organization of the legal writing program and how it was staffed influenced salaries for both directors and faculty in 2002. Directors in programs with tenure-track teachers hired to teach LRW had the highest average directors' salaries ($98,333). Average salaries were lower in adjunct-taught programs ($93,789) and “complex hybrid”\(^{25}\) programs ($84,733).\(^{26}\) Salaries were lowest in

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\(^{22}\) Question 75.

\(^{23}\) Question 6 by Question 75. Figure 2 illustrates the regional salary differences for the four years 1999-2002. New York City and Long Island 2002 average salary was $59,500 with an average low of $56,500 but no reports in 2002. Great Lakes and Up. Midwest average salary was $51,666 with an average low of $44,789 and a 2001 average low of $39,500. Southwest and South Central average salary was $51,423 with an average low of $47,077 and a 2001 average low of $45,326. Mid-Atlantic average salary was $50,550 with an average low of $45,850 and a 2001 average low of $42,000. Far West average salary was $50,509 with an average low of $47,173 and a 2001 average low of $48,894. Northeast average salary was $50,025 with an average low of $46,150 and a 2001 average low of $45,500. Southeast average salary was $47,696 with an average low of $45,136 and a 2001 average low of $42,429. No reports were submitted for the Northwest and Great Plains region in either 2001 or 2002.

\(^{24}\) Question 8.

\(^{25}\) Survey respondents were asked to classify their programs by one of the eight basic staffing models defined in Ralph Brill et al., *ABA Sourcebook On Legal Writing Programs*
programs with LRW faculty on contract ($76,744). For LRW faculty, average current salaries were highest if the faculty were tenured or on tenure-track ($65,639) and next highest in complex hybrid programs ($51,079). 27

Directors' average salaries were highest if they were tenured and their primary responsibility is LRW ($106,506), and next highest if the directors' primary responsibility is not LRW ($97,167). 28 Following behind were tenure-track directors if their primary responsibility is LRW ($84,690) and clinical tenure or tenure-track directors ($81,894). Non-tenure track directors earned the lowest salaries ($70,541). LRW faculty average current salaries were highest when their director is tenured ($47,182) or on tenure track ($45,994) and lowest in programs where the director is on contract ($43,329). 29

The number of students LRW faculty members are expected to teach also appears to affect salary; however the affect seems to be inconsistent with the highest average salaries going to those who teach the largest and the smallest numbers of students. 30 Salaries tend to be higher when faculty members teach smaller classes. For example, the average salary for LRW faculty with responsibility for fewer than 25 students in 2002 was $53,200. The average salary for faculty with responsibility for 25-29 students was $51,625. However, the average salary for faculty with responsibility for 30-34 students was $49,344, and for faculty with responsibility for 35-39 students was $45,219. Faculty salaries begin to rise again when the student-faculty ratio goes above 40, yet the salaries never equal those of faculty with lower student loads until the class size exceeds 50. The highest paid group, at $67,100, must teach between 75 and 80 students each semester. When the average faculty salary is divided by the number of students taught, the numbers become even more disturbing. A faculty member teaching 24 students per term would earn $2,217 per student in 2002, while a faculty member teaching 40 students would earn

(1997). Respondents unable to so classify their programs could designate it as a “complex hybrid” of the models. A follow-up question asked respondents selecting the “complex hybrid” option to indicate which elements of the standard models were included in their programs.

26 Question 10 by Question 49.
27 Question 10 by Question 75.
28 Question 45 by Question 49.
29 Question 45 by Question 75.
30 Question 75 by Question 82a.
only $1,144, and a faculty member teaching 80 students would earn a mere $839 per student.

D. Adjunct LRW Faculty and Teaching Assistant Salaries

Unlike director and faculty salaries, the average salaries of adjunct faculty and teaching assistants in legal research and writing programs fell in 2002. LRW adjuncts earned an average of $1,490 per credit hour in 2002, compared to $1,745 in 2001.\textsuperscript{31} Adjuncts compensated by term earned an average of $3,452 in 2002, compared to $4,407 in 2001.

In the 24 programs that pay their teaching assistants by term, those TAs earned an average of $1,372, compared to the $1,524 they earned in 2001.\textsuperscript{32} In the 21 programs that pay their TAs an hourly wage, that wage fell to $8.50 from the 2001 rate of $8.65. The only TAs whose compensation increased in 2002 were those who received an offset against their law school tuition. That offset averaged $2,043 in 2002, up from $1,406 in 2001.

IV. STAFFING MODELS AND STATUS ISSUES

A. Director Types

The overwhelming majority of American law schools have legal research and writing directors, persons with direct responsibility for the design, implementation, and supervision of the law school’s writing program.\textsuperscript{33} These directors hold a variety of faculty and administrative positions within the legal academy.\textsuperscript{34} Twenty-one or 16\% of the nation’s legal writing directors are tenured faculty members whose primary responsibility is directing the legal writing program. Eighteen are untenured faculty members on a tenure track whose primary responsibility is directing the legal writing program. Eight are faculty members with clinical tenure or on clinical tenure track. Seven are faculty members or administrators whose primary responsibility is not the first-year legal writing program, and another three are administrators whose primary responsibility is directing the writing program.

