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THIRD GOLDEN PEN AWARD

Joseph Kimble*

Welcome to the Legal Writing Institute’s third Golden Pen Award. I’m Joe Kimble, chair of the Institute’s Outreach Committee.

We’re back at the National Press Club, where we gave our first Golden Pen Award to Arthur Levitt, the former chair of the Securities and Exchange Commission, for the SEC’s plain English rules.

As you probably know, our Golden Pen Award goes to someone who has made an extraordinary contribution to the cause of better legal writing. And today, we recognize Linda Greenhouse for the model of her own writing on legal issues and for her success in explaining those issues to the general public.

In the last few months, I’ve been reading her columns with special interest, and I’m reminded again that legal writing doesn’t have to be legalistic. So just for fun, let me translate a couple of passages from Greenhouse into legalese.

Here is Greenhouse in her lead to a story on the Second Amendment: “The Justice Department reverses decades of official policy on the meaning of the Second Amendment and tells the Supreme Court that the Constitution ‘broadly protects’ the right of individuals to own firearms.”

And here’s the lawyer’s version: “A reversal has been made by the Justice Department with regard to a long-established official government policy concerning the meaning of the Second Amendment, in that the government apprised the Supreme Court for the first time late on the day of Monday that the Constitution broadly protects the rights of individuals to have, possess, own, or otherwise hold legal title to firearms and other such weapons.”

Or here is Greenhouse using a case to illustrate the philosophical differences between Justice Breyer and Justice Scalia. She writes: “Cases from last term illustrate the Breyer versus Scalia debate in action. In U.S. Airways v. Barnett, a case under the Americans with Disabilities Act, the question was whether seniority systems trump a disabled worker’s right to the reasonable accommodation of transferring to a less physically demanding job.

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Justice Breyer, writing for the 5–4 majority, said the answer was yes . . . ordinarily. But there may be special circumstances that make a disabled worker's requested reassignment reasonable despite a more senior employee's right to the position, he said."

Or, as a lawyer might say, “Special or unusual circumstances may obtain, pursuant to which a request for reassignment on the part of a disabled worker may be deemed reasonable despite the fact that a more senior employee is entitled to said position.”

Finally, I think Linda Greenhouse really shines in her question-and-answer column on The New York Times website. Here I won’t translate, but just let you listen to her answer to a question posed by a reader. This is the question: “The recent Supreme Court case allowing voucher programs seems to allow religious programs to receive assistance in the form of vouchers. Is this a direct challenge to the Lemon test? Is the Court signaling the end to the Lemon test?”

Greenhouse's answer:

The Lemon test (from Lemon v. Kurtzman, 403 U.S. 602 (1971)) for whether a government policy amounted to a prohibited “establishment” of religion held sway at the court through the 1970s and 1980s. It set out a three-part test for validity under the First Amendment [then she gives the three tests]. The Court never officially disavowed the Lemon test but rather has allowed it to linger in a persistent vegetative state, functionally replaced by other markers such as “neutrality” or “private choice.” The Cleveland voucher program that the Court upheld last June involved “true private choice,” Chief Justice Rehnquist wrote for the majority. It’s possible that the Lemon test will be trotted out in the future for some specific purpose, but it’s day is quite clearly over.

I don’t know whether she’s right or not, but I know clear writing when I see it. And that's why we are recognizing her today.

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LESSONS LEARNED FROM LINDA GREENHOUSE

Steven J. Johansen*

Before saying a few words about our award recipient, I would like to thank those responsible for tonight’s event. The members of the Outreach Committee have done an outstanding job in organizing tonight’s festivities. Please join me in thanking Joe Kimble, Amy Gajda, Mark Wojick, Sue Liemer, Chris Wren, Maureen Straub Kordesh, and Catherine Wasson.

I would like to begin by reading a short excerpt from a speech that Linda Greenhouse delivered to the AALS/American Political Science Association Constitutional Law Conference last June. The piece was recently reprinted in the New York University Law Review and is titled “The Day Anthrax Came to the Supreme Court.”1 In this article, Ms. Greenhouse provides us with an insider’s view of those frightening days when the anthrax scare was at its height — and in particular of the day that the Supreme Court itself was threatened with a potential contamination. I pick up just after she has learned that there will be a briefing on the situation at 2:00:

I cancelled my lunch date, called my office, called my husband, and waited for two o’clock, when I would learn, along with everyone else at the Court, what the situation was and what we were supposed to do about it. As the time approached, I joined the press office staff, who were closing their doors in preparation for going upstairs to the West Conference Room, where the briefing was to be held. As I started to walk with them down the corridor, I was amazed to be told that the briefing was only for Court employees.

“Well, I’m here, and I’m coming,” I said. The staff members looked abashed as they repeated their instructions. When it became clear that they actually intended to keep me out while they got the facts on what could quite plausibly be a life or death situation for us all, it appeared to me that the bonds of civility that normally define our

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relationship were about to snap. I’m usually a very civil, non-confrontational person — in fact, I hate the confrontational, theatrical, 60-Minutes style of journalism — so the Court staff was rather surprised when (I’ll clean up my language a little bit, but you get the general idea) I said to them: “I’m breathing your [blank] air, and I’m going to your [blank] briefing.

And so I did.\(^2\)

Now, many may look at that excerpt as a lesson in journalism — that even a usually polite correspondent sometimes has to be assertive to perform her job. We may also see it as a lesson reminding us that in journalism, as in law, civility is the key to success and that confrontation is best used sparingly. I see yet another lesson. A lesson in effective writing. Ms. Greenhouse uses this story to set up her thesis about the relationship between the press and the Court. The story is clearly told, is memorable, makes its point, and moves on. Oh, that we could say that about all legal writing.

Of course, we are not recognizing Ms. Greenhouse tonight for this lesson alone. This is just one example of the consistently superb writing that she has produced in more than two decades of reporting. Linda Greenhouse has been the Supreme Court correspondent for *The New York Times* since 1978. She is a magna cum laude graduate of Radcliffe College and she later received a Master of Studies in Law from Yale University. She has honorary degrees from Brown, Colgate, and Northeastern Universities, and from the City University of New York. She is a fellow of the American Academy of Arts and Sciences and a member of the American Philosophical Society. In addition, she appears regularly as a panelist on PBS’s *Washington Week in Review*.

The Golden Pen is the latest of many awards that she has received. In 1993, the New York State Bar Association gave her its John Peter Zenger Special Media Award. In 1998, she received the Pulitzer Prize for the excellence of her reporting on the Supreme Court. And in 2002, she and Sinclair Lewis became the first non-lawyers to receive the Henry Friendly Medal from the American Law Institute.

Ms. Greenhouse’s reporting is clearly deserving of our recognition. But I would like to emphasize two ways in particular that her

\(^2\) *Id.* at 868.
work has advanced the cause of good legal writing. First, from a selfish perspective, she has made all of our jobs easier. As Legal Writing teachers, we have all faced the challenge of providing our students with examples of good writing. Many students look first to their casebooks — and try to write like judges. Every year, I have to remind students that while some judges write very well, judges are writing for a different audience. And that the opinions in their casebooks are not usually selected for the clarity of thought or graceful writing.

Some students want to look at legal journals — to read the words of experts from the legal academy. Indeed, there are some excellent examples of clear writing in law reviews. Unfortunately, for many articles, that clarity cannot be sustained beyond the first colon. So where do we send students who are looking for models, for examples of clarity and grace? I tell my students, “Go to nytimes.com, search ‘Linda Greenhouse,’ and start reading.”

A second and far more important contribution is that Ms. Greenhouse makes the Supreme Court accessible to a lay audience. This is especially challenging with a Court that is often sharply divided, cantankerous, and sometimes inconsistent. Her ability to explain the complexities of the Court and its decisions to a lay audience is critical to our collective understanding of our government. Few Americans read Supreme Court decisions and fewer still understand them. Fortunately, Ms. Greenhouse writes with such clarity and insight that all Americans can understand this remarkable institution. Thus, her work provides yet another lesson for our students: when lawyers write, we write not just for judges and other lawyers. Rather, our most important audience consists of our clients and the other people who will be affected by our work and we should strive to write the clarity and conciseness that our entire audience will understand.

Of course, Ms. Greenhouse can convey these thoughts much more effectively than I can. And so I would like to close my remarks with another excerpt from The Day Anthrax Came to the Supreme Court. She writes that the title is a metaphor for the relationship between the press and the Court. But she goes on to explain:
It is also a metaphor for the community of all of us whose lives are entwined with the life of the Supreme Court. We are all breathing the same air.\(^3\)

Thanks to twenty-four years of her writing with clarity and grace, Ms. Greenhouse has seen that the legal air we all breathe is fresh and clean. For that, we are honored to present her with the Golden Pen Award.

\(^3\) Id. at 873.
REMARKS — ON RECEIVING THE GOLDEN PEN AWARD

Linda Greenhouse* 

I'm thrilled to receive this award. You are a very special audience for me. Everyone who writes for The New York Times has a variety of audiences, and the Supreme Court beat has perhaps a greater range than many others. I have specialized audiences, and then I have the audience that I most often keep in mind — basically, people like myself twenty-four years ago, before I went to Yale Law School and started covering the Supreme Court — interested and active citizens who don’t happen to have any particular knowledge about the court.

What I try to provide for this audience — or any audience — is what I would want for myself as a reader. The two watchwords I try to keep in mind are context and precision, and I find that these are what is most often missing from journalism about legal subjects. (I don’t think of what I do as “legal writing” but as journalism about the court and the law.) When context is missing, it often seems as if cases just drop from the sky at random, without a history or a sense of how they got there. When precision is lacking, you can’t find a statement of the actual holding of the case, or sometimes even the proper name for the court.

In preparing to receive this award, I turned to the person who I think is the best writer about writing, William Zinsser. He is best known for his book On Writing Well,¹ but my favorite of his is another book, Writing to Learn.² He is, as I’m sure you know, a leading exponent of “writing across the curriculum,” and he maintains that writing is an exercise in thinking, not in mechanics. Let me quote from Writing to Learn:

Writing is a tool that enables people in every discipline to wrestle with facts and ideas. It’s a physical activity, unlike reading. Writing requires us to operate some kind of mecha-

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nism — pencil, pen, typewriter, word processor — for getting our thoughts on paper. It compels us by the repeated effort of language to go after those thoughts and to organize them and present them clearly.3

I completely agree: writing, for me, is very much a physical activity. When I’m handed an opinion, or am facing a big stack of briefs for an upcoming argument, I often feel as if I’ve been thrown into a deep pit, and have to manage to float and crawl my way back up the sides, through the process of writing about the case, to come to some understanding of the material. It is for me a decidedly physical process.

Joe Kimble encouraged me to say something relevant to what all of you do, and for that I can’t do better than to quote Zinsser again. Here is what he said about the teaching of writing:

Writing teachers are lucky if 10 percent of what they said in class is remembered and applied. The bad habits are just too habitual. They can be cured only by that most painful of surgical procedures: operating on what the writer has actually written. Only there, where a writer is at his most vulnerable, having put some part of himself on paper, does she make the connection between principle and practice. The operation is almost as hard on the teacher. Like the parent who tells the spanked child that “this hurts me more than it hurts you,” the writing teacher wants nothing so much as a paper that’s well written — one that won’t mire him in endless repairs and emotional debris. . . .

Why, then, would anyone in his right mind want to be a writing teacher? The answer is that writing teachers aren’t altogether in their right mind. They are in one of the caring professions, no more sane in the allotment of their time and energy than the social worker or the day care worker or the nurse. Whenever I hear them talk about their work, I feel that few forms of teaching are so sacramental; the writing teacher’s ministry is not just to the words but to the person who wrote the words. . . . We are reminded, whatever subject we are charged with teaching, that our ultimate charge is to produce broadly educated men and women with a sense of stewardship for the world they live in.4

We have a lot in common. You have that sense of stewardship, and I suppose that I do, too. That’s why this award is so meaningful to me, and I thank you very much.

3 Id. at 49.
4 Id. at 47–48.
Welcome to the first panel of the AALS Section on Legal Writing, Reasoning, and Research (LWRR). I’m Jo Anne Durako, program chair for the section for 2003. It’s my pleasure to introduce the panel for “Better Writing, Better Thinking” today.

I said this is the first panel because the “Better Writing, Better Thinking” panel is the first of four sessions addressing legal research and writing topics at the AALS conference this year. It is a measure of the growth of interest in our field of research and writing that has spawned this broad array of exciting programs. On Sunday, there are three panels co-sponsored by the LWRR section. The first two panels focus on teaching foreign LL.M. students. First, we have a panel titled “Developing Writing Programs for Foreign LL.M. Students,” followed by “Developing Research Programs for Foreign LL.M. Students.” Both panels, coordinated by Professor Mark Wojick, of John Marshall Law School in Chicago, continue the conversation our community has had with the Section on Graduate Programs for Foreign Lawyers, a fast developing specialty in research and writing, judging from the number of new books, conferences, and other presentation on this topic. These two programs are also co-sponsored with the Academic Support, International Legal Exchange, and Law Libraries sections.

In the final time slot for this conference is a very exciting session co-sponsored with the Mass Communication Law Section called, “Op-Eds and Talking Heads: Legal Commentary for a Lay Audience.” With a title like that, you know Amy Gajda of the University of Illinois has put together a glittering panel of professors and pundits. You’ll recognize the names of panelists from the op-ed pages, such as Arthur Miller, Erwin Chemerinsky, and Linda Greenhouse.

In addition to these four diverse panels, I would also like to remind you of three additional events at this conference that honor some of the stars in the field of research and writing. This year the Legal Writing Institute (LWI) presents its Golden Pen Award to

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1 Papers from this panel appear in this volume of the *Legal Writing: The Journal of the Legal Writing Institute* at pages 207–243.
Linda Greenhouse, columnist for *The New York Times*. Linda will be honored on Saturday at a reception at the National Press Club. The Golden Pen Award was established to improve the quality of legal writing throughout the legal profession. The award is presented to persons who have significantly advanced the cause of better legal writing. Anyone who has read Linda Greenhouse’s clear, incisive coverage of the Supreme Court knows her important contributions demonstrating how the most complex legal issues of the day can be written about in language the lay reader can understand and enjoy.

The next event is the first annual Thomas F. Blackwell Memorial Award presented in memory of our slain colleague from Appalachian Law School. Professor Richard K. Neumann, Jr. of Hofstra University School of Law is the first recipient of this prestigious award. Richard Neumann, who is practically a household name in legal writing circles, was chosen for his outstanding contributions to the improvement of the field of legal writing. Among his many contributions are authoring and co-authoring leading legal writing texts, working to help establish the teaching of legal writing as a respected academic discipline, and counseling innumerable individual teachers over the years. Please join us in honoring Tom Blackwell’s memory and Richard Neumann’s many contributions.

And finally, at the LWRR Section luncheon, we will honor Professor Laurel Currie Oates, from Seattle University School of Law. Laurel was chosen as the Section’s award recipient for her two decades of dedication to legal research and writing — she was there at the creation. From helping found the Legal Writing Institute in 1984 to playing a significant role in seven biennial conferences, Laurel has been a force in shaping our field. Much of the credit for LWT’s success over its past twenty years is directly attributable to her vision, dedication, tenacity, and patience. Beyond her leadership, scholarship, and reputation for creative innovation, Laurel’s award also recognizes the affection that so many in our emerging field feel toward a person who has made such an indelible and positive mark on legal writing.

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2 The presentation and acceptance remarks appear at pages ix–xvi of this issue of the *Legal Writing: Journal of the Legal Writing Institute*.
3 Both Steve Johansen’s remarks and Laurel Oates’ response are printed in the AALS Newsletter of the Section on Legal Writing, Reasoning, and Research 1, 6 (Spring 2003).
From this description of panels and other events at the 2003 conference, you can begin to see the impact that legal research and writing is having on legal education today. This is a far different situation than the first AALS conference I attended some years ago when I was hard pressed to find much directly relating to our field. We now have so many exciting events that it may be impossible to attend them all. I am very pleased that you made a point to attend our lead-off panel today.

It was almost fifteen years ago, when Philip Kissam noted in his often-cited article “Thinking (by Writing) about Legal Writing”\(^4\) that “the writing process itself can serve as an independent source, or critical standard, that alters and enriches the nature of legal thought.”\(^5\) Today’s panel will discuss how well the legal academy has used the power of writing to improve the quality of our students’ legal thought. Panel members will explore whether we have harnessed this power and whether we effectively use it to inform the lessons learned in all law classes, not just those in legal writing. During the maturation of the field of legal writing, the emergence of its pedagogy, and growth of our scholarship, we must continue to investigate how effectively those charged with teaching writing are at sharing the lessons we have learned. Today, we will reflect on how well we are sharing these lessons.

As part of this reflection, the panel will explore the interplay between the process of writing and the process of thinking and thinking like a lawyer. We also will review how better writing — and better writing teaching — can lead to better thinking. Panelists will discuss how writing is used to help train students to “think like lawyers” and how the best practices in writing programs can inspire and improve legal education throughout the law school. Panelists also will investigate how legal writing teaching techniques can advance analytical skills teaching in doctrinal teaching, or what’s been called “stand-up teaching.” By making thinking visible through writing, analytical skills can be examined, critiqued, and refined. By slowing down the thinking process through the recursive process of writing, key lawyering skills can be honed. By drawing from learning theory, clinical practice, and educational evaluation and innovation, we can learn how best to ensure that what we do in all our classes helps our students become better writers, better thinkers, and better lawyers.

\(^5\) Id. at 140.
It is my great pleasure to present today’s panelists. These are three of the most thoughtful and knowledgeable people I know on the topic — a dream panel. Each panelist plays a different role in teaching future lawyers — as a doctrinal professor, as a legal writing professor, and as a dean.

The first panelist has very impressive credentials in her many roles as an educator. She is the 1995 President of AALS and the former Dean of the University of North Carolina School of Law, where she now teaches several “stand-up” courses and sit-down seminars. Recently, she was also a senior scholar with the Carnegie Foundation for the Advancement of Teaching. I am pleased to present Judith Wegner. Judith’s interest in education goes back to the late 1970s when she left her post at the Department of Justice to become a special assistant to the first U.S. Secretary of Education, Shirley Hufstedler. Judith and I recently realized that we were both part of the first federal agency dedicated to education — the Department of Education — the agency that was targeted for extinction but that is still in place today. You can read more about Judith’s thoughts on teaching in her 2001 article in The Journal of Legal Education titled “A Curriculum: Patterns and Possibilities.”

Judith will talk today about teaching thinking and how to use some of the techniques from legal writing in doctrinal courses — those large “stand-up” classes.

The second panelist is from Ohio State University College of Law, and is one of the most creative and dynamic legal writing teachers I know, and I know hundreds of writing teachers. Professor Mary Beth Beazley has written extensively about legal writing. Her new book on Appellate Advocacy7 includes many of her time-tested lessons on effective legal writing teaching, such as the self-graded draft and private memos. The private memo technique — a kind of direct communication between the writer and the reader/reviewer about the writing and thinking process — is discussed in a thoughtful article she co-authored over ten years ago titled “Teaching Law Students to Think Like Lawyers: Integrating the Socratic Method with the Legal Writing Process.”8 The first time I saw Mary Beth present her self-graded draft technique at a legal writing conference, I was so impressed by her ideas and her teaching that I wrote her a fan letter. Although she told me she wanted

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to make that fan letter into wallpaper. I’m certain she’s received enough fan mail from other legal writing teachers and her many students to cover all her walls. Mary Beth will talk about the revolution in legal education sparked by legal writing pedagogy. She will explore some of the many techniques that legal writing faculty use that could be integrated into all law courses to improve teaching and learning — and without the need for time-consuming, individualized critique.

I am also a big fan of our final speaker. After clerking for Judge Louis F. Oberdorfer and Supreme Court Justice Sandra Day O’Conner and practicing law in Washington, D.C., Kent Syverud taught at the University of Michigan for ten years before becoming dean at Vanderbilt University Law School in 1997. Kent is so deeply committed to teaching that he has won teaching awards. I wonder how many deans can claim that distinction? He has demonstrated his continued interest in teaching in many ways, including editing the *Journal of Legal Education*. Kent’s tenure as editor has been marked by a special concern for legal skills teaching and recognition of the important contributions from the legal writing field. I once heard him say that some of the most innovative teaching at law schools today is happening in legal writing classes. He is a true friend of legal writing and teaching. Kent is also well known for his 1993 article in *The Journal of Legal Education*, “Taking Students Seriously: A Guide for New Teachers.” This simple and heartfelt guide to new teachers has become a classic. It was one of the first things I read when I became as legal writing teacher ten years ago. In our first conversation, I told him what a profound impact that article had on me and that I continue to recommend it to new teachers. I highly recommend this article to anyone who has yet to have the pleasure of reading it. Kent will give us the deans’ perspective and reaction to the ideas presented by the other two panelists.

So, you can see I’m a fan of all these people who were kind enough to join the “Better Writing, Better Thinking” panel today. Quite frankly, for anyone who has thought about legal writing and thought about how to teach students to think better, I can’t think of a better group to listen to as they consider our topic from three distinctly different vantage points. It’s my pleasure to turn the program over to the panel and to begin with Judith Wegner. Thank you for coming.

Thank you for being here. We have such an important set of questions to consider. I’ve been a law professor since 1981, and whenever I can, I have integrated writing into my efforts to teach thinking and problem solving. My job today is to talk with you about the work I’ve been doing as part of a major study of legal education for the Carnegie Foundation for the Advancement of Teaching.

My effort today is to pursue the question of thinking — the teaching of thinking and how we might conceptualize that theoretically. I’d like to talk about are three things. First, what is thinking like a lawyer? Some of you have written about, some of you have thought about, and I’m sure all of us who are lawyers have experienced some effort by somebody to help us learn about that. So, I’m going to say a little bit, based on the empirical work I did with the Carnegie Foundation, about what various people across the country might have to say about thinking like a lawyer — some interesting things, I believe. Second, how do we teach “thinking” in what I call the standard first-year curriculum, the large “stand-up” classes, the typical kind of baseline substantive courses that all of us have experienced and that our students spend the bulk of their time on? Finally, I want to say a bit that might catalyze our thinking about how these pieces interrelate.

Briefly, the Carnegie Foundation for the Advancement of Teaching is not a group that merely gives away money. It is a group that was chartered by Congress in 1905 with funding initially from Andrew Carnegie to do all things needful that would advance teaching. They're the folks we have to thank for creating TIAA-CREF, the Educational Testing Service, the Carnegie units for high schools that have been used to figure out when folks can come into college — a whole variety of things like that. Back in its early formative time, the earlier part of the twentieth century, the Foundation conducted a series of studies, the most famous of which is called the Flexner Report, which led to or contributed to a

* Professor, University of North Carolina School of Law. Professor Wegner served as Dean of the University of North Carolina School of Law from 1989 to 1999.
A major shift in how medical education proceeded, really implementing a model much more like the European model, as was being created by Johns Hopkins at that time. The Foundation also had two studies, one by Josef Redlich and one by Alfred Z. Reed, at about the same time on legal education, but these studies were not instrumental in bringing about much change. The Foundation also studied engineering, social work, and a variety of other things.\(^1\)

That was back in their earlier life. The Foundation is now revisiting some of these major issues, but in a wholly different way. The Foundation sees that the professions are a central place in which the academy meets the world at large and that, if you could really understand education and preparation for the professions, you’d be able to make a difference to society and improve higher education as well.

Thus, the current approach is quite different from the initial approach. The Foundation is taking a deliberately comparative viewpoint so that the questions being framed for law, which was the first of a series of studies, are tracked by the studies of engineering education and the study of preparation for the clergy that are currently underway. The Foundation has tried to ask comparative questions that can illuminate the heart of the professions and professional education in ways that allow comparison and contrast, in order to hold mirrors up to ourselves to realize, what, in fact, we’re doing or might do, and to be able to exchange insights across these different fields in quite fruitful ways.

The law study was the first one out of the box. It is an effort to step back and take a serious look at what we really do, what we’re about. The first question I thought was important to ask was: What is this business of thinking like a lawyer? How is it taught? How is it assessed? I realized the more I worked on it, partly because I was working with someone who’s a philosopher, that at root, we’re talking about epistemology — that is, our individual theories of what it means to know. I can’t tell you how powerful and profound that is when you really get down to it. I’m not going to try to take you through all aspects of it, but just think about that. Coming into law school, students have generally not articulated their personal theories, but they have implicit theories, as we all do, theories of what it means to know. Generally such theories are not disclosed, probably even if they’ve taken philosophy courses, and are not really understood. What we do when we teach stu-

\(^1\) For a list of Carnegie Foundation publications, visit www.carnegiefoundation.org.
dents to think like lawyers is to radically, radically change their personal theories for many of them. That’s a very profound thing.

Some of the evidence that this is a profound proposition has been the experience I’ve had each time I’ve spoken about this notion to people in physics, medicine, and engineering. They all began to say, “Well, what is it like to think like a physicist? What is it like to think like a historian? What does it mean to think like an engineer?” So, by unveiling our way of proceeding, we’ve already made a profound contribution to the way other fields and disciplines may move in the future.

Now let me move on to more specifics. I’ve learned a great deal based on going to sixteen different law schools, a cross-section of schools, sitting in on classes, more than a hundred classes, interviewing faculty we saw teach, having focus groups with faculty and students, interviewing deans, talking with legal writing program teachers in every case, and sitting in on clinical instruction in various ways. We asked nearly everyone we spoke with: “What does it mean to think like a lawyer, and how do you learn it?” I’ll tell you a little more about that after I sketch other facets of the study.

There are three other major dimensions of the study (other than epistemology, ways of thinking) that are likely to be of interest to those teaching legal writing, but in the time we have today, I’ll not be able to talk about these in much depth. Another focus is the course of study. What does it mean? How do we put our hands around the course of study within legal education as we understand it? We’ve used a three-year program for a good while now. One prior Carnegie study from the early 1970s suggested that the third year of law school was rather “flat” and should be lopped off — that we should only have two years of law school because we couldn’t really explain what we were doing.

That is not the tack I believe is warranted with the current study, although the “flatness” remains evident and is perhaps rooted in a fundamental dilemma or dichotomy that has been rooted around the academy for a long time. The seeming dichotomy relates to the relationship between theory and practice, which I think is a false dichotomy, as most dichotomies are. In addition, there is a major hole in legal education — a dimension that we do very poorly at — to convey what it means to be a professional (in terms of roles and responsibilities) and to help students navigate the passage of becoming a professional. I think many legal writing programs try to situate students in context and help them with
that, but it’s a real shame to see how little these matters are touched on in standard stand-up classes. Nor do faculty typically endeavor to help students integrate that sense of what a profession is and who students are becoming as professionals with who they are as individuals and how their values and lives are affected by that. Finally, there is a question that interests me because I study state and local government law and am intrigued by institutional and organizational behavior: How do different law schools go about educating students — do they go at this differently, or should they or could they? The fact is they do differ in some significant ways, and yet to date, nobody has found ways to articulate or explain that.

These, then, are the kinds of things we undertook to understand by gathering data from visits at sixteen diverse law schools. Now let me turn to the heart of the matter: What do we mean by “thinking like a lawyer”?

I think what we mean, and what I was able to distill from all these conversations, was that “thinking like a lawyer” involves dealing with uncertainty in a very profound way. I don’t think anybody has previously described this process in quite this way.

Let me give you an example of what I mean. Over the past semester, I have been working with a class of eighty first-year students in a five-hour Property course and have urged them to think about what it means to be uncertain. Step back and consider. As faculty members, we have gradually become somewhat of experts in what we do, but think about trying to learn something new. What if your friends or family are doing fancy things with computing, and you’re having some difficulty keeping up with it. Think about the changing international dimensions of our world, which leave some folks challenged — I think that about twenty percent of the American public knows where Afghanistan is. As faculty, we’re in a milieu where we could always be learning, and yet learning is not an easy thing.

Certainly that’s true for first-year students. We’re guiding them in thinking like lawyers and making them confront uncertainty, because uncertainty is inevitable in every profession that introduces students to situations that are abstract in the first instance, but then are shaped in reality by a host of individual circumstances. Lawyers are dealing with rapidly changing events in the world. We’re seeing science change, society change in many different ways. That’s really, I think, what we’re doing. My favorite way of describing the challenges we’re facing for students is
we’re helping them “domesticate doubt.” Think about that. How do you domesticate doubt? I’m a fan of cats. I was reading an interesting book my husband got me on *Shrinking the Cat*, which is about how genetic shifts occurred from lions to housecats. If any of you are interested, it’s also about corn and about silkworms and a variety of other things, but just really think about domesticating doubt, coming to be at peace with it, not letting it frighten you, making it be interesting, and finally getting a kick out of it. That’s what we’re trying to do to the students, but for them, the stakes are very high. They don’t know what they’re doing when we teach them to think like lawyers.

If that’s the core of what we’re trying to do, how do we unpack that a bit, so that we can do it reasonably effectively? Let’s take a look at a diagram I’ve provided:

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**THINKING LIKE A LAWYER: STRATEGIES FOR DEALING WITH UNCERTAINTY**

*What does it mean to “think” or “reason”?*
* Posing Questions
* Developing a Routine
* Reconstructing Knowledge

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*What is “the law”?*
* Inhabiting the Territory
* Developing Legal Literacy

*What does it mean to be a “lawyer”?*
* Assuming a Role
* Adapting to Norms

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The top point of the triangle is: “What does it mean to ‘think’?” You can always push things back if you study science and try to say that thinking is really neurological, or thinking is really something about neurons doing one thing or another, but as we use it in our common parlance, I think it’s about some kind of reasoning.

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2 Sue Hubbell, *Shrinking the Cat: Generic Engineering before We Knew about Genes* (Houghton Mifflin Co. 2001).
How do we go about making that domesticated and what about the doubt that goes with that? I think we do at least three things.

First, we pose questions a lot, so people get used to asking questions. You don’t have to be afraid of asking questions. Instead, you have fun making up questions. That’s what law professors do. That’s what all of you do when you all prepare writing problems for students. They may not be comfortable with that, particularly. There have been changes in elementary and secondary education with the kind of standardized testing required now. Many successful college students who seek law school admission, I fear, may be those who have navigated their way through something that they felt reasonably certain about, rather than those who have been risk-takers or askers of questions.

Second, it’s not just asking questions; it’s developing a routine about how you take apart questions. For example, when we teach first-year students to do case briefs, we teach them to put some structure around the uncertain questions by pinning down key questions — what’s the issue? what were the facts? what’s the reasoning?

And finally, we gradually teach them that they can reconstruct knowledge. For those of you who are education theory buffs, you probably know, and I know in the legal writing literature, there’s more and more thoughtful work being done about the social construction of knowledge. If you read psychological theory about the development of advanced moral reasoning or cognitive capacities, it’s really about recognizing, and this is the epistemology point, recognizing at some point that the truth is not out there as Mulder or Scully would say. The truth is within us — how we’re seeing things. When we own that, we begin to understand what expertise is really about, instead of expecting, as first-year students tend to do, that an expert is the professor on the stage who is pouring out words for them to transfuse into their brains. It’s a way of proceeding, and in the end, that’s what we have to help them navigate.

What else goes into thinking like a lawyer? Students have to find out what the “law” is — what we mean by “the law.” As field interviews revealed, “thinking” really came down to inhabiting the territory — learning that there’s a new narrative here, like Middle Earth, a new place that students are gradually entering. I think I finally understood in a way that I hadn’t before, that part of the virtue of the casebooks, as we’ve known them historically, is that that is a world that is obviously not the real world, but it is a
streamlined, slimmed-down world. Students can gradually get to know the characters, and they can gradually develop legal literacy. Many students reported that thinking like a lawyer meant they had to learn to read again and to write again in a wholly different way, and to master an immense vocabulary, which is quite an interesting thing when you think about the students we inherit. Mastering a new language is pretty sophisticated, particularly as we have more and more students who may not have English as their first language, or who may not be literate in the way we're used to thinking about literacy — coming out of an audiovisual universe that for those of us who are now into our 40's and 50's was not the way we encountered the world. So, that's really very much worth thinking about. Only if students have those tools, can they learn the law. As faculty help students develop skills needed to learn the characters and to be literate, we're helping them navigate uncertainty.

Then, finally, what does it mean to be a lawyer? One of the most notable gaps in legal education is our failure to really engage with that issue, and it is becoming even harder since fewer and fewer recent hires seem to have had any kind of serious law practice or experience with the profession, at least until they've been around a while. What are professional expectations, and how does that integrate with students’ personal identities? Many students entering law school have only the experience of watching lawyers on television, or, if they do know lawyers, they may have concluded that they want a law degree but don't want to work the hours or do the kinds of task they associate with what they have observed. Here, then, is a further dimension of uncertainty, which is filled in through implicit lessons derived from between the lines.

In sum, then, that is what I'd say about what it means to think like a lawyer — something really pretty complicated, something worth unpacking, and I'm sure that as we talk about questions of how do you work with that within legal education, I would bet that what you do is really work across all those variables of uncertainty and make visible those various forces, including what it means to be a lawyer.

Legal writing instructors rely on problems that situate people in the context, giving students actual scenarios with which to work. You give students an actual situation so that they'll begin to learn about protocols for preparing pleadings or writing client letters or filing appellate briefs. That’s not usually how it’s explained to students what they’re doing. I think, however, that we should
try to be more explicit about what we’re doing, and it would help students immensely if we did. I think that increasingly many faculty members will have to be aware of the language and reading issues. I really would hope too that the LSAC would develop not just assessment tools to rank students coming to law school, but also some sort of diagnostic mechanism to identify which gaps people may have that affect their learning. In that way, once students are actually in law school, we would have a better take on what kinds of strategic interventions may be needed and useful for them individually (and students would realize that as well). In addition, we’re increasingly educating students to work in multicultural settings, and we need to appreciate that words that may seem to have a single meaning may not be understood in the same way with people living and working in varying cultural contexts.

Now, let me turn to the question of how we teach “thinking,” particularly in the context of an eighty-person first-year stand-up class. As the diagram illustrates, there are at least two dimensions to legal education’s classical approach.

**Intellectual Tasks and Instructional Tactics:**

**Composite Framework**

- **Teacher** (expert whose knowledge is tacit, unstated) draws out student by:
  - Modeling
  - Coaching
  - Scaffolding
  - Fading

- **Student** (novice, who doesn’t know, has partial knowledge, unstated misunderstanding) draws out student by:
  - Reflects
  - Articulates
  - Explores

This prototype is sometimes called the “case method,” and sometimes is referred to as the “Socratic method.” Students of Socrates would tell you that it’s not really “Socratic” because we’re not asking “What is the good?” But our shorthand reference is well-established, so it’s an important point of departure. I call legal education’s prototypical method the “case-dialogue” method because it relies heavily on the common law (most particularly in the first
year). Cases provide a very neat framework by which to advance people’s cognitive skills — higher order thinking skills, through systematic exploration. Cases are well-suited for working with certain fundamental intellectual tasks, and dialogue (the give-and-take between professor and student) provides a powerful form of “cognitive apprenticeship” that allows the teacher to make the student’s (and the professor’s) thinking visible for all to explore. I’ll first focus on the uses of cases, and then turn in more detail to the role of dialogue.