\textsuperscript{31} Question 88: note that responses greater than $20,000 were excluded.
\textsuperscript{32} Question 98.
\textsuperscript{33} Question 44: 130 schools have directors; 20 do not.
\textsuperscript{34} Question 45.
Nearly half, 55, are faculty members not on a tenure track whose primary responsibility is directing the legal writing program. In 2002, there were fewer tenured directors (21 vs. 22) but more tenure-track directors (18 vs. 16) responding than in 2001. In addition, eight directors have clinical tenure or tenure-track status compared with nine in 2001. About 36% of those responding were tenured or tenure-track including clinical tenure status. However, 42% of the directors whose primary responsibility is LRW are not on tenure-track (55 of 130).

B. Assistant Directors

Only 19 programs reported having assistant directors in 2002 (up from 18 in 2001 but down from 25 in 2000). The average salary for an assistant director was $54,176 compared with $51,965 in 2000. (In 2001, the average of $37,753 was based on only three responses.)

C. Staffing Models

In 2002, most American legal writing programs used full-time, nontenure-track teachers (76 or 50%), a hybrid staffing model (41 or 27%), or adjuncts (21 or 16%). LRW faculty in most programs are on short-term contracts with 65 on 1-year contracts, 19 on 2-year contracts, and 36 on contracts 3 years or longer. Faculty in 17 programs have ABA Standard 405(c) status, up from only 7 in 2001. In 2002, seven programs used solely tenured or tenure-track teachers hired specifically to teach LRW, and another six programs used such teachers in hybrid programs. A total of 20 programs reported using tenure or tenure track LRW faculty in some capacity, compared to only 8 in 1999 and 15 in 2001. The overwhelming majority of those LRW faculties on contract have no limit to the number of years they may teach (100 of 109 or 92% consistent with the 2001 numbers of 85 of 92). Such limits are commonly referred to as “caps.”

35 Question 45.
36 Question 46.
37 Question 10.
38 Question 65.
39 Questions 10 & 11(a).
40 Such limits are commonly referred to as "caps."
41 Question 66.
The percentage of programs with caps has fallen steadily during the past 4 years, from a high of 22% in 1999, to 12% in 2000, to 8% in 2002. The average contract term in uncapped programs has increased to 1.21 years (from 1.19) for the first term, and has remained steady at approximately 1.5 years, 1.9 years, and 2.22 years for subsequent terms.\(^{42}\)

**D. Legal Research and Writing Faculty Titles**

More than two-thirds of program directors have a form of “professor” in their official title (87 of 130).\(^{43}\) “Director” is the next most common title (57 or 44%). Nine directors still have a title of “lecturer” or “senior lecturer.” These figures are remarkably consistent with those from 1999 through 2001. For LRW faculty, many have some form of “professor” in their official title (64 or 42%). This does show a marked increase from 37 in 1999, 58 in 2000, and 56 in 2001. Many LRW faculty members are “instructors” (36 or 25%), with “lecturer” the next most common title (17 or 11%).\(^ {44}\)

**E. Adjunct Faculty**

Adjunct faculty members teach legal research and writing in nearly half of the programs in American law schools.\(^ {45}\) These adjunct faculty members represent a wealth of legal practice and teaching experience. Thirty-three programs require that their adjuncts have a minimum number of years of legal practice experience to be hired. That requirement averages just below 3 years of experience, but reaches as high as 10 years.\(^ {46}\) Sixty-four programs, representing an average of 12.8 adjuncts each, report that the largest percentage of their adjunct faculty members has between six and ten years of teaching experience.\(^ {47}\)

\(^{42}\) Question 67.
\(^{43}\) Question 48.
\(^{44}\) Question 68.
\(^{45}\) Question 86. 16 programs use adjunct faculty members exclusively; 17 use them “substantially” (to teach approximately 75% of their students); 10 use them “significantly” (to teach approximately 50% of their students); 15 use them “somewhat” (to teach approximately 25% of their students); 15 use them “rarely,” and 68 do not use adjuncts.
\(^{46}\) Question 90: The average required experience is 2.87 years, with a minimum requirement of one year and a maximum requirement of 10 years.
\(^{47}\) Question 91: The average number of adjuncts representing the given ranges of teaching experience are 0-2 years, 5.6 adjunct faculty members; 3-5 years, 5.05 adjunct
V. **CURRICULUM**

A. **Required Programs**

Virtually all writing programs extend over two semesters averaging 2.22 credit hours in the fall and 2.14 hours in the spring.\(^{48}\) Thirty-four programs have a required component in the fall of the second year, averaging 2.12 credit hours. In the majority of programs, the number of credit hours awarded for the required program each semester equals the number of hours of weekly in-class teaching.\(^{49}\) For the twenty programs where classroom hours exceeded credit hours for the course, the average excess was 1.18 hours of classroom instruction per week. For those 15 programs where credit exceeded weekly classroom hours, the deficit was an average of .93 hours each week.