Many of you may be familiar with something called Bloom’s Taxonomy of Educational Objectives, and you may even know the story of Dr. Benjamin Bloom who was at the University of Chicago in the mid-twentieth century. That was at a time when many elite colleges had comprehensive examinations, and professors charged with developing comprehensive examinations had to tease out what exactly they were trying to test. Dr. Bloom and his colleagues developed a widely accepted set of educational objectives (and associated intellectual tasks) that served as the underpinning of such tests. These dimensions are noted in the center column of the diagram provided.

Consider this. “Knowledge” means you are familiar with the definition of a key term (such as adverse possession) that you’ve read in a book. “Comprehension” means understanding, being able to give key ideas back to someone. It’s different than just raw memory or rote repetition. “Analysis” means taking things apart. “Application” means applying principles to new situations. “Synthesis” means putting things together. “Evaluation” means critiquing using some kind of benchmarks, standards that are agreed upon out of some kind of a value set.

These dimensions are not only the educational objectives that Dr. Bloom heard about from colleagues at the University of Chicago years ago. Having sat in on more than a hundred classes, it’s evident that these objectives are near and dear to law professors’ hearts. These intellectual tasks are addressed in one way or another in nearly every classroom. A student is asked: “What happened?” “Explain the facts or reasoning in the court’s words, and in your own.” “What are the elements of a particular tort?” “What if the facts changed slightly?” “How does this case relate to the prior case or the case that follows?” Typically, we expect students to have moved pretty quickly from knowledge to comprehension, but at the outset, at least, we dwell on teaching them to look very, very closely so that they learn that they need knowledge of exact facts.
They need understanding, and to understand, they need to analyze — to take ideas and rules apart.

Law professors also expect students in class to develop the ability to apply the law to novel fact patterns we make up in our heads or assign from the casebook notes. Unfortunately, we don’t often give students classroom experience with complicated application. We work some with synthesis, particularly in its simple form, calling on students to explain how a given case relates to another or providing them with a comprehensive unit-end review. Evaluation occurs, but seems oddly constrained. There’s discussion about efficiency in some instances, and about certainty and the virtues of bright lines and balancing tests. Rarely, however, is there discussion of justice.

Stepping back from what may be observed in the classroom, it is also important to think about how we as assess student performance on exams. Although faculty in many classrooms dwell on comprehension, analysis, and simple application and synthesis, that’s not all that we evaluate. Most essay examinations require complicated application, complicated synthesis, and complicated evaluation, and we don’t teach that nearly enough. While there is not time to explore issues of assessment here, we need to bear in mind that students who enter our classrooms with high-level cognitive skills that they understand how to translate into a new context may thrive at least at the outset and outdistance the performance of their peers. Others can take a little bit longer to master either the higher-level intellectual tasks themselves, particularly if their prior education did not concentrate on their development, or if they’re unsure how to translate prior experience into the law school setting. That’s something we need to think about in “thinking like lawyers”; think about law school assessment systems and their impact.

Now let me return to the “dialogue” part of our “case-dialogue method.” Some of you may have heard of the notion of “cognitive apprenticeship,” which I’ll try to sketch very simply here. It’s a fascinating theory. Think about apprenticeship — what goes on in an apprenticeship and why is this notion so pervasive? Sociologists have studied apprenticeship for midwives, tailors, chess players, you name it. I don’t know if you’ve ever learned something where you really sat down at the feet of, for example, your grandmother, to learn how to make bread. Different people learn how to ride a bike or play a sport this way. Junior faculty can count themselves lucky if a senior colleague helps us get on our feet as scholars.
Most of the examples I’ve just provided are relatively tangible. Consider, instead, how we work with students who are apprentice lawyer-thinkers. We take students through the process of analytical problem-solving using certain set conventions. We’re working with them as apprentices in a very challenging setting, typically in extremely large classes, rather than individually, as many of you do in teaching legal writing.

Consider what’s going on in the typical professor’s head during a large first-year class. Often, much of our own thinking is not self-conscious: we’re experts, we have tacit knowledge, knowledge we may not even know we have both about the law and about teaching. Students don’t like that, because they’re uncertain, and we’re asking them questions. What’s going on in the professor’s mind is invisible and involves complex processes. How do we teach them how to do what we do? We model the analysis we’re seeking, do it right in front of them, or give positive comments to those in the class who do well when called upon. We also “coach” them, give them hints, break down questions into more subtle nuances, try to get them to move from one step to the next, and give them encouragement. We also “scaffold” for them, and try to build the framework and then gradually fade away to let them do it on their own. Scaffolding may take the form of diagrams or lists on the blackboard, or orally — an oral connecting of the dots.

We’re not alone in this dialogue, however. The student, who’s a novice, generally doesn’t know what he or she doesn’t understand, at least at the outset. If you’ve been teaching for a long time, you understand that better. You can guess by the light in their eyes. You call on students to speak it, and set for them several key tasks designed to make their own thinking visible so you can work with it. You ask them to articulate what they’re thinking, or perhaps to stop and reflect on what they or someone else has said. (“Do you agree, Mr. Jones? Why/why not?”) After they’ve spent time working with the basics, you ask one or more students to explore variations on fact patterns, engage in critique, or shift roles (to stand in the shoes of a different party, the trial judge, the dissenters, the legislature). That’s really what we do in the classroom.

The case-dialogue method is thus exceedingly powerful, in part because it combines these two aspects — use of cases to move across the spectrum of intellectual tasks and cognitive apprenticeship that calls on both teacher and student to make thinking visible. Bear in mind, however, that this system creates a powerful
kind of hierarchy, at least when the bulk of classes taught by tenure-track faculty, with the bulk of academic credit, are perceived by students as the accepted norm.

Legal writing instructors build on the instructional efforts to teach “thinking like a lawyer” in stand-up classrooms, but face an additional challenge since most legal writing courses involve work on an individualized basis using a different type of pedagogy. Perhaps in the latter context, the premiere pedagogy is more akin to that in engineering (whose signature pedagogy is probably the “design laboratory”) or medicine (which devotes more time to clinical pedagogy). Moreover, the epistemology and type of reasoning that underlies “thinking like a lawyer” is not the only way of knowing. Indeed, if we were more attentive to such matters, we might recognize the hidden nuances that differentiate “thinking like a corporate lawyer” from “thinking like a criminal lawyer.”

Those teaching legal writing must also contend with the seeming dichotomy of theory and practice, something that profoundly affects the academy as a whole. Without going into it at length, you know from your experience that university faculty typically say “there’s theory, and that’s preferred and there’s practice, and we look down on that.” This dichotomy is flawed for many reasons. It’s helpful to go back to basics with the Greek philosophers, some of whom thought there really are three kinds of reasoning: theory that is book learning, abstract, and discursive (much of what goes on in the first year); production (the creative process used in making artifacts, which requires technical skill); and practical reasoning (taking on an ill-defined question or problem, taking it apart and resolving it). That’s what practice means to many, but in academia too often practice is treated as if it means something else: repetition, the mundane, the stuff of the nonacademic world from which academics have escaped. But even in the academy, faculty engage in “practice,” for example, the practice of scholarship, whereby we rely on underlying theoretical understandings and create a “product” that seeks to resolve an ill-defined problem.

In closing, let me summarize key points that I hope will stimulate your further reflection. “Thinking like a lawyer” entails a particular epistemology or way of knowing that most students (and indeed many faculty) do not name or understand. Such thinking involves working with and domesticating uncertainty regarding the particular types of reasoning, the nature of law, and the role of lawyers. First-year teaching in stand-up classes often relies upon the “case-dialogue” method that causes students to develop higher-
level thinking skills by repeated exposure to certain types of intellectual tasks readily illustrated in working with cases and using a form of dialogue that makes both the professor’s and the students’ thinking more visible in ways that help the novice apprentice move on to journeyman status over time. Ironically, legal writing instructors face special challenges because of differences between the prototypical pedagogy just described and their own approaches, which generally involve individualized work with students, helping them to develop their thinking abilities by using language and analysis in concrete settings, and assisting them in moving beyond theory to the higher levels of “thinking” required for effective “production” and “practice.”

I hope these thoughts on “thinking” will stimulate your further reflection today and in days to come.
BETTER WRITING, BETTER THINKING: USING LEGAL WRITING PEDAGOGY IN THE “CASEBOOK” CLASSROOM (WITHOUT GRADING PAPERS)

Mary Beth Beazley*

The first revolution in American legal education occurred in the late nineteenth century, when Christopher Columbus Langdell took a giant step away from the apprenticeship method of teaching law and moved to the case study method. Although Langdell was not the first to use the classroom to seek more efficient ways of training lawyers, his “scientific” method became popular at universities, where law professors sought to distance themselves from the “trade-school” methods of apprentice-based legal education.

The benefits of the apprenticeship method were limited, naturally, by the strengths of the particular lawyers who supervised each apprentice lawyer. At least a theoretical advantage of this method, however, was that each apprenticeship could be tailored

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to the particular needs, and perhaps even the particular learning style, of the apprentice. Such tailoring was not possible with the Langdellian method, but the giant increase in efficiency was a small price to pay for the loss of individual attention. It may also be true that the law schools of the nineteenth century — and much of the twentieth century — had the luxury of admitting all of the applicants and then dismissing those who could not adapt to the teaching methods.\(^5\) It may now be time to supplement the case method/final examination system\(^6\) of teaching to reach students with more varied learning styles.\(^7\)

In recent years, there have been several announcements of revolutions in law and in legal education,\(^8\) with particular — and appropriate — attention on the clinical education revolution.\(^9\) This Article proposes that a Legal Writing revolution is the next revolution in legal education, and that the revolution is not just coming, it has begun.\(^10\) It offers first steps for law school faculty to take in furtherance of this revolution.

\(^5\) See e.g. 1999 Reception Remarks: Our Place in History: A Celebration of Women in the Law at the University of Texas School of Law, 8 Tex. J. Women & L. 331, 335 (1999) (remarks of 1936 graduate that her entering class of “more than 300” dropped to 120 students by graduation); Foreword: Celebrating the 150th Anniversary of the Cumberland School of Law, 27 Cumb. L. Rev. 859, 872 (1996–97) (alumnus noting that as late as 1979 the dean told first-year students during his welcome speech: “Look to your right, then look to your left. One of you will not be here to graduate in three years.”); see also Barbara Glesner Fines, Competition and the Curve, 67 UMKC L. Rev. 879, 891 (1997) (noting that open admission standards and high rates of attrition have been replaced by a system in which admissions are more selective and implying that attrition rates are expected to be much lower).


\(^7\) Paula Lustbader, Principle 7: Good Practice Respects Diverse Talents and Ways of Learning, 49 J. Leg. Educ. 448, 448–449 (1999) (noting the diversity of learning styles and recommending that law schools “employ a wider variety of educational experiences”).

\(^8\) These revolutions include an alternative dispute resolution revolution, Marshall J. Breger, Should an Attorney Be Required to Advise a Client of ADR Options? 13 Geo. J. Leg. Ethics 427, 451 n. 146 (2000), and a technology revolution, John D. Feerick, A Few Reflections on a Long Deanship, 33 U. Tol. L. Rev. 25, 27 (2001) (noting that technology changes mean that “the manner in which we use legal materials to teach, learn, and research is — in its own way — undergoing a revolution that is as significant as any single advance in law school training of the last hundred years”).


\(^10\) Philip C. Kissam, Lurching towards the Millennium: The Law School, the Research University, and the Professional Reforms of Legal Education, 60 Ohio St. L.J. 1965, 1966 (1999). The Legal Writing revolution has something important in common with both the technological revolution and the clinical revolution: all three promote increased student participation in the process of learning.
The Legal Writing revolution is a move forward to an apprenticeship method in law school teaching. I purposely do not say “a move back,” because this new apprenticeship method is not the haphazard apprenticeship of old, nor is it the enhanced, traditional apprenticeship that is reflected in most clinical programs.¹¹ As Professor Wegner’s remarks imply,¹² the apprenticeship offered in the legal writing course is a cognitive apprenticeship, an apprenticeship that allows faculty to train the mind of the apprentice as the master of old trained the hand. Many of the techniques that Legal Writing faculty use to guide this cognitive apprenticeship are relevant to the “casebook classroom,”¹³ and all faculty should consider how they can be integrated there.

The pioneers of this new revolution are Legal Writing faculty, although others have joined from various parts of the faculty club.¹⁴ One force behind this revolution was the publication in 1992 of the ABA’s “MacCrate Report,” which called for law schools to pay more attention to legal writing and other skills.¹⁵ Because

¹¹ Of course, clinical apprenticeships are much more effective teaching tools than the legal apprenticeships of the nineteenth century. See e.g. McCaffrey, supra n. 10, at 4 (“In the past forty years, clinical legal education has developed as a way of providing law students with the direct lawyering experience of the apprenticeship system in the controlled environment of the law school, under the supervision of faculty members who are as focused on teaching excellence as they are on lawyering.”).


¹³ Nonlegal writing and nonclinical faculty — and the courses they teach — have been described as “traditional,” “doctrinal,” and “substantive.” The faculty who teach these courses also have been referred to as “stand-up faculty” and “The Faculty,” Kent D. Syverud, The Case System and Best Practices in Legal Education, 1 J. ALWD 12, 14 (2002). While all of these labels have been helpful in some contexts, I believe that they do not distinguish these faculty sufficiently from legal writing faculty, and they impose what may be a pejorative label (e.g. “non-substantive”) on legal writing faculty and clinical faculty. Thus, I use the term “Casebook Faculty,” because no legal writing faculty (or perhaps very few) use casebooks to teach legal writing, and I believe the same is true of clinical faculty in their courses. Thus, “Casebook Faculty” refers to faculty who teach courses in which the primary text is a casebook, and “Casebook Courses” are courses in which the primary text is a casebook.

¹⁴ For example, Professor Philip Kissam notes that Legal Writing exercises “provide[e] an active focused practice that emphasizes understanding and applying legal doctrine, making sound rhetorical and other practical judgments, and contemplating the ethics of law.” Kissam, supra n. 10, at 1968; see also Rena I. Steinzor & Alan D. Hornstein, The Unplanned Obsolescence of American Legal Education, 75 Temp. L. Rev. 447, 472 (2002) (noting that legal writing is “the most important item” on a list of areas currently receiving “short shrift” in the law school curriculum).

ABA Standards mandate that every law school require legal writing in some form, and because virtually all Legal Writing programs incorporate significant individual teaching through conferences and personal critiques, every law student is getting a taste of this revolutionary new method. The revolution will be complete, however, only when Legal Writing faculty and legal writing courses are fully integrated into the law school curriculum. Only after this integration will the goal of integrating Legal Writing teaching methods into the rest of the curriculum be possible.

Integrating Legal Writing teaching methods does not mean that all faculty must begin assigning and individually critiquing writing assignments, although others have suggested that. Instead, I recommend that the educational theories behind Legal Writing teaching methods should be adapted for use in casebook courses. As will be explained below, this integration will result in students doing more writing, but it will not result in casebook faculty doing the hours of individualized critique that are the hallmark — and one of the chief benefits of — the Legal Writing course. Just as Legal Writing faculty have integrated Socratic

placing them in a practical, hands-on context.

The preamble to the ABA standards provides that “an approved law school . . . must provide an educational program that ensures that its graduates . . . receive basic education through a curriculum that develops . . . skills of legal analysis, reasoning, and problem solving; oral and written communication [and] legal research.” ABA, ABA Standards, Preamble, http://www.abanet.org/legaled/standards/preamble.html (visited Aug. 2, 2003). In addition, Chapter Three, regulating “The Program of Legal Education,” restates the importance of “[a]ll students” receiving instruction in “oral and written communication” ABA Standard 302(a)(1), and mandates that “[a]ll students” receive “substantial legal writing instruction,” ABA Standard 302(a)(2).

For example, 171 of the 172 schools responding to the 2003 Legal Writing Institute/Association of Legal Writing Directors Survey noted that they provide individual comments on student papers; ninety-six schools reported providing a feedback memo written specifically for each individual student, and 144 schools reported that they give students comments during individual conferences. ALWD & Legal Writing Institute, 2003 Survey Results, question 24 (copy available online at http://www.alwd.org) [hereinafter ALWD/LWI 2003 Survey].

E.g. Amy E. Sloan, Erasing Lines: Integrating the Law School Curriculum, 1 J. ALWD 3, 3 (2002) (noting that a goal of the 2001 Conference of the Association of Legal Writing Directors is to “begin the process of erasing the often artificial lines that presently exist between ‘doctrinal’ and ‘skills’ courses, between education focused on the acquisition of knowledge and education focused on the practical application of that knowledge”).

Kissam, supra n. 10, at 1968 (noting significance of “individualized supervision and feedback”); Noble-Alligire, supra n. 15, at 46 (noting the time-saving benefits of providing individualized feedback without grading); but see Carol McCrehan Parker, Writing throughout the Curriculum; Why Schools Need It and How to Achieve It, 76 Neb. L. Rev. 561, 576 (1997) (noting that “writing exercises need not always be graded or even collected by the teacher”).

I recommend against individual critiques in the casebook classroom not because
Pedagogy into the Legal Writing course,\textsuperscript{21} casebook faculty can integrate aspects of Legal Writing pedagogy into their courses.

Because writing and thinking are so closely intertwined, using Legal Writing pedagogy in the casebook classroom can advance the goal of teaching students “how to think like lawyers.” Legal Writing pedagogy can benefit casebook faculty first by allowing them to “see” their students’ thoughts through vicariously-critiqued writing, thinking, and meta-thinking exercises. Furthermore, by giving casebook faculty methods for exposing their thoughts as legal readers, Legal Writing pedagogy can help faculty to give students heuristics for performing legal analysis, and may accordingly make it easier for faculty to cover their course subjects in more depth. The teaching methods explored in this Article seek to integrate some of the individual learning benefits of Legal Writing courses with the vicarious\textsuperscript{22} teaching benefits of casebook courses.

Section I of this Article will examine some ways that the law school culture that segregates Legal Writing faculty has both promoted their opportunities to develop innovative pedagogies and inhibited their ability to share those pedagogies with other faculty.\textsuperscript{23} Section II will explain certain aspects of cognitive apprenticeship theory, and of composition and writing process theory, that are relevant to the casebook classroom. Section III will identify teaching methods that Legal Writing faculty have used to teach students how to think like lawyers by exploring and exposing the thinking behind the decisions of both legal writers and legal readers. Section IV will identify certain teaching methods that exploit

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\textsuperscript{21} E.g. Mary Kate Kearney & Mary Beth Beazley, Teaching Students How to “Think Like Lawyers”: Integrating Socratic Method with the Writing Process, 64 Temp. L. Rev. 885 (1991).

\textsuperscript{22} “Vicarious learning” refers to learning in which the student is not an active participant in the learning, but instead participates vicariously by observing other students; it is the primary mode of learning in the “pure” Socratic classroom. Michael Schwartz has characterized the typical casebook classroom teaching method as a “Vicarious Learning/Self-Teaching Model,” noting that the classroom teaching is often one-on-one but that “Professors expect that the other students in the class will learn by watching these interactions.” Michael Hunter Schwartz, Teaching Law by Design: How Learning Theory and Instructional Design Can Inform and Reform Law Teaching, 38 San Diego L. Rev. 347, 351 (2001); see also Kearney & Beazley, supra n. 21, at 889.

\textsuperscript{23} Unfortunately, most casebook faculty fear incorporating legal writing teaching methods into their courses. In most law schools, Legal Writing faculty, clinical faculty, and casebook faculty live in segregated academic neighborhoods. E.g. Syverud, supra n. 13, at 15.

\end{footnotesize}
the educational benefits supported by these theories and that may be particularly well-suited to adaptation by casebook professors with minimal expenditures of time.

I do not mean to imply that the teaching methods suggested in this Article are the only legal writing teaching methods that are adaptable to the casebook classroom, nor that casebook faculty should limit themselves to “time cheap” curricular innovation.24 I recognize, however, that revolutions often begin with small steps, and that small steps sometimes lead to giant strides.

I. HOW LAW SCHOOL CULTURE PROMOTES AND INHIBITS CURRICULAR INNOVATION

Legal Writing is not a “separate” course in any law school curriculum that is meant to teach students “how to think like lawyers,” although it is often perceived that way. This perception was vividly driven home to me during the job interview for my first full-time legal writing job, which was interrupted by a drunken law professor.25 He was disgusted to learn that I was interviewing for a Legal Writing job, saying accusingly, “You can’t teach people how to write. They either know it or they don’t.”

At the time, I didn’t realize that this drunken academic had articulated a sobering issue that many Legal Writing faculty face to this day: the attitude that the good writing fairy blesses you with the ability to write at birth, in the same way you might get good teeth.26 And if you are not blessed with the good writing gene, there is nothing a teacher can do, so law schools should not waste their money trying to teach Legal Writing.27

24 E.g. Kissam, supra n. 10, at 1968.
25 I have no idea what school the professor was from, but he was not from Vermont Law School, with which I was interviewing — and where he also wanted to teach. In fact, Vermont’s Dean, Jonathan Chase, took me by the shoulders after the encounter ended, saying, “I promise you, as long as it is within my power, that man will never teach at Vermont Law School!” I taught legal writing at Vermont Law School from 1983 to 1985.
26 J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35, 43 (1994) (noting that one “traditional view” is that “Legal Writing is a talent; either you have it or you don’t,” and that a consequence of this view is the attitude that “[w]riting can’t be taught, so we shouldn’t try”).
27 Law schools have a long history of trying to save money on Legal Writing programs. E.g. Norman Brand, Legal Writing, Reasoning & Research: An Introduction, 44 Alb. L. Rev. 292, 294 (1980) (citing and decrying articles that focus on how to save money when teaching Legal Writing courses by noting that no similar articles focus on “cheap” methods for teaching contracts or civil procedure).
In fact, Legal Writing is part of the core curriculum at every American law school. Institutional forces at many schools, however, perhaps reflecting the attitude that writing is impossible to teach, have relegated it to the status of “other.” “Other” people teach it, or it has an “other” grading system, or it is awarded fewer credits than the “other” first-year courses, all or all of the above. This “otherness” is both strange and unfair, for faculty who teach Legal Writing are not teaching an “other” subject matter. On the contrary, there is a strong intersection between writing and thinking, and both faculty who teach legal writing courses and faculty who teach casebook courses are teaching students how to think like lawyers. Even more unfortunately, this otherness is also counterproductive to the law school’s mission: when Legal Writing courses and the faculty who teach them are treated as outliers in the educational venture of the law school, all faculty lose a

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28 Indeed, it is one of the few courses that is specifically mentioned as a requirement in the ABA guidelines for law schools. ABA Standard 302(a)(2) mandates that “[a]ll students” receive “substantial legal writing instruction.” Legal ethics and clinical courses are the only other law school courses identified by name, and only legal ethics study is mandated. ABA Stand. 302(b)–(c).

29 In 1987, Professor Philip Kissam noted that a misunderstanding of how writing and thinking intersect “supports a corollary principle that the teaching and learning of legal writing can and should be kept independent from other aspects of legal education.” Philip C. Kissam, Thinking (by Writing) about Legal Writing, 40 Vand. L. Rev. 135, 138 (1987).

30 The 2003 ALWD/LWI Survey shows that in most U.S. law schools, Legal Writing is taught by full-time, non-tenure-track faculty. ALWD/LWI 2003 Survey, supra n. 17, at question 10.

31 The 2003 ALWD/LWI Survey shows that Legal Writing had a different grading system than other courses at 68 out of 172 responding schools. This statistic represents an improvement over previous years; for example, in 2001, 80 out of 136 responding schools reported a different grading system. Id. at question 16.

32 In my experience as a student or faculty member at four different law schools, I have observed that almost all casebook courses are awarded a minimum of three credit hours per semester. In contrast, the average number of credit hours for Legal Writing courses remains at less than 2.25 credit hours per semester. Id. at question 12.

33 Peter Brandon Bayer, A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties As a Violation of Both Equal Protection and Professional Ethics, 39 Duq. L. Rev. 329, 331 (2001) (noting that the academy has “marginalized [Legal Writing faculty’s] existence in the law school community” and arguing that this marginalization violates both ethical and legal standards).

34 Kissam, supra n. 10, at 1988–1989 (noting that conducting “critical” legal writing “is a far better means of learning most of the basic skills of legal analysis, synthesis, and rhetoric than mere oral exchanges in case method classrooms and the instrumentalist writing that is demanded by final examinations” (footnote omitted)).

35 See e.g. Kearney & Beazley, supra n. 21; Laurel Currie Oates, Beyond Communication: Writing As a Means of Learning, 6 Leg. Writing 1, 1 (2000) (“When our [Legal Writing] students write memos and briefs, they are doing more than just telling us what they know. They are also learning how to think like lawyers.”).
valuable opportunity for sharing\textsuperscript{36} teaching methods that could benefit both law students and the practice of law.

\section*{A. Promoting Curricular Innovation}

Over the past ten to fifteen years, Legal Writing faculty have published extensively, and much of their work is related to pedagogy.\textsuperscript{37} Some reasons for the scholarship boom have little to do with the virtues or vices of Legal Writing faculty. Cultural and institutional forces have created an atmosphere that has led Legal Writing faculty to experiment, share, and eventually publish their work.\textsuperscript{38} In contrast, these same forces reward casebook faculty for maintaining the status quo.\textsuperscript{39}

Four aspects of the role of Legal Writing courses and their faculties have particularly spurred curricular innovation.\textsuperscript{40} First is the perceived tabula rasa of Legal Writing as a field. The existence of Legal Writing courses themselves was an innovation. Unlike casebook professors, who found it easy to use the case method of instruction as a matter of curricular inertia, many early Legal Writing faculty had never taken a course in Legal Writing. We were aided in filling in the blank slate by the fact that Legal Writing courses proliferated at about the same time as significant curricular innovation in the field of composition and rhetoric, our closest non-law academic kin. Second, because many Legal Writing

\textsuperscript{36} Bayer, supra n. 33, at 354 (“Any full-time teacher who [is not allowed to] compete for tenure can never be a complete or fully respected member of her academic society. Such a teacher . . . will always be an outsider if not an outcast — not quite a stranger, but never an esteemed colleague.” (footnote omitted)).


\textsuperscript{38} That a scholarship boom has happened at all is a testament to the doggedness of Legal Writing faculty, for teaching others how to write often interferes with one’s own writing. As Professor Sue Liemer has observed, “The irony never escaped me that I spent several summers teaching an advanced writing course, working with some of the more talented law students on fairly sophisticated aspects of legal writing, yet I never had time to apply my expertise in my own work.” Susan P. Liemer, \textit{The Quest for Scholarship: The Legal Writing Professor’s Paradox}, 80 Or. L. Rev. 1007, 1018 (2001).

\textsuperscript{39} E.g. Schwartz, supra n. 22, at 360 (“The criteria by which law schools hire new law teachers and measure law teachers’ performances for tenure purposes discourage innovation.”).

\textsuperscript{40} Although these reasons are of course interconnected, I will consider them separately.
courses were created with the more measurable goal of “teaching students how to write,” Legal Writing faculty had an outcome-based goal of making good writers out of all of their students, and they often looked for new teaching methods when this goal was not met. This effect was compounded by a third aspect of Legal Writing courses: the evident connections between teaching methods and student performance in the course, which contrasts strongly to the indirect connections between class discussion of cases and the written final examination. Legal Writing teachers could readily see what worked and what did not work in their teaching, and this transparency spurred further innovation. Finally, in part because Legal Writing faculty could see the benefits of curricular innovation, they have been able to earn significant intrinsic rewards from this innovation.

1. The Blank Slate

One reason that Legal Writing faculty have been forced to become pedagogical innovators is that we have had the luxury of the blank slate. Many of us were the first people at our law schools to hold a job called “Director of Legal Writing” or “Legal Writing Instructor” as a long-term position, and not as a committee assignment or something that you passed through on your way to teach something else.41 Many of us had graduated from law schools where there was no formal legal writing instruction, or only a student-taught program, and so we did not even have valid notes that we could look back on.42 We had no preconceived ideas; we were on our own, and we had to figure it out.43

Because our courses resembled composition courses far more than they resembled casebook courses, we turned to composition

41 See e.g. Jan M. Levine, You Can’t Please Everyone, So You’d Better Please Yourself: Directing (or Teaching in) a First-Year Legal Writing Program, 29 Val. U. L. Rev. 611, 613–614 (1995) (noting that new directors may have been hired to start a new program or to rescue a program in flux, but also noting that the new director may have to cope with the vision of the program held by the casebook faculty).

42 I am fortunate in that I was not in this situation. In my very first Legal Writing class at Notre Dame Law School, Professor Teresa Godwin Phelps drew a triangle on the board and talked to us about the relationships between and among reader, writer, and document. A very few textbooks had been published in those early days. E.g. Marjorie Dick Rombauer, Legal Problem Solving: Analysis, Research & Writing (5th ed., West 1991) (first published in 1970).

43 E.g. Arrigo, supra n. 3, at 131–132 (noting the creation of a few Legal Writing programs in the 1950s, and that many programs were still student-taught in the 1980s (citations omitted)).
Theorists for teaching ideas. Fortuitously, the dramatic increase in professional Legal Writing faculty occurred during and just after the great paradigm shift in writing and composition theory, from the “current-traditional theory” to “new rhetoric.” Writing teachers were evolving from the more primitive “instrumentalists” — those who saw writing as merely a method for transcribing thought — into “cognitivists” — those who saw writing as a way of making meaning, as a method of thinking. Thus, when we consulted writing theorists for guidance, we found a world that was changing its pedagogy, and that gave us the courage to experiment with our pedagogy, too.

In contrast, law faculty have had to fight the powerful force of inertia: the property of an object at rest to remain at rest, or the tendency of a Property teacher who was taught by the case method/final exam system to begin teaching and continue teaching using the case method/final exam system. We tend to teach the way we were taught, and casebook faculty were taught by teachers who gave exams, while Legal Writing faculty were taught by students, or not taught at all. Thus, we had no preconceived agenda to follow, and this lack of an agenda encouraged us to explore new horizons.

2. “Measurable” Teaching Goals

The second reason Legal Writing faculty are likely to pursue curricular change is that we had a more measurable teaching goal. Although I certainly disagree with the drunken academic who said that you cannot teach anyone how to write, it may also be unreasonable to presume that you can teach everyone how to write. Yet many Legal Writing faculty, myself included, have at some point

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44 E.g. Nancy Soonpaa, Using Composition Theory and Scholarship to Teach Legal Writing More Effectively, 3 Leg. Writing 81, 81 (1997) (“The research on composition and writing theory from English scholars can provide perspective and understanding for those teaching legal writing as the legal writing field develops its own theory and scholarship.”).


46 See text accompanying footnotes 126–140.

47 E.g. Kissam, supra n. 6, at 151 (noting that “ideological forces will implicitly or explicitly encourage a seasoned law professor to retain the [case method/final examination teaching] method (footnotes omitted); see also Schwartz, supra n. 22, at 364–365 (“Because . . . law professors receive very little instruction in designing instruction or in teaching, law professors are likely to use the methodologies by which they learned law.” (footnote omitted)).
in their careers harbored the notion that we really could teach all of our students to write, and we measured our progress toward that goal by looking for final drafts that were error-free. If our students’ final drafts were not error free, or mostly error free, we tried to make changes in our teaching that would produce those error-free documents.\(^\text{48}\)

In my own case, I think this irrational goal arose from my early misunderstanding of the Legal Writing teacher's job. Like many teachers, my beginnings were primitive. I started out as an instrumentalist, thinking that my job was to help my students use error-free sentences to transcribe their thoughts.\(^\text{49}\) When critiquing student papers, I was more of a proofreader than a teacher, attacking each line of text with my pencil, finding each error in sentence structure or word choice or punctuation, and citing our text so that students could see that I was relying on good authority when I told them to change their sentences. My students had many mechanical-level problems on their drafts, and with my fierce editing, their revisions were much improved. But I made a little discovery when I finally read a paper that was free of mechanical errors: there was more to good legal writing than just not making mistakes. The student had written a paper that was “correct,” in the hyper-technical sense of the word, but it was an empty suit. She had failed to analyze the legal issues, failed to use authority properly, failed to support her conclusions. She had seen, however, that I cared deeply about mechanical errors, and she had corrected every mistake I had pointed out.

What happened when I read this “perfect” paper, I suppose, is that I discovered a new set of errors that I had to get rid of: errors in analysis, errors in use of authority, errors in thinking. And because I saw my job as helping students to “get rid of” these errors, I changed my method of teaching, changed my method of assigning

\(^{48}\) It would be even more irrational for casebook faculty to have “whole class success” as a teaching goal, because the case method/final exam method presumes only one measurement: one examination at the end of the semester. With only one measurement, bringing all of the students to a minimal level of competency is nearly impossible, because the semester is over when you take your first measurement.

\(^{49}\) At least some casebook faculty have thought that this was our job as well. Many Legal Writing faculty can tell stories about casebook faculty who have upbraided them for the random mechanical writing errors of upper-level students. See e.g. Lisa Eichhorn, Writing in the Legal Academy: A Dangerous Supplement? 40 Ariz. L. Rev. 105, 115 (1998) (“I think many of my [casebook faculty] colleagues believe that much class time in my legal writing course is devoted to comma usage and the diagramming of sentences; why else would they direct their comments about unfortunate grammar in upperclass students’ papers to me?”).
papers, and changed my method of critique. I believe that my path to innovation has not been unique, and that many of my colleagues, trying to achieve this unreasonable teaching goal that had been thrust upon us (or that we thrust upon ourselves), looked to curricular innovation as a way of achieving teaching goals.

3. The Connection between Course Goals and Course Methods

In Legal Writing courses, a clear connection exists between the goal of learning how to write and the methodology of classroom sessions about writing methods coupled with frequent, personal critiques of student-written work products. Teachers can easily see the connection between their teaching methods and student performance due to the multiple samples taken over the course of the semester. In contrast, as Professor Eichhorn has noted, in the typical casebook classroom, the oral presentation is held in higher esteem than written work. While it may be easy to see the direct connection between the goal of thinking like a lawyer and the course method of talking through legal analysis and orally challenging students to “revise” those thoughts, it is more difficult to connect course teaching methods to the typical method of measurement: a one-time written examination.

The Legal Writing curriculum is directly and obviously connected to the measurement system used in the course. In a typical Legal Writing course, the professor teaches for a week or two about how to write an office memo, and then asks the students to turn in a draft of an office memo. Some professors break things up even more, and might have a session or two devoted to individual elements in legal documents, such as questions presented, case descriptions, rule explanations, or the like, and ask the students to produce that narrow element for review. These professors have instant feedback on the effectiveness of their teaching: they were teaching about how to write a memo, or a rule explanation, or

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50 Id. (noting sarcastically that “[casebook] classes ask students to exhibit their pure thoughts in Socratic discussion, [and] writing skills courses ask students to ‘process’ those thoughts into writing…. Teaching the process, one could argue, distances students from the pure thought that is so nicely and immediately displayed, orally, in the Socratic classroom.”).

51 Including myriad steps such as research, issue spotting, case authority description, etc.
whatever, and here are the documents, right in front of them, with each student’s attempts at the work.

In the typical casebook course,\footnote{I recognize that the “typical” or “average” course does not describe all courses, and that many casebook faculty are using innovative techniques to teach their students. As I have noted, however, institutional forces inhibit casebook course innovations; this Article is meant to help counter those forces.} the exam is used at the end of the semester to sort the students from the best to the worst.\footnote{Kissam, supra n. 10, at 1979–1980 (noting that using one-time exams makes it easier to arrange students on a mandatory curve).} The teacher cannot use the exam to adapt teaching methods for that class, because the class is over. Further, because most casebook professors do not teach students how to write the examination,\footnote{Id. at 1980 (noting that students are graded on only a final examination and generally receive “no supervised practice or mid-term examinations”).} it is difficult for faculty to see a cause-and-effect between the process of their classroom teaching and the product of the final examination. Thus, the “disconnected” nature of the case method/final exam course structure\footnote{Id. (noting “[t]he basic disjunction between case method analysis in the classroom and the rule-oriented process of identifying and quickly resolving novel, surprising situations on time-limited final examinations”).} does not lead casebook faculty to experiment with changes that would help particular students achieve particular goals, or to be able to see and understand the effectiveness of particular teaching methods if they did so.

In Legal Writing courses, however, the measurement method is also used to assess each student’s particular strengths and weaknesses so that teachers may help each student to improve. They have instant feedback on the teaching methods that they use, and they can use this feedback to “revise” their teaching methods as the semester progresses, and not only at the beginning of each new semester.\footnote{Linda L. Berger, A Reflective Rhetorical Model: The Legal Writing Teacher As Reader and Writer, 6 Leg. Writing 57, 58 (2000) (noting that Legal Writing teachers “should focus as much on planning, monitoring, and revising our own reading and writing as we do on communicating our interpretations of student work; and we should use our own reading and writing experiences to reflect on and respond to what our students are doing”).} Therefore, by allowing Legal Writing faculty to see the impact of their teaching — and their teaching innovations — the very structure of the Legal Writing course promotes curricular reform.
4. Intrinsic Rewards

Another reason that Legal Writing faculty have been innovators in pedagogy is that we have had rewards available to us that were not available to casebook faculty. While casebook faculty may never have been formally punished for innovation or for pedagogy-related scholarship, many have seen handwriting on the wall that told them not to rock the curricular boat, and to publish articles in which they analyzed cases, rather than articles in which they analyzed how to teach students how to analyze cases. Although there has been a recent surge in articles on pedagogy by casebook faculty, pedagogy has not been a traditional focus for casebook faculty scholarship. In fact, it has been a given that scholarship about pedagogy would hurt rather than help chances for tenure.

Because, even now, most Legal Writing faculty are not on the tenure track, both our pressure to publish and our rewards for that pressure have been more intrinsic than extrinsic. Furthermore, because of our course design of providing several individual critiques to our sometimes too-numerous students, many Legal Writing faculty have literally hundreds of pages of critiquing to accomplish each semester. Thus, we grew hungry not just for

59 Kevin H. Smith, “X-File” Law School Pedagogy: Keeping the Truth out There, 30 Loy. U. Chi. L.J. 27, 42 n. 29 (1998) (noting that “legal scholarship which deals with law school pedagogy frequently is treated as second-class scholarship, not worthy of anyone’s interest or time, either to write or to read”).
60 Each year, however, there are more legal writing faculty on the tenure track. The 2001 ALWD/LWI Survey found thirty-eight tenured or tenure-track directors and fifteen tenured or tenure-track non-directors teaching legal writing. In 2003 those numbers had increased to forty-eight and twenty-six, respectively. ALWD/LWI 2003 Survey, supra n. 17, questions 45, 65.
61 The ABA Sourcebook recommends that full-time legal writing faculty teach no more than forty-five students per semester. Ralph Brill et al., ABA Sourcebook on Legal Writing Programs 74 (ABA 1997). This recommendation seems to be too high, given that each legal writing student uses up to eight hours of one-on-one teacher time each semester. Yet some programs assign as many as eighty-five students per semester. ALWD/LWI 2003 Survey, supra n. 17, at question 82.
62 Professor Jan Levine initiated the practice of asking legal writing faculty to total the number of pages of student writing they read each semester. Jan M. Levine & Cheryl Beckett, Status and Salary, in The Politics of Legal Writing: Proceedings of a Conference for Legal Research and Writing Program Directors 15 (Jan Levine, Rebecca Cochran & Steve
sleep, but for knowledge about useful pedagogy. The reward for learning how to teach better was the joy of having a more successful semester, of seeing our students’ writing improve, of having better papers to read on those long nights.\textsuperscript{63} We published not to meet tenure requirements, but because we wanted to share our triumphs with others who we knew were in the same boat.

In this sense, the formation of the Legal Writing Institute (LWI) after a conference for Legal Writing teachers in 1984\textsuperscript{64} had a synergistic impact on Legal Writing teaching and scholarship. LWI has held a national conference every other year since 1984, and many of its members attend regional conferences annually.\textsuperscript{65} While tenure-track faculty may have found (and may still find) that people frown on scholarship and presentations about pedagogy, pedagogy was celebrated at LWI conferences. At the first meeting in 1984, 108 Legal Writing faculty shared their common dilemmas and solutions in presentations and workshops. LWI started a newsletter in 1985\textsuperscript{66} and published the first volume of \textit{Legal Writing: The Journal of the Legal Writing Institute} in 1991. When Legal Writing faculty published in our newsletter and journal (and eventually elsewhere), we were rewarded not just by seeing our ideas published or by getting cited, but by getting personal thank yous from colleagues who had tried our teaching methods. Many of the textbooks that line the shelves of Legal Writing faculty offices today got their starts at LWI conferences or in LWI publications.

In 1995, Legal Writing faculty gained another professional voice, when the Association of Legal Writing Directors held its founding

\textsuperscript{63} As several of my faculty colleagues at Ohio State have noted, one of the real satisfactions of teaching Legal Writing is seeing the dramatic progress that students make over the course of the semester. We see their first, stumbling attempts in January, and watch them learn how to write dramatically improved analysis by April.

\textsuperscript{64} LWI was founded by Anne Enquist, Laurel Currie Oates, and Christopher Rideout of the University of Puget Sound School of Law (now Seattle University School of Law). See http://www.lwionline.org for information about joining LWI.

\textsuperscript{65} The AALS Section on Legal Writing, Research, and Reasoning was certainly valuable, but many legal writing faculty had no travel budget, and some deans were reluctant to send low-status faculty to such an expensive conference to attend the section meeting. Thus, in those pre-email days, the LWI conferences were the only place that some legal writing faculty could gather to share ideas, frustrations, and successes in a meaningful way. The most recent LWI conference, held at the University of Tennessee in Knoxville in 2002, was attended by more than 350 legal writing faculty from the United States and abroad.

\textsuperscript{66} \textit{The Second Draft} is published twice annually; its current editors are Barbara Busharis (Florida State), Sandy Patrick (Lewis & Clark), and Joan Malmud (Oregon).
The Journal of the Legal Writing Institute

conference. Interestingly, casebook faculty have lately stepped up the search for more effective teaching techniques.

Necessity is truly the mother of invention, and so Legal Writing teachers have been highly motivated to find new, more efficient, and more effective ways of achieving their pedagogical goals. The curricular innovations that have resulted should not remain in the Legal Writing classroom, but should spread throughout the legal academy.

B. Not Separate, but Not Equal: The Impact of Lack of Integration

The fact that Legal Writing faculty, and their courses, have been considered separate, or “other,” may have spurred Legal Writing faculty toward curricular innovation, but it has hurt and continues to hurt useful cross-pollination between Legal Writing faculty and casebook faculty. Although I teach at a law school in which Legal Writing is not segregated, at many schools, there are four types of courses taught by three types of faculty. One group, the largest, which Kent Syverud would call “The Faculty,” and which I have been calling “casebook faculty,” teaches only casebook courses and seminar courses. The second group, “Legal Writing faculty,” teaches only legal writing courses and advanced Legal Writing courses. The third group, “clinical faculty,” teaches only clinical courses.

67 ALWD’s founding conference was held at the University of San Diego School of Law, and its founding President was Jan Levine, then of the University of Arkansas at Fayetteville and now at Temple University’s Beasley School of Law. See ALWD, www.alwd.org (Like LWI, ALWD held its first conference before it was officially founded.).

68 In the early 1990’s Professor Gerry Hess founded the Institute for Law School Teaching at Gonzaga University School of Law. Not surprisingly, legal writing faculty are well-represented both as authors in the organization’s newsletter and as speakers at the group’s conferences. For example, at the 2001 conference, with the theme of Assessment, Feedback, and Evaluation, eight of the twenty-eight presenters listed were Legal Writing faculty. See Gonzaga Univ., Inst. L. Sch. Teaching, ILST Publications and Other Resources, http://www.law.gonzaga.edu/ILST/PubsResources/2001mats.htm (visited July 3, 2003).

69 Syverud, supra n. 13, at 14.

70 See e.g. Bayer, supra n. 33, at 360 (“Many law schools do not allow writing faculty to teach outside of that genre.”); see also Arrigo, supra n. 3, at 146 (noting that being denied the opportunity to teach outside of Legal Writing “can retard future academic opportunities”).

71 Of course, this segregation does not exist at all schools. At Ohio State, most faculty have taught Legal Writing, and some make it part of their regular teaching package, along with casebook courses. At Mercer University School of Law, the new home of the LWI, Legal Writing faculty are fully integrated members of the faculty, with teaching packages based on their interests and abilities and the school’s curricular needs, rather than on artificial distinctions.
There is nothing wrong with faculty having areas of expertise, but too many schools draw lines that push these groups farther away from each other and inhibit interaction. At most schools, at least some Legal Writing faculty and clinical faculty are not members of the faculty, or do not have the status that casebook faculty have. They may have segregated offices and separate mailboxes, they may not be allowed to vote at — or even attend — faculty meetings, they may have “lesser” titles, and they almost certainly have lesser salaries. Professor Ilhyung Lee, after a year teaching Legal Writing, found that he was welcomed to “the Academy” only after accepting a job teaching casebook courses.

The real and metaphorical symbols of segregation that separate Legal Writing faculty from casebook faculty affect more than the emotional and financial well-being of the affected faculty: they directly inhibit the ability of different types of faculty to learn from each other. If casebook faculty are inhibited from getting to know Legal Writing faculty personally and professionally, they are more likely to misunderstand what goes on in Legal Writing courses, and certainly less likely to expect to find any benefit in learning about Legal Writing teaching methods. Further, while it is not impossible for those with higher status to be interested in teaching ideas from those with lower status, it does not happen

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72 Professor Schwartz notes that certain teaching methodologies “have been very effectively explored and deployed by academic support faculty and by faculty teaching legal writing courses,” admitting that “this learning has not reached substantive law classrooms.” Schwartz, supra n. 22, at 426–427 (citations omitted).

73 In 2001, out of 98 schools answering the question, eight law schools reported that their LRW full-time faculty (meaning non-directors) were not allowed to attend faculty meetings. In 2003, 129 schools responded to the question, and thirteen schools reported a ban on attendance, a two per cent rise in schools banning attendance. ALWD/LWI 2003 Survey, supra n. 17, at question 82; see also Arrigo, supra n. 3, at 150 (describing “ongoing petty indignities” suffered by Legal Writing faculty at “especially disheartening institutions”).

74 Jan M. Levine & Kathryn M. Stanchi, Women, Writing & Wages: Breaking the Last Taboo, 7 Wm. & Mary J. Women & L. 551, 577 (2001) (noting that in dollars adjusted for location, the average Legal Writing faculty member — regardless of experience — is paid 57% of the median salaries of tenure-track assistant professors teaching casebook courses, 51% of the median salary of associate professors, and 40% of the median salary paid to full professors. The dollar amount differential ranges from $28,973 to $56,550 per year).


76 As Professor Bayer has noted, “Writing professors are substantially injured by . . . disparate treatment — harmed financially through low salaries, hurt professionally by the lack of respect from colleagues, damaged communally through withholding of the franchise at faculty meetings, and denied the peace-of-mind resulting from job security.” Bayer, supra n. 33, at 385.
naturally. Keeping Legal Writing faculty in low status, segregated positions makes it harder for the rest of the academy to take their scholarship seriously, and thus inhibits the ability of all faculty to realize the benefits of sharing teaching methods. The integration of legal writing teaching methods — and Legal Writing faculty — should proceed with all deliberate speed.

II. THEORETICAL FOUNDATIONS

Because their teaching situation has enabled Legal Writing faculty to learn so much about their students' thought processes and about how particular pedagogies affect those thought processes, Legal Writing faculty have something valuable to share with casebook faculty. The educational theories that underlie Legal Writing teaching methods make clear how teaching Legal Writing is a way of teaching legal thinking.

Both Legal Writing courses and casebook courses are courses about how to think like a lawyer; the main difference is one of process. In most casebook courses, the teaching can be compared to the post-mortem. Students read appellate decisions and dissect them as a group, under the teacher's guidance, discovering in the process the "thinking like a lawyer" that led to the various decisions of both attorneys and judges along the way. Ideally, the students learn both the doctrine of the particular subject matter as well as protocols for how to think like a lawyer in various situations.

In the Legal Writing course, in contrast, the students work from the bottom up instead of from the top down. Typically, teachers present the students with a set of facts and ask the students to research like a lawyer, think like a lawyer, and write like a lawyer, guiding them along the way through in-class workshops, writ-

77 Rideout & Ramsfield, supra n. 26, at 82 ("Some professors may not wish to work with legal writing professionals or may make them too keenly aware of their lower status.").

78 Although he does not mention the impact of various professorial titles, James Lindgren has noted that student editors tend to be blinded by the prestige of the author's law school and suggests that law review authors should remove information identifying the author's name, gender, and institution before reviewing articles. James Lindgren, An Author's Manifesto, 61 U. Chi. L. Rev. 527, 538 (1994).

79 Eichhorn, supra n. 49, at 109–110 (noting that Langdell thought that "the law school classroom should resemble the laboratory in the medical school... Thus, law students would dissect cases much in the same way that medical students would dissect a cadaver." (footnote omitted)).
ten critiques, and individual conferences. Of course, this does not mean that the process of Legal Writing has three discrete steps; it is recursive, with the writer moving among thinking, researching, writing, and revising.

In Legal Writing, the student thinks in order to write and writes in order to think, and this thinking-writing connection provides rich teaching opportunities that can be exploited by all law faculty. Two pedagogical lenses are relevant here. First, as noted above, students who complete guided written analysis in the Legal Writing course are participants in a “cognitive apprenticeship.”

Allan Collins, John Seeley Brown, and Ann Holum have characterized the cognitive apprenticeship as “thinking made visible,” and have described how this apprenticeship theory can be used to inform the teaching of reading, writing, and mathematics. Cognitive apprenticeship theory is particularly relevant to describe pedagogy used in the Legal Writing course, which in most law schools is the only required course in which students are guaranteed the individual faculty attention that mirrors the traditional apprenticeship. As I will explain, however, these techniques are not limited to use in Legal Writing or clinical courses.

Second, the teaching of Legal Writing is also informed by composition and writing theory. While this connection seems more obvious, it is only within the past twenty years that Legal Writing faculty have begun to articulate and embrace the theories underpinning their courses. Legal Writing faculty use their experience to provide students with the tools they need to succeed in their legal careers.

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84 Id. Professor Joe Kimble has also recognized the intersection between writing and thinking, noting that “writing is thinking. Thinking on paper. Thinking made visible.” Joe Kimble, On Legal Writing Programs, 2 Persp. 1, 2 (1994); see also Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Leg. Educ. 562, 579 (2000) (“If writing is thinking made visible . . . then it is thinking and analysis that are the core of legal writing courses.” (footnote omitted)).
85 See discussion in Section IV (noting differences).
knowledge of writing process theory when designing appropriate teaching methods to help their numerous “cognitive apprentices” learn how to think like lawyers.

A. The Writing-Thinking Connection

The connection between writing and thinking may be difficult to see for those who have always thought of writing as merely an instrument for clothing thought.87 I imagine, however, that many law faculty can specifically remember a time when the act of writing advanced their thought, if not while working on a law review article, then perhaps when they were law students. Many law graduates can recall taking an exam by reading through the question, figuring out how to approach the response, and then confidently beginning the essay by writing the “answer” to the question, such as “The plaintiff will be able to recover damages.” Then, lo and behold, about halfway through the “answer,” we realized that we were writing an analysis that revealed not that the plaintiff would be able to recover damages, but precisely why the plaintiff would not be able to recover. Our revised thoughts were born, not of our original thoughts, but of the process of writing those thoughts down into a coherent message.

The concept of writing as a means of generating thought is not a new one in writing theory circles. As early as 1981, Linda Flower and John Hayes were analyzing how writers “regenerate or recreate their goals in the light of what they learn” while writing.88 Professor Kissam wondered in 1987, “why law professors have ignored or simply missed seeing this aspect of writing as thinking.”89 These scholars would recognize the internal dialogue of the law-student exam-taker as a writer who was thinking because the act of writing — and of thinking by writing — allowed the student to think about the case in a different way and to better understand it.

87 Berger, supra n. 56, at 58 (“[R]eading and writing are processes for the construction of meaning [and] ‘writing’ is the weaving of thought and knowledge through language, not merely the clothing of thought and knowledge in language.” (footnote omitted)); but see Judith S. Kaye, Judges As Wordsmiths, 69 N.Y. St. B.J. 10, 10 (Nov. 1997) (“Words are, after all, how I clothe my thoughts.” (cited in Charles R. Wilson, How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit, 32 Stetson L. Rev. 247, 264 n. 91 (2003)).


89 Kissam, supra n. 29, at 142.
Although some think of writing as inevitably distinct from thinking,\footnote{See e.g. Dina Schlossberg, An Examination of Transactional Law Clinics and Interdisciplinary Education, 11 Wash. U. J.L. & Policy 195, 215 (2003) (noting that “the dominant pedagogic value in most law school environments is still the analytical thought process,” and “[t]he majority of law school instruction is spent on developing the analytic skills associated with ‘thinking like a lawyer,’” but also admitting that “[t]here are certainly courses in every law school that teach students other important skills . . . including courses in . . . legal writing.” (emphasis added)).} it is difficult to separate writing from thought. In fact, there is increasing recognition that a Legal Writing course is a particularly good place for students to learn the process of analytical thought at the heart of “thinking like a lawyer.” Professors Steinzor and Hornstein note that “writing in law school is the understanding of legal analysis in concrete form, in order to provide a vehicle for critique and improvement,” and that writing “cannot be separated from the analysis it substantiates.”\footnote{Steinzor & Hornstein, supra n. 14, at 472.} Thus, they note, “effective writing instruction means teaching students how to perform rigorous analysis.”\footnote{Id.} Similarly, in a piece stressing the importance of integrating “skills” and “doctrine” in legal education, Professor Noble-Allgire noted that the MacCrate Report recognized that both practical and analytical skills are “essential to competent lawyering and that ‘individual skills and values cannot be neatly compartmentalized.’”\footnote{Noble-Allgire, supra n. 15, at 36 (footnote omitted).} The Honorable Kenneth Ripple has noted that “writing is for most legal ventures the primary engine that drives the reasoning process,” seeing it as a “necessary tool for thinking through the most difficult problems.”\footnote{The Hon. Kenneth F. Ripple, Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special “Classroom,” 74 Notre Dame L. Rev. 925, 926, 929 (1999).} Professor Carol Parker has noted that “the development of communicative skills is inseparable from the development of analytical skills.”\footnote{Parker, supra n. 19, at 562; see also Busharis & Rowe, supra n. 82, at 314 (“Legal writing cannot be isolated from other law school experiences; learning to write in the legal context is intimately related to learning to think and analyze in the legal context.”).}

The internal dialogues of law students in the process of writing represent a hidden teachable moment that should interest all law faculty. Both cognitive apprenticeship theory and writing process theory give law teachers methods that allow them to use the written word to see and enter into these internal dialogues, and to guide and improve their students’ thinking. In the casebook classroom, when teachers use Socratic method to discuss the analytical processes of judges and attorneys, much of the learning is vicari-
ous. Not all students participate in each conversation; the conceit of the large-classroom Socratic dialogue is that one student will participate directly while the rest of the class participates vicariously, following the conversation and mentally proposing answers, and then testing the validity of those answers by following the teacher-student discussions that go on around them. In Legal Writing courses, in contrast, each student must write, and so each student directly participates both in the thinking and the teacher-student conversations about that thinking. This required participation is what makes Legal Writing courses so difficult and so rewarding, for both teachers and students.

More importantly, because each student in the writing class participates in this visible thinking, the Legal Writing course presents a wonderful opportunity not just to demonstrate how to think like a lawyer, but to directly supervise each student’s “cognitive apprenticeship” as they begin their life in the law. The Legal Writing curriculum gives Legal Writing faculty many opportunities to lay bare and analyze the legal thinking relevant to the production of legal documents. Indeed, in both their teaching and their scholarship, Legal Writing faculty have analyzed writing as it relates to the act of thinking itself, and as it relates to how best to teach the process of communicating legal thought to a reader.

B. Cognitive Apprenticeships

In her remarks, Professor Wegner discussed the cognitive apprenticeship of the law student, and she, Brook Baker, and others have noted the concept’s connection to legal education. Most people are familiar with the notion of an apprenticeship as it relates to the trades; we know that Ben Franklin was apprenticed to one of his older brothers to learn the trade of printing, for example,  

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96 Of course, not all casebook professors believe that students are following along in the ways that they should. Schwartz, supra n. 22, at 351 n. 11 ("The author has serious doubts as to whether law students, particularly new law students, actually play along. He suspects many focus either on their relief at not being called on or their fear of being called on next.").

97 Brook K. Baker, Learning to Fish, Fishing to Learn: Guided Participation in the Interpersonal Ecology of Practice, 6 Clin. L. Rev. 1, 27 (1999) (noting that "[p]lacing learning in practice and locating learning in participation contextualizes learning and encourages students to enter a cognitive apprenticeship" (footnote omitted)); Schwartz, supra n. 22, at 421 (noting how cognitive apprenticeships relate to learning theory (footnote omitted)).

in what turned out to be a six-year apprenticeship.\textsuperscript{99} As described by Collins, Brown, and Holum, this kind of traditional apprenticeship has four types of interaction between the apprentice and the “expert”: In the “modeling” interaction, the expert shows the apprentice how to do a task.\textsuperscript{100} As the apprentice learns more about the task, the expert allows the apprentice to attempt the task under supervision, but provides various types of support or “scaffolding,” such as advice and critique. The expert then “fades,” turning over more and more responsibility until the apprentice “is proficient enough” to accomplish the task independently.\textsuperscript{101} Collins, Brown, and Holum note that the fourth interaction, “coaching,” is “the thread running throughout the entire apprenticeship experience”:

The master coaches the apprentice through a wide range of activities: choosing tasks, providing hints and scaffolding, evaluating the activities of apprentices and diagnosing the kinds of problems they are having, challenging them and offering encouragement, giving feedback, structuring the ways to do things, working on particular weaknesses. In short, coaching is the process of overseeing the student’s learning.\textsuperscript{102}

After describing the traditional apprenticeship, the authors incorporate the modeling, coaching, and scaffolding elements of that apprenticeship into a set of seventeen principles for designing learning environments for the cognitive apprenticeship.\textsuperscript{103} Teaching Legal Writing, like the traditional apprenticeship, contemplates significant individual attention. Although an apprenticeship paradigm would not seem to be immediately relevant to the case-

\textsuperscript{99} Id. at 34.
\textsuperscript{100} Collins, Brown & Holum, supra n. 83, at 8.
\textsuperscript{101} Id.
\textsuperscript{102} Id. at 8–9. Although this description is meant to be focused on traditional apprenticeships rather than cognitive apprenticeships, many Legal Writing faculty will recognize themselves in the description. When we design writing projects and in-class exercises, we are “choosing tasks”; when we assign texts and design criteria sheets, we are “providing hints and scaffolding”; when we provide individual critiques of student papers and hold student conferences, we are “evaluating the activities of apprentices and diagnosing the kinds of problems they are having, challenging them and offering encouragement, giving feedback . . . [and] working on particular weaknesses”; finally, when we design the course and its assignments, and when we provide focused criteria for various projects, we are “structuring the ways to do things.”
\textsuperscript{103} Id. at 42–45. Although almost all of these principles would provide a helpful paradigm for analyzing the teaching of Legal Writing, such an analysis is beyond the scope of this Article.
book class, which is based on a vicarious learning model, at least four of the principles relevant to the cognitive apprenticeship highlight teaching methods in Legal Writing courses that could be transferable to casebook courses.

For example, the use of “Heuristic Strategies” is described as a principle of providing course content that gives students “generally effective” techniques for accomplishing certain common tasks.\(^{104}\) Legal Writing faculty give students a variety of heuristic strategies. For example, many writers include irrelevant details when they include case descriptions in their work. Legal Writing faculty might provide a heuristic strategy to help student writers to identify the information that most readers would be interested in, for example, to first locate the issue relevant to the issue under discussion in the writer’s work, to include information about how the court disposed of that issue, and then to consider what facts and reasoning might also be necessary for the reader’s understanding of the case in the context of the particular document.\(^{105}\) The heuristic strategy does not dictate content, but guides students’ thinking by giving them a set of questions to answer in particular rhetorical situations.

“Modeling” asks the expert to perform the task and to “externaliz[e] . . . usually internal processes and activities . . . by which experts apply their basic conceptual and procedural knowledge.”\(^{106}\) In the Legal Writing course, the teacher “models” legal writing not only by displaying sample documents, but by identifying what the writer was trying to accomplish in various parts of the document and the decisions that writers must make to accomplish those goals.

As in traditional apprenticeships, “Coaching” in the cognitive apprenticeship requires the expert to observe students while they carry out a task and to offer “hints, scaffolding, feedback, modeling, reminders, and new tasks aimed at bringing their performance closer to expert performance.”\(^{107}\) Legal Writing faculty take on this task with each student, offering written, individualized critiques as the students progress through the stages of the writing process, and designing a variety of assignments and exercises to give students practice in various cognitive skills.

\(^{104}\) Id. at 42.


\(^{106}\) Collins, Brown & Holum, supra n. 83, at 43.

\(^{107}\) Id. at 43.
Finally, the principle of “Articulation” asks teachers to use teaching methods that require students to “articulate their knowledge, reasoning, or other problem-solving processes.”\footnote{Id. at 44.} Although in some ways, every Socratic dialogue requires articulation, requiring students to reveal their reasoning “processes” is what makes articulation such an important part of the cognitive apprenticeship in the Legal Writing course. Students in casebook courses certainly articulate their knowledge when they describe elements of cases under discussion, but not every Socratic dialogue requires them to articulate the processes that underlie their statements in that dialogue. In writing courses, in contrast, professors can require students to conduct “meta-writing,” which often turns out to be “meta-thinking” that reveals the students’ “reasoning or other problem-solving processes.”\footnote{The prefix “meta” comes from a Greek word meaning “beside,” or “after,” and it is often used to describe a more comprehensive version of the noun. For example, “meta-discourse” is discourse within a document in which a writer describes, references, or characterizes the discourse in the document. See Joseph M. Williams, \textit{Style: Ten Lessons in Clarity & Grace} 66–68 (7th ed., Longman Publishers 2003). Similarly, I think of “meta-writing” as “writing that describes or analyzes writing,” and “meta-thinking” as “thinking that describes or analyzes thinking.” For more information about possible meta-writing and meta-thinking exercises, see Section III(B).}

Thinking of the Legal Writing course as a “cognitive apprenticeship” helps Legal Writing faculty to design teaching methods and coursework that will enhance their students’ learning. Section IV of this Article will identify and discuss Legal Writing teaching methods that can advance this apprenticeship in the casebook classroom.

\section*{C. Writing Process Theory}

In addition to the type of pedagogical theory embodied in the cognitive apprenticeship model, Legal Writing faculty can turn to writing process theory. Although this Article cannot do justice to the many layers of theory relevant to composition and writing process, an overview of fundamental principles reveals some of the intellectual underpinnings of legal writing courses.

In the early years of legal writing programs, perhaps most law faculty had a simplistic view of writing that Kissam has called the “instrumental” view.\footnote{Kissam, \textit{supra} n. 29, at 136.} Instrumental legal writing exists merely to transcribe the pre-formed thoughts of the lawyer. A Legal Writing
teacher would review the writing only to make sure that “the conventions and rules of grammar and vocabulary are applied correctly to thoughts that could be communicated orally but for considerations of efficiency and effectiveness.” In other words, the writing is just the “instrument” the writer uses to transcribe the already-formed thoughts, and the only job of the writing teacher is to make sure that each sentence is transcribed in a grammatically correct fashion.

An instrumental view of writing is consistent with — although it does not fully describe — what some have called a “formalist” theory of teaching writing; both would be at home in what some people have called a “product method” Legal Writing course. In a product method course, teachers and students talk about the rules of writing, and perhaps about organization, but teachers grade only a final product. They do not work directly with the students as they complete their writing, and they do not challenge the students to refine their thoughts or analysis, because they presume that all of the thinking takes place before writing begins, and the writer uses the written word merely to record or transcribe those thoughts. In other words, the brain completes its thinking, and then “dictates” the results to the hands, which record those thoughts in writing. Writing teachers use the written product to measure how well the students have complied with the formal standards for correct writing. Any critique the students might receive will be used on the next, different product.

Most Legal Writing courses are now structured around some form of the “process” method. In the process method, teachers intervene in their students’ writing before the final draft, so they can give students feedback on their research, writing, and thinking and question premises upon which their analysis is based. Through this interaction, both student and teacher think more deeply and critically, both about the subject matter that is the focus of the writing and about the writing process itself. The process method recognizes that writing is more than the hands taking dictation from the brain. Even if that were a realistic description of how words get onto paper, it is getting those words onto paper or

111 Id.
112 Pollman, supra n. 86, at 897; Rideout & Ramsfield, supra n. 26, at 49–50.
113 Schwartz, supra n. 22, at 401 (noting that “the writing of legal analysis is the end product of all the thinking that precedes it”).
114 Phelps, supra n. 45, at 1093.
115 Id. at 1093–1094.
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screen that makes the act of writing a process of thinking. But it is not a realistic description, for the brain interrupts itself, thinking and revising, during the time the hands take to record the original thoughts. Furthermore, once the writer can see his or her words, the writer can continue to engage with the text — even in the absence of a guiding teacher — and question its premises, its substantive message, and the communicative impact of that message.116 As E.M. Forster has famously observed, “How can I know what I think until I see what I say?”117

Process method courses are more in line with what Kissam calls “critical writing” and what others have characterized as “epistemic writing” theory.118 Kissam characterizes critical writing as a dimension of the writing process that

encourages a writer, by herself and possibly with the assistance of others, to enter into a sustained and serious dialogue about the subject under consideration. This dialogue can generate a much fuller and richer consideration of contradictory evidence, counterarguments, and the complex elements of a subject than is ever possible in oral communications alone or in a strictly instrumental process of legal writing. The critical writing dimension (and thinking about writing as critical writing) is thus an integral aspect of effective legal analysis.119

Both “critical” and “epistemic” writing theories are at home in the “cognitivist” school of the process method.120 Those in the cognitivist school seek to analyze how the writer makes decisions during the composing process for the purpose of constructing models of that process.121 Cognitivist scholars may study the process that writers use to work recursively on research, writing, and revision as they move from “writer-based prose” to “reader-based prose.”122

This process is particularly important in Legal Writing. “Writer-based prose” can operate primarily as a vehicle for the writer to “make meaning” and gain an understanding of the substance of his

116 Flower & Hayes, supra n. 88, at 385.
118 Kissam, supra n. 29, at 151–170; Rideout & Ramsfield, supra n. 26, at 55–56.
119 Kissam, supra n. 29, at 140–141 (citation omitted, emphasis added).
120 Rideout & Ramsfield, supra n. 26, at 51–52 nn. 49–56.
121 Id. at 51 n. 50.
or her eventual message.\textsuperscript{123} In other words, writer-based prose is a way that writers use writing to think about and learn about the legal issues that they grapple with. In contrast, “reader-based prose” is the vehicle the writer uses to communicate information about those issues to the reader.\textsuperscript{124} By studying the thinking underlying the writer’s decision-making during this process, cognitivist scholars can help teachers identify heuristics to focus the multiple drafts that writers complete while they are creating a document.

Some scholars have added a layer of theory to the concept of “reader-based prose,” using the “social perspective” theory to recognize that a writer who wants to communicate to a reader effectively must understand “the social contexts within which writing takes place, and, thus, to acknowledge the ways in which writing generates meanings that are shaped and constrained by those contexts.”\textsuperscript{125} For legal writing, at least, this definition could be characterized as circling back to reference formalist requirements, for it is certainly true that legal writers are usually “constrained” by their readers’ expectations about format requirements and rules of grammar and citation, as well as the readers’ need for complete analysis. At least some of the time, both formalists and social perspectivists would ask their students to follow the same “rules,” but for different reasons. For example, a formalist might require a student writing an appellate brief to follow the rules of grammar because rules of grammar are important to good writing, while a social perspectivist would do so because judges and their clerks are sticklers for good grammar, and a writer who uses grammar perceived to be inaccurate will lose credibility with those readers.\textsuperscript{126} Similarly, a social perspectivist would tell students to follow rules of effective legal writing style — at both the sentence level\textsuperscript{127} and

\textsuperscript{123} Id. at 459.
\textsuperscript{125} Rideout & Ramsfield, \textit{supra} n. 26, at 57.
\textsuperscript{126} Indeed, social perspectivists may require students to follow rules that are not really rules. I am not the only writing teacher who tells her students not to split infinitives, and who does so not because splitting infinitives violates a grammar rule — it doesn’t — but because I know that many overly formal writers in the legal profession think that splitting infinitives is wrong. See e.g. Anne Enquist & Laurel Currie Oates, \textit{Just Writing} 20 (Aspen L. & Bus. 2001); Mary Barnard Ray & Jill J. Ramsfield, \textit{Legal Writing: Getting It Right and Getting It Written} 356 (3d ed., West 2000). Thus, in the social context in which lawyers find themselves, splitting infinitives is “wrong” because it could affect their credibility with legal readers.
\textsuperscript{127} E.g. Enquist & Oates, \textit{supra} n. 126, at 71–96; Richard Wydick, \textit{Plain English for
the document level\textsuperscript{128} — not just because they are rules, but because a legal reader will be more likely to understand a well-written and well-organized argument that includes the information and analysis that the reader expects.\textsuperscript{129}

Some commentators have collapsed these various theories into two camps: “inner-directed writing” refers to writing processes focused on the writer’s cognitive needs, while “outer-directed writing” concentrates on how the writer revises the work with social and formal concerns in mind, to improve its effectiveness in the writer’s discourse community.\textsuperscript{130} Not surprisingly, some members of each of these camps have spent some time criticizing members of the other camp.\textsuperscript{131} I imagine, however, that if you asked Legal Writing teachers to pick a theoretical home for their own Legal Writing courses, many would have to describe themselves as “Socio-cognitive-formalists.”