1. **Grading Practices**

Almost all LRW courses are graded (125 programs).\(^{50}\) The majority of legal writing programs are graded in the same way as other first-year courses, using the same required curve, mean, or median.\(^{51}\) Others are graded on curves or means specifically for LRW or on some other curve or mean.\(^{52}\) The average curve or mean specifically for LRW courses reported by survey respondents (2.86) is slightly higher than the curve or mean reported for “all first-year courses” (2.71). Thus it appears that these “special” grading rules for LRW courses require higher grades for these courses than for others in the first-year curriculum. However, this conclusion may be flawed because the question did not ask respondents that selected a “special” curve or mean to indicate the required mean for their other first-year courses. Therefore, the difference in averages may be the result of disparate means at a vari-

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\(^{48}\) Question 12.

\(^{49}\) Question 14: 111 respondents indicated that the number of credits and the number of weekly class hours were equal.

\(^{50}\) Question 15.

\(^{51}\) Question 16: 87 of 146 respondents indicated that their legal writing program is graded the same as other first-year courses.

\(^{52}\) Id. 25 respondents indicated a specific curve or mean for LRW, and 3 indicated some other curve or mean is used to grade the LRW course.
ety of schools rather than a result of "inflated" grading in LRW courses.

Within LRW courses there are differences in the way assignments are graded and the number of assignments that carry grades. Many programs grade at least some assignments anonymously (79), but 70 programs do not. The majority of programs grade all or nearly all of the major writing assignments in the required course. One-hundred-twenty-three programs require rewrites with 40 of those programs requiring rewrites on all assignments. Fifty-five programs grade all rewrites; 34 grade only the rewrites; 19 grade only the final drafts.

2. Uniformity

The area of greatest uniformity within legal writing programs is citation system, with 137 programs (91%) using a uniform text. Uniformity is also high for the number of major assignments (120 programs or 80%) and required textbooks (101 programs or 68%). Syllabus coverage, due dates, and lengths for most assignments are also fairly uniform within programs, although strict uniformity falls to just above 60% and general consistency rises to around 35%. General consistency rather than uniformity is the trend in grading legal writing courses, with 59% favoring general consistency and only 37% requiring uniformity. Programs tend to vary the most in the uniformity of the number of minor assignments within their courses, with three-quarters of programs almost evenly splitting between uniformity and general consistency with a quarter of programs indicating variety between sections. The greatest variety within programs is found in content of class lectures and exercises, where half of the programs indicate that such content varies across sections, only 34% strive to maintain generally consistency across sections, and 16% strive for uniformity.

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53 Question 17.
54 Question 25: 106 programs indicate grading of between 76% and 100% of "major assignments." The survey defines a "major assignment" as "one in which the final product is equal to or greater than 5 pages. Graded assignments do not include those evaluated with a check, check +, check – or similar method."
55 Question 23.
56 Question 26.
57 Id. Syllabus coverage was 61% uniform and 33% generally consistent. Due dates and lengths of major assignments were 62% uniform and 39% generally consistent.
58 Id. 38% uniform; 36% generally consistent; 26% varies among sections.
3. Research Teaching

The vast majority of programs integrate research and writing instruction (117 programs).59 At 65 schools, legal research is taught by LRW faculty. At 40 schools, it is taught by librarians. In 37 schools LRW faculty and librarians teach legal research in combination, and at 20 schools teaching assistants and other students are responsible for teaching research.

The types of research assignments, content coverage, and online database training offered to students in the required legal research and writing programs appear remarkably consistent regardless of whether the research in the program is taught in an integrated manner with the writing instruction or taught separately.60 A slightly higher percentage of programs where research is taught separately include research exercises unrelated to writing assignments.61

The largest statistical difference between integrated and non-integrated research programs reflects the relationship between research and writing assignments. The approach favoring a combination of closed and open library research for writing assignments is much more common (97 of 117 or 83%) in integrated programs than it is in non-integrated programs (20 of 39 or 51%).62 Writing assignments based exclusively on open library research is favored by more integrated programs than non-integrated programs, but the difference is not as great (28 of 117 or 24% of integrated programs vs. 7 of 39 or 18% of non-integrated programs). Similar percentages of integrated and non-integrated programs favor instruction using all closed universe research for writing assignments (14 of 117 or 12% of integrated programs vs. 5 of 39 or 13% of non-integrated programs).

Regardless of program design, approximately half of required programs cover legislative history and administrative law research, while half do not.63 The majority of legal research and

59 Question 18.
60 Question 19.
61 Id. 85 of 117 (73%) for integrated programs vs. 33 of 39 (85%) for non-integrated programs.
62 Because respondents were able to select multiple answers to this question, percentages exceed 100%.
63 Id. 53 of 117 (45%) of integrated programs and 21 of 39 (54%) of non-integrated programs teach legislative history research. Sixty of 117 (51%) of integrated programs and 20 of 39 (51%) of non-integrated programs teach administrative law research.
writing programs (80%) expose their students to online database (WESTLAW/NexisLexis) training during the first semester, with 19% offering unlimited training during that semester. Almost two-thirds of programs offer unlimited training during the second semester.

4. Assignments

The most common writing assignments in legal research and writing programs are office memoranda (150), appellate briefs (126), pretrial briefs (76), and client letters (70). Increasingly programs are introducing less traditional assignments into their first year programs. Thirty-eight programs include drafting documents, up from 28 in 2000, and 32 programs include trial briefs in their first-year courses.