Legal Writing faculty do not have luxury of concentrating solely on either inner or outer-directed writing. Legal Writing teachers must pay attention to “inner-directed” teaching methods because the legal writer must spend time learning about and thinking about the issues to be analyzed. But legal writers do not write in a vacuum, and these issues must be understood within an “outer-directed” professional and jurisdictional context. Furthermore, legal writers must understand the needs and expectations of the eventual reader within that same context, including the formal requirements inherent in the production of professional quality work and the production of particular documents.\textsuperscript{132} Even though the writing teacher must combine these theories while teaching, understanding their several focuses helps the Legal Writing teacher to design course content and teaching methods that allow students to learn about the many different tasks that face the legal writer.\textsuperscript{133}


\textsuperscript{129} One reason for considering the reader’s needs, of course, is the recognition that many legal readers have an overwhelming amount of reading to do. E.g. Beazley, supra n. 105, at 3 (noting average court caseloads).

\textsuperscript{130} Berger, supra n. 81, at 158.

\textsuperscript{131} Id. (citing Patricia Bizzell, \textit{Cognition, Convention, and Certainty: What We Need to Know about Writing}, 3 Pre/Text 213, 214–217 (1982)).

\textsuperscript{132} Parker, supra n. 19, at 565 (noting that “no single theory is sufficient” (footnote omitted)).

\textsuperscript{133} E.g. Bari R. Burke, \textit{Legal Writing (Groups) at the University of Montana: Professional Voice Lessons in a Communal Context}, 52 Mont. L. Rev. 373, 376 (1991) (noting that
Both inner-directed and outer-directed writing theories can inform faculty who explore teaching opportunities that make their students’ thinking visible. And because teaching methods relevant to both of these theories can help to teach students how to think like lawyers, they are relevant to both the legal writing classroom and to the casebook classroom.

III. HOW LEGAL WRITING FACULTY USE WRITING PROCESS THEORY TO ADVANCE THEIR STUDENTS’ COGNITIVE APPRENTICESHIPS

Combining cognitive apprenticeship theory and writing process theory seems at first like a daunting task, but the multifaceted aspects of these theories inform the sophisticated teaching methods that occur in good Legal Writing courses. Legal Writing faculty must design courses that teach their students how to organize the many intellectual tasks necessary to create a legal document. These tasks range from the inner-directed requirements of research, organization, and use of authority to the outer-directed requirements of document format, organization, and transparent analysis.

This section will first address how Legal Writing faculty have analyzed and used the reader’s thinking and point of view as a way of communicating requirements of effective writing to their students. Next, it will discuss how they have analyzed and used the writer’s thinking to “revise” their teaching as the semester progresses. For, just as research, writing, and revising are recursive, so is teaching: the teacher must review the thinking of his or her apprentice to evaluate teaching success, and then try again.134 Because the law professor has a much shorter time limit on the apprenticeship than the master printer, it is even more important for expert Legal Writing teachers to learn from their students to make the teaching more effective.

134 Berger, supra n. 56, at 79 (noting that the writing teacher should change her role as a reviewer depending on the student’s writing).
A. The Thinking of the Reader

In Legal Writing courses, the writer encounters the thinking of the reader in two contexts. First, in the context of identifying the reader’s general expectations for the document; second, in the context of anticipating the reader’s reaction to specific thinking and writing decisions within the document.

Although some might think of the continuum of the writing process as moving smoothly from writer-based, or “inner-directed” writing to reader-based, or “outer-directed writing,” good legal writers often will consider the needs of their readers early in the writing process. The reader’s needs and expectations dictate much of the form, structure, and content of the document that the writer creates, and most legal writers must have these considerations in mind from the moment they begin creating a written work.

Some of these expectations are codified in court rules about document requirements; for example, United States Supreme Court Rule 24 describes the requirements for briefs on the merits. Some of these expectations have been articulated by legal writing scholars; James F. Stratman, Laurel Currie Oates, and others have studied legal readers’ cognitive processes as they read and write. These studies provide valuable insights for both legal writers and teachers of Legal Writing, and they reveal how the reader’s needs and expectations inevitably affect the writer’s thinking as he or she writes, thus connecting the epistemic branch of cognitivism with the social perspective.

Legal Writing faculty have used many different methods to translate these expectations into heuristic strategies and to make these abstract readers and their needs become more concrete in the mind of the legal writer. Some teachers have used pictures to conjure up concrete images of either readers or their needs.

\[^{135}\text{See e.g. }\text{James F. Stratman, }\text{Teaching Lawyers to Revise for the Real World: A Role for Reader Protocols, 1 Leg. Writing 35, 36 (1991).}\]
\[^{136}\text{Laurel Currie Oates, }\text{Beating the Odds: Reading Strategies of Law Students Admitted through Alternative Admissions Programs, 83 Iowa L. Rev. 139 (1997).}\]
\[^{138}\text{E.g. Beazley, Teacher’s Manual to Practical Guide to Appellate Advocacy 52–54 (Aspen L. & Bus. 2002) (noting how to use photographs to make students think about their audience); Sheila Simon, }\text{Top 10 Ways to Use Humor in Teaching Legal Writing, 11 Persp.}\]
while others have required their students to create and sign “reader-writer covenants,” in which they articulate the needs of a person reading a particular document.¹³⁹

One common way in which Legal Writing teachers teach students to anticipate the needs of the reader is by giving students generic “criteria sheets” that describe, in varying degrees of detail, the formal, structural, and analytical expectations that the reader has for the document.¹⁴⁰ These criteria sheets give students a set of heuristic strategies that spur the writer to consider the reader's needs at various stages of the writing process, from planning to revision.¹⁴¹ Although some fear that giving students heuristics can make their writing too formulaic, the heuristics do not dictate content. Rather, they give students a set of decisions to make, or questions to answer, as they write. In this way, heuristics can “generate thought.” The reader's expectations, as the basis for the heuristic, help the teacher to provide scaffolding that will guide the students' thinking on a given project. For example, knowing that the reader expects the writer to articulate and explain a rule directs the students' thinking as they read and synthesize legal authorities, for the students look for rules that they can use to support their points, and try to identify authorities that will effectively explain, illustrate, or prove how the rule should be applied in the current situation.

Formalists would note that the criteria sheet should be different for each category of document — court rules are different for appellate briefs than for trial briefs, for example. Similarly, social perspectivists would expect different criteria for each category of document, because each category of document has a different category of reader, with different needs — an appellate judge or clerk has different needs and expectations than a trial judge, for example. Finally, cognitivists, who are concerned with the thinking process of the writer as he or she progresses from blank page to final document, would ask for a different criteria sheet or set of heuristic strategies for each document and for each stage of the writing process.

¹²⁵, ¹²⁵ (2003) (explaining the use of photographs of various arrangements of lasagna ingredients to illustrate reader's expectations and the result when those expectations are not met).

¹³⁹ Phelps, supra n. 45, at 1099 (noting that requiring students to think about their readers in advance can enable them to make more informed choices as they write).

¹⁴⁰ I am grateful to Nancy Elizabeth Grandine, who was my supervisor when I taught at Vermont Law School and who introduced me to the concept of criteria sheets.

¹⁴¹ Berger, supra n. 81, at 176; see also Beazley, supra n. 105, at 50 (addressing the question, “Will my writing be boring if I use the same paradigm in each section?”).
process. For example, at an early stage of the writing process, teachers can provide heuristic strategies for planning, research, or large-scale organization, while at later stages of the writing process teachers can design criteria sheets to help the writer revise his or her document for the reader.¹⁴²

The second context in which the writer encounters the reader is in trying to anticipate the reader’s thoughts as the reader reacts to methods of organization, analysis, and even writing style within a specific writer’s document. The reader’s thoughts can affect the writer’s thought processes and writing processes because good writers anticipate the reader’s reaction, and may even write to provoke a wanted reaction. In her well-known first-year textbook, Linda Edwards asks her students to consider the “commentator” — that voice that all readers have inside their heads when they read — when making writing decisions.¹⁴³ If the writer anticipates an unwanted reaction from the reader’s commentator, the writer can stop and analyze what aspect of the writing to change in order to provoke the desired reaction.

Good Legal Writing faculty help students to anticipate their readers’ reactions by giving them direct experience with the reader’s reactions in several different ways. Perhaps the most common is the personal, detailed critique in which the teacher articulates the reader’s concerns, questions, and confusion as a method of making the writer realize the particular ways in which the analysis — and often, the underlying thinking — is inadequate in that particular document.¹⁴⁴ If the reader is unable to understand the substance of the writer’s point, it is often because the writer has not fully explained it. This failure can result from a “writing” failure: the writer has failed to articulate the analysis completely. However, the failure can also result from a “thinking” failure: the writer may have failed to articulate the analysis because he or she failed to understand the point.

Thus, anticipating the reader’s reaction — an outer-directed concern — gives the writer a tool for more effectively accomplishing the thinking required — an inner-directed concern — to produce an effective document. By revising to respond to the anticipated concerns of the reader as expressed by the legal writing

¹⁴² E.g. Beazley, supra n. 138, 24–33 (models of four different criteria sheets for four stages of the writing process).
¹⁴³ Edwards, supra n. 124, at 165.
¹⁴⁴ E.g. Berger, supra n. 56, at 79–80 (noting that in later drafts, the teacher-responder must respond to the writing “as an average reader in the field”).
teacher, the writer re-engages with the thinking process necessary to make meaning with the written word. Through the repeated, recursive process of writing, being critiqued, and revising, student writers develop strategies that refine the writer’s ability to think and analyze not only the issues raised in the current document, but future ones as well.

A method that is relevant to both the expectation context and the reaction context is “modeling” legal writing documents. As noted above, in the cognitive apprenticeship, “modeling” allows teachers to perform the task and to “externaliz[e] . . . usually internal process[es] and activities . . . by which experts apply their basic conceptual and procedural knowledge.” Legal Writing teachers “model” legal writing by providing students with annotated samples of legal writing. These annotations can occur in at least two ways. In the “live sample” method, a teacher shows students a sample paper, often on an overhead projector of some type, and conducts a critique in front of the class. Joe Kimble, of Thomas M. Cooley Law School, has pioneered a method of individual live critique, known as the “live grading conference.” Some teachers use this method as a vicarious rather than individual teaching tool, looking at one document with the whole class. The teacher can show the students places where the document met and did not meet reader needs and expectations, and this allows students to hear the thoughts of a reader reacting to the writer’s composition and analytical decisions. The teacher may even ask the students to participate in this critique themselves; serving as legal readers often gives students useful insights into the writing process.

A second modeling method is the pre-annotated sample. Many modern Legal Writing textbooks provide annotated samples within the text, with perhaps the first widely-used example appearing in 1989 in Writing and Analysis in the Law, by Professors Shapo, Walters, and Fajans. Instead of showing a five- or ten-page exam-

145 Collins, Brown & Holum, supra n. 83, at 43.
146 Soonpaa, supra n. 44, at 96; see also Jo Anne Durako et al., supra n. 80, at § II(B)(1).
147 Teachers who use a live sample method can give students their own copies of the paper and allow them to annotate the document themselves based on class discussion or their own insights.
ple and telling students that it was an example of good legal writing, Shapo, Walter, and Fajans took the then-revolutionary step of using the margins to describe exactly what legal writers were trying to do in specific paragraphs, and even specific sentences within those paragraphs.\footnote{I have told my students that if Writing and Analysis in the Law were a sex book, it would be banned for being too explicit.} This is a perfect example of the use of “modeling” in the cognitive apprenticeship to “externaliz[e] . . . usually internal process[es] and activities.” Since 1989, many others have followed their lead and provided annotated samples of legal writing to help their students to see how a legal writer uses certain heuristic strategies to create an argument.\footnote{E.g. Edwards, supra n. 124, at 101–103; Neumann, supra n. 128, at 102–103. Of course, teachers also have annotated documents on their own. E.g. Durako et al., supra n. 80, at 725.} Some textbooks contrast annotated bad examples with good examples so that students can note the differences between ineffective and effective writing.\footnote{E.g. Beazley, supra n. 105, at 140.} Annotated examples advance the teacher’s mission in two ways. First and most obviously, they give students a “model” to follow, externalizing inner thoughts about what the writer is trying to accomplish in particular paragraphs and allowing students to see directly how certain heuristic strategies have played out in a written document.\footnote{Professor Oates has discussed the importance of providing sufficient depth when using sample documents. Laurel Currie Oates, I Know That I Taught Them How to Do That, 7 Leg. Writing 1, 8 (2001).} Second, they define and illustrate vocabulary about the doctrine of Legal Writing. Teachers and students can then use that vocabulary to communicate more precisely about their thinking and their writing.\footnote{Pollman, supra n. 86, at 892 (footnotes omitted).} Professor Pollman has noted that the use and development of Legal Writing vocabulary is one way that Legal Writing faculty develop and communicate the doctrine of Legal Writing to their students.\footnote{Id. at 891.}

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well as on outer-directed strategies of meeting reader expectations and needs.

B. The Thinking of the Writer

Legal Writing faculty, like casebook faculty, are often trying to guide and mold their students’ thinking through their teaching. Because casebook teachers often use Socratic method in the classroom, they have an opportunity to ask students directly about their thoughts (“Why do you say that? Have you thought about . . . ?”) and to guide students through their thinking on a certain issue.156

In some ways, Legal Writing faculty have a more difficult situation. While the casebook teacher engaged in a Socratic dialogue can offer critique and suggest “revision” while the student is still engaged in thinking, the Legal Writing teacher usually reviews the cold record of the document itself, alone and apart from the student whose thinking is at issue. This separation can also be a benefit, however. By asking the student to complete writing and meta-writing, thinking and meta-thinking, in private, the teacher can give all types of students — both those comfortable talking in class and those who are uncomfortable in the glare of the headlights157 — time to think and to reflect upon their thinking.

The more the teacher knows about the thinking behind the student’s writing, the more effectively she can “coach” that writing, offering heuristic strategies to solve the thinking problems that led to the document problems. This problem is one of “articulation”: writing faculty must create opportunities for their students to articulate the thinking and reasoning behind their writing decisions.

Some Legal Writing faculty require their students to record in writing their meta-thoughts while writing. Ellen Mosen James has required her students to perform “reflective writings”158 in which

156 Some writing faculty have used one-on-one Socratic method at the pre-writing stage in a method called the “feed forward tutorial,” pioneered at Hamline University School of Law by Alice Silkey and Mary Dunnewold. The teacher uses a pre-draft conference to guide each student’s thinking and analysis. Mary Dunnewold, “Feed-Forward” Tutorials, Not “Feedback” Reviews, 6 Persp. 105 (1998). The time commitment for a feed-forward tutorial may seem daunting, but it could be no more than the time spent on individual critiques.

157 Parker, supra n. 19, at 576 (noting the value of giving students an opportunity to perform outside the “hotseat” of the classroom).

the students reflect on the steps they have taken as lawyer-writers. Inspired by the concept of reflective writings, I have asked students more directly to record the thoughts and anxieties that occurred while writing. In these “private memos,” students can record analytical conflicts as well as conflicts based on formal requirements or reader needs. The private memo asks students to think about their thinking as they use language to make meaning. When they have trouble deciding how to accomplish a particular writing task — or a particular thinking task required to complete a writing task — they can record their conflict and seek specific advice from an expert reader and writer. In the alternative, they can test their self-evaluation of the document and seek the teacher’s approval. For example, a student might drop a footnote and write, “I used a Court of Appeals case. Not very persuasive, huh?” One student wrote the following at the end of a section: “Nice conclusory statement. How about some rule application?” Each of these “private memo” notes shows the writer struggling with the text and recognizing ways in which the writer believed that the writing did not meet the reader’s needs and expectations. By recording his or her thoughts, the writer sets up an opportunity to discuss these conflicts in a later conference.

Some private memos reveal the ways in which the process of writing generates thought. One student dropped a footnote at the end of a section and wrote, “I think I should eliminate this section and work some of the stuff into another section.” One might wonder why the student wrote the whole section out if the section should be eliminated. The answer is obvious: The student thought about the problem by the very act of writing about it; after finishing this stage of the writing, she was able to decide how to revise and reorganize.

The private memo gives Legal Writing faculty a window on students’ thought processes, and thus a way to intervene in and guide those processes so that students can make more effective writing decisions. For example, I learned of one student who wrote detailed private memos in which he analyzed his writing choices, saying essentially, “I did A. I thought about doing B, but I didn’t do B because. . . .” Even though the student made the wrong choice on many occasions, the private memos showed the teacher the stu-

\footnotesize
159 Kearney & Beazley, supra n. 21, at 891–892.
160 This student was writing a brief to the United States Supreme Court, in which a United States Court of Appeals opinion would not be optimal authority.
dent’s thinking at the moment of decision. In conference, both student and teacher could review the options, talk about the student’s thinking and decision-making process, and help the student to identify strategies to use in the future when making writing and thinking decisions.\textsuperscript{161}

Tasks like private memos provide meaningful opportunities for students to seek guidance as they accomplish cognitive, inner-directed writing tasks. Some teachers require their students to annotate their documents in specific ways, answering specific questions about the document and their writing choices. For example, Steve Johansen has required his students to annotate documents that they gather in a portfolio at the end of the semester.\textsuperscript{162} Professor Johansen notes that “in [writing] a simple five-page intra-office memo, we will make hundreds of conscious choices, and untold subconscious choices . . . . When students annotate their work, they begin to recognize, and gain control over, the choices they make.”\textsuperscript{163}

Another annotation method that allows students to recognize their rhetorical choices is the “self-graded draft,” a method that combines subjective annotations with more objective tasks.\textsuperscript{164} I developed the self-graded draft as a way of forcing students to tell me what they were thinking about various document requirements. The method asks students to identify in the margins certain “intellectual locations” within each unit of discourse in their documents. These intellectual locations are the elements that a typical legal reader expects to find in the legal document, and many legal writing teachers give their students heuristic strategies that employ these locations. In an appellate brief, for example, the reader expects to find, in each unit of discourse,\textsuperscript{165} an articulated rule, an explanation or “proof” of that rule, and some application of the rule to the facts of the client’s case.\textsuperscript{166}

Instead of merely asking each student to make marginal notes or footnotes that identify where each element of the heuristic ap-
pears, the self-graded draft also requires students to use highlighters of different colors to physically mark the words or phrases that comprise the element, or common markers of the element. For example, because the legal writer must talk about the client’s facts when applying the law to the facts, the writer is asked to highlight his or her facts in one color. The writer is also asked to highlight the key terms, or “phrase-that-pays,” in another color, and is advised to look for the application of law to facts in the paragraph(s) in which the writer finds these two colors juxtaposed. Students are also encouraged to use private memos to record questions and concerns that occurred to them during the self-grading process. Asking students to isolate certain analytical elements gives the students an opportunity to analyze the elements’ effectiveness; it also gives teachers an opportunity to evaluate the students’ understanding.

By giving students heuristic strategies, and then asking them to annotate their documents and articulate how and where they used these heuristic strategies, Legal Writing faculty can learn about their students’ thinking at critical junctures in the writing process. Seeing these thoughts will often dramatically illustrate students’ confusion on certain aspects of legal analysis. Just by asking students to mark their articulated “rules” in a particular document, the teacher can learn much about the students’ understanding. Some students will have articulated a rule and will be able to identify their articulated rule. Others will have articulated the rule, but will be unable to identify the sentence in which they have done so. Some will have failed to articulate a rule, but will recognize that failure and be spurred to draft a rule on the spot, while others will have failed to articulate a rule but will mark some other part of the document as having articulated the rule. Seeing these two different types of “failures” and two different types of “successes” can be very enlightening to a teacher who is in the middle of guiding these students through the thinking and writing necessary to produce written legal analysis. The students’ revelations about their thinking can encourage the teacher to revise the teaching as needed to clarify the students’ confusion.

167 E.g. Beazley, supra n. 105, at 95. Having the correct color combination is not what indicates complete analysis. Instead, the writer uses the colors to find the relevant parts of the analysis so that he or she can evaluate them more effectively.
168 Id. at 92.
Similarly, when students use marginal and highlighting annotations to identify the elements of an analytical paradigm, the teacher can easily see and evaluate the students’ understanding of the paradigm elements and how they can be used most effectively in the particular section of the document.

Thus, although most people think of the personal, individualized critique as the only way that students learn in a writing class, there are actually many ways that Legal Writing faculty use writing to teach students how to think like lawyers. As the next section will show, some of these are adaptable to the casebook classroom.

IV. USING WRITING PROCESS METHODOLOGY IN THE CASEBOOK CLASSROOM

Phil Kissam and Carol McCrehan Parker, among others, have suggested changing or supplementing exams and implementing more “Writing across the Curriculum” type exercises in casebook courses.169 Professor Parker’s suggestions, in particular, try to focus on ways that busy faculty can incorporate writing into even large-enrollment courses.170 The techniques suggested below also recognize the time demands that can inhibit personal feedback in a large enrollment course, and, as noted above, suggest that casebook faculty can use Legal Writing pedagogy to get the benefits of both full student participation and vicarious feedback.171 These suggestions, however, are particularly focused on techniques that allow both students and faculty to learn about the thought processes of legal thinkers in the roles of readers and writers.

Section A addresses some of the reasons that casebook faculty might choose to talk more explicitly about the elements of legal analysis when teaching. Section B suggests that faculty can incorporate Legal Writing pedagogy into their courses by affirmatively labeling steps in their legal analysis. Section C suggests a variety of ways that faculty can use legal writing pedagogy to help stu-
dent’s learn how to write more effective law school examinations, recognizing that the examination is just one example of how to use writing in the casebook classroom.

A. The Case for Being Explicit in Law School Teaching

When asked why they do not teach legal analysis methodology more explicitly — particularly in regard to exam-taking — many casebook faculty give one of three answers: 1) they are not grading students on their writing, so there is no need to teach them how to write an exam; 2) it will wreck the curve to teach too explicitly; or 3) lawyers have to spend a lot of time teaching themselves how to do things with little direction; it is appropriate to rank law students on how well they teach themselves to take an exam. While there is a kernel of truth behind these statements, the benefits of explicit teaching far outweigh the burdens for each justification. All faculty who grade exams are grading students on their writing. In some foreign law schools, students’ final grades are determined based on oral final examinations. Faculty who give oral finals can state with certainty that they are not grading students on their writing. Any faculty member who gives a written exam, however, is, in some way — and probably in a significant way — grading students on their writing. Many casebook faculty sincerely believe that they have no standards about the writing; they have standards only about the thinking, and they believe that the writing will take care of itself. The problem is that students may be doing a fine job of thinking, but the professor is grading them only on the information that is recorded in writing. Writing theory helps to clarify this problem. Many professors are instrumentalists, who think that writing is merely the clothing of thought. They spend their semester on inner-directed concerns that help students learn how to think, but they pay no attention to the outer-directed concerns that show students the categories of

172 See e.g. Philip C. Kissam, Confering with Students, 65 UMKC L. Rev. 917, 925–926 (1997) (noting that mandatory curves may be a disincentive for Professors considering teaching “the analytical skills demanded by law school exams”).

173 Schwartz, supra n. 22, at 351–352 (“This Article classifies law school instruction as self-teaching because, for the most part, law professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class.”).

information their readers will need in order to understand the written legal analysis that will be a constant part of their legal careers. This problem may be compounded on examinations by the fact that students know that they are writing to an expert; to the extent that they are paying attention to audience concerns at all, they may neglect to include information because they perceive that their audience — the law professor — already knows that information.

Thus, students who have not been taught about exam method are being graded on more than their thinking ability; they are being graded on their ability to learn on their own what each particular professor cares about on an exam. Most professors have at least unconscious expectations about just how this thinking should be communicated in writing.\textsuperscript{175} They expect certain analytical details to be included, they may expect a certain organization, they expect a certain attention to general rules, exceptions, and counterarguments.\textsuperscript{176} By teaching students about reader expectations, faculty are not “teaching to the test”; they are giving students information they can use both on the examination and in the practice of law.\textsuperscript{177} 

**Teaching more explicitly will not “wreck the curve.”** Some faculty may be concerned that giving students specific advice about exam methodology will “tell too much,” and may make it more difficult to arrange student grades along a curve. Giving students heuristic strategies to use when analyzing issues will not, however, ensure that every student will find all of the issues in the exam, or even that each student will analyze all issues thoroughly (not all students are able to follow guidelines — even guidelines that seem explicit to the teacher). While a thorough examination of the benefits and burdens of the system of curved grades is beyond the scope of this Article,\textsuperscript{177} I would hope that teaching exam methodology might make D’s and F’s less common, and might make a grade of “C” reflective of basic competence.\textsuperscript{178} Faculty who fear

\textsuperscript{175} E.g. Berger, supra n. 56, at 81 (citing research noting that writing teachers’ judgments “often seemed to come out of some privately held set of ideals about what good writing should look like, norms that students may not have been taught but were certainly expected to know” (citing Robert J. Connors & Andrea A. Lunsford, Teachers’ Rhetorical Comments on Student Papers, 44 College Composition & Commun. 200, 218 (1993))).

\textsuperscript{176} And all of this is quite outside any standards they may have about rules of grammar or mechanics.

\textsuperscript{177} But see Fines, supra n. 5, at 891.

\textsuperscript{178} During most semesters, I can get all of my students to understand the elements of legal discourse and how they operate. I cannot, however, get all of them to implement these
wrecking the curve might want to make their exams more complex, or longer, to assure that some students will stand out at each end of the spectrum. I confess, however, that I do not see universal basic competence as a crisis.

Law faculties should go beyond supervising self-teaching. Professor Schwartz has characterized the case method/final examination classroom as a “self-teaching” model, noting that “for the most part, law professors expect students to figure out on their own what the students need to know and what they need to be able to do to succeed in the class.”[^179] Professor Rogelio Lasso notes that not all students develop the same level of self-teaching competence. Some students are capable self-teachers and likely to perform well on law school exams. Most law professors managed to learn by this sink-or-swim model. However, this model does not work well for most, completely fails some, and is frustrating to all students.[^180]

It is true that lawyers will have to practice on their own, and some may use this reality as a reason for continuing the self-teaching method.[^181] It seems a waste of talent and opportunity, however, for law professors not to be more explicit when all of the students are gathered in the law school classroom with the expectation that they will be taught how to conduct legal analysis. Furthermore, while this methodology might have made sense in the days when law schools routinely flunked out one-third or more of their student bodies, it makes less sense to use this method in law schools that hope to graduate all of their students, to see those students pass the bar examination, and to see those students who practice law have successful practices. Professor Schwartz notes elements with equal effectiveness; I have always had students display a range of abilities. I hope for all of my students to achieve basic competence in legal analysis. My B’s are reserved for those whose performance is beyond competence, and my A’s for those whose performance is well beyond competence. I presume that this same use of curved grades could exist in casebook courses.

[^179]: Schwartz, supra n. 22, at 351–352.
[^181]: See e.g. id. Faculty who believe that lawyers need to self-teach may wish to develop standards for self-teaching, and give students guided practice in accomplishing self-teaching. See e.g. Collins, Brown & Holum, supra n. 83, at 10 (noting that the “exploration” aspect of the cognitive apprenticeship “involves pushing students into a mode of problem solving on their own”).
that the self-teaching model is “particularly problematic for all but the very best law students. . . . On the other hand, students who enter law school with lesser skills and less developed learning strategies depend on their instruction to succeed in law school, on the bar exam, and in practice.”\textsuperscript{182}

Law schools whose goal is to reach all — or even almost all — of their students should therefore use teaching methods that reach more students. The seemingly simple method of being more explicit is a good way to start. Legal Writing pedagogy can help faculty in the quest to be more explicit; perhaps more importantly, it can help them to see and understand the ways in which their students are not understanding legal analysis.

\textbf{B. No Writing Required: Labeling Analytical Steps}

One of my first teaching assignments was to teach a fellow cast member how to skip for a part in the freshman play. First, I simply tried skipping for him, and asking others in the cast to skip, figuring that he could pick it up by observation. When this did not work, I tried to use words to tell him how to skip, and I realized that I could not; skipping came so naturally to me that I skipped without consciously thinking about it. To put skipping into words, I tried skipping slowly (not an easy task), noting each movement of my legs and feet, breaking the process of skipping down into steps so that I could talk to him about it.

Lawyers take complex rules — and previously unrecognized rules — and break them into steps every day so that judges and courts can see how they apply or do not apply to their clients’ situations. Similarly, Legal Writing faculty have begun to break the complex and often unrecognized “rules” of analytical writing into steps for their students to follow when completing written legal analysis.\textsuperscript{183} Thus, a first step, and a relatively easy one, in using writing process theory in the casebook classroom does not require any writing. Rather, it is the simple step of assigning labels to the steps in the analytical process.

\textsuperscript{182} Schwartz, \textit{supra} n. 22, at 354.

\textsuperscript{183} \textit{E.g.} Pollman, \textit{supra} n. 86, at 908 (citing Legal Writing textbooks that use “explication, rather than . . . demonstration or the Socratic method, to articulate exactly what lawyers mean when they talk about ‘legal analysis’”).
Because the tradition in law schools has been to illustrate thinking without talking about components of legal thought,\textsuperscript{184} many students leave the casebook classroom uncertain of exactly what steps they are supposed to take to accomplish this “thinking like a lawyer” that they are supposed to be learning how to do.\textsuperscript{185} Some students may have intuitively picked up on the method by observation, but for other students, like my college cast member, observation may not be enough. Professor Schwartz has noted that, while law professors will critique students’ oral attempts at legal analysis in class, they “fail to state explicitly what students need to know, or to explain how to spot legal issues or to perform legal analysis.”\textsuperscript{186} Traditional law school pedagogy does not give the casebook faculty a ready vocabulary to communicate failings, and traditional casebooks, which contain only cases and discussion questions, do not lay out and label common steps in the analytical process.

Leading a particular student out of a particular analytical quagmire can certainly be a helpful teaching exercise, but it could be even more helpful if each step on the way out of the quagmire is labeled with a re-useable title that the student can recall the next time he or she is in a similar quagmire. By using these labels, and encouraging students to use these labels, casebook faculty can provide heuristic strategies that students can use again and again when analyzing cases. Furthermore, by using labels that are relevant to how lawyers use cases instead of merely how lawyers read them, they can better prepare students for the work of the classroom hypothetical and the law school exam — and for the work of the lawyer.

Faculty will correctly note that law students are taught to break cases into labeled pieces when they brief cases. Unfortunately, most case brief formats do not go far enough. Typical parts of a case brief include “Parties,” “Prior Proceedings,” “Issue(s),” “Hold-

\textsuperscript{184} See e.g. Schwartz, supra n. 22, at 352 (“Law teachers, however, usually fail to identify for their students (and, sometimes, even for themselves) which goals they are teaching at any given moment. This approach requires the students . . . to figure out, from the professor’s comments and questions, both the professor’s instructional goals and the relationships between those goals and the instruction presented.”).

\textsuperscript{185} Id. Even when I teach Legal Writing courses that begin in the second semester, I find some students who are unfamiliar with the phrase “applying the law to the facts,” or who don’t have a concrete image of what this concept means. This occurs despite the fact that they have spent a semester witnessing conversations in which they, their classmates, and their teachers have been applying various laws to various sets of facts every day.

\textsuperscript{186} Id. at 351.
ing(s),” “Facts,” “Policy,” “Dicta,” and finally, “Reasoning.” Most
would agree that the reasoning is the most important part of the
opinion and therefore the most important part of the brief.187 And
yet, this most important element is labeled with one broad label
instead of being broken into the pieces that would represent what
the court did in that case and what lawyers must do when they use
cases to construct written legal arguments and write briefs to
courts.188 At least some guidelines for writing case briefs advise
students that the “reasoning” section should include discussion of
relevant rules and how those rules are applied to facts.189 This ad-
vice mirrors parts of the common paradigm that some use to de-
scribe the use of syllogistic legal reasoning within the basic units
of legal discourse: Issue, Rule, Application, Conclusion.190 Most
Legal Writing texts, however, recognize that this paradigm does
not go far enough. They note that the connection between the ma-
ajor premise, or “rule” and the minor premise, or “application,” is
not always self-evident, and that the lawyer usually needs to pro-
vide rule explanation191 (also known as “rule proof,”192 or an “an-
alogous cases” section193) to see — and to show someone else — the
connection between the rule and the facts.

As the footnotes above make clear, faculty need not reinvent
the wheel when looking for labels: Legal Writing textbooks are a
good place to start. For example, Linda Edwards, in her popular
first-year text, uses the common latinisms of dicta and stare deci-
sis, but also uses the phrase “inherited rule” to talk about the rule
that a court starts from when analyzing a legal issue, and “pro-
cessed rule” to talk about the new rule that the court has fas-
tioned to decide the case before it.194 I use the label “phrase-that-
pays” to refer to the specific language from the rule that is in con-
troversy in the current case.195 These labels are helpful in Legal

187 See e.g. Ray & Ramsfield, supra n. 126, at 65.
188 The best possible compliment for a lawyer is when an appellate court adapts a large
portion (or even a small portion) of his or her brief for the court’s opinion. We do not make it
easy for our students to learn to do this when we refuse to break a court’s reasoning into
labeled elements.
189 Id. at 65.
190 E.g. Beazley, supra n. 105, at 47–48.
191 E.g. id. at 54–57; Edwards, supra n. 124, at 92–97.
192 Neumann, supra n. 128, at 95–109.
193 Laurel Currie Oates, Anne Enquist & Kelly Kunsch, The Legal Writing Handbook
194 Edwards, supra n. 124, at 40–43.
195 Beazley, supra n. 105, at 54–55. Many authors refer to these words as “key terms.”
E.g. Oates, Enquist & Kunsch, supra n. 193, at 592–593.
Writing courses, but they can also be helpful in casebook courses. For example, many first-year students are misled by a court’s statement, early in its opinion, that “the rule in this area of law has always been thus,” and they eagerly record the information in their case briefs without noticing that in the next few pages, the court explains why the old rule must change into a new and better rule. When faculty ask students to distinguish between the “inherited rule” and the “processed rule,” they not only use meaningful vocabulary to distinguish between two types of rules that commonly appear in cases — especially cases that find their way into law school casebooks — they also give students a heuristic strategy to use when reading cases. Similarly, faculty who want to focus students’ attention on the nub of the controversy can ask students to identify the “phrase-that-pays”; simply having this vocabulary term helps students to realize that many legal controversies turn on the meaning of a word or phrase from a statute or other legal rule.

Thus, when a professor asks a student to identify the rule in the case and the student replies by talking about the “old” rule, the professor could say, “that’s a good job of identifying the ‘inherited rule.’ That’s the rule the court found when it started looking for what rule to apply in this situation. What I want to know is the ‘processed rule’ — the rule the court ended up with.” Of course, some professors might want students to identify the inherited rule and spend time talking about how the court moved from the inherited rule to the processed rule, asking them to identify the ways in which the court changed the inherited rule to create the processed rule. Often, the struggle in a case is whether the court should apply a rule more broadly, to include new categories of persons or situations, or more narrowly, to exclude them. Did the court create an exception to the inherited rule? Perhaps the inherited rule is the same as the processed rule, and the court simply used analogical reasoning, counter-analogical reasoning, or policy-based reasoning to make the connection between the rule and the facts more obvious.

Faculty might also want to use labels to discuss parts of rules and categories of information within rules. For example, Richard

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196 Many teachers already use the concept of the “abstraction ladder” to illustrate a method of moving between more abstract and more concrete categories. E.g. Beazley, supra n. 105, at 29–30 (citing S.I. Hayakawa, Language in Thought and Action 155 (4th ed. 1978)).

197 Edwards, supra n. 124, at 4–8.
Neumann’s Legal Writing textbook identifies three parts of a rule: (1) the set of elements, or test; (2) the result that occurs when the necessary elements are present; and (3) the “causal term,” that shows whether the rule is “mandatory,” “prohibitory,” or “discretionary.”

Linda Edwards’s text uses familiar labels to focus on categories of elements that may exist, noting, for example, that some sets of elements are “conjunctive,” others are “disjunctive,” and that some courts use a “balancing test” to consider the elements.

There are many ways that labels can help students to understand common, but often troublesome, aspects of opinions. In some cases, the court will go through a quick discussion of several legally significant but uncontroversial rules that lead up to the issue at the heart of the controversy. Legal Writing students often ignore these rules when conducting legal analysis in their haste to get to what they see as “the important part.” What they fail to recognize is that any judge analyzing the issue would need to know the context in which the “important” issue arose, and the rules whose application is “given” may nonetheless be a necessary part of the analysis. Using the label “rule cluster” to describe a paragraph that contains one or more “given” issues can help students to recognize that before focusing on the most controversial point, they must be sure to understand the legal context — and to include that context in written legal analysis.

Of course, terms that are used in Legal Writing texts or courses are not the only permissible vocabulary words. Law faculty are so creative that I would expect a proliferation of new vocabulary words to result from many faculty trying to label the parts of legal analysis. That has certainly happened in the field of Legal Writing, as Legal Writing faculty have struggled with labels over the past fifteen years or so in particular. It does not even matter if two faculty members within the same school use different vocabulary to refer to the same analytical step, although it might be preferable for faculty to converse enough about their teaching to dis-

198 Neumann, supra n. 128, at 15–18.
199 Edwards, supra n. 124, at 19–23. Edwards also identifies a “factors” test, which guides, rather mandates, court behavior; she also analyzes rules with exceptions and rules that have no elements, factors, or subparts. Id.; see also Neumann, supra n. 128, at 17–18 (analyzing the various types of elements that rules contain).
200 Beazley, supra n. 105, at 51.
201 Pollman, supra n. 86, at 889 (noting the rise of new jargon as use of various new Legal Writing textbooks became more common).
cover each other’s vocabulary and agree to common terms when appropriate.\textsuperscript{202} Right now, some students have \emph{no words} to use to articulate the steps they go through when reasoning. Certainly it is better to have too many words than to have no words.

Professors do more than just ease class discussion when they label the steps in legal analysis. By identifying vocabulary words to use when discussing these steps, faculty give students heuristic strategies that they can use when reading cases and analyzing legal issues. The labels give students a set of questions they can ask to help them penetrate the sometimes unyielding reasoning within court opinions. “Is this rule the ‘inherited rule,’ or the ‘processed rule’? Is the court applying conjunctive or disjunctive elements? What is the ‘phrase-that-pays’ for each element? Did the court go through a ‘rule cluster’ of givens that I must be sure to include in my analysis?” By using labels, faculty can teach not just the doctrine of contracts, torts, or civil procedure, but can give students a doctrine of legal analysis that they can use to enrich their thinking for the rest of their lives.

\textbf{C. No Individual Critiquing Required: Teaching Exam Method Is Teaching Legal Method}\\

Others have commented that in the typical casebook course the student spends the semester reading and talking, but receives a grade based on a written exam, which requires skills that they have not practiced all semester.\textsuperscript{203} These concerns are not limited to the law school. In \textit{Harry Potter and the Order of the Phoenix}, Hogwarts students are outraged to learn that they will not be practicing in class the spells they will have to perform in the year-end Ordinary Wizarding Level (OWL) tests. One student says incredulously, “Are you telling us that the first time we’ll get to do the spells will be during our exam?”\textsuperscript{204} The professor tries to reassure the worried students: “As long as you have studied the theory hard enough, there is no reason why you should not be able to per-

\textsuperscript{202} I expect that a more likely scenario is that the students will figure things out for themselves when two professors use different words to refer to the same step. It may also happen that different professors will give students different heuristics — and thus different words — to help them complete legal reasoning, and that having multiple valid strategies is a good thing rather than a bad thing.

\textsuperscript{203} Kissam, \textit{supra} n. 10, at 1980.

\textsuperscript{204} J.K. Rowling, \textit{Harry Potter and the Order of the Phoenix} 244 (Scholastic Press 2003).
form the spells under carefully controlled examination conditions.\[205\]

Similarly, many of us seem to have the idea that if students have studied hard enough and paid enough attention during the classroom lectures and discussions, they will be able to perform the “spell” of written legal analysis. Some law students have very unclear expectations about what the final exam will look like (other than its predictable rectangular shape) and even less of an idea as to what the professor will want them to write. By giving them practice and structured feedback, however, the professor can learn about students’ thought processes and give students heuristics that will be useful in the examination and beyond.\[206\]

Students whose teachers communicate their expectations are much better prepared to write a good exam to do the thinking necessary to practice law. Accordingly, students should have meaningful opportunities to practice written legal analysis in casebook courses. Giving an ungraded practice exam is one way to achieve this goal.\[207\] Casebook faculty might reasonably respond to this suggestion by pointing out that they have no magic wand with which to critique the 300 or more pages of text generated by even a short practice exam in a typical large-section course. Legal Writing pedagogy, however, suggests effective alternatives to the individualized critique, techniques that give each student the benefit of a teaching method that may appeal to students with different learning styles.

Thus, faculty who want to give students meaningful practice in the thinking and writing necessary for a good exam may wish to try the teaching methods described in the following pages, alone or in combination: 1) creating generic exam criteria sheets or guidelines; 2) using annotated sample exams; 3) asking students to include “private memos” with practice exams; 4) asking students to “self-grade” practice exams; or 5) conducting “live grading conferences” with selected student sample exams.

\[205\] Id.

\[206\] I recommend using the practice exam as the home for these teaching methods because it is a common and familiar device. Of course, many or all of these methods could be used with discussion questions, informal essays, or other varieties of legal writing.

\[207\] See also Lasso, supra n. 180, at 34–35 (noting how the use of web-based threaded discussion lists can help teachers reach students with different learning styles).
1. Articulating Generic Exam Standards

As noted above, traditionally, casebook faculty have not explicitly articulated standards for law school examinations. As a result, many students who write exams concentrate on “inner-directed” thinking concerns, paying inadequate attention to the “outer-directed” writing concerns that are vital for effective communication. Even students who do wish to pay attention to these concerns may not have enough data about the reader’s expectations to do so. Thus, one way to improve students’ ability to communicate their thinking in writing is to articulate exam standards.

Many faculty draft model answers of exams, in which they articulate the specific issues and analyses they expect the students to include. Exam standards — or an exam criteria sheet — would need to be more abstract, and faculty would need to identify the categories of information that they expect to see in student exams. The good news, however, is that faculty need not start from scratch. Two authors — Charles Calleros, who has taught both Contracts and Legal Writing, and Linda Edwards, who has taught both Property and Legal Writing — have included information about exam methodology in their textbooks.

By articulating examination standards, faculty will be giving their students “heuristic strategies”: i.e., “generally effective” techniques for accomplishing certain common tasks. The standards make the reader’s thinking visible, showing the exam-writer the expectations that the reader has for the document, and also giving students a way to organize their thoughts when attacking examination questions. With a criteria sheet or an exam guideline, faculty can also make vivid the connections between classroom sessions and the final examination, and between the final examination and legal practice. For example, a professor who always asked students to consider the general rule and then the exceptions during the semester could design a criteria sheet that consisted of a list of questions, such as “What is the general rule that governs issues of this type? Are there any exceptions to this rule? (List them.) Which exceptions apply in this case?”

Faculty need not be concerned that their examination guidelines may differ from those of their colleagues; a variety of examination methods will help students to learn a variety of heuristic strategies for coping with legal problems. In fact, it is so much the better if various expert faculty members can teach students particularized strategies that are helpful in various doctrinal areas.

2. Providing Annotated Sample Exams

In Collins, Brown, and Holom’s vision of the cognitive apprenticeship, “modeling” asks the expert to perform the task and to “externaliz[e] . . . usually internal processes and activities . . . by which experts apply their basic conceptual and procedural knowledge.” Casebook faculty can implement this concept by giving students a practice exam and then annotating a model answer, using the analytical vocabulary mentioned above, a criteria sheet, or both, as a source of vocabulary for identifying what the writer of the model exam was doing in each section of the exam. By making the writer’s thinking visible, they model an examiner’s thinking behavior, and give students concrete ideas to use when they write exams and when they confront similar analytical issues in the practice of law.

3. Ask Students to Include “Private Memos” with Practice Exams

In my nomadic career, I have chatted with many faculty members after they have read their first set of student exams. Almost always, dismayed by too many incoherent exam answers, they say something about their students along the lines of, “What were they thinking?” Private memos can give faculty a way to discover and address this problem at a meaningful time: early in

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211 Id. at 43.
212 This technique was inspired in part by Dean Kent Syverud’s description of his use of a similar technique during our panel discussion on January 2, 2003.
213 Because many schools used to term-limit their Legal Writing faculty, I taught at two schools where writing faculty were forced to leave after two years before landing at Ohio State. I was thus “the new person” three times at three different schools, and inevitably made pals of first-year faculty members.
214 Indeed, annotative methods that show student thinking were developed precisely because legal writing faculty feel this same frustration when we read our student papers. See e.g. Steven J. Johansen, “What Were You Thinking?” Using Annotated Portfolios to Improve Student Assessment, 4 Leg. Writing 123, 137 (1998).
the semester, when there is still a chance to guide the students’ thinking process.

Thus, faculty could give students a practice exam and ask students to use private memos to make their thinking visible to the teacher. The teacher could request two types of private memos. For “freestyle” private memos, the students could be asked to record whatever thoughts or concerns occur to them while writing. For “directed” private memos, the students could be required to answer specific questions, such as, “Which issue was the hardest to analyze?” “Are you worried that you left anything out of your analysis?” “What issue did you notice first?” “What aspect of the exam do you think represents your best work?” and so on.\textsuperscript{215}

Asking students to answer questions, and allowing them to voice their concerns, fulfills the goals of the cognitive apprenticeship by allowing students to “articulate their knowledge, reasoning, or other problem-solving processes.”\textsuperscript{216} More importantly, it can provide casebook faculty with a window on students’ thought processes that may have an immediate impact on the teacher's ability to “coach” the students through the process of legal thinking, and thus improve student learning. Simply reading through the practice exams and noting the private memo questions and comments can be very enlightening. The private memos may show where the students are having difficulty with particular substantive elements, with exam requirements, or with the process of thinking like a lawyer. Although faculty may wish to respond to private memos individually, those who need to provide a more efficient response could identify common themes and problems in the exams and the private memos. They could then use class time to address those questions, either through class discussion or, as noted below in section five, by showing sample student answers and modeling the differences between less effective and more effective answers.

\textsuperscript{215}Dean Syverud noted during his remarks that the competitive dynamic of law school may inhibit some students from “opening up” to the teacher through private memos. Making exams anonymous might help allay these fears; in addition, of course, faculty should exercise sensitivity about responding to private memo questions, whether individually or through class comments. On another note, I find that my students write more detailed private memos when I “model” the use of private memos in class by displaying sample private memos on an overhead projector.

\textsuperscript{216}Collins, Brown & Holum, \textit{supra} n. 83, at 44.
4. Self-Graded Exams

Another method that teachers can use to encourage students to articulate their thinking is to develop a “self-grading” instrument for students’ practice exams. As noted above, Legal Writing faculty ask students to use self-grading instruments to physically mark certain intellectual locations within each unit of discourse within their document. For example, within each section in which they analyze an issue or sub-issue, students must highlight in pink the “phrase-that-pays” or key terms of the rule governing that issue. They must highlight the client’s facts in blue. In addition to the highlighting, students must mark specific analytical elements such as the “rule” (or “focus”), “explanation of rule,” and “application of law to facts” in the margin.

After the teacher develops generic exam standards, it could be very enlightening to design a self-grading instrument that requires students to identify where they think they are articulating rules, noting exceptions, applying law to facts, or identifying counter-arguments. Because many of the same markers of effective legal analysis appear in office memoranda, appellate briefs, and examinations, it would be relatively easy to adapt existing self-grading instruments to a professor’s particular exam requirements. Furthermore, telling students in advance that they will be asked to “self-grade” their analysis of each issue separately might encourage them to use an issue-based organization for their exam answers. Completing the self-grading of the exam allows students to “articulate” their knowledge and processes, and reviewing the self-graded exams allows the professor to “coach” the students more effectively.

It might be tempting to design a self-grading exercise that is specific to the particular exam — for example, one that asks students to identify where they discussed the res ipsa issue or specific exceptions to the search warrant requirement. This type of exercise would certainly have benefits, but the transferability of these benefits would be limited unless the exercise also included generic...
categories such as “rule,” “application,” “exceptions,” etc. It could certainly be beneficial to identify and discuss the numerous issues that the exam contained, for students who have trouble spotting issues would benefit from knowing which issues they missed. It might be even more important, however, to identify and articulate heuristic strategies for issue-spotting to share with the students. An important value of developing criteria for exams is that the criteria give students thinking strategies that they can use not just on a particular examination, but when they act as legal thinkers throughout their lives in the law.

Reviewing self-graded exams can let the professor see how students comprehend both the substantive law and the fundamental elements of legal reasoning. Seeing just what students mark as “rules,” as “exceptions,” as “application,” or as “counter-arguments” might well dictate the focus of class discussion by allowing the teacher to spend less time on concepts that appear to be generally understood, and more time on concepts that significant numbers of students do not understand. Teachers might also use the “live conference” method described below to focus the students’ attention on troublesome concepts and try to clear up common confusions and misunderstandings as evidenced by the students’ “meta-thinking.”

5. The Vicarious “Live Grading Conference”

As noted above, Joe Kimble of Thomas M. Cooley Law School has pioneered the “live grading conference,” in which he reviews student work on the spot in a one-on-one conference, articulating the reader’s thoughts in real time, as they occur. Many writing

220 Thus, teachers who are concerned that these methods interfere with self-teaching might want to develop standards for self-teaching. For example, what questions should the student ask when trying to reverse-engineer a legal argument or a legal document? See e.g. Collins, Brown & Holm, supra n. 83, at 10 (noting that the “exploration” aspect of the cognitive apprenticeship “involves pushing students into a mode of problem solving on their own”); see also Schwartz, supra n. 22, at 413 (noting that “pattern recognition instruction” seldom occurs).

221 This guideline is focused on those aspects of casebook courses that are meant to teach skills, rather than those that are meant to impart legal doctrine. See e.g. John E. Sexton, ‘Out of the Box’: Thinking about the Training of Lawyers in the Next Millennium, 33 U. Tol. L. Rev. 189, 195 (2001) (recommending that schools must abandon the “coverage” paradigm and apparently recommending a doctrine of skills, noting that there are “skills and styles of thinking that must be learned”). I will not wade into the “skills versus coverage” debate, but I will note that writing exercises can also be helpful to assess the depth of student understanding of particular legal doctrines.
teachers use a vicarious-learning version of this method by using an overhead projector or document camera to review student work (anonymously) in front of the whole class. This technique could also be used with practice exams. Instead of critiquing each exam individually, the professor could scan through the practice exams, looking for examples of good answers and examples of common mistakes. The professor might display either the annotated model answer, the student answers, or both, for class discussion. The professor can both annotate the papers live (“here is where the student laid out the counter-argument”) and react to them live (“I don’t understand what rule the student is applying because he or she only referred to ‘a tort’ and did not name the specific tort.”). The professor might decide to engage the class even more by distributing excerpts or samples at the beginning of class (or even the day before, perhaps via e-mail) and asking the students to participate as readers. By articulating the reader’s thoughts when reading “good” exam answers and “bad” exam answers, the professor can communicate the reader’s thoughts and expectations to the students and help them to see written legal analysis through the reader’s eyes.

Any method that displays students’ written work in front of the whole class for the purpose of criticism has the potential for hurt feelings, and professors must use special care when doing so. It is interesting that some students will tolerate being questioned and proven wrong in an oral conversation, when there is no possibility of remaining anonymous, but will chafe at any criticism of the written word in public, even when only the writer knows whose work is being criticized. Because students take criticism of written work so personally, it is worth planning the class time and presentation carefully to avoid hurt feelings. The professor can use the sample papers to engage students with the text, asking them to explain why the writer might have made certain choices, or even asking them to identify places where revision is needed or to suggest certain revisions.

Although the method of showing student work has risks, I believe that those risks are offset by the benefits. Showing students the difference between a strong answer and a weak answer is a vivid learning tool that gives a professor an invaluable opportunity to perform the kind of “coaching” envisioned by the cognitive apprenticeship, in which the expert observes students while they carry out a task and offers “hints, scaffolding, feedback, modeling,
[and] reminders . . . aimed at bringing their performance closer to expert performance.”

Displaying student papers can enhance the effectiveness of Socratic method in the casebook classroom. Instead of calling on random students (or even assigned students) and trying to mold the conversation into a good teaching discussion, faculty can review a large selection of written examples and pull the best illustrations of common weaknesses and important strengths. The teacher can then use these illustrations to lead an effective class discussion; students will be more engaged because they will all have thought carefully about the answer to the question posed in the exam or other written problem, and the teacher can choose in advance which thorny analytical problems will be tackled. In this way, using sample papers can allow faculty to get the best of both the casebook and legal writing teaching methods.

D. Practical Concerns

Although these methods could be used in isolation at various times throughout the semester, faculty could incorporate all of these methods into a casebook course by using only two class periods. This estimate does not count preparation time or time spent reviewing papers, but at least some of that preparation time would be a one-time investment. For example, once a professor identified generic criteria for exams, they could be re-used every year with little revision, as could the vocabulary that would be incorporated into each class session. It is true that reviewing student papers would take faculty time, but there is a huge difference in the time needed to conduct individual critiques and the time needed to read student papers, record general impressions and concerns, and look for “good” and “classic mistake” samples.

A professor who wanted to give a practice exam could announce the exam in the syllabus and distribute it at the end of a class session as a take-home exercise. Students would complete the exams on their own time, including private memo questions, and then could hand them in — or better, e-mail them in — on a date certain, keeping a copy for themselves. On that day or the next, the professor could devote some class time to the practice exam by conducting a workshop showing how to self-grade the ex-

222 Collins, Brown & Holum, supra n. 83, at 43.
am, perhaps getting even more mileage out of the demonstration by having the students participate in the self-grading of a model answer on a simple, unfamiliar problem. On a later day, students could turn in their self-graded papers for review. At this point, the professor can review the self-graded exams only, noting the private memos for common questions and concerns, and reviewing the exams and self-grading annotations for common misunderstandings as well as to identify sample papers that would provide good fodder for class discussion. The professor might block and copy excerpts from the e-mailed answers to use in the class discussion (being careful to delete private memos).

On a later designated day, the professor could again use class time to go over model answers, good student answers, and/or classic mistake answers and to engage students in discussion. In this way, the only class time that would be needed would be one class session to demonstrate the self-grading method, and one class session for discussing the exams themselves.

While the suggestions listed above are by no means exhaustive, I hope that they show techniques that provide the benefits of full-class participation without the individual critiquing burdens that are unrealistic in the large-section casebook classroom. Although these ideas seem to focus on exam method, their real focus is the thinking that is necessary to write a good exam, and thus they are meant to advance the goal of teaching students how to think like lawyers.

V. CONCLUSION

A Legal Writing revolution is a reasonable step in the progress of legal education. Negative attitudes have for too long interfered with the spread of effective pedagogy germinated in Legal Writing courses. Just as Legal Writing faculty have benefitted from using casebook pedagogy, it is time for casebook faculty to
consider the benefits of using Legal Writing pedagogy. Integration of Legal Writing faculty into the legal academy is one clear way to advance this goal.

Certain aspects of the cognitive apprenticeship provide a helpful framework for showing how writing process theory is relevant in the casebook classroom. Legal Writing teaching methods relevant to both inner-directed and outer-directed theories can help casebook faculty to use the concepts of heuristic strategies, modeling, articulation, and coaching to advance the goal of teaching students to think like lawyers.

Although there are many ways in which Legal Writing pedagogy can enter the casebook classroom, teaching exam method may be the easiest and most obvious. Casebook faculty may believe that they care only about the “inner-directed” aspects of the writing process — they want to help the students learn how to think, and classroom lectures and discussions are directed toward that goal. As both Professor Berger and Professor Edwards have noted, however, when we read, we have unconscious expectations of the document.226 By communicating those expectations to their students, by giving them practice in articulating their processes, by modeling reader and writer thinking, and by coaching the class, casebook faculty members can help both to guide the students’ inner-directed processes and make them aware of the very real but often unexpressed outer-directed requirements of all written legal analysis.

Admittedly, casebook faculty face a challenge when deciding how they might incorporate writing process pedagogy into their classrooms, but they do not need to face that challenge alone. In addition to the authorities cited in this Article, faculty could consult the living authorities on this type of pedagogy: their Legal Writing colleagues.

226 Berger, supra n. 56, at 81; Edwards, supra n. 124, at 165.
BETTER WRITING, BETTER THINKING: CONCLUDING THOUGHTS

Kent Syverud*  

I am deeply grateful to Jo Anne Durako for putting this panel together. I have only a few minutes for my own reactions to these two excellent papers by Professor Mary Beth Beazley and Professor Judith Wegner. I want to make some general observations in response, and then to encourage this large audience to be prepared to respond to the issues posed at the end of Professor Wegner’s paper. Those issues include: (1) What dilemmas have you encountered in using writing to enhance students’ thinking? and (2) What are the best practices to enhance students’ thinking abilities? The relation between thinking and writing is at the heart of the discussion here, and I hope our interaction will focus upon it.

At the outset, I should note that it is hubris for me to be the one assigned to speak on these issues from a “dean’s” or “institutional” perspective, for the simple reason that Professor Wegner herself remains my role model of a great dean. She walked me through all my crises during my early years of deanining, and, therefore, she is much more an authority on institutional issues than I am. In addition, Professor Beazley is the best director I know — the professor who understands the managerial and institutional challenges of a rigorous law school writing program. In other words, I feel today like the Vanderbilt football coach advising Ohio State and Miami. But I’ll just take my job as I find it, starting with some general observations.

First, I taught legal research and writing to forty-two students more than twenty years ago. Professor Wegner’s paper talks about “thick” and “thin” models of writing programs.1 The program I taught in was the “wafer-thin” model — I would like to think of it as “svelte,” but the reality is it was mainly cheap. This teaching was the most demanding, and is some ways the most tedious, teaching I have ever done. It was also the most rewarding teaching I have done. It was tedious in the sense of grading individual papers for every student every three weeks and going over each one

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1 Judith Wegner, Theory, Practice, and the Course of Study — The Problem of the Elephant (forthcoming) (author’s analysis of legal writing programs and the relation of theory and practice in professional education, drawing on data developed in connection with the Program on the Professions of the Carnegie Foundation for the Advancement of Teaching) (manuscript on file with the Journal).
line-by-line with the students, sometimes with terrific variance among the students in terms of what they needed from me. It was rewarding in terms of the terrific progress I saw in each student. It felt like I had deftly led them step-by-step through the painful process of becoming a lawyer. Then, of course, they attributed much of the learning I gave them to their Contracts professor. Back then, the notion that there was a theory underlying my work in teaching writing was not just “invisible,” it was unthinkable. The scholarship of legal writing and the theory of legal writing have therefore come a long way indeed.

Second, there is a terrific variance on how curricula change at law schools, and how far different law schools have come in changing the writing curriculum. Professor Wegner’s study, like the authoritative Sourcebook on Legal Writing Programs, suggests that the variance is quite broad. Even among law schools that are compatible on most levels — Ohio State and its excellent peers, for example — you will find schools that are thoughtfully revising and investing in legal writing teaching, and schools that have changed little despite all the innovations and scholarship of the past twenty years. Why is this so? What explains why the ideas we are discussing today get implemented quickly at some schools, and not at all at others?

One answer, of course, is that the easiest curriculum reform occurs in response to a crisis, and in the writing program, a crisis usually means a change in faculty coupled with serious complaints about the writing program from both students and faculty. In other words, there is a vacuum because the people who used to teach writing have left the battlefield, and students and faculty are eager to change the terms of combat in the future. Easy curriculum reform, in fact, is characterized by three elements: no increase in work for tenured faculty, no tenured faculty with a vested interest in teaching the course in a particular way, and few cost trade-offs visible to tenured faculty. Hard curriculum reform is characterized by different elements: a serious increase in work for faculty, a serious commitment of money and faculty time that could be devoted to other needs, and a displacement of an approach to teaching that some current faculty hold dear. My point is that the reform of a writing curriculum, which both Professor Wegner’s and Professor Beazley’s papers suggest is most meaningful, is a hard reform, and maybe the hardest. So where you see that reform has occurred,

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2 Ralph L. Brill et al., Sourcebook on Legal Writing Programs (ABA 1997).
like at Ohio State, it means someone in a leadership role had a lot of courage. This kind of reform doesn’t just happen naturally. It takes a dean or a group of faculty willing to push hard for it.

My third general observation is the most important. There is also terrific variance across law schools in the norms of what level of teaching quality is acceptable. This applies to all parts of the curriculum, but it applies with particular force to the legal writing curriculum. Law schools are not ranked by teaching quality, except to the extent that the two percent of rankings that are based on bar passage rates indirectly reflect teaching quality. Partly as a result, many if not most law professors cynically believe that teaching quality is pretty much the same everywhere (or at least, that schools at similar levels of the pecking order teach pretty much at the same quality level). “Oh, there are a few stars and a few duds on every faculty,” they think, “but in reality, if you have seen one Civil Procedure class, you have seen them all.”

This is not true. I have visited many law schools in the past five years, and I have sat in on more than fifty classes, including more than a dozen Civil Procedure classes. There is a huge variance in teaching quality, not just among faculty members, but also among faculties. For example, I visited one school, ranked toward the bottom in U.S. News, and I attended a Civil Procedure class that truly astounded me by its high quality. I learned much more in this class, about a case I had taught myself many times — and from the analysis of the students in the class — than I had in a Civil Procedure class at a top twenty law school on the same case. I came out of that class saying, “Wow, this must be the star of your faculty.” “He’s good,” came the dean’s answer, “but actually he’s only in the middle of our teaching quality distribution.” I was skeptical. I visited other classes. Sure enough, half a dozen faculty members taught as rigorously and as well. The norms of teaching quality at this school were just so much higher than I thought possible. The faculty really was working at doing more with their students and was setting very high expectations for themselves and their students. So I conclude that a faculty that really cares about this can make a big difference.

I have just a few minutes left to make some specific responses to Professor Wegner and Professor Beazley.

First you saw Professor Wegner display Bloom’s education objectives quickly on the screen, and you heard about their incorporation in terms of knowledge, comprehension, analysis, application, synthesis, and evaluation. I believe many professors, includ-
ing many of us, react to that presentation by saying, “Big deal. That’s obvious. I already do all those things. I just never articulat-
ed it the way Bloom does. It is just another education school no-
menclature, with another little pyramid and some diagrams.” For
me, that reaction is the equivalent of the person responsible for
the family finances saying, “I save money. I just don’t bother to do
a budget or balance a checkbook, or for that matter, even to write
down the amounts when I write a check or pay a bill. These things
just work out without my thinking about them.” Fat chance. Sav-
ing is a product of planning, and so is the achievement of concrete
educational objectives.

Second, we heard about the integration of legal writing meth-
odology with other first-year courses. My experience, and my ob-
servation from the schools I have visited, is that most of the inte-
gration is one-sided: the writing faculty integrate the first-year
subjects that their students are taking in that particular semester,
but the other first-year faculty note, and rarely remember, little
about what is going on in legal writing. For this to really work,
integration has to go both ways, and the other first-year faculty
need to really understand what the writing faculty is doing. And,
of course, the thing that most stands in the way of a two-sided in-
tegration is the differential status of legal writing faculty at most
schools.

Third, we heard about “cognitive apprenticeship,” which I un-
derstand to include the task of making one’s thinking visible in
one’s writing. This is really hard. On most examinations I grade, it
is the failure to make thinking explicit that causes the greatest
loss of credit. Why do students baldly assert conclusions without
making the thinking that produced them explicit? Because it
seems more “authoritative” that way. The students fear that if
they show their thinking, and thereby expose the uncertainties of
thinking along the way, they will lead the reader to believe they
are uncertain themselves, and therefore, stupid. Professor
Beazley’s work has taught me that this problem cannot just be
overcome by oral dialogue with students. You can’t just tell them
to make their thinking explicit, or even show them through an oral
dialogue. You have to show them, concretely illustrating the words
and sentences in their work that they are leaving out. I now give
out sample exam answers with the commonly omitted sentences
underlined, and the commonly forgotten counterarguments
marked in boldface. Why? Because I have learned from writing
teachers.
Fourth, on the subject of “best practices” — best practices that involve huge costs don’t get implemented. So the relevant question with these best practices is “Which ones involve manageable costs?” Those are the ones that will get implemented, and if they work, those are the ones that will stick. I believe the Law School Admissions Council is now developing a “skills readiness inventory,” aimed at college sophomores, that may be helpful in this regard. It is being designed to help students identify where their law school-related skills are weak, whether it be in writing or logic or whatever.

Can you really teach people how to write? Professor Beazley has faced down skepticism on that question from fine academics. I want to conclude by offering her one testimonial. I know you can teach people how to write. I know this is true because when I was born, I could not write. Somebody taught me, and taught you, how to do it. For almost all of us, that somebody did the things that Professor Beazley has advocated. Somebody sat us down and asked us hard questions about what we meant by each line and sentence — made us state explicitly what we meant and what we were trying to do with our words. Yes, you can teach someone how to write. But it is hard work, and the beneficiaries rarely appreciate it at the time. All the teacher needs is to know someone is watching her back — someone in a leadership role understands that the work is vital and hard — and that the cries of pain from the students who are experiencing it are often signs that things are going right, not wrong. Status issues for legal writing faculty are again relevant here, because the hardest teaching leaves the faculty who do it the most vulnerable to short-term criticism. If that faculty has little status or respect in the school, the constant temptation will be to forego the best practices we have described, and instead, just entertain the students. It is a dean’s job, I believe, to make sure that law school involves education more than entertainment.
Throughout the twentieth century, as composition worked to define itself as a field within the academy, it always acknowledged its heritage in classical rhetoric and acknowledged that it shared this background with legal studies. Both, for example, concerned themselves with issues of ethos, pathos, and logos, looking to classical rhetoric for ways to make arguments. Although compositionists realized that they had a lot in common with legal scholars and practicing orators in courtrooms, until recently, developments within legal practice and theory hadn’t been widely recognized as helpful to the actual teaching of writing. This is not to say that compositionists haven’t been writing about legal issues or practices. Wearing their rhetorician hats, rhetoric and composition scholars (as we sometimes call ourselves) have looked to legal discourse as a fruitful site for research into the nature of rhetoric. As we, Lindsay and Anne, have talked and worked together, however, we have become convinced that it’s time to explore a new relationship between composition and legal studies. We refer to the potential connections between composition and Alternative Dispute Resolution (ADR). We’re coming to see how ADR can have a significant impact on our actual teaching. Lindsay is writing her dissertation on the intersection of ADR and composition, and Anne is chairing the committee overseeing this project.

In this article, we will share insights we have come to as a result of our combined thinking about the relationship between ADR and composition. First, we will look at scenes of conflict in composition classrooms, demonstrating how differences create what we call, borrowing from Mary Louise Pratt, a “contact zone” for students and teachers. With the conflicted nature of composition instruction firmly established, we turn to the field of ADR, tracing the parallel histories of composition and ADR. Then we explore ways composition teachers might employ strategies of mediation to create greater student engagement with and commitment to a writing class, and might help students develop their capacity for critical thinking by writing essays based on models of ADR: arbi-
trating conflicting viewpoints, mediating to find common ground among positions, and negotiating with others who hold differing views.

Before we could appreciate the potential of ADR, we had to acknowledge the conflicts in our classes. For a number of years, Anne managed not to notice conflict in her classrooms, or at least not to think about it very much. She liked to think that she was able to create a classroom community where students felt safe to share ideas, where mutual respect — even genuine liking — was the norm. But gradually she had to come to terms with what was happening all around her. Students didn’t always act respectfully toward one another, and despite her best efforts, put-downs echoed through the room. Lindsay, on the other hand, perhaps because she attended several religiously affiliated schools undergoing change, was inculcated early to notice ideological conflicts among students and faculty and to think about how the conflicts motivated discursive action.