The most common oral exercises were appellate arguments (115), pretrial motion arguments (52), and in-class presentations (43). Other programs include oral reports to senior partners (31, a doubling of 2000 survey responses), trial motion arguments (17), or other oral skills.

B. Upper-level Courses

Most law schools (89%) require that students satisfy an upper-level writing requirement, beyond the required program, in order to graduate. In order to assist students in fulfilling this requirement, the majority of American law schools (119 of 150 or 79%) offer upper-level elective legal writing courses in addition to their first-year programs. Only 13% (19 of 150) do not. At most law schools (39%), these courses are taught by a combination of LRW and non-LRW faculty members. Smaller groups of schools offer these courses taught exclusively by non-LRW faculty members (28%) or exclusively by LRW faculty members (12%).

The topics of upper-level writing courses vary widely from general survey courses in advanced legal writing, advanced research, and drafting to courses focusing on such specialized topics as judicial opinion writing, legislative drafting, transactional draft-

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64 Question 20.
65 Question 33. The majority schools (126 of 142) responding to this question have such a requirement. Only 16 do not.
66 Question 32.
ing, and advanced appellate advocacy.67 The majority of these courses are electives; however, a few schools do require them for graduation. The most common required course is in scholarly writing, with 55 schools reporting such a requirement.

Of necessity, advanced writing courses have limited enrollment and fairly small class size. The popularity of these elective courses is evidenced by survey data that shows greater demand than availability for every category of advanced writing course listed.68 The greatest imbalances appear in courses in general writing skills and survey courses, drafting, and judicial opinion writing, where unavailability was noted in at least half of the programs offering the course.

In addition to courses in the upper-level writing curriculum, many upper-level doctrinal courses in the more than 90% of law schools include writing assignments.69 Only eleven schools report that no doctrinal courses include a writing component. At those schools where doctrinal courses do include writing assignments, 3 report that all such courses include writing and 130 report that an average of 25% of upper-level doctrinal courses include writing assignments. These assignments vary from drafting (general, litigation, legislation, and transactional) to memoranda and briefs to client letters and judicial opinions, with scholarly papers being the most common.

Whether students receive training before they are required to produce scholarly papers varies greatly throughout law schools.70 The most common training is given by faculty within the courses for which papers are written.71 Other training is given in non-curricular workshops72 and separate courses taught by both LRW and non-LRW faculty.73 Unfortunately, students receive no training in more than a third of law schools.74

67 Questions 33 and 35.
68 Question 36.
69 Question 37.
70 Question 34.
71 Id. 55% or 84 of 154 programs.
72 Id. 5% or 7 of 154 programs.
73 Id. 8% or 13 of 154 programs.
74 Id. 34% or 53 of 154 programs.
VI. LEGAL RESEARCH AND WRITING COMMON PRACTICES

A. Common Practices

The techniques, philosophies, and objectives of legal writing programs are as varied as the professionals who teach them; however, there are areas of common practice. Among these are commenting techniques, classroom teaching activities, technology, citation method, and support services for first-year students.

Individualized review and critique of student writing is arguably the most intensive and effective work that legal research and writing teachers do. The most common methods of commenting on papers during the 2001-02 academic year were comments on the paper itself (149), comments during conferences (124), comments at the end of the paper (123), general feedback addressed to the class (108), feedback memos addressed to individual students (84), and grading grids or score sheets (82).75

As a profession, legal writing teachers have put great emphasis on classroom teaching and pedagogy.76 The most common teaching activities and the average amount of time spent in each activity were lecture (139 spending an average of 29%), questions and answers and class discussion (136 spending an average of 21%), group in-class exercises (131 spending an average of 13%), individual in-class exercises (106 spending an average of 10%), demonstrations (107 spending an average of 9%), and in-class writing (83 spending an average of 7%).77

More legal writing programs made use of technology in 2002. While the extent of its use varies greatly across programs, nearly

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75 Question 24.
77 Question 21. Figure 3 shows the division of teaching activities and converts the percentages to base 100.
80% have some technology component. Program-wide web pages are used in 64 programs, up from 48 web pages reported in 2001. Class e-mail listservs were popular during the 2001-02 year with 122 programs using them. These listservs are effective in a legal writing course as shown by a 4.13 average satisfaction rating (out of a possible 5). Seventy-one programs had course web pages with a 3.68 average satisfaction rating. Sixty-eight programs made use of electronic “smart” classrooms with a 3.82 average satisfaction rating.

A final common practice among legal writing programs is the adoption of a citation system. As of the time of the survey, 59 programs planned to teach the ALWD Citation Manual only, while 60 programs planned to teach the Bluebook only, 13 planned to teach both methods, 5 planned to leave the choice to each teacher, and 10 planned to either teach a different system or were undecided which system they would teach for the 2002-03 academic year.

During 2002 law schools offered a wide variety of services to help first-year students succeed. Thirty-six law schools employed a full-time or part-time writing specialist, 34 offered tutorials, 81 employed student teaching assistants to help students in need, and 110 schools offered academic support programs. Thirty-one law schools have formal writing centers; while at 54 schools, university writing centers are available to law students in lieu of a specialized center within the law school.

B. Writing Specialists

Nearly one-quarter of American law schools employ legal writing specialists to assist students with writing. The status, training, gender, and job responsibilities of this group of professionals vary greatly. Only 20% (9 of 43) of writing specialists hold full-time positions. Two are tenured, two are associate professors, and two more serve as associate directors of their legal writing.

78 Question 42.
79 Question 27.
80 Question 28.
81 Question 31.
82 Question 28. The total number of writing specialists is difficult to calculate. No survey question specifically asks how many writing specialists are employed at each law school. This total represents the sum of male and female specialists represented in question 29 part j and k. This question was chosen to represent the total as it seemed to be the one most likely to solicit complete responses.
One-third (14 of 43) of legal writing specialists hold a J.D. degree. Another 20% hold doctoral degrees in English (9 of 43), and nearly one-third hold other relevant advanced degrees (14 of 43). The gender division among legal writing specialists mirrors the division among directors and full-time faculty with 74% (32 of 43) females and 36% males. These numbers do represent a significant change from 2000 when only 12% of the nation's legal writing specialists were male.

The primary job responsibility of legal writing specialists is holding individual student conferences. Nearly three-quarters of these specialists spend on average of 71% of their time preparing for and holding these conferences. More than half provide workshops for students, taking up about one quarter of their time. Smaller percentages (12% each) are responsible for training LRW faculty, training law review and advanced moot court students, teaching upper-level courses, reviewing upper-level seminar papers, and publishing scholarly articles and books.

VII. WORKLOAD

A. Directors' Workload

Directors of legal research and writing programs do much more than attend to administrative tasks and teach a few classes. They are involved in nearly every aspect of the law schools in which they teach. In 2001-02, directors spent 30% of their time teaching in the required program, 22% on directorship duties, 13% teaching outside the required program, 9% on service, 8% on scholarship, 7% on academic support, and 11% on “other” activities including participating in important areas of law school governance.

In the 2001-02 academic year, the “average” director taught 30 entry-level students 3 hours per week using 3 major and 4 minor assignments while reading 1,134 pages of student work and hold-
ing 36 hours of conferences during the fall semester. The spring semester workload was similar. This compares with the prior year in which the “average” director taught 32 entry-level students 3 hours per week using 3 major and 4 minor assignments while reading 983 pages of student work and holding 38 hours of conferences—a slightly lighter workload than reported for the 2002 survey. In addition to their teaching time, directors spent an average of 41 hours preparing major research and writing assignments and 50 hours preparing for classes in the fall and comparable time in the spring.

Many directors have core job responsibilities or take on additional activities that are not primary components of the legal writing program but are often related in purpose and scope. Most of this additional work is done without compensation. Nearly two-thirds (96 of 130) have responsibility for first-year orientation. More than half (79 of 130) serve as faculty advisor to students. Nearly a quarter (30 of 130) coach in-house moot court teams; 30 coach outside moot court teams; and 9 coach outside negotiation and counseling teams. Directors in 28 schools are also responsible for the schools’ academic support. Fifteen directors serve as Law Review advisor, and 13 are responsible for overseeing the law school’s writing center.

B. Legal Research and Writing Faculty Members’ Workload

In the 2001-02 academic year, the “average” LRW faculty member taught 43 entry-level students 4 hours per week using 3 major and 4 minor assignments while reading 1,589 pages of student work and holding 51 hours of conferences. Again this past year, the average class load was within the maximum range recommended by the ABA Sourcebook on Legal Writing Programs. This compares with the prior year in which the “average” LRW faculty member taught 46 entry-level students 6 hours per week using 3 major and 4 minor assignments while reading 1,410 pages of student work and holding 62 hours of conferences—a similar

88 Question 54.
89 Question 58.
90 Only one response for each category indicated that the director received additional compensation for the activity.
91 Question 82.
92 Brill, supra note 25.
workload. In addition to their classroom teaching, faculty spent an average of 32 hours preparing major research and writing assignments and 57 hours preparing for classes in the fall and comparable time in the spring.

C. Upper-level Teaching

In addition to their responsibilities in the required legal writing program, directors and faculty widely teach upper-level courses at their law schools. More than half of the country’s directors teach courses beyond the first-year program (77 or 59%). In 2002, they taught an average of 1.46 upper level writing courses and 1.67 non-LRW courses. More than a quarter (21 or 27%) of these directors receive additional compensation for their upper-level teaching, which shows a sizeable increase from 2001 when only 20% received additional compensation. Many LRW faculty also teach upper-level courses (85 or 75%), including upper-level LRW classes (38) and non-LRW courses (74). These courses are taught both during the regular academic year (46) and during separate summer sessions (39).

D. Law School Governance

The vast majority of directors participate in law school governance by serving on faculty committees as voting members (112 or 86%); only 10 serve as non-voting members. For LRW faculty, those in 88 (77%) programs serve on faculty committees with 77 programs afforded voting (67%). LRW director and faculty are widely represented on important law school committees including curriculum (97 schools), admissions (71 schools), library (45 schools), technology (43 schools), appointments (26 schools), and clerkships (26 schools). Predictably, LRW faculty are also well represented on Moot Court and LRW committees.