Together, we began to articulate our unique experiences of conflict in classrooms. Let us conjure a few scenes for you. Anne currently directs a research project that takes her into local high schools, and when she visited some classes there recently, she was struck by the pure physicality of the interactions she saw. Kids brushed against one another in the halls, gave high fives, and hugged. When she went into an English class, she watched in amazement as two young men who had been punching one another in the hall continued to strike at each other, and when the teacher told them to sit down, one sat quickly and tripped the other so that he fell flat on the floor as he walked toward his seat.

In Anne’s recent first-year writing course at the University of Michigan, where the subject of affirmative action has special significance, students got into a discussion of admissions policies, and the discussion quickly turned hostile. It happened that this class had a majority of students of color, and they became vocally angry about the assumptions of their white peers. Several of them came from wealthy suburbs of Detroit and others were international students. They claimed that everywhere they went, white students assumed that they had been admitted because of their race rather than their abilities, and they were tired of being identified as less than competent. The white students became defensive and said that they knew many highly qualified white students who hadn’t been admitted to UM and some less well qualified students of color who had.
Last summer, Lindsay observed a week-long poetry workshop. The participants were high school students from diverse backgrounds who wrote poetry for different reasons. Some of the students wrote poetry for personal self-expression and others wrote poetry to perform it on stage and in competitions in front of their friends. When asked to give each other positive and constructively critical feedback for revision of their poems, the group wrestled with contradictory advice and competing values. Comments became personal confrontations. “The whole workshop isn’t about you,” Lindsay heard one girl say icily to a male student. “OK, do you want to, like, slap me down some more?” the boy retorted.

Even in a graduate course that Anne has taught and Lindsay has taken, titled “Introduction to Composition Studies,” lines of conflict often develop between graduate students who plan to teach in high schools and those who plan to teach at colleges or universities. Though Anne tries to assure students that their different teaching experiences and interests represent a resource for the class and that they will benefit from the varying perspectives of their classmates, it often seems that the two groups grow increasingly annoyed with each other as the semester progresses. Though Anne has never had a class boil over into fully articulated conflict, she hears muttered asides and passing comments about differences in working conditions, varying expectations, and mutually exclusive ideas about what writing instructors “ought” to do and to study.

These scenes occur regularly in many classrooms. Students come to us male and female, white and non-white, rich and poor, along with a variety of other asymmetrical and antagonistic relationships, and these differences pervade our classrooms, frequently creating conflicts. Sometimes conflict takes physical form as students, particularly those in K–12 schools, display their emotions through violence. In other cases conflicts are articulated, with students expressing their differences in clear language. More commonly, conflicts take subtle form, often remaining out of sight while poisoning the atmosphere of the classroom, or simmering just below the surface and occasionally erupting in misdirected anger. The pervasiveness of classroom conflict is best demonstrated, we think, by the eagerness with which theorists in composition studies have appropriated Mary Louise Pratt’s term “contact zone.”

Pratt, a professor of Spanish, Portuguese, and Comparative Literature, describes contact zones as “social spaces where dispar-
ate cultures meet, clash, and grapple with each other, often in highly asymmetrical relations of domination and subordination.”¹ Pratt’s main example of a “contact zone” is Peru in the late sixteenth and early seventeenth centuries, where she studied the interaction among newly discovered texts by Native Americans and the canonical Spanish accounts of the same period. She also coined the term “autoethnography” or “autoethnographic expression” to refer to instances in which colonized subjects undertake to represent themselves in ways that engage with the colonizer’s own terms. She explains, “If ethnographic texts are a means by which Europeans represent to themselves their (usually subjugated) others, autoethnographic texts are those the others construct in response to or in dialogue with those metropolitan representations.”²

In a 1991 piece titled Arts of the Contact Zone, Pratt extended her thinking about the contact zone to college classrooms and described her experience of developing and teaching a multicultural course at Stanford during what has been called the culture wars. She describes the experience this way:

The very nature of the course put ideas and identities on the line. All the students in the class had the experience, for example, of hearing their culture discussed and objectified in ways that horrified them; all the students saw their roots traced back to legacies of both glory and shame; all the students experienced face-to-face the ignorance and incomprehension, and occasionally the hostility, of others. In the absence of community values and the hope of synthesis, it was easy to forget the positives; the fact, for instance, that kinds of marginalization once taken for granted were gone. Virtually every student was having the experience of seeing the world described with him or her in it. Along with rage, incomprehension and pain there were exhilarating moments of wonder and revelation, mutual understanding and wisdom — the joys of the contact zone.³

¹ Mary Louise Pratt, Imperial Eyes: Travel Writing and Transculturation 4 (Routledge 1992).
² Id. at 7.
Pratt urges teachers to use what she calls “some of the literate arts of the contact zone”: autoethnography, transculturation, critique, bilingualism, mediation, parody, denunciation, imaginary dialogue, and vernacular expression. And she urges us to think about our classrooms as crossroads of cultures where we can employ the pedagogical arts of the contact zone. She describes these as including:

Exercises in storytelling and in identifying with the ideas, interests, histories, and attitudes of others; experiments in transculturation and collaborative work and in the arts of critique, parody, and comparison (including unseemly comparisons between elite and vernacular cultural forms); the redemption of the oral; ways for people to engage with suppressed aspects of history (including their own histories), ways to move into and out of rhetorics of authenticity; ground rules for communication across lines of difference and hierarchy that go beyond politeness but maintain mutual respect; a systematic approach to the all-important concept of cultural mediation.4

We want to highlight here that the word “mediation” is prominent in Pratt’s description of what should occur in classrooms, and we will turn to that in just a moment, but first we want to do a bit of clarifying and explaining. First, the clarification — in describing conflicts, we do not mean merely the sort that Gerald Graff promotes. In his book, *Beyond the Culture Wars: How Teaching the Conflicts Can Revitalize American Education*, Graff urges English instructors to “teach the conflicts,” but he is referring to the conflicted theoretical and political differences that divide scholars in the academy. He wants teachers to make the conflicts between a feminist and a post-colonial reading of *Huck Finn* visible to students; he wants students to read Conrad’s *Heart of Darkness* next to Chinua Achebe’s *Things Fall Apart*; he wants the classroom to be a space where differing positions, theories, and practices can be examined and discussed. In other words, he wants to bring already constituted conflicts into the classroom for a rational examination. While we see this as important intellectual work, we regret that Graff is not interested in the conflicts that students themselves bring to class, the sort that lead them to trip one another, engage in heated argument, or function with a steady if unexpressed hos-

4 *Id.* at 17.
tility. Both types of conflicts are important sites of learning — the ones that define existing academic discourse communities and the ones that students bring to their engagement with these academic discourses and to each other.

Now the explaining — although Mary Louise Pratt developed her terms contact zone and autoethnography in the context of thinking about texts from sixteenth century Peru and extrapolated them to teaching a multicultural course at Stanford, they were immediately appropriated by composition studies. The term “contact zone” has been used to describe a multiplicity of sites of conflict: the position of writing centers in the university, the context of electronic communication, the limitations of thinking about classrooms as communities, literacy instruction carried on outside the classroom, the role of writing program administrators, the ways racism insinuates itself into the classroom, portfolios where students give more attention to audience and purposes for writing, and new approaches to assessing writing. Professing in the Contact Zone, a collection of essays in which Pratt’s Arts of the Contact Zone appears, demonstrates the many ways composition studies has used the theory of the contact zone to identify and discuss various phenomena in the field.

In similar fashion, autoethnography has been appropriated as an assignment for students in composition classes. Carol Severino, for example, describes it as a genre that enables students who use second-dialect or second-language-influenced forms of the dominant power’s language to define or redefine their identity or describe their culture for themselves and for members of the dominant culture who may have a simplistic view of it. Many of our colleagues assign autoethnographies in seminars dealing with topics in literacy and/or composition. Carole Yee explains how autoethnography can be used to understand academic programs in order to set goals and determine directions for such programs.

From 1991 to the present, Pratt’s concept of the contact zone has been enthusiastically embraced by composition studies. The strength and duration of this embrace demonstrates that the idea of the contact zone spoke to something far-reaching and powerful in the lives of composition theorists. We offer the hypothesis that

5 Carol Severino, Writing Centers as Linguistic Contact Zones and Borderlands, in Professing in the Contact Zone, supra n. 3, at 230–239.
6 Carol Yee, Contact Zones in Institutional Culture: An Anthropological Approach to Academic Programs, in Professing in the Contact Zone, supra n. 3, at 257–273.
the enthusiasm for the term came from an awareness of the significant amount of conflict swirling in most composition classes. The language of the contact zone gave composition theorists a way to describe something that had been felt but not named. One could argue that all classrooms are sites of conflict. After all, conflict can be described as a byproduct of change, and education is all about change. Still, we think writing classes face more conflict because issues of language and identity are so central to the pedagogy of composition.

We are not, of course, the only people to comment upon the conflict inherent in composition classes. In his book, Collision Course: Conflict, Negotiation and Learning in College Composition, Russell Durst writes,

The composition classroom itself is frequently positioned as a scene of disagreement, debate, and confrontation. Berlin’s Rhetorics, Poetics and Cultures, Fitt’s and France’s Left Margins: Cultural Studies and Composition Pedagogy, Gale’s Teachers, Discourses, and Authority in the Postmodern Composition Classroom, and Sullivan and Qualley’s Pedagogy in the Age of Politics are but four examples of influential contemporary works that depict the classroom as an arena for various kinds of conflict.7

And Durst’s book itself examines the very different, and often opposing, agendas of students and teachers in composition class. Durst argues that students are frequently “career-oriented pragmatists who view writing as a difficult but potentially useful technology. These students would generally prefer to learn a way of writing that is simple, quick, and efficient; applicable in all or most situations.” Their teachers, on the other hand,

typically stress much more complex and demanding notions of critical literacy. . . .[they] ask students to examine their relationships to language and other cultural tools in an attempt to understand their role as actors in history and to realize their potential to create change. . . . Influenced by Freireian pedagogy as well as continental literary theory, critical literacy approaches in composition . . . foreground awareness of social and political inequities

7 Russell Durst, Collision Course: Conflict, Negotiation, and Learning in College Composition 1 (Natl. Council of Teachers of English 1999).
and consideration of ways to resolve them . . . [they are] designed to complicate rather than simplify students’ lives.\textsuperscript{8}

Now that we’ve explained how conflict figures in composition classes, we are going to return to the prominence of the word “mediation” in Pratt’s description of the pedagogical arts of the contact zone. This is where Lindsay’s interest in how people communicate across difference fruitfully cross-pollinated with Anne’s long experience in the field of composition. Last year, as Lindsay developed her dissertation prospectus, she became interested in the extending the work of Catherine Lamb, who urges instructors to teach students a model of critical thinking based on mediation and negotiation techniques.\textsuperscript{9} In investigating the concepts of mediation and negotiation, Lindsay found that these were key terms in the discourse of ADR, and that no compositionist had delved deeply into the resources of this body of literature for its use in teaching writing. It was only when Lindsay brought up the subject of mediation as a site of study in and of itself that Anne began to see places where she had overlooked it over the years. The first time Anne read Pratt’s work, the word “mediation” slid right by her and sat waiting for rediscovery years later.

To give a basic overview of concepts, ADR emerged in the twentieth century as an alternative to litigation through the courts, and arbitration, mediation and negotiation are its central components. In the language of ADR, arbitration is a dispute resolution process in which a neutral, often expert, third party hears the positions of disputants and issues a written settlement. The settlement is usually pre-determined as legally binding and usually references contract, precedent or law. Mediation is a second dispute resolution process that operates with the facilitation of a neutral third party, but it differs from arbitration in that it is aimed toward the discovery and development of a consensual agreement by disputing parties. The mediator is not in place to determine a resolution, but instead is expected to facilitate procedures for examining and evaluating the issues, for exploring interests, concerns, and options for dealing effectively with emotional and hidden factors, and for generally assisting the parties towards resolution of the issues. Negotiation is the resolution process as it pro-

\textsuperscript{8} Id. at 17.

ceeds without the neutral party present. It can be defined as “the method by which two or more parties communicate with each other in an effort to agree,” usually to agree to change or leave unchanged their relationship to each other, to others, to objects, or to ideas or symbolic goods.\footnote{10}

In reading more about ADR, Lindsay began to see similarities in the skills and qualities that ADR and composition studies value in their practitioners. ADR literature recommends that mediators develop skills like listening, observing non-verbal communication, helping parties to hear, questioning, summarizing, acknowledging, using language effectively and reframing, normalizing, managing conflict and expression of emotions, managing the process, lateral thinking, encouraging a problem-solving mode, centering, being silent, and using constructive facilitation.\footnote{11} This list certainly has a lot in common with what we read in discussions of best practices for composition instruction. We want to be writing instructors who are attentive to all forms of language, who encourage problem-solving and facilitate classroom processes.

Now that we are both alerted to the discourses of ADR and its close parallels with the goals and practices of composition studies, we are amazed that no one noticed this connection before. Anne is particularly amazed that she hadn’t noticed it because, as Lindsay recently showed her, it had been hidden, like the purloined letter, in plain sight, right where she could see it.

What happened is this. Lindsay read Anne’s book, \textit{Intimate Practices: Literacy and Cultural Work in U.S. Women’s Clubs 1880–1920}. In this book, Anne describes how African American, working class, Jewish, Mormon, and white Protestant women at the turn of the last century banded into clubs where they could read and write about pressing issues of that time. Anne argues that through their textualizing they contributed to nation-building through negotiations with Americanization, consumer culture, constructions of the new woman, the meaning of culture, and the professionalization of reading and writing that accompanied the emergence of English departments. \textit{Intimate Practices} was published in 1997, and Anne has gone on to other projects, but Lind-

say read the book recently and showed Anne a connection that she might have made much sooner.

One of the women who played a major role in Americanization projects between 1916 and 1920 was Frances Kellor. During that period she served as chair of the National Americanization Committee, and Anne had read extensively about Kellor when she did the research for *Intimate Practices* because Kellor contributed significantly to the Americanization projects of club women. Kellor took her law degree from Cornell University in 1897 and then studied sociology at the University of Chicago. While in Chicago, she lived and worked at Hull House, the institution Jane Addams created to help immigrants acclimate to their new country while still retaining some of their own heritage and culture. Kellor later moved to New York where she worked at the Henry Street Settlement, another institution that served immigrants. As the U.S. became involved in World War I, Kellor grew concerned about developing immigrants’ loyalty to the nation, and her 1916 book *Straight America* stressed the need for a coercive Americanization of immigrants. It was this coercive version that she stressed in her work with the National Americanization Committee between 1916 and 1920.

After the war was over, Kellor returned to her earlier commitment to empathy and acceptance for immigrants, and this commitment led her to a greater interest in arbitration. Like many people, Anne had forgotten Kellor’s work in arbitration because she focused on her role in Americanization. Lindsay reminded Anne that Kellor spent nearly thirty years of her career in the area of ADR. Kellor was a founding member of the American Arbitration Association in 1926, and she served as its vice president until her death in 1952. During this time she published *Arbitration in the New Industrial Society, Arbitration in Action*, and *American Arbitration: Its History Function and Achievements*. She also prepared its Code of Arbitration in 1931.

Reading *American Arbitration* and *Intimate Practices* simultaneously, Lindsay was delighted to find that the author of the former appeared on the pages of the latter. Bringing her questions about Frances Kellor to Anne and talking through the relationship between composition and ADR, Lindsay and Anne began to see all sorts of possibilities for composition teachers. There is, of course a parallel history. ADR has grown and flourished during the past quarter century, just as composition studies has. In 1948 Kellor wrote that ADR had not:
Struck deep roots in early American life. It did not become an integral part of the early social and economic development of the country nor a recognized institution of any consequence and its impact was negligible upon the growth of justice in the country.

It is probable that this situation was due somewhat to the attitude of Americans toward discord and dispute. They were complacently accepted phenomena, to be settled by force or by litigation, if need be. America was a rich country, full of adventure and could afford a considerable volume of disputes at a high cost of settlement. As disputes were regarded as an inevitable and healthful process in the development of a new country, the prospect that they might sometime become a menace to society was not of immediate concern.12

Today, ADR takes a much greater role in society as individuals and groups make new efforts to resolve conflicts. As labor unions became more powerful, corporations turned to ADR to help deal with increasingly costly discord. The overloaded dockets of many courts made the ADR option attractive, particularly as our increasingly litigious society faced more and more disputes.

During the latter part of the twentieth century, when ADR became more prominent in American culture, composition studies also began to emerge as a discipline. In the 1960s and 1970s, professors trained in English departments did much of the seminal work that established process-based pedagogies. Then in the 1980s, composition journals, publications, and graduate programs burgeoned and disciplinary sub-groups proliferated, creating specialties from computers and writing to Bakhtinian theory and writing. The parallel growth of composition and ADR combined with the growing interest in issues of conflict in composition makes it all the more remarkable that there has been so little crossover between the two fields.

Leaving aside the might-have-been’s, the parallel development of ADR and composition studies means that we have two fields at relatively similar levels of maturity and that we can begin to think about how they might inform one another. Because we stand on the composition studies side, we are much more interested in the

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ways ADR can inform the teaching of writing. Thinking about the ADR-composition relationship takes us back to a 1991 article by Susan Jarratt in which she calls into question the strand of feminist approaches to composition that advocates avoiding conflict. Jarrett argues that avoiding conflict in writing classes means instructors spend too little time helping their students learn how to argue about public issues, too little time making the turn from the personal to the public. As an alternative Jarrett envisions “a composition course in which students argue about the ethical implications of discourse on a wide range of subjects and, in so doing, come to identify their personal interests with others, understand those interests as implicated in a larger communal setting, and advance them in a public voice.”13 While Susan Jarratt and Catherine Lamb may seem to be articulating two very different trajectories for teaching — Lamb advocating less argument and less combativeness in writing instruction and Jarratt advocating more arguing and more conflict — we see an interesting point of contact at the junction of their recommendations. What Jarrett doesn’t do is talk about how we might use conflict constructively instead of combatively to achieve the results she desires, and what Lamb’s work is missing is a thorough look at the complexities of the practices of mediation and negotiation that she advocates.

Lindsay’s dissertation is tackling exactly these issues. Her project began with the following guiding questions: How can a deeper understanding of negotiation help students and instructors understand and learn more from their conflicts regarding class workload, the meaning of texts, and the values that define “good writing” at the college level? And how can what is learned about negotiation in these discussions help students to write with more rhetorical skill? How can understanding the theory and practice of mediation help English instructors and students understand and improve their management of the social and cultural differences that they bring to their collaborative reading and writing activities? How can the theory and practice of arbitration help English instructors understand the ethical dilemmas they face as they manage their power in institutional settings? How can an understanding of arbitration help student writers understand and improve their composing processes, as they understand themselves

as arbitrators of complex and competing ideas and ideologies, arbitrating not only differing interpretations of their subject matter but also the differing expectations and values of diverse readers?

Anne has become convinced that Lindsay’s questions are not only important and interesting but timely. Timely because Anne thinks the academy is at a moment when it needs to move beyond the theory of the contact zone. This theory, in the many ways it has been used in composition studies, enabled us to notice and begin to address many of the conflicts that inhabit our classrooms. Certainly the discourses Pratt recommends have been useful. Transculturation, parody, critique, comparison and so on do help with cultural mediation, but in Pratt’s representations, they remain at a rather high level of abstraction. An examination of ADR from the perspective of composition studies offers much more specific ideas about how we might address conflicts.

Here are two examples. In the spring 2003, Lindsay taught an upper level section of “Essay Writing” at the University of Michigan. Having recently read Roger Fisher and William Ury’s classic, Getting to Yes, and taken a course in civil mediation, she decided to overtly negotiate the course syllabus with her students. Why? As Fisher and Ury state on the first page of their introduction, “Everyone wants to participate in decisions that affect them; fewer and fewer people will accept decisions dictated by someone else.”

Not only did Lindsay believe that students would be more invested in the course and complete more of their assignments if they had some hand in designing the syllabus, but she also believed that because students differ, and students differ from her, a co-constructed syllabus would meet students’ needs better than any she could construct individually. A negotiated syllabus could take her and her students’ differences and pre-existing conflicts of interest into account.

Drawing on her training in mediation, Lindsay facilitated an interest-based negotiation on the first day of the course. She led students through a discussion of their and her interests before she let them begin taking and defending concrete positions regarding the syllabus’ organization. To begin, she made three columns on the board. On the left, she listed the positions of the absent third party to the negotiation, the University of Michigan. The English department required that students write between thirty and forty

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pages of “formal writing” in this particular class. The institution also required a list of grades by June 20. Lindsay acknowledged that they all had to work with these positional demands because they weren’t negotiable but were nonetheless significant.

Then the fun began. She next modeled an articulation of her own interests regarding the syllabus. For instance, she said she wanted students to write multiple drafts so they could receive feedback from her and their peers. She hoped to have no disciplinary problems, i.e., neither plagiarism nor uncompleted work. She was interested in seeing students become enthusiastic about the topics of their papers. And she also was interested in sharing what she knew about effective composing strategies, stylistic tricks of the trade, and the principles of rhetoric that helped her feel more confident as a writer. This list is not exhaustive of what Lindsay eventually discussed with her students, but notice the shift to deep-seated interests and away from rigid positions like deadlines.

After modeling this exploration of interests, she opened up the floor for students to share their own interests. What did they want to get out of this course? Though the first answers were quite academic, articulating a desire to improve their ability to address a scholarly audience, students also began to share their desires for a manageable workload and for interesting writing topics. When the board was nearly covered with interests, some of which seemed mutually exclusive, Lindsay led the group into a discussion of positions, that is, to the actual design of the syllabus including topics of papers and deadlines. To make a long story shorter, though an initial student push was made for a completely open syllabus allowing students to work toward the forty-page goal at their own pace, students who believed that was not in their best interest turned the tide and convinced the others to create a weekly six-page deadline. They agreed that they wanted to write about topics of their own choosing at lengths of their own choosing. On any given week, some students turned in three two-page creative essays and others turned in six pages of progress toward one forty-page work. The class was a joy.

In some ways, this method of syllabus design looks like a mediation. The instructor has the chalk and is facilitating the exploration of interests and eventually the taking of positions. She mediates when students’ interests conflict, and mediates in a more general way between students’ needs and those of the university. But we think it is critical to remember that the instructor is never a neutral party. In this sense, this activity was a negotiation with
no neutral party, because to be truly effective, an instructor must acknowledge that he or she has a whole list of his or her own needs and interests that will certainly impact the class’s progress. We think this practice of negotiation should not stop after the first day either. Negotiations can also address the very different agendas students and teachers bring to any particular activity, especially when students want simple and practical approaches to writing and teachers seek to complicate their relationship to language.

A second specific idea for teaching writing is to use ADR practices as models for students’ compositions. Lindsay’s syllabus for “Argumentative Writing” leads students through a three essay sequence. In preparation for writing the first essay, the class examines the theory and methods of arbitration. Students then write essays that arbitrate between conflicting viewpoints, striving to be objective third-person authors who give a disinterested analysis of a debate. In this first essay, students articulate a decision in favor of a particular position. The second essay grows out of a study of mediation, and the student writers turn in a paper that finds the common ground between conflicting viewpoints instead of deciding in favor of any one. After exploring mediation, the class looks at negotiation. In this third and final essay, students are asked (or invited) to leave their neutral stance and enter the debate as fully interested parties. They negotiate with the positions of others in the first person, using the authority of their “I,” which is often taboo in high school.

By studying and practicing three different approaches to resolving a conflict of viewpoints, students are forced to think critically about the choices they and any essay writer make. Suddenly, how one develops a thesis statement is seen to be a choice that reflects a particular epistemology. Students are asked not just to decide what their thesis statement will be, but to decide how they are going to determine what their thesis statement will be. They are asked to engage in meta-cognition, that is, thinking about their thinking. ADR gives Lindsay a language to teach this. It allows her to talk about the multiplicity of ways that writers can develop a thesis that uniquely intervenes into a conflict of viewpoints.

The sequencing of the essay assignments is also important. Placing the arbitration essay first seemed appropriate once Lindsay realized how prominent arbitration was to modernist social reformers and how aptly negotiation’s principles can reinforce some postmodern ideas about knowledge. So this particular se-
quence reflects aspects of the twentieth century history of arbitration, mediation, and negotiation as they developed within U.S. law and business. It can help students not only to think critically through their epistemological decisions as writers, but also to understand something about the twentieth century shift in these epistemological paradigms, from modernist conceptions of objective truth to postmodernist conceptions of situated truths.

Let us explain this further. In her recent biography of Frances Kellor, *Endless Crusade*, Ellen Fitzpatrick notes the influence of Kellor’s training as a social scientist at the University of Chicago upon her later work, including the founding of the American Arbitration Association (AAA). Kellor developed a faith in the power and efficacy of social scientific methods to improve the world, and this faith springs off the pages of her book *American Arbitration*. As a modernist, she was confident that scientific methods would uncover objective truth and best practice. For instance, Kellor lauds arbitration as “a science that might one day help to bring peace and tranquility within the nation and security against war,” and she calls the AAA a “laboratory” for this work.¹⁵ Throughout her career, Kellor believed that effective social reform was possible if political power could be placed in the hands of those with scientific expertise. For Kellor, arbitration did just that, giving the power to decide resolutions to an objective, often expert, outside party who strove to discern the truth of the situation.

Mediation, on the other hand, gives disputing individuals control of their own outcome. While arbitration came onto the American scene powerfully in the 1920s and 30s, when modernist conceptions of scientific expertise were still prevalent, mediation didn’t rise to join arbitration in popularity until the 1970s, when the U.S. Department of Justice established pilot programs across the country to test mediation’s viability. The Atlanta Justice Center, one such pilot program still in operation, reports that it was founded by the Department in order to determine “whether alternatives to litigation, such as arbitration and mediation, would more quickly resolve disputes *without violating any party’s due process or civil rights.*”¹⁶ Mediation became attractive to disputants and to the Department of Justice at the same time that American attention shifted to the rights of individuals and to the potential abuses of centralized power. Self-determination, not expert judg-

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¹⁵ Kellor, *supra* n. 12.

ment, became seen as more democratic and more just. As confidence in scientific expertise and knowable objective truth declined, mediation rose as a preferred alternative to arbitration in many cases.

Soon afterwards, when Fisher and Ury established the Harvard Negotiation Project in 1979 and published *Getting to Yes: Negotiating Agreement without Giving in* in 1981, negotiation joined mediation and arbitration as a subject for academic, legal, and corporate study.\(^{17}\) The negotiation theory that came and continues to come out of the Harvard Project and its associated organizations emphasizes the cultural and social specificity of knowledge. This body of work counsels would-be negotiators to try to understand a conflict from the other party’s point of view. While this sounds simple, it indicates a significant shift away from a concern for objective truth. “In each situation,” Fisher, Kopelman, and Schneider write in *Beyond Machiavelli*, “the key to the dispute is not objective truth but what is going on in the heads of the parties.” Each person’s perceptions of the world differ, they argue, because each person has different experiences, selects different experiences as significant, and reads incoming data with reference to prior experiences and interests. “We often handle conflict poorly because we are each prisoners of our own thinking,” they write. “In any conflict people think and feel differently from one another, and the issue is not whose perceptions are ‘true’ and whose are ‘false.’”\(^{18}\) The issue is, rather, finding a way for both parties’ needs to be met, though there is an assumption that these needs may change as parties grow in their understanding of the reasons for the others’ perceptions. This emphasis on subjective knowledge is not a message hidden in the literature either. It is central and foundational. The current and advertised motto of one of the Harvard Negotiation Project’s affiliated organizations called Common Outlook Incorporated is “What you see depends on where you stand.”\(^{19}\)

By using a three-essay sequence that asks students to approach a conflict of viewpoints first as arbitrators, second as mediators, and third as interested negotiators, we can give students a repertoire of critical thinking skills, help them become attentive readers of others’ viewpoints, and introduce them in a hands-on

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\(^{19}\) Common Outlook Consulting, Inc., *supra* n. 17.
way to the paradigm shifts in epistemology that define the twentieth century. They can begin to become conscious of how they have understood truth and knowledge, and how they have approached new ideas. In *Culture and Truth: The Remaking of Social Analysis*, Renato Rosaldo describes the shift that we are introducing students to by citing leading anthropologist Clifford Geertz:

According to Geertz, the social sciences have undergone deep changes in their conceptions of (a) the object of analysis, (b) the language of analysis, and (c) the position of the analyst. The once dominant ideal of a detached observer using neutral language to explain “raw” data has been displaced by an alternative project that attempts to understand human conduct as it unfolds through time and in relation to its meaning for the actors.20

Rosaldo, an anthropologist himself, celebrates these changes. No longer comfortable writing about cultures as a detached expert observer, he believes that writing narratives of his own participation and investment in the cultures that he experiences offers a richer picture of those cultures and allows him to raise issues that strict objectivity precluded. He argues that “dismantling objectivism creates a space for ethical concerns in a territory once regarded as value-free. It enables the social analyst to become a social critic.”21 In the negotiation-style paper, Lindsay’s students are asked to make this move, writing no longer as objective analysts but as social critics with an investment in the issue under their investigation. The three-essay sequence allows students to develop this skill as well as the more objectivist ones, giving them a deep toolbox of conflict management methods to draw on when confronted with an issue in need of response. Though we are wary of mandating students’ conversion to postmodern epistemologies, we think it is beneficial to introduce students to good reasons why all voices within conflicts should be given respectful attention and to give students good strategies for using language and critical thinking to do so in their essays.

As we have said, we are excited about what becomes possible when composition recognizes the resources that ADR research offers. Lindsay’s dissertation project contributes to the ongoing dis-

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21 *Id.* at 181.
cussion of writing pedagogy, specifically addressing conversations about how instructors can manage instances of social, cultural, and ideological struggle in classrooms and writing tasks. It speaks to issues in critical pedagogy generally, and offers a way to productively discuss competing views of the purposes of teaching writing. By making use of the theories and practices of arbitration, mediation, and negotiation as writing strategies, we foresee a potential resolution to the one conflict between teachers and students that Russell Durst describes, that is, the conflict between student pragmatists and teacher problematizers. Because ADR methods are not only concrete strategies for resolving conflicts but also embodiments of particular epistemological stances, teaching these varying approaches together meets both the needs of pragmatic students who want writing technologies to increase their efficiency and effectiveness, and the needs of critically-minded professors who want students to leave their course with nuanced understandings of social and intellectual paradigms and habits of critical thought. Thus we think that teaching skills and technologies and teaching towards critical thinking do not have to be mutually exclusive. Professors can teach specific skills and methods for managing the conflicts of ideas and ideologies that students encounter — skills and methods that actually require and put to practical use certain habits and disciplines of mind, such as open-mindedness, tolerance, a willing and yet critical suspension of disbelief, an ability to deconstruct arguments and evaluate them according to a set of objectives, and an ability to identify one’s own interests and assumptions in a conflict.

In the spirit of negotiation, then, we’d love to hear from readers with a knowledge of legal writing and a relatively close proximity to ADR. We’re still exploring other uses of negotiation, mediation, and arbitration in teaching writing. We welcome your responses, then, to keep this intellectual project dialogic and to make it the fullest work possible.
THE USE AND EFFECTS OF STUDENT RATINGS IN LEGAL WRITING COURSES: A PLEA FOR HOLISTIC EVALUATION OF TEACHING

Judith D. Fischer*

I. INTRODUCTION

Student ratings are pervasive in American universities.1 Sometimes called “student evaluations,” they are obtained through questionnaires on which students rate their instructors and courses. They were first used in a few scattered colleges in the 1920s2 and remained largely voluntary and informal for decades.3 Their use increased in the 1960s, when student groups administered them and made their data available to other students.4 Soon university administrators decided that they, too, could use student ratings, and they began administering and maintaining the forms for use in personnel decisions.5 Eventually, student ratings became mandatory in many universities.6 They are now a major and some-

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1 See Joseph Lowman, Mastering the Techniques of Teaching 11 (2d ed., Jossey-Bass 1995) (stating that “[s]tudent evaluations have become routine at most U.S. colleges in the past two decades”).

2 See John A. Centra, Reflective Faculty Evaluation: Enhancing Teaching and Determining Faculty Effectiveness 50 (Jossey-Bass 1993) (explaining that in the 1960s professors often voluntarily administered student evaluation forms for their own information).


4 See Ory, supra n. 2, at 64 (discussing administrators’ adoption of student ratings in the 1970s).

5 Id.
times the sole source of information about professors’ teaching effectiveness for salary, retention, and promotion purposes.\textsuperscript{7}

This whole process occurred without much analysis of how student ratings would impact university education.\textsuperscript{8} Twenty-five years ago, a scholar observed that there seemed to be no published surveys of university personnel “certifying that the level of instruction was higher after [the rating] scales were adopted.”\textsuperscript{9} There still seem to be none. This has prompted scholars to call for more research on the effects of the ratings.\textsuperscript{10}

Meanwhile, few would contend that university teaching and learning have improved during the ratings’ ascendancy. Instead, academics and commentators bemoan the decline of standards in U.S. universities,\textsuperscript{11} report grade inflation\textsuperscript{12} and decreased student workloads,\textsuperscript{13} and contend that many college graduates lack basic knowledge.\textsuperscript{14} Education professor J.E. Stone has argued that the

\textsuperscript{7} See Valen E. Johnson, \textit{Grade Inflation: A Crisis in College Education} 50 (Springer 2003) (stating that “a vast majority of American universities now include some summary of these evaluations when making promotion and tenure decisions”); Peter Seldin, \textit{Point of View: The Use and Abuse of Student Ratings of Professors}, Chron. Higher Educ. A40, A40 (July 21, 1993) (stating that student ratings are sometimes misused as the only source of information about teaching effectiveness).

\textsuperscript{8} See Max O. Hocutt, \textit{De-Grading Student Evaluations: What’s Wrong with Student Polls of Teaching}, 1 Academic Questions 55, 60 (Winter 1987–1988) (stating that student ratings were adopted without proof of what they measure and not for educational reasons but for political and economic ones).

\textsuperscript{9} Robert Powell, \textit{Faculty Rating Scale Validity: The Selling of a Myth}, 39 College English 616, 626 (Jan. 1978).

\textsuperscript{10} E.g. Johnson, supra n. 7, at 140–141 (arguing that it is important to evaluate the effects of the ratings); John C. Ory & Katherine Ryan, \textit{How Do Student Ratings Measure up to a New Validity Framework?} 109 New Directions for Institutional Res. 27, 41 (2001) (calling for “studies of how student ratings are used on today’s campuses and what happens as a result”); Paul Trout, Flunking the Test: The Dismal Record of Student Evaluations, 86 Academe 58, 59 (July/Aug. 2000) (noting a lack of research on how student ratings affect classroom standards).


\textsuperscript{12} E.g. Louis Goldman, \textit{The Betrayal of the Gatekeepers: Grade Inflation}, 37 J. Gen. Educ. 97, 99–101 (1985) (citing sources showing that grade inflation occurred in American universities while ACT and SAT scores were declining); Stone, supra n. 11, at 4 (discussing sources that document grade inflation).

\textsuperscript{13} E.g. Johnson, supra n. 7, at 163.

\textsuperscript{14} One indicator of declining achievement is the Graduate Record Examination, on which the scores of college seniors declined in most subjects after 1964. See Tom Shachtman, \textit{The Inarticulate Society} 65–66 (Free Press 1995) (stating that SAT scores declined from 1963 to 1995); see also Susan Hanley Kosse & David ButleRitchie, \textit{How Judges, Practi-
decline in student learning as student ratings gained prominence “speaks for itself.”

As student ratings became prominent in undergraduate schools, they were also adopted in law schools, including courses in legal writing, a subject I teach. Yet only a few scholars have explored the ratings’ use in law school in any depth, and there is only one reported study of student ratings of legal writing courses. Folklore in the field of legal writing holds that student ratings of the course are influenced by factors other than the quality of teaching — factors like the difficulty of the course, the students’ reluctance to have their writing criticized, and their receipt of critiques and grades before they complete the forms. Anecdotal
evidence also indicates that student ratings prompt some law teachers to water down course work in the quest for better ratings. Yet few data currently exist on these points.

To explore these issues in the context of legal writing courses, I analyzed the recent research on student ratings and surveyed members of the Association of Legal Writing Directors (ALWD), whose members direct law school writing curricula or teach in schools without writing directors. ALWD members have a useful perspective on student ratings because many not only teach but also evaluate other teachers. While some of their observations apply mainly to the legal writing field, others may be relevant to other disciplines as well.

This Article reports the results of my research. Part II below provides an overview of the extensive literature on student ratings, with a particular focus on recent research that challenges some widespread assumptions about them. Part III reports my survey methodology and discusses the ratings' use and effects as reported by the ALWD members who responded to the survey. Part IV presents conclusions and recommends that, to promote appropriate standards for student learning, legal writing teachers should be evaluated on a holistic basis rather than by heavy reliance on student ratings.

II. THE LITERATURE ON STUDENT RATINGS

A. Background

Some background will place this discussion of student ratings in context. By student ratings, I mean questionnaires on which students give their opinions about the courses they take and the professors who teach them. The rating forms usually contain some objective questions (that is, questions whose answers are coded on

22. Id. at 74 (describing the author's attempts to improve ratings by “hand-holding,” including giving students key issues and authorities for their papers, even though this might discourage independent analysis); see also Markovits, supra n. 16, at 427 (stating that professors are tempted to demand less in order to obtain good student ratings, and that each professor’s “adjustment to student desires makes it more costly for the others to do what they think is right”).

23. Although the completed questionnaires are sometimes called “student evaluations,” the phrase “student ratings” is more exact and has been adopted by most researchers in the field because it “distinguish[es] between the people who provide the information (sources of data) and the people who interpret it (evaluators).” William E. Cashin, IDEA Paper No. 20: Student Ratings of Teaching: A Summary of the Research 1 (Sept. 1988).
a numeric scale such as 1 to 5) along with space for the students’ comments. They are typically administered while the teacher is out of the room on one of the last days a class meets. Students usually submit them anonymously.

Student ratings researchers often discuss issues concerning the ratings’ validity. In the field of statistics, a measurement is called valid if it measures what it is supposed to measure. This, of course, raises the question of what student ratings are supposed to measure. While most agree that they should measure effective teaching, scholars do not agree on a single definition of that concept. This problem is particularly intractable in the law school setting, where there is no consensus about the best way to teach the skills and critical thinking that lawyers must employ. Professor Richard Abel summarized the differing points of view about teaching law: “Should students be spoon-fed or made to think for themselves? Should they be taught black-letter law or larger issues?” Indeed, some students may want professors to provide them with simple answers, but that approach may not be appro-
appropriate for teaching law, which is replete with ambiguities and contradictions.29

Moreover, there is disagreement about whether teaching effectiveness can be measured, and if so, how it should be measured. Student achievement is often proposed as the appropriate indicator of effective teaching, but there is no universally accepted means of measuring it.30 This is especially so with legal writing courses, because no test exists to measure whether students have learned the complex analytic and verbal skills covered in the course.31 These uncertainties about measuring student learning make it difficult to determine whether student ratings of the course are valid — that is, whether they actually measure success in teaching it.

Another relevant concept is the reliability of the ratings, which refers to the level of agreement among responses either within a class or between students and other sources, such as faculty observers or former students.32 Thus, for example, ratings would be reliable within a class if the range of students in that class tended to give the teacher the same ratings.

Student ratings researchers have undertaken several types of studies.33 Experimental studies work with “experimental analogues” of university courses.34 Such studies have been heavily

29 See Abel, supra n. 17, at 436 (stating that “instructor[s] cannot teach students black-letter law and simultaneously demonstrate that the law is internally contradictory”).

30 Johnson, supra n. 7, at 152 (stating that “there are no universally agreed-upon measures of student achievement”); James A. Kulik, Student Ratings: Validity, Utility, and Controversy, 109 New Directions for Institutional Res. 9, 10 (2001) (stating that “no one knows what measure to use as the criterion of teaching effectiveness”).

31 See Kosse & ButleRitchie, supra n. 14, at 87–90 (identifying numerous skills involved in competent legal writing). While law graduates’ bar examination results might be proposed as a measure of their learning in the legal writing course, the bar examination is not a practical measure of particular teacher’s effectiveness because it does not isolate effects of individual teachers. Moreover, many states do not release individual scores to schools, and variations in bar exam standards by location and year would impede meaningful comparisons in any event. See George B. Shepherd, No African-American Lawyers Allowed: The Inefficient Racism of the ABA’s Accreditation of Law Schools, 53 J. Leg. Educ. 103, 127 (2003) (noting that states frequently change their bar passage rates from year to year, and different states’ rates vary substantially from one another).


33 For more comprehensive summaries of the types of student ratings studies, see Anthony G. Greenwald, Validity Concerns and Usefulness of Student Ratings of Instruction, 52 Am. Psychol. 1182, 1182–1184 (Nov. 1997), and Ory & Ryan, supra n. 10, at 30–31.

criticized on methodological grounds; a major issue is that they do not take place in an actual classroom setting where students expect to be tested and graded on their knowledge.\textsuperscript{35} By contrast, field studies work with university classes.\textsuperscript{36} The most common type of field study of student ratings is the multisection validity study, which typically focuses on a large introductory undergraduate course with multiple sections and instructors.\textsuperscript{37} These studies attempt to measure the correlation between student ratings and student learning by using scores on a common examination as an indicator of learning.\textsuperscript{38}

When student ratings are used to help instructors improve their teaching, researchers call their purpose formative; when they are used for personnel decisions, their purpose is summative.\textsuperscript{39}

\textbf{B. Are Student Ratings Valid? — Two Viewpoints}

In 1998, a journalist identified nearly 2,000 studies on student ratings,\textsuperscript{40} most of them published after 1970, and articles on the subject have continued to proliferate. Yet there is a continuing lack of consensus among scholars about a number of points, including the important issue of the ratings’ validity, that is, whether they actually do measure teaching quality.

Some scholars have declared the case in favor of validity closed. For example, in a 1984 review of the research on the point, (1973). For that study, professionals attended a single lecture by an actor playing “Dr. Fox,” who looked distinguished, sounded authoritative, spoke expressively, and larded his talk with humor. \textit{Id.} at 631. However, the lecture was filled with double talk and non sequiturs to the point of being essentially meaningless. \textit{Id.} at 631–632. Nevertheless, the attendees rated the lecture highly for both presentation and content, leading the study’s authors to conclude that ratings can be biased by matters of style even when content is lacking. \textit{Id.} at 633. Subsequent researchers have identified serious flaws with this study. \textit{E.g.} Johnson, \textit{supra} n. 7, at 135–137 (identifying weaknesses in the Dr. Fox study).


\textsuperscript{36} \textit{See} Cohens, \textit{supra} n. 34, at 288–290.

\textsuperscript{37} Johnson, \textit{supra} n. 7, at 143. For a comprehensive analysis of the multi-section studies up to 1987, see Marsh, \textit{supra} n. 26, at 253. A more recent review appears in Anthony G. Greenwald, \textit{Applying Social Psychology to Reveal a Major (but Correctable) Flaw in Student Evaluations of Teaching}, paper presented at the Annual Meeting of the American Psychological Association (available through ERIC).

\textsuperscript{38} Greenwald, \textit{supra} n. 37, at 6; Marsh & Roche, \textit{supra} n. 26, at 1191.


ratings scholar Herbert Marsh wrote that student ratings are “quite reliable” and “reasonably valid” and that “much of the debate is based on ill-founded fears about student ratings . . . .”  

More recently, Theall and Franklin stated that student ratings are “generally valid and reliable,” that efforts to find negative evidence about them are a “witch hunt,” and that those who question the ratings are simply unfamiliar with the literature on the subject.  

Two writers in the legal academy have echoed these opinions, writing that academics should “put aside our doubts about [student ratings’] validity and reliability,” which are “pretty much settled.”  

It is just such statements, psychology professor Anthony Greenwald contends, that have discouraged newer research and deflected attention from older studies finding the ratings biased and questioning their validity.  

Greenwald’s review of the literature led him to conclude that the ratings have only modest convergent validity (correlation with other measures of teaching effectiveness) and unproven discriminant validity (freedom from the influence of other factors).  

He therefore found it a “paradox” that “well respected researchers have asserted that it is acceptable to treat student ratings as construct-valid measures of instructional quality.”  

Other scholars have stated that student ratings measure not teaching effectiveness but student perceptions of teaching effectiveness or feelings that are not directly related to good

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41 Marsh, supra n. 32, at 749.
42 Michael Theall & Jennifer Franklin, Looking for Bias in All the Wrong Places: A Search for Truth or a Witch Hunt in Student Ratings of Instruction? 109 New Directions for Instructional Res. 45, 45, 46 (2001); see also Marsh, supra n. 26, at 305 (calling the search for biases a “witch hunt”); Peter A. Cohen, Bringing Research into Practice, 43 New Directions for Teaching & Learning 123, 125 (1990) (contending that negative opinions about student ratings are “myths” supported only by anecdotal evidence).
43 Walter, supra n. 17, at 182 (footnote omitted).
44 Wangerin, supra n. 17, at 112.
45 Greenwald, supra n. 33, at 1186. Older studies questioning the ratings’ validity include Joseph DuCette & Jane Kenney, Do Grading Standards Affect Student Evaluations of Teaching? Some New Evidence on an Old Question, 74 J. Educ. Psychol. 308, 312 (1982) (finding that students’ expected grades accounted for part of the variance in their ratings of professors), and Powell, supra n. 9, at 621 (citing studies in which manipulated grade expectations affected student ratings).
46 See Greenwald, supra n. 33, at 1184–1185 (summarizing four validity studies).
47 Greenwald, supra n. 37, at 8. Greenwald stated that ratings research occurred in four periods, the first two of which, from 1971 to 1980, contained many methodologically sound studies showing bias. Id.
48 Ory, supra n. 2, at 73.
teaching and learning.\textsuperscript{49} McKeachie declared that “[f]or personnel purposes, faculty and administrators rightfully have great concerns about the validity and reliability of evaluation data.”\textsuperscript{50} Others have bluntly called the ratings “risky business,”\textsuperscript{51} “pernicious,”\textsuperscript{52} or “an unqualified failure”\textsuperscript{53} with a “dysfunctional” impact.\textsuperscript{54} How can scholars come to such divergent conclusions about student ratings? Several factors help explain this.

First, validity is to some extent in the eye of the beholder.\textsuperscript{55} All studies of student ratings are probably flawed in some way, because in an educational field study it is not ethically or practically possible to exercise complete control over the participants and their environment. Moreover, studies have produced a wide range of correlations between the ratings and student learning, ranging from negative to high,\textsuperscript{56} with an average coefficient of around .43 (on a scale of zero to one).\textsuperscript{57} Some look at this data and call the correlation between ratings and student learning “consistently high”\textsuperscript{58} or make broad statements that research “is amazingly consistent in showing [student ratings] to be reliable and valid . . . .”\textsuperscript{59} Other scholars, however, describe this level of validity as “moderate”\textsuperscript{60} or “modest.”\textsuperscript{61} Writers on both sides of the subject

\textsuperscript{49} John Palmer et al., \textit{Leniency, Learning, and Evaluations}, 70 J. Educ. Psychol. 855, 862 (1978); Larry E. Stanfel, \textit{Measuring the Accuracy of Student Evaluations of Teaching}, 22 J. Instructional Psychol. 117, 122 (June 1995).
\textsuperscript{50} W.J. McKeachie, \textit{Can Evaluating Instruction Improve Teaching?} 31 New Directions for Teaching & Learning 3, 4 (Fall 1987).
\textsuperscript{51} Powell, supra n. 9, at 628.
\textsuperscript{53} Johnson, supra n. 7, at 151.
\textsuperscript{55} See Abrami et al., supra n. 35, at 459 (stating that “[c]onclusions about validity are a matter of judgment”).
\textsuperscript{56} Cohen, supra n. 34, at 296 (reporting a wide span of correlations ranging from .21 to .61).
\textsuperscript{57} Id. at 295. Cashin has stated that, in this setting, validity coefficients below .29 are “not practically useful,” those in the range of .30 to .49 are “practically useful,” and higher coefficients are “very useful” but uncommon because learning is a complex phenomenon. Cashin, supra n. 26, at 3.
\textsuperscript{58} Theall & Franklin, supra n. 42, at 49.
\textsuperscript{59} Lowman, supra n. 1, at 15.
\textsuperscript{61} E.g. Peter A. Cohen, \textit{Comment on a Selective Review of the Validity of Student Rat-
selectively cite sources to support their views.62 The different viewpoints of those who interpret the ratings thus lead to varying impressions of the data.

Second, the ratings are used in a wide variety of settings, from undergraduate to graduate schools, and from introductory mathematics courses to advanced creative writing courses.63 Yet the multisection validity studies that provided much of the support for the ratings’ validity typically involved only objective tests in undergraduate introductory courses, because those courses have enough sections to provide a large statistical pool. There is some question whether the data from these studies are relevant to advanced courses.64 The typical rating form does not address whether the course promotes complex analysis,65 yet that is an important component of graduate study in some fields, including the law. Use of the forms in disparate settings produces some inconsistent conclusions about their effectiveness.

Third, many student rating forms now in use have not been subjected to sufficient validity testing.66 “Home-grown” instruments, developed at individual institutions, have often not been tested for validity at all and contain ambiguous and confusing items.67 This situation partially explains why studies reach inconsistent results.68

62 See Cohen, supra n. 42, at 125 (stating that both supporters and detractors of student ratings support their points by citing selectively).
64 See Cohen, supra n. 34, at 305 (stating that the correlation between ratings and achievement may be different in advanced courses); Centra, supra n. 3, at 63 (stating that the teaching behaviors in multi-section validity studies may not be well suited for higher level courses involving critical thinking).
65 See Kolitch & Dean, supra n. 63, at 28; Wilbert McKeachie, Student Ratings: The Validity of Use, 52 Am. Psychol. 1218, 1219 (1997) (proposing that validity data must “go beyond recall of facts” to cover other educational goals).
66 See Johnson, supra n. 7, at 142 (stating that no measures of student learning were used to determine which items to include on Marsh’s widely-used Students’ Evaluation of Educational Quality (SEEQ) form); Marsh, supra n. 26, at 263 (stating that most evaluation forms contain an “ill-defined hodge-podge” of items, leaving no basis for knowing what is being measured or comparing results with other findings); McKeachie, supra n. 65, at 1223 (stating that most current rating forms were developed through “dust bowl empiricism”).
67 Kolitch & Dean, supra n. 63, at 28, 31.
68 See Marsh & Roche, supra n. 26, at 1187 (stating that “[p]oorly worded or inappropriate items will not provide useful information, whereas scores averaged across an ill-defined assortment of items offer no basis for knowing what is being measured”). Marsh and Roche suggested Marsh’s SEEQ form as an alternative. Id. at 1187–1188.
Fourth, researchers disagree about whether student ratings improve teaching. Study results on the point are mixed. One researcher concluded that “for the most part student-rating feedback has made a modest but significant contribution to the improvement of college teaching.” Like many who discuss the point, he concluded that instructors’ teaching had improved if their student ratings rose. There is, however, an alternate explanation for the improved ratings: perhaps the instructors did not become better teachers but simply became more ratings savvy. This does occur: faced with the need for acceptably high ratings, an instructor may “inflate grades, deflate coursework, and keep grade expectations high,” as the literature and the results of my survey indicate.

Fifth, several constituencies benefit from the ratings’ continued use, which creates a potential for biased analyses.

- University administrators and boards. The ratings’ technical appearance appeals to administrators and boards who seek numeric proof that universities are succeeding in their mission. As Williams and Ceci noted, there is a “heightened desire for objective grounds on which to evaluate faculty for reappointment, tenure, and promotion decisions; on the surface, at least, student evaluations produce numbers, which seem not to lie.” Abel identified this exaltation of numbers as the “micrometer fallacy,” a form of innumeracy that attributes meaning to a number simply because it can be calculated.

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70 Peter A. Cohen, Effectiveness of Student-Rating Feedback for Improving College Instruction: A Meta-Analysis of Findings, 13 Res. Higher Educ. 321, 336 (1980); but see Seldin, supra n. 7, at A40 (stating that student ratings do “not necessarily” improve teaching.)
71 Cohen, supra note 70, at 323, 337.
73 See infra nn. 151–176 and accompanying text (discussing grade inflation as a collateral effect on student ratings).
74 See David A. Dowell & James A. Neal, The Validity and Accuracy of Student Ratings of Instruction: A Reply to Peter A. Cohen, 54 J. Higher Educ. 459, 462 (1983) (stating that higher education officials like the ratings because of “the seductive way they seem to reduce a complex human activity, teaching, to simple numbers”).
76 Abel, supra n. 17, at 428–429 (footnotes omitted).
stand that the ratings imperfectly reflect actual teaching but continue to use them anyway because they are inexpensive to administer and provide data that can be interpreted in various ways to suit the administration’s purpose.

- **Some students.** The ratings appeal to some students because they appear to give them a voice and power (even if that power is not always beneficial).
- **Some faculty members.** The ratings appeal to some faculty members who benefit from them. And ironically, considering the ratings’ purported purpose of improving teaching, some faculty may even be “quite happy to dumb down their classrooms” in service of the ratings, because requiring less work from students lightens the teacher’s workload as well.

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77 See Trout, supra n. 10, at 60 (stating “that highly numerate administrators . . . treat evaluation scores as meaningful,” although they must understand their limitations).

78 Id. (referring to student ratings as a “cheap way to convince taxpayers and politicians that their institution rewards classroom instruction to the second decimal”); Seldin, supra n. 7, at A40 (explaining that administrators like student ratings partly because they are “easy to administer and to score”).

79 See Abel, supra n. 17, at 454 (stating that administrators use the ratings to “retain their power”); Marina Angel, Women in Legal Education: What It’s Like to Be Part of a Perpetual First Wave or the Case of the Disappearing Women, 61 Temp. L. Rev. 799, 832 (1988) (stating that law faculties can interpret high ratings as evidence of either good teaching or pandering to the students and low ratings as evidence of either bad teaching or being appropriately tough); Mary Gray & Barbara R. Bergmann, Student Teaching Evaluations: Inaccurate, Demeaning, Misused, 89 Academe 44, 45 (Sept.–Oct. 2003) (stating that administrators use student ratings as a weapon to proclaim that fifty percent of faculty are “bad teachers”); Trout, Flunking the Test, supra n. 10, at 60 (stating that the ratings are used to pressure instructors not to upset the students).

80 See Sacks, supra n. 28, at 96 (stating that the ratings give students an inordinate amount of power); Abel, supra n. 17, at 454 (stating that students who seek revenge against instructors will defend the ratings); Robert E. Haskell, Academic Freedom, Promotion, Reappointment, Tenure and the Administrative Use of Student Evaluation of Faculty (SEF): Analysis and Implications of Views from the Court in Relation to Academic Freedom, Standards, and Quality Instruction, 5 Educ. Policy Analysis Archives 22 (Nov. 25, 1997), available at http://epaa.asu.edu/epaa/v5n21.html (stating that students like the ratings because they result in inflated grades); Hocutt, supra n. 8, at 61 (stating that students wanted ratings because they wanted teachers they could control).

81 See Abel, supra n. 17, at 454 (stating that instructors who receive high ratings have a vested interest in the system); Haskell, supra n. 80, at 22 (stating that, along with administrators and students whose work load is lightened, faculty members who receive high ratings are in a “closed, mutually rewarding, escalating system with little or no restraining feedback”).

82 Trout, supra n. 10, at 60.
Those who profit from the forms’ continued use. Some of the staunch defenders of student ratings maintain centers for student evaluation, some of which sell rating forms. Johnson pointed out that designing the forms “has become something of a cottage industry” among ratings researchers, who hope to bolster their forms’ credibility by expressing “dismay” at suggestions that the ratings may be biased. Another scholar proposed that research by those who profit professionally or financially from student ratings should be viewed as critically as any other research performed by those who stand to profit from it.

These factors explain some of the disagreement among student ratings researchers. It is beyond the scope of this Article to attempt to reconcile the researchers’ incongruent conclusions. But one thing seems clear: statements that the research is “amazingly consistent” in showing student ratings to be unqualifiedly “reliable and valid” are not sustainable in light of well supported findings to the contrary, as developed further below.

C. Biasing Factors

Part of the difficulty with student ratings is that they may measure a number of things other than teaching effectiveness. Recent studies have contributed important new data on this point.

A recent study by Stapleton and Murkison dramatically showed the limits of the term “valid” as applied to student ratings. Their study showed a positive correlation between student ratings and student-reported learning. But theirs was perhaps

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83 See Johnson, supra n. 7, at 58–59 (stating that “many of the most notable researchers in this area proposed their own instruments during the 1970s and 1980s. Suggestions that these instruments were biased by the effects of instructor grading practices were vigorously contested.”); Powell, supra n. 9, at 621 (stating that “[m]uch of the published research and most of the survey articles favorable to ratings continue to come from . . . sources” that sell forms or whose “jobs or professional advancement” depend on their continued use).

84 Johnson, supra n. 7, at 58.

85 Powell, supra n. 9, at 617; see also Johnson, supra n. 7, at 238 (stating that some researchers refuse to acknowledge that higher grades do translate into higher ratings because they want to bolster the credibility of their own rating forms).

86 See supra n. 59 and accompanying text.


88 Id. at 273, 276–277.
the only study to break down and report data by professor.\textsuperscript{89} Broken down that way, the data revealed that some instructors confounded the general trend: of the twenty-nine instructors studied, four who produced learning in the top half received ratings in the bottom half, while four who produced learning in the bottom half received ratings in the top half.\textsuperscript{90} Had personnel decisions been made on the basis of these data, with a cutoff at the median,\textsuperscript{91} four of the more effective professors would have been punished or dismissed, while four of the less effective ones would have been rewarded. This study highlights an important point about statistical data: an overall correlation between two variables does not mean that one variable is always correlated with the other in particular instances.\textsuperscript{92}

Stapleton and Murkison did not attempt to explain why eight professors confounded the general pattern. But studies have demonstrated that a number of factors other than teaching effectiveness influence student ratings.

1. \textit{Expected Grades}

Student ratings usually correlate with the students’ grades; numerous studies have demonstrated this, comparing ratings with either expected or final course grades.\textsuperscript{93} But does this occur because highly rated teachers teach better, causing their students to achieve more and thus deserve better grades? Does it occur because students reward teachers from whom they have received or expect to receive good grades? Or is there some other explanation?\textsuperscript{94}

Two scholars recently attempted to untangle these relationships. Psychology professor Anthony Greenwald and assessment specialist Gerald M. Gilmore asked students in hundreds of cours-

\textsuperscript{89} Id. at 282.
\textsuperscript{90} Id. at 279. For example, the instructor who ranked ninth in learning production ranked twenty-first in student-appraised excellence. Id. at 282.
\textsuperscript{91} Universities do sometimes use student ratings data this way. See Abel, supra n. 17, at 452–453 (stating that “faculty grossly misuses the numerical results . . . . They stigmatize those falling below the median, even though half the instructors must do so . . . . [N]umbers become the decision instead of informing it.”).
\textsuperscript{92} Theall & Franklin, supra n. 42, at 51.
\textsuperscript{93} See Johnson, supra n. 7, at 52–57 tbl. 1, 63–68 tbl. 2 (summarizing studies).
\textsuperscript{94} See Philip C. Abrami, Improving Judgments About Teaching Effectiveness Using Teacher Rating Forms, 109 New Directions for Institutional Res. 59, 67 (2001) (stating that “the relationship between ratings and course grades is difficult to interpret”).
es at the University of Washington to state on their rating forms what grades they expected. Their data showed a correlation of .45 between the students’ expected grades and their ratings of their instructors. The study’s authors concluded that a positive within-class grades-ratings correlation meant that the overall grades-ratings correlation was not caused by good teaching, because all the students in a class had the same instructor. The authors also found a negative correlation between workload and grades, and partly on that basis concluded that the grades-ratings correlation is not the result of high student engagement, but rather occurs because students “give high ratings in appreciation for lenient grading.”

Another recent study produced a similar conclusion. Valen E. Johnson collected student rating forms from nearly 1900 Duke University students, whose ratings of their professors correlated positively with their grades. Johnson reasoned that his data did not support the teaching-effectiveness explanation for the correlation because the within-class correlations occurred among students who all had the same instructor. He also found that some students’ grades for prerequisite courses correlated negatively with their grades for related advanced courses, suggesting that “prerequisite courses in which professors grade more stringently are more effective in preparing students for advanced courses.” Johnson concluded that “the sensitivity of global measures of

95 Greenwald, supra n. 25, at 284–285; see also Anthony Greenwald & Gerald M. Gilmore, Grading Leniency Is a Removable Contaminant of Student Ratings, 52 Am. Psychol. 1209 (1997) (an earlier report of the study).
96 Greenwald, supra n. 25, at 285.
97 Greenwald & Gilmore, supra n. 95, at 1212; see also Johnson, supra n. 7, at 60 (making a similar observation).
98 Greenwald and Gilmore reported that this finding is supported by other studies. Greenwald & Gilmore, supra n. 95, at 1213.
99 Id. at 1211; but see McKeachie, supra n. 65, at 1220–1221 (arguing that Greenwald and Gilmore’s data do not support their conclusion and may actually support the validity of student ratings).
100 Johnson, supra n. 7, at 27.
101 Id. at 117.
102 Id. at 60.
103 Id. at 160; see also Arthur M. Sullivan & Graham R. Skanes, Validity of Student Evaluation of Teaching and the Characteristics of Successful Instructors, 66 J. Educ. Psychol. 584, 589 (1974) (reporting that professors who focused on achievement rather than projecting enthusiasm received lower student ratings but produced students who learned more and did better in advanced courses).
teaching effectiveness to biases like expressiveness, grading leniency, and other factors is . . . unacceptably high.”

Researchers have partially explained the connection between expected grades and ratings with the theory of source attribution bias, which holds that persons tend to be biased in assigning causes for events in their lives. If they meet positive results, they tend to attribute them to their own merit, but if they meet negative results, they tend to attribute them to external sources. Unsuccessful students may thus blame their instructors for their failure to learn.

2. Expressiveness, Warmth, and Extroversion

There are differing views about the effects of teachers’ personalities on student ratings. Some researchers believe that instructors’ personalities do not significantly bias the ratings’ results. However, a number of other researchers have concluded that personality factors, especially the instructor’s expressiveness, warmth, and extroversion, do influence student ratings.

An important question is whether these personality traits affect not only ratings but also student achievement, in which case they would be not biases but learning catalysts. Professors Wil-

104 Johnson, supra n. 7, at 165; see also David S. Holmes, Effects of Grades and Disconfirmed Grade Expectancies on Students’ Evaluations of Their Instructor, 63 J. Educ. Psychol. 130 (1972) (reporting a study showing that students who received lower grades than they expected gave their instructor lower ratings than other students did); Ross Vasta & Robert F. Sarmiento, Liberal Grading Improves Evaluations but Not Performance, 71 J. Educ. Psychol. 207, 210 (1979) (finding through manipulated grades that liberal grading resulted in higher student ratings but not more studying or better performance).

105 See Dowell & Neal, supra n. 61, at 59 (stating that attribution theory suggests that “poor students might . . . attribute[e] their poor performance to external factors such as the instructor,” resulting in an “underestimate of the teacher’s ability”).

106 This was illustrated in a 1976 study of student ratings in which grades were artificially manipulated during the semester. C.R. Snyder & Mark Clair, Effects of Expected and Obtained Grades on Teacher Evaluation and Attribution of Performance, 68 J. Educ. Psychol. 75, 77 (1976). The students’ artificial grades correlated positively with their end-of-course ratings of instructors, from which the researchers concluded that students with low grades tend to blame their instructors. Id. at 80; see also Richard Gigliotti & Foster Buchtel, Attributional Bias and Course Evaluations, 82 J. Educ. Psychol. 341, 349 (1990) (discussing a study in which students blamed instructors for low grades and therefore gave them low ratings).

107 Johnson, supra n. 7, at 59 (stating that unsuccessful students will tend to blame their instructors); McKeachie, supra n. 65, at 1221 (noting that students may “blame the instructor if they fail to learn,” creating a “negative halo” effect).

108 See e.g. Cohen, supra n. 42, at 124 (calling the belief that student ratings are “popularity contests” a “myth”).
Williams and Ceci addressed this question in their experiment with instructor expressiveness.\textsuperscript{109} Ceci taught a course in the fall and again in the spring, using the same materials and lectures, but with one change: in the spring, he varied his vocal pitch more and used more gestures.\textsuperscript{110} He received significantly higher ratings from the spring students.\textsuperscript{111} Yet Ceci’s increased expressiveness did not affect learning as measured by exam scores: the fall and spring students’ scores on the \textit{same examination} were nearly identical.\textsuperscript{112} One scholar commented that this study revealed a “scandalous” degree of bias in student ratings.\textsuperscript{113} And Williams and Ceci’s study is not an anomaly; other studies have produced consistent conclusions.\textsuperscript{114}

The effect of instructor warmth was demonstrated in a study where students who were told a lecturer was warm rated him higher than students who saw the same lecture but were told he was cold.\textsuperscript{115} Instructor extroversion has also been shown to correlate positively with student ratings.\textsuperscript{116}

Phenomena like this caused one professor to theorize that “sober, substantive” and careful teaching may limit a teacher’s ability to project the “lightheartedness, amicability, and the like” that are correlated with better ratings.\textsuperscript{117} Yet McKeachie has stated that it is unfair to penalize a teacher who lacks personality traits associ-

\textsuperscript{109} Williams & Ceci, \textit{supra} n. 75.
\textsuperscript{110} \textit{Id.} at 15.
\textsuperscript{111} \textit{Id.} at 20.
\textsuperscript{112} \textit{Id.} at 20–21. This experiment has been criticized on methodological grounds, including the lack of controls, which in two professors’ opinions relegate it to “preexperimental” status. \textit{Abrami, supra} n. 94, at 66.
\textsuperscript{113} Johnson, \textit{supra} n. 7, at 150.
\textsuperscript{114} \textit{E.g.} Abram et al., \textit{supra} n. 35, at 455 (concluding from a review of other studies that, although expressiveness had a “substantial impact” on student ratings, its effect on student achievement was “much less”); Sullivan & Skanes, \textit{supra} n. 103, at 588 (reporting a study of ten first-year courses where instructors’ low expressiveness, task orientation, and high expectations produced low student ratings but high achievement).
ated with high ratings, suggesting that this may be as “unethical as judging an individual on the basis of race.”\textsuperscript{118}

3. Gender

Another potential biasing factor is a female instructor’s gender. Findings on this point outside the legal academy are mixed.\textsuperscript{119} However, anecdotal evidence suggests that the effect of women’s gender may be more disadvantageous in law school than in other university courses.\textsuperscript{120} For example, law professor Kathleen Bean reported meeting hostility from students who viewed women as less competent than men; she believed that this preconception negatively affected women professors’ student ratings.\textsuperscript{121} Such results may be due to students’ expectation that a law professor will be an authoritarian “Professor Kingsfield,”\textsuperscript{122} or perhaps to a general bias against women professors in traditionally male-dominated fields.\textsuperscript{123}

Whatever the cause, empirical studies have produced evidence of a bias against women law professors. A 1994 study of students in nine law schools showed that 48% of the women and 18% of the men believed that women professors had a heavier burden than men to prove themselves competent to students,\textsuperscript{124} and other stud-

\textsuperscript{118} McKeachie, supra n. 65, at 1219 (quoting M. Scriven). Indeed, whether one is extroverted has been shown to be 57% determined by heredity. Thomas J. Bouchard, Jr. & Yoon-Mi Hur, Genetic and Environmental Influences on the Continuous Scales of the Myers-Briggs Type Indicator: An Analysis Based on Twins Reared Apart, 66 J. Personality 135, 144 (1998).

\textsuperscript{119} See Cashin, supra n. 26, at 4 (stating that some studies found no difference between student ratings of male and female instructors, some found that males received higher ratings, and a few found that females received higher ratings).

\textsuperscript{120} Lorraine Dusky, Still Unequal: The Shameful Truth about Women and Justice in America 88 (1996) (quoting former Association of American Law Schools president Deborah Rhode as saying, “Students in both classroom and laboratory studies evaluate women’s performance more harshly, particularly those who violate feminine stereotypes of warmth and deference.”).


\textsuperscript{122} See Angel, supra n. 79, at 832–333 (stating that in the 1980s the author encountered hostility from law students who expected to see a male, authoritarian “Professor Kingsfield” in front of the class).

\textsuperscript{123} See Janice L. Nerger et al., Student Ratings of Teaching Effectiveness: Use and Misuse, 38 Midwest Q. 218, 224 (Winter 1997) (citing studies that suggest students may view women more negatively in fields that were traditionally male-dominated).

ies have produced similar results.\textsuperscript{125} And when Christine Haight Farley studied language in student evaluations, she found that students’ skepticism about women in the legal academy negatively affected the evaluations of female professors.\textsuperscript{126}

Moreover, students may apply different standards to women professors than to men, expecting personal contact and nurturing from women and judging them more harshly than men on that score.\textsuperscript{127} Female professors may also find themselves in a “double bind,” expected to walk a fine line between appearing weak or being too assertive, while fearing that however they act, their demeanor will never be quite right.\textsuperscript{128} These biases may be particularly influential in the aggregate student ratings of legal writing teachers because a large majority of them are women.\textsuperscript{129}

\textsuperscript{125} E.g., Lisa A. Wilson & David H. Taylor, \textit{Surveying Gender Bias at One Midwestern Law School}, 9 Am. U.J. Gender Soc. Policy & L. 251, 263 (2001) (reporting a similar result at Northern Illinois University, where 79% of females and 21% of males thought women professors had a heavier burden to prove competence). My survey of students in a law school with a very diverse faculty also found that some students, albeit in lesser percentages (12% of women and 11% of men), thought women professors had a heavier burden. Judith D. Fischer, \textit{Portia Unbound: The Effects of a Supportive Law School Environment on Women and Minority Students}, 7 UCLA Women’s L.J. 81, 106 (1996). And in 1996, a nationwide American Bar Association study found that women professors met hostility and disrespect from some students because of their gender. ABA Comm. on Women in the Prof., \textit{Elusive Equality: The Experience of Women in Legal Education} 26 (ABA 1996).