93 Question 55.
94 Question 56.
95 Question 85.
96 Question 59.
97 Question 83.
E. Voting Rights

Voting rights of both legal writing directors and faculty have increased during the last four years. The majority of directors attend and vote at faculty meetings with 13 non-tenure track directors voting on all matters (17%) and 31 more voting on all but hiring and promotion (41%). Directors in 31 programs (41%) may attend faculty meetings but are not given a vote. Only one director (1%) reported that she may not attend faculty meetings. In 2000, fewer directors had voting rights. That year only eight non-tenure track directors could vote on all matters (11%); 33 could vote on matters except hiring and promotions (44%). Directors in 30 programs (40%) were allowed to attend faculty meetings but could not vote. An additional four could not attend (5%).

Voting rights for full-time LRW faculty also increased during the first 3 years of the twenty-first century. In 2002, LRW faculty in 61 programs (53%) voting at faculty meetings with 25 (22%) of those programs afforded voting on all matters. This shows a 10% increase from 2001 where faculty at only 42 schools (43%) were given a vote and a 12% increase from 2000 numbers. At 45 more programs (39%), LRW faculty attend, but do not vote, signaling a significant decrease from the 48% denied a vote in 2001. Only 10 schools (9%) report that LRW faculty do not attend faculty meetings, down 1% from 2001 and 2% from 1999.

F. Scholarship and Support

For 46 or 35% of directors, there is an obligation to produce scholarship. For 21 there is no obligation, but there is an expectation they will. This scholarship requirement is consistent with 2001 when 40 schools (35%) required scholarship and 24 had an expectation of scholarship. In 2002, 48 law schools’ legal writing directors’ scholarship was expected to be of the same quality and quantity as tenure-track faculty; however, at 7 law schools it was not. For LRW faculty, there is an obligation in 20 programs to attend faculty meetings.

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98 These voting rights are in addition to the 47 tenured and tenure-track directors, who are assumed to have full voting rights.
99 Question 60.
100 These numbers exclude 41 directors on tenure-track.
101 Question 84.
102 Question 62.
produce scholarship, and in 11 programs they are expected to produce scholarship, while 82 programs impose no such obligation or expectation. Unlike the consistency in the scholarship expectation for directors, this is a significant increase from 2001 when only 12 law schools imposed a scholarship requirement on LRW faculty.

LRW faculty scholarship receives a varied level of financial support, both in the form of financial summer grants and research assistance. In 2002, 57 programs provide LRW faculty with summer grants averaging $6,371, down from $6,435 in 52 programs in 2001. At nearly one-quarter of law schools the grants given to LRW faculty are less than the amount given to doctrinal faculty. Forty-one schools do not provide summer research grants for LRW faculty. More than half, or 79 programs, provide funding for research assistants, with 69 providing funding for all reasonable requests and 10 providing an average of $920, down significantly from $2,335 in 2001. LRW faculty members receive no funding for research assistance at 31 schools.

G. Legal Research and Writing Adjunct Faculty and Teaching Assistants’ Workload

Adjunct faculty teaching legal research and writing are responsible for an average of 19 students each semester in sections that average 17 students, both fairly consistent with 2001 figures. In addition to teaching their courses, adjunct faculty in 11 programs are responsible for creating the majority of writing assignments for their classes.

Legal writing teaching assistants are responsible for an average of 21 students each during the fall semester and 20 students each in the spring. These loads are down slightly from 2001 when the average teaching assistant was assigned 23 students in

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103 Question 81.
104 Question 76.
105 Question 78.
106 Question 76. In addition, 7 schools do not generally provide summer research support for any faculty.
107 Question 80.
108 Question 89.
109 Question 92. In the majority of programs with adjunct faculty (39), the program director has primary responsibility for creating the assignments adjuncts use.
110 Question 95.
the fall and 21 students in the spring. Before or during their TA service, teaching assistants receive an average of 13 hours of training each term. 111 Teaching assistants spend an average of 92 hours on TA duties during fall semester and an average of 87 hours during the spring semester. 112 While TA student loads are down from 2001, the average number of hours worked went up nearly 9 hours each semester from 84 in the fall and 76 in the spring. Twelve programs compensate their teaching assistants with course credit and grades. 113 Twenty-nine award teaching assistants an average of 1.93 credits for fall semester and 1.73 credits for spring. Twenty-four programs pay their teaching assistants by term (an average of $1,372), and twenty-one pay their teaching assistants an hourly wage averaging $8.50. Four programs compensate their teaching assistants with a tuition offset.

The vast majority of teaching assistants (76 of 85 programs) hold office hours during which they answer student questions. 114 Most teaching assistants offer advice and answer questions about legal research, legal writing in general, writing assignments before they are graded, citation format, and other law school matters such as exams.

VIII. GENDER HIGHLIGHTS

Past disparities in the treatment of female and male legal writing directors and faculty have been well documented, and the 2002 Survey data add evidence to those findings. 115

A. Salary Differences

Consistent with earlier surveys, the 2002 Survey shows that female directors earn less than their male counterparts; however, the disparity between average salaries is decreasing. Female di-

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111 Question 99.
112 Question 96.
113 Question 98.
114 Question 97.
rectors earn less than male directors when paid 12-month salaries ($80,775 female; $94,227 male). They also earn less when paid for shorter contract periods (typically nine or ten month academic contracts) ($79,220 female; $80,710 male). When all salaries are combined regardless of term, females earn an average salary of $79,806 compared with an average male salary of $87,790.\footnote{2002 Survey Appendix A, supra note 1.}

Comparison with 2001 and 2000 combined averages\footnote{2001: $75,971 female; $88,015 male; 2000: $71,628 female and $87,410 male.} shows that the disparity between female and male salaries is decreasing.\footnote{Figure 5 illustrates the differences in female and male directors' salaries for the years 2000, 2001, and 2002.} The 2000 disparity of nearly $16,000 shrunk to $12,000 in 2001 and now stands at $8000. The data indicates that while female salaries are rising, male salaries are not increasing significantly, which may indicate that male salaries are approaching a ceiling.\footnote{This point was originally made by Jo Anne Durako during a panel presentation on gender issues in legal writing at the 2002 Legal Writing Institute in Knoxville, TN, June 1, 2002.}

Gender differences are also apparent in the range of salaries paid to legal writing directors and the percentage paid high-level salaries. Female directors have a wider range of salaries paid than male directors with a range of $94,200 compared with $89,600.\footnote{46,800 to $141,000 female; $46,000 to $135,600 males.} Fewer females than males earn more than $100,000 (13 of 77 females, or 17\% of females; 8 of 21 males, or 38\% of males). However, the number of females earning more than $100,000 has risen substantially since 2001 when only 6 of 68 (or 9\%) earned such salaries compared with 9 of 25 (or 36\%) in 2002.

The legal writing program director's gender not only affects her salary but also affects the salaries of the faculty she supervises. In programs headed by female directors, once again the salary range for LRW faculty was lower: the averages at the low end of the range were lower ($44,605 low with female director; $48,031 low with male director). The averages at the high end of the range were also lower ($53,380 high with a female director, $57,533 high with a male director).
Female directors are not only paid less than their male colleagues, they are also more likely to have lower status, less-prestigious titles, and a more limited role in law school governance.

In 2002, female directors were less often tenured than were male directors (15% of females; 23% of males). When tenured and tenure-track directors were combined, males just pass females (33% male; 32% female); however, significantly more female directors continue to find themselves on contract than do males (48% females; 32% males).

Despite their status, fewer females than males have “professor” in their official title (45% female; 57% male). More females have titles of “instructor” or “lecturer” than males (12% females; 5% males). About 35% of females have “director” as their official title compared with 29% of males.

The affect gender may play on directors’ role in law school governance is less clear. The vast majority of both male and female directors actively participate as voting members of law school committees (94% males; 85% females). All male directors involved on faculty committees participate as voting members, but 8% of responding female directors participated in a more limited manner as non-voting committee members. A 6% minority of both male and female directors is excluded from faculty committee service.

Slightly more than one-quarter of non-tenured male directors have a full vote in faculty meetings while only 13% of non-tenured female directors have such a right. The most common voting right held by non-tenured directors is a limited vote allowing the director to vote on all matters except for hiring, promotion, and tenure, with 40% of male directors and 45% of female directors having such a right. One-third of non-tenured male directors have no voting rights compared with 42% of non-tenured female directors.

Fewer females teach courses beyond the required writing course than males (57% female; 80% male). While the gender comparison remains fairly consistent, the overall level of directors teaching upper-level courses has increased slightly from the 2001 data when 52% females and 76% male directors taught those classes. The one factor involving upper-level teaching that ap-
pears to be correlated with gender is a legal writing director's involvement in academic support. In 2002, more female directors taught academic support as their only upper level course than males (6% females; 3% males).

Finally, female directors were somewhat less often eligible for paid sabbaticals (35% female; 40% male), more often eligible for unpaid sabbaticals (10% female; 6% male), and were slightly less often eligible for other leave and reduced loads than were their male counterparts (45% female; 47% male).

IX. CONCLUSION

The picture presented by the 2002 Survey is one of great variation and vibrancy. Legal writing programs around the country are involved in dynamic teaching and probing scholarship. They are as different as the law schools and faculty they represent, but they stand together to represent a quest for excellence.

For the profession as a whole, the results of the 2002 Survey show the field of legal research and writing is making great strides. These strides are largely attributable to the many directors, LRW faculty, deans, non-writing faculty, and others who have used the data provided by earlier surveys to improve the programs within their own schools. These improvements benefit all members of the legal academy and particularly the generations of law students to come. But while the improvements are encouraging, we cannot rest on these laurels. Areas of concern remain that must be addressed. While the general improvement in salaries is encouraging, the relatively small percentage of full-time LRW faculty with tenure or on tenure track is disappointing. Gender disparities are diminishing, but class size for all LRW faculty members remains too high. Voting rights and involvement in law school governance are not afforded to each and every professional legal writing teaching, and too many LRW faculty are not given the respect they deserve in their official law school titles. Legal writing faculty and others in the legal academy must now concentrate on these issues and aim to have new improvements reflected in future surveys.
### Figure 1: **Director Average Salary by Region**

<table>
<thead>
<tr>
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</tr>
</thead>
<tbody>
<tr>
<td>New York City &amp; Long Island</td>
<td>$121,167</td>
<td>$105,500</td>
<td>$124,333</td>
<td>$113,000</td>
</tr>
<tr>
<td>Mid Atlantic</td>
<td>$92,427</td>
<td>$86,735</td>
<td>$ 87,036</td>
<td>$ 77,375</td>
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<tr>
<td>Northeastern (excluding New York City and Long Island)</td>
<td>$82,236</td>
<td>$87,583</td>
<td>$ 83,179</td>
<td>$ 68,996</td>
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<tr>
<td>Great Lakes/Upper Midwest</td>
<td>$82,190</td>
<td>$72,850</td>
<td>$ 71,552</td>
<td>$ 62,621</td>
</tr>
<tr>
<td>Far West</td>
<td>$80,924</td>
<td>$78,693</td>
<td>$ 71,609</td>
<td>$ 74,000</td>
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<tr>
<td>Southeast</td>
<td>$76,218</td>
<td>$79,708</td>
<td>$ 69,615</td>
<td>$ 64,208</td>
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<tr>
<td>Southwest &amp; South Central</td>
<td>$73,205</td>
<td>$72,271</td>
<td>$ 68,746</td>
<td>$ 69,608</td>
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<tr>
<td>Northwest &amp; Great Plains</td>
<td>$69,100</td>
<td>$68,900</td>
<td>$ 65,017</td>
<td>$ 51,400</td>
</tr>
</tbody>
</table>

*Note: Average salary is computed by averaging the low and high base salary for each school.*

### Figure 2: **LRW Faculty Average Salary by Region**

<table>
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<tr>
<th></th>
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<tbody>
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<td>New York City &amp; Long Island</td>
<td>$59,500</td>
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<td>$54,000</td>
<td>$45,833</td>
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<td>$51,666</td>
<td>$39,500</td>
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<td>Southwest &amp; South Central</td>
<td>$51,423</td>
<td>$45,326</td>
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<td>Mid Atlantic</td>
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<td>$42,500</td>
<td>$45,125</td>
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<tr>
<td>Far West</td>
<td>$50,509</td>
<td>$48,894</td>
<td>$41,583</td>
<td>$39,833</td>
</tr>
<tr>
<td>Northeastern (excluding New York City and Long Island)</td>
<td>$50,025</td>
<td>$45,500</td>
<td>$39,667</td>
<td>$42,700</td>
</tr>
<tr>
<td>Southeast</td>
<td>$47,696</td>
<td>$42,429</td>
<td>$39,778</td>
<td>$37,700</td>
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<tr>
<td>Northwest &amp; Great Plains</td>
<td>N/A</td>
<td>N/A</td>
<td>N/A</td>
<td>$52,500</td>
</tr>
</tbody>
</table>

*Note: Average salary is computed by averaging the low and high base salary for each school.*
Figure 3: Distribution of Teaching Activities

Teaching Activities

- Lecture 29%
- Q&A and Discussion 21%
- Other activities 11%
- in-class writing 7%
- Group in-class exercises 13%
- Individ. in-class exer. 10%
- Demonstrations 9%
Figure 4: **Directors' Workload**

- Teaching in required program: 30%
- Directorship duties: 22%
- Teach. outside req. prog.: 13%
- Other: 11%
- Scholarship: 8%
- Service: 9%
- Academic Support: 7%
Figure 5: Differences in Annual Salaries for Female and Male LRW Directors

<table>
<thead>
<tr>
<th>Year</th>
<th>Average Base Salary</th>
<th>Percentage of Male Avg.</th>
<th>Female Directors</th>
<th>Male Directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>$79,806</td>
<td>91%</td>
<td>$79,806</td>
<td>$87,790</td>
</tr>
<tr>
<td>2001</td>
<td>$75,971</td>
<td>86%</td>
<td>$75,971</td>
<td>$88,015</td>
</tr>
<tr>
<td>2000</td>
<td>$71,628</td>
<td>82%</td>
<td>$71,628</td>
<td>$87,210</td>
</tr>
</tbody>
</table>

*Base salaries do not account for differences in contract length

<table>
<thead>
<tr>
<th>Year</th>
<th>Average 12-Month Salary</th>
<th>Percentage of Male Avg.</th>
<th>Female Directors</th>
<th>Male Directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>$80,775</td>
<td>86%</td>
<td>$80,775</td>
<td>$94,227</td>
</tr>
<tr>
<td>2001</td>
<td>$77,163</td>
<td>84%</td>
<td>$77,163</td>
<td>$91,615</td>
</tr>
<tr>
<td>2000</td>
<td>$73,171</td>
<td>86%</td>
<td>$73,171</td>
<td>$84,817</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Year</th>
<th>Average 9-Month Salary</th>
<th>Percentage of Male Avg.</th>
<th>Female Directors</th>
<th>Male Directors</th>
</tr>
</thead>
<tbody>
<tr>
<td>2002</td>
<td>$79,220</td>
<td>98%</td>
<td>$79,220</td>
<td>$80,710</td>
</tr>
<tr>
<td>2001</td>
<td>$75,086</td>
<td>89%</td>
<td>$75,086</td>
<td>$84,115</td>
</tr>
<tr>
<td>2000</td>
<td>$70,480</td>
<td>77%</td>
<td>$70,480</td>
<td>$91,182</td>
</tr>
</tbody>
</table>