\textsuperscript{127} See Kristi Andersen & Elizabeth D. Miller, \textit{Gender and Student Evaluations of Teaching}, 30 Political Sci. & Pol. 216, 217 (June 1997) (summarizing studies finding that, although women professors spent more time with students than men did, women and men received equal student ratings on that point); Sheila Kishler Bennett, \textit{Student Perceptions of and Expectations for Male and Female Instructors: Evidence Relating to the Question of Gender Bias in Teaching Evaluation}, 74 J. Educ. Psychol. 170, 177 (1982) (stating that students expect more contact with female instructors and judge them “far more closely” on that point).

Some researchers have also found a “gender of student/gender of instructor” effect. Cashin, \textit{supra} n. 26, at 4 (stating that a few studies show women rate women higher and men rate man higher); Nerger et al., \textit{supra} n. 123, at 223–224 (citing studies showing that male students rate male professors higher than female professors).

\textsuperscript{128} Anderson & Miller, \textit{supra} n. 127, at 217 (citing Bernice Resnick Sandler, \textit{Women Faculty at Work in the Classroom, or, Why It Still Hurts to Be in Labor} 2 (Ctr. for Women Policy Studies 1993)). As one woman law professor put it, “[S]tudents . . . did not respect female professors because they were either inadequate or bitchy . . . those were the two choices.” ABA, \textit{supra} n. 125, at 26 (quoting a survey respondent); see also Diane Kierstead et al., \textit{Sex Role Stereotyping of College Professors: Bias in Students’ Ratings of Instructors}, 80 J. Educ. Psychol. 342, 344 (1988) (concluding that to receive high student ratings women must not only be highly competent but also act according to “sex role stereotypes”).

\textsuperscript{129} See Kathryn M. Stanchi & Jan M. Levine, \textit{Gender and Legal Writing: Law Schools’ Dirty Little Secret}, 16 Berkeley Women’s L.J. 3, 4 (2001) (reporting that, while women held only 26% of tenure-track doctrinal positions in law schools, they held 73% of non-tenure-track legal writing positions).
One might hope that these biases have diminished somewhat in the twenty-first century. Still, statistics show that women remain underrepresented in the law school power structure: at the end of the twentieth century, women constituted less than 13% of deans and 26% of the tenured or tenure-track faculty at ABA-approved law schools. At the same time, law school classes were composed of about 50% women.

4. Students’ Biases and Motives

Some ratings scholars have declared that students are generally well-qualified, accurate raters. At the same time, scholars tend to agree that students cannot appropriately judge factors like a teacher’s knowledge, and some researchers have concluded that student biases and motives affect their ratings. Indeed, a few incongruous results illustrate the sometimes whimsical nature of the ratings.

For example, law professor Richard Abel experienced an anomaly when, after he received no complaints about a textbook for years, students in one class declared it “terrible,” “ridiculous,” and “worthless.” He attributed this new opinion to a group judgment directed by a few opinion leaders. Another law professor had a similarly puzzling experience when he received widely differing ratings from two sections of the same course that he taught the same way. He sardonically noted the implicit statement that “I am good and mediocre all at once and am perfectly and less than perfectly prepared all at once.”

Puzzling ratings also occurred in the Williams and Ceci study described above. When Ceci taught a second section of a course in

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131 E.g. Markovits, supra n. 16, at 420 (stating that legal academics “think that on balance students’ numerical evaluations are highly reliable indicators of teaching and course quality”); Theall & Franklin, supra n. 42, at 48 (stating that students are generally qualified to rate their instructors).
132 E.g. Ory & Ryan, supra n. 10, at 38 (stating that students should not be asked to evaluate course content); Seldin, supra n. 7, at A40 (stating that students cannot properly judge whether course materials are current or whether the teacher knows the subject matter); Theall & Franklin, supra n. 42, at 49 (stating that students are not qualified to rate a teacher’s knowledge).
133 Abel, supra n. 17, at 451.
134 Id.
the same way as the first except for being more expressive, both his organization and his textbook, neither of which had changed, were rated almost a full point higher on a five-point scale.\footnote{Williams & Ceci, \textit{supra} n. 75, at 21. Similarly, Greenwald demonstrated that ratings for items that were only weakly related with good teaching — the quality of the classroom facilities and the instructor's handwriting — correlated positively with ratings within the same class. That is, students who rated the professor lower also rated these items lower, even though all students in the class experienced the same facilities and handwriting. Greenwald, \textit{supra} n. 25, at 290.} In another study involving artificially manipulated grades, the students who thought they were receiving higher grades rated the reading material, the length of the assignments, and the stimulation of independent thinking higher than did those in the same class who thought their grades were lower.\footnote{Vasta & Sarmiento, \textit{supra} n. 104, at 209.}

Students' responses can even be flatly wrong. One group of students filled out forms that inadvertently asked about a speaker whose speech to the class had been canceled. They rated him better than three of the speakers they did hear, and most of them also gave high ratings to a film they had not seen.\footnote{David V. Reynolds, \textit{Students Who Haven't Seen a Film on Sexuality and Communication Prefer It to a Lecture on the History of Psychology They Haven't Heard: Some Implications for the University}, 4 Teaching Psychol. 82, 82–83 (Apr. 1977).} Another professor decided it should be easy to receive perfect scores on items that covered events he could easily accomplish and verify. Therefore, after he explained his course objectives and grading procedures, he gave the students a quiz about these points, and all answered it correctly. Nevertheless, when asked on the ratings form if course objectives and grading standards had been made clear, only two of thirty-two students in one class agreed that they had.\footnote{Stanfel, \textit{supra} n. 49, at 119.} These responses, the professor wrote, “were so incorrect as to fail even to be remotely related to actual circumstances.”\footnote{\textit{Id.} at 122.}

5. \textit{Other Factors}

Several other factors have been shown to affect student ratings. Students give higher ratings to courses in which they had a prior interest or which they take as electives, to upper level courses, and to courses in certain academic fields.\footnote{Cashin, \textit{supra} n. 26, at 5–6; Ory & Ryan, \textit{supra} n. 10, at 37.} Cashin, who classified courses according to their student rating scores, observed that
"quantitative courses" like math, economics, physics, and architecture tend to receive the lowest ratings. The legal writing course shares some characteristics of those courses in that it requires rigorous research, analysis, and attention to detail. Legal writing teachers have often asserted that the course tends to receive lower student ratings. This observation received support from Marlow-Shafer's recent study, in which respondents who taught both legal writing and other courses reported a tendency to receive higher student ratings in their other courses. This suggests that the instructors’ lower ratings for legal writing courses may be partially attributable to features of the course rather than to poor teaching.

Other identified biasing factors include instructor attractiveness and dress. Timing can also affect student ratings; ratings taken after students have received grades or during a final examination period tending to be lower. Heavier workloads for students have also been shown to correlate inversely with high student ratings, although other studies have shown a positive correlation between these two variables.

143 E.g. Peter Brandon Bayer, A Plea for Rationality and Decency: The Disparate Treatment of Legal Writing Faculties as a Violation of Both Equal Protection and Professional Ethics, 39 Duq. L. Rev. 329, 363–364 (2001) (pointing out, in contrast to most law school courses, legal writing students receive grades throughout the semester and asserting that their reactions to disappointing grades and the course’s difficulty lead some of them to direct anger at the professor).
144 Marlow-Shafer, supra n. 17, at 127.
145 Daniel Hamermesh & Amy Parker, Beauty in the Classroom: Professors’ Pulchritude and Putative Pedagogical Productivity, http://www.eco.utexas.edu/faculty/Hamermesh/Teachingbeauty.pdf (Oct. 2003) (reporting that professors whom students rated as attractive received better student ratings at a statistically significant level, id. at 4–5, but that the effect of attractiveness was “much lower for female than for male faculty,” id. at 7).
146 Tracy L. Morris et al., Fashion in the Classroom: Effects of Attire on Student Perceptions of Instructors in College Classes, 45 Comm. Educ. 135, 141 (1996) (reporting that formally dressed instructors were deemed more intelligent and competent, while those less formally dressed were deemed more extroverted and enthusiastic).
147 See Wachtel, supra n. 60, at 194; Walter, supra n. 17, at 189 (stating that teachers who give grades throughout the semester “are at risk of lower evaluations from students disappointed with their grades”).
148 E.g. Stapleton & Murkison, supra n. 87, at 280–281 (reporting that teachers who assigned more work received lower student ratings).
149 See Cashin, supra n. 26, at 6 (stating that students give higher ratings to courses with heavy workloads).
D. Collateral Effects of Student Ratings

Whether student ratings are valid is only part of the picture. The more important question for the long term is how they affect the educational process. Researcher Valen Johnson recently pointed out that supporters of student ratings “seem to have little apprehension about the impact that their use has in determining [teaching] behaviors” and urged that the ratings’ unintended collateral effects be analyzed.\(^{150}\) There is by now a growing body of evidence that student ratings have had troubling unintended effects, particularly when their data are used for personnel decisions.

1. Grade Inflation

Several commentators have pointed to grade inflation as a collateral effect of student ratings. As former professor Peter Sacks said, “placing significant weight on student evaluations produces the unwholesome incentive in all-too-human teachers to give out lots of good grades to make students happy.”\(^{151}\) While Sacks believed that “most educators would never openly concede that this happens at their institutions,”\(^{152}\) evidence of this effect does exist. Sacks himself told of giving “outrageously good grades” in order to raise his student ratings, which did increase.\(^{153}\) Some of his superiors even encouraged him to improve his ratings this way.\(^{154}\) Another undergraduate writing professor admitted giving higher grades to improve his ratings.\(^{155}\) And there are similar reports in legal academia.\(^{156}\)

\(^{150}\) Johnson, supra n. 7, at 140–141.  
\(^{151}\) Sacks, supra n. 28, at 182.  
\(^{152}\) Peter Sacks, In Response . . ., Change 29 (Sept./Oct. 1997).  
\(^{153}\) Sacks, supra n. 28, at 85, 99.  
\(^{154}\) Id. at 86; see also Greenwald & Gilmore, supra n. 95, at 1209 (reporting a professor’s advice to improve ratings by giving a “softball midterm” so students will expect good grades).  
\(^{155}\) James B. Twitchell, Stop Me before I Give Your Kid Another ‘A’, Wash. Post A23 (June 4, 1997) (attributing grade inflation to student ratings); see also Hocutt, supra n. 8, at 61 (stating that he and other professors have raised their student ratings by raising grades).  
\(^{156}\) One law school dean stated that law school grade inflation arises partly from professors’ “need for favorable student evaluations.” Bradley Toben, What Should Our Students Justifiably Expect of Us As Teachers, 33 U. Tol. L. Rev. 221, 228 (2001). Another dean noted professors’ tendency to give high grades to court student approval. Richard A. Matasar, The Two Professionalisms of Legal Education, 15 Notre Dame J.L. Ethics & Pub. Policy 99, 110
These observations were supported by a recent study in which 70% of faculty respondents reported that their university’s reliance on student ratings was an incentive to give higher grades.\textsuperscript{157} Other empirical studies indirectly support this point by showing that expected grades influence student ratings.\textsuperscript{158} This provides instructors with an incentive to inflate grades in order to receive the ratings they need to keep their jobs or advance professionally.

2. Decreased Rigor

“The most effective device for lowering standards,” wrote English professor Paul Trout, “is the numerical [student] evaluation form.”\textsuperscript{159} As another professor pointed out, with personnel decisions at stake, “even the most conscientious professor” will naturally look for ways to improve student ratings. While some of these efforts will improve teaching, some will be tangential or even antithetical to good teaching, and they “should not be confused with educational competence.”\textsuperscript{160} Some teachers will cater to students who would rather listen passively than be challenged.\textsuperscript{161} As one commentator put it, “[i]t is very hard to educate people you have reason to fear; it is often possible to please them, and where the rewards for flattering them are great, it will be hard not to.”\textsuperscript{162}


\textsuperscript{158}See Anthony C. Krautmann & William Sander, \textit{Grades & Student Evaluations of Teachers}, 18 Econ. Educ. Rev. 59 (Feb. 1999) (reporting data showing that grades affect student ratings and suggesting grade inflation is partly due to the ratings); see also supra nn. 93–107 and accompanying text (discussing the effect of expected grades on student ratings).

\textsuperscript{159}See Trout, supra n. 52, at 30.

\textsuperscript{160}Robert W. Weinbach, \textit{Manipulations of Student Evaluations: No Laughing Matter}, J. Soc. Work Educ. 27, 28 (Winter, 1988); see also Ian Neath, \textit{How to Improve Your Teaching Evaluations without Improving Your Teaching}, 78 Psychol. Rep. 1363 (1996) (offering instructors sardonic recommendations for improving student ratings, such as “Grade leniently,” “Teach only high-level courses,” and “Show lots of films”).

\textsuperscript{161}McKeachie, supra n. 65, at 1219; see also Stanford Ericksen, \textit{Private Measures of Good Teaching}, 10 Teaching Psychol. 133, 136 (Oct. 1983) (stating that using student ratings for personnel purposes is “an open invitation for the teacher to teach for the evaluation”).

\textsuperscript{162}Michael Platt, \textit{Souls without Longing}, 18 Interpretation 415, 452 (Spring 1991).
There is plenty of anecdotal evidence of this effect. Peter Sacks described his “sandbox experiment,” in which he dramatically lowered his writing courses’ rigor to improve his ratings with “Generation X” students. Sacks identified that generation as the one born between 1965 and 1980 and characterized its members as having “a keen sense of entitlement but little motivation to succeed.” Encountering students who were “empowered, by virtue of their own mediocrity, to define their own standards and curriculum,” he “adjusted” his course’s level to meet their “abilities and needs.” He also stopped chiding students who came to class late or failed to turn in required drafts. His ratings rose. Sacks heard similar stories from some of his colleagues, and he wrote about this effect in the hope of exposing “the corruption that has enveloped much of higher education.” Another professor wrote that, to improve his student ratings, he resolved to tell the students what they wanted to hear about their writing, “praising them however much they founeder.” The result: his ratings improved.

Law professors have told similar tales. A constitutional law professor who critiqued writing exercises found that his student ratings declined substantially. He stopped the practice and his ratings rose. Another law professor observed some of his colleagues “alter their teaching in pedagogically unjustified ways to secure better ratings,” including assigning less work, demanding less preparation, and avoiding topics and activities that the students did not like.

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163 See Johnson, supra n. 7, at 164 (reporting “anecdotal evidence that many professors have modified their instruction so as to improve their teaching evaluations, possibly without actually improving their teaching”).
164 Sacks, supra n. 29, at 101.
165 Id. at 124.
166 Id. at xii–xiii.
167 Id.
168 Id. at 87, 95–96.
169 Id. at 99.
170 Id.
171 Id.
172 Ben Marcus, Graded by My Students: Through Some Dubious Teaching Techniques, I’ve Learned to Win Good Evaluations from My Classes, 157 Time 51, 51 (Jan. 8, 2001); see also Kissam, supra n. 20, at 148 (stating that, because criticism can hurt, the ratings system may lead instructors to avoid critiquing students’ writing).
173 Marcus, supra n. 171, at 51; see also Hocutt, supra n. 8, at 62 (stating that to get better ratings, professors may abandon complex skills in favor of teaching simple facts).
174 Kissam, supra n. 20, at 149 n. 40.
175 Markovits, supra n. 16, at 427; see also Anderson, supra n. 21, at 74–75 (describing the author’s attempts to improve ratings by “hand-holding,” including giving students key
A recent survey in one university provided empirical evidence on this point: 72% of the responding faculty members said student ratings encouraged them to “water down” course content. Trout summed up the ratings’ effect on rigor: “It is hard to imagine a practice more harmful to higher education than one that encourages instructors to satisfy the demands and pleas of students who resent the appropriate rigors of college instruction.”

3. Negative Effects on Students

Ironically, student ratings may also damage their purported beneficiaries, the students. The whole ratings process “profoundly reverses fundamental authority relations,” encouraging “the student, when he learns little, to blame the teacher rather than himself.” Weak students may thus acquire a false sense of competence, while students who do want high standards find their educations devalued by lowered rigor. The ratings’ anonymity also “tempt[s] students to calumny,” teaching them that “it’s okay to offer anonymous criticism of persons behind their backs to third parties,” even when the criticism has “adverse consequences.”

All of this cultivates a consumer mentality in the students, who come to see themselves as customers who deserve to be satisfied and their education “as something that can be delivered like a purchase at a shop.” As one professor summarized this approach, “[I]t does not matter what the student learns, or even

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175 Birnbaum, supra n. 157, at 6.
176 Trout, supra n. 52, at 30.
177 Abel, supra n. 17, at 411; see also Johnson, supra n. 7, at 151 (stating that ratings have “alter[ed] the dynamics of student-instructor interactions in ways that are not yet fully understood”).
178 Michael Platt, What Student Evaluations Teach, 22 Persp. on Political Sci. 29, 31 (1993).
179 See Sacks, supra n. 28, at 62–64 (reporting encounters with two highly motivated students who felt cheated by lowered standards and easy grades).
180 Platt, supra n. 178, at 33.
181 Id. at 35.
182 Id. at 34; see also Dowell & Neal, supra n. 74, at 462 (stating that the ratings “are inaccurate indicators of student learning and therefore are best regarded as indices of consumer satisfaction”); Markovits, supra n. 16, at 421 (stating that law schools rely on “numerical ‘market evaluations’ by the direct consumers of teaching for faculty assessment of teaching quality”).
whether he learns anything; what matters is whether he is satisfied with the process. If the student likes the service he is getting, his teacher is good; otherwise, not.”\textsuperscript{183} But this notion misperceives the role of the student, who is less the consumer than the product of education, while education’s real consumers — parents, taxpayers, employers, and future clients — are shortchanged by diluted standards.\textsuperscript{184} It also misperceives the role of the professor, who, unlike the retail clerk, must sometimes require difficult work and at times is even “duty bound to displease.”\textsuperscript{185}

Legal writing teachers may be especially vulnerable to student attitudes fostered by the ratings. As one writing professor explained, “I face many students who are unprepared for rigorous, constructive criticism, and who seek a great deal of hand-holding.”\textsuperscript{186} Yet writing teachers must critique students' work and prod them to engage in analysis. These requirements of the course and the lower status of some writing teachers\textsuperscript{187} mean many of them have little protection against the ratings’ negative effects.

4. *Negative Effects on Teachers*

The ratings negatively affect professors, too, damaging their morale. Indeed, “an assumption implicit in collecting student evaluations is that the average student is more likely right than the professor.”\textsuperscript{188} And heavy reliance on the forms’ data for personnel decisions is unfair to those teachers who effectively facilitate learning but do not receive high ratings for a variety of reasons, including the biases discussed above.

This problem is exacerbated where norms are computed because, as McKeachie pointed out, norms not only lead to invalid comparisons but also damage the morale of the 50% of teachers who by mathematical necessity must fall below the median, even though they may be good teachers.\textsuperscript{189}

\textsuperscript{183} Hocutt, \textit{supra} n. 8, at 56.

\textsuperscript{184} \textit{Id.}

\textsuperscript{185} Platt, \textit{supra} n. 178, at 33.

\textsuperscript{186} Anderson, \textit{supra} n. 21, at 73.

\textsuperscript{187} Stanchi & Levine, \textit{supra} n. 129, at 4.

\textsuperscript{188} Birnbaum, \textit{supra} n. 157, at 11; see also Hocutt, \textit{supra} n. 8, at 62 (stating that it is demoralizing for mature professionals to be subjected to the students’ sometimes whimsical evaluations).

\textsuperscript{189} McKeachie, \textit{supra} n. 65, at 1223; see also Cohen, \textit{supra} n. 70, at 338 (stating that “the use of normative data does not seem to enhance instructional improvement”); d’Apollonia & Abrami, \textit{supra} n. 26, at 1204 (stating that ratings harm faculty morale be-
III. THE SURVEY

A. Methodology

Against the background of this literature, much of which pertains to undergraduate education, I set out to gather data on student ratings in legal writing courses. My purpose was to study the ratings’ use and effects to help inform colleagues’ work with the ratings in their own courses and the courses they supervise.

Designing this project posed some challenges. A multisection validity study was not suitable because most law schools have only a few sections of the writing course, and studying a small number of sections would preclude the statistical analysis of large numbers that these studies require. Moreover, there is no objective test to measure whether students have learned the complex skills taught in legal writing courses and it would be difficult to devise an acceptable one.\(^{190}\) Other models are fraught with problems as well. Experimental studies have been attacked as methodologically unsound.\(^{191}\) And methods like artificially manipulating grades would not be approved by today’s human subjects research committees because of the ethical problems they pose.\(^{192}\)

I therefore decided to gather data by surveying members of the Association of Legal Writing Directors (ALWD). ALWD is a professional organization made up of about 200 persons who direct law school writing programs or teach in schools without writing directors.\(^{193}\) ALWD members are attractive subjects for a student ratings survey because they have a unique perspective: they re-
view not only their own student rating forms but also (in many cases) those of the teachers they supervise. Their observations would, I believed, provide helpful insights about the use and effects of student ratings in legal writing courses and in law school generally.

In the spring of 2002, I distributed a questionnaire to ALWD members by e-mail through the ALWD listserv. The questionnaire asked ALWD members how student rating forms are actually used in their legal writing courses and inquired about their observations and opinions about the ratings’ effects. I defined legal writing course as a “first-year law school course of which legal writing is a significant component.”

B. Survey Results

1. Response Rate

Fifty-two of the approximately two hundred ALWD members on the listserv returned the form, for a response rate of about 26%. The total number of schools represented is fifty; all but one of these are accredited by the ABA. Thus 27% of the 186 law schools fully approved by the ABA are represented. Because this is not a high response rate and because the respondents were self-selected, the data may not be representative of the entire ALWD membership. Still, the survey responses shed some light on the use and effects of student ratings in legal writing courses and may suggest directions for further research in the area.

194 Two schools are represented twice, which is possible because ALWD has multiple members from some schools that have coequal writing professors instead of directors.
195 There is no “standard” for what is an acceptable survey response rate. See Dianne Molvig, The Economics of Practicing Law, 74 Wis. Law. 6, 56 (Dec. 2001). While the 26 to 27% rate for the survey of ALWD members is not high, it is comparable with response rates for surveys of busy attorneys. Id. (reporting survey results based on a 24% response rate).
197 Data from smaller samples can be instructive, particularly if they allow readers to compare the respondents with the entire population being studied. See Martyn Denscombe, Ground Rules for Good Research: A 10 Point Guide for Social Researchers 155 (Open U. Press 2002) (stating that, with smaller samples that are not claimed to be representative, “sufficient detail needs to be given about the nature of the units that are studied and the process of their selection”); Molvig, supra n. 195, at 56 (stating that the important question is how closely the sample matches the population being studied). The next section of this Article contains some data about this survey’s respondents and the ALWD membership.
2. **The Respondents**

   The fifty-two respondents to the survey represent both public and private law schools, schools in every tier of the *U.S. News & World Report* law school rankings for 2004, and all regions of the country. Of the forty-nine respondents who identified their gender, thirty-eight (80%) are female and ten (20%) are male; this gender breakdown is similar to the 75% female and 25% male ratio reported in the 2002 ALWD survey of its membership. Of the forty-seven respondents who specified their amount of experience, all had more than two years’ experience teaching or directing legal writing. Eight had three to five years’ experience, nineteen had five to ten years’ experience, and twenty had eleven or more years’ experience, with some reporting more than twenty years in the field. Their degree of job security varied from short-term contracts to tenure.

   Interestingly, in their written comments, more than a few respondents referred to student ratings familiarly as “evals,” suggesting that the ratings are discussed often enough to warrant a nickname.

3. **Background about the Use of Student Rating Forms at the Respondents’ Schools**

   All fifty-two respondents to the survey reported that students complete evaluation forms in their legal writing courses, and at all but one of the fifty schools the forms are submitted anonymously. Most respondents (representing forty-five or 90% of the fifty schools) said their forms include both objective items (items answered by marking a number or letter) and space for written comments.

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198 Completed surveys were returned from schools located in the Northeast, the East, the Southeast, the Great Lakes Region, the Midwest, the South, the Rocky Mountain states, the Northwest, the Southwest, and the West.
200 By comparison, respondents to the 2002 Association of Legal Writing Directors Survey had an average of 11.38 years of experience teaching full time in law school. *Id.*
4. Feedback Students Receive before Completing Rating Forms

All respondents reported that their students receive some sort of written feedback in the writing course before they complete student rating forms. This contrasts with the practice in most other law school courses, where grading is based on a single examination at the end of the course.\footnote{See Bayer, supra n. 143, at 363–364 (stating that “students receive their first law school grades in legal writing”).} For eight respondents, feedback during the course consisted only of written comments; the others named other kinds of feedback, usually in combination with written comments. Table 1 summarizes the kinds of feedback the respondents’ students received.

Table 1

<table>
<thead>
<tr>
<th>Type of feedback</th>
<th>Number and percent of respondents reporting this</th>
</tr>
</thead>
<tbody>
<tr>
<td>Written comments, either alone or with another type of feedback</td>
<td>51 (98%)</td>
</tr>
<tr>
<td>Numeric score</td>
<td>33 (63%)</td>
</tr>
<tr>
<td>Score or grade plus the class median</td>
<td>26 (50%)</td>
</tr>
<tr>
<td>Letter grade</td>
<td>21 (40%)</td>
</tr>
<tr>
<td>Written comments alone</td>
<td>8 (15%)</td>
</tr>
<tr>
<td>Final grade in the course</td>
<td>4 (8%)</td>
</tr>
</tbody>
</table>

5. How Information about Teaching Is Used at Respondents’ Schools

When making personnel decisions, the respondents or their schools all consider student ratings data, and all consider at least one other source of information. Ten schools consider only two
sources, fifteen schools consider three, sixteen consider four, seven consider five, and two schools consider the highest number of sources, six. Twenty-two respondents (representing twenty-two schools) estimated the weights of the various factors they or their schools use in evaluating teaching for personnel decisions. Table 2 shows those factors considered and their estimated weights.

**Table 2**

Numbers of respondents estimating each range of weights for factors in personnel decisions (N = 22)

<table>
<thead>
<tr>
<th>Factor</th>
<th>0-24% weight</th>
<th>25-49% weight</th>
<th>50-74% weight</th>
<th>75-100% weight</th>
<th>Total whose schools consider this source</th>
</tr>
</thead>
<tbody>
<tr>
<td>Student Ratings</td>
<td>6</td>
<td>9</td>
<td>6</td>
<td>1</td>
<td>22</td>
</tr>
<tr>
<td>Volunteered oral comments from students</td>
<td>15</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>19</td>
</tr>
<tr>
<td>Class observation by the director</td>
<td>3</td>
<td>7</td>
<td>6</td>
<td>0</td>
<td>16</td>
</tr>
<tr>
<td>Other</td>
<td>3</td>
<td>6</td>
<td>1</td>
<td>0</td>
<td>10</td>
</tr>
<tr>
<td>Class observation by faculty</td>
<td>4</td>
<td>1</td>
<td>2</td>
<td>0</td>
<td>7</td>
</tr>
<tr>
<td>Informal interviews with students</td>
<td>2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>3</td>
</tr>
<tr>
<td>Class observation by an administrator</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Focus groups</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Some respondents volunteered additional sources of information used in personnel decisions at their schools. These included reviews of graded student papers (eight respondents), reviews of the problems the instructors assigned the students to write about (five respondents), reviews of other teaching materials, and discussions with the instructor about his or her teaching.
Asked whether any decision maker at their school requires a certain average rating score, many respondents reported some uncertainty about the process. For example, one respondent wrote that the university flags forms below a certain mean, but she did not know what that mean was; another wrote, “I’m not sure anyone cares but me.” Sixteen respondents reported that someone at their schools expects the legal writing teachers to achieve a certain average on the forms, while twelve did not know whether their schools have any such expectation. Ten responded that the average expected of writing teachers is also expected of the rest of the faculty, while three said the expectations for the two groups differ. Two wrote that their scores are not quantified. Because rating scales and expected scores vary from school to school, a numeric comparison of those expectations will not be attempted here.

6. Whether Student Ratings Have Improved the Respondents’ Own Teaching

Most respondents saw benefits to student ratings. Forty-three respondents (83%) reported that student ratings data had helped them improve their own teaching. Thirty-nine provided some explanation on this point. Thirty (77%) of the thirty-nine explained that information about specific behaviors or assignments had helped them. For example, they were alerted to problems with their conference or oral presentation styles, to student desires to write more or receive more feedback before being graded, and to issues about specific writing assignments or exercises. Nine respondents mentioned more general help, such as being reminded of what first-year students do not know, of younger students’ fears, or of the need to find better ways to reach students. Two pointedly said that while student ratings had helped them, that help was minimal, and one said that the ratings had helped improve her subsequent ratings, but not her teaching.
7. Respondents’ Opinions about Extraneous Effects on Student Rating Forms

The respondents were asked, “Have there been instances when your or another faculty member's classroom observation indicated that a legal writing teacher was notably better or worse than the completed student evaluation forms indicated?” Twenty-four (46% of all respondents) said this had occurred; fifteen (29%) said it had not; and eight (15%) marked the question not applicable because they do not evaluate others. Those who had observed these incongruent results were asked to identify factors that they believed explained them. If they marked a factor, they were asked to mark whether it had occurred with one or two teachers or with more than two teachers. Table 3 shows the explanations they identified for lower ratings than expected; Table 4 shows their explanations for higher ratings than expected. The two groups overlapped: twenty-one respondents are represented in both tables, while five others are represented only in Table 4.

202 Six respondents marked that they had not seen incongruent results but then marked explanations. Because it is unclear why this occurred, these respondents’ explanations have not been included in the totals in Tables 3 and 4.
Table 3

Explanations chosen by those who saw teachers receive lower ratings than expected after classroom observations (twenty-six respondents said they had observed incongruous results and marked explanations, but percentages in this table are expressed as percentages of fifty-two, the total number of respondents to the survey)

<table>
<thead>
<tr>
<th>Explanation for a teacher's lower ratings</th>
<th>I. Number and percent of all respondents who observed this with one or more teachers</th>
<th>II. Number and percent (including those counted in Column I) who observed this with three or more teachers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Students reacted negatively to having their writing critiqued</td>
<td>20 (38%)</td>
<td>14 (27%)</td>
</tr>
<tr>
<td>Students reacted negatively when a teacher did not provide simple answers but expected them to do their own analysis</td>
<td>20 (38%)</td>
<td>10 (19%)</td>
</tr>
<tr>
<td>Students reacted negatively to rigorous grading</td>
<td>19 (37%)</td>
<td>10 (19%)</td>
</tr>
<tr>
<td>Students were resentful of the amount of work in the course</td>
<td>18 (35%)</td>
<td>11 (21%)</td>
</tr>
<tr>
<td>A few students turned a class against a teacher</td>
<td>17 (35%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>A female teacher's gender affected the results</td>
<td>13 (27%)</td>
<td>5 (10%)</td>
</tr>
<tr>
<td>A teacher's age affected the results</td>
<td>10 (19%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>Students respected the teacher less because writing teachers have low status at the school</td>
<td>7 (13%)</td>
<td>3 (6%)</td>
</tr>
<tr>
<td>A teachers' race, religion, regional background or ethnic origin worked against him or her</td>
<td>6 (12%)</td>
<td>1 (2%)</td>
</tr>
<tr>
<td>A male teacher's gender affected the results</td>
<td>5 (10%)</td>
<td>0 (0%)</td>
</tr>
<tr>
<td>The classroom observer overestimated the teacher's competence</td>
<td>4 (8%)</td>
<td>1 (2%)</td>
</tr>
</tbody>
</table>

One respondent did not mark answers to this item because she does not supervise others, but she wrote that she had observed teachers who give lower grades get some “very negative evalua-
tions,” in contrast to those who give higher grades. She has also twice seen hostile students campaign against a new instructor.

Table 4

Explanations chosen by those who saw teachers receive higher ratings than expected based on classroom observations (twenty-one respondents said they had observed these results and marked explanations, but percentages in this table are expressed as percentages of fifty-two, the total number of respondents to the survey)

<table>
<thead>
<tr>
<th>Explanation for a teacher’s higher ratings</th>
<th>I. Number and percent of all respondents who observed this with one or more teachers</th>
<th>II. Number and percent (including those counted in Column I) who observed this with three or more teachers</th>
</tr>
</thead>
<tbody>
<tr>
<td>A teacher was popular with the students for reasons independent of his or her teaching performance</td>
<td>16 (31%)</td>
<td>4 (8%)</td>
</tr>
<tr>
<td>A teacher was an easy grader</td>
<td>16 (31%)</td>
<td>4 (8%)</td>
</tr>
<tr>
<td>A teacher avoided challenging the students</td>
<td>15 (29%)</td>
<td>4 (8%)</td>
</tr>
<tr>
<td>The classroom observer underestimated the teacher’s competence</td>
<td>0 (0%)</td>
<td>0 (0%)</td>
</tr>
</tbody>
</table>

One respondent gave an example of behavior extraneous to teaching that apparently led to higher student ratings: “I have heard students say a class is confusing and that they don’t always know what is going on — but the prof is so much fun at the bar so they don’t want to complain and they know the prof won’t give bad grades. I think this is all connected to trying to get good teaching evals.”

Another survey item asked, “Concerning your own or others’ teaching of writing courses, have there been instances where you believe two sections of the same course were taught in essentially the same way, but the teacher received notably higher results on student evaluation forms for one class than for the other?” Thirty-two respondents (62%) said they had seen this. Of the twenty respondents with eleven or more years’ experience, sixteen (80%) had seen this.
Their comments were illuminating. The largest number of those providing comments (thirteen, or 25% or of all the respondents) attributed the differing ratings to classroom dynamics, offering comments like “Classes take on different personalities” or “The ‘personality’ of one class was more collaborative, and it had a stronger work ethic than did the other class.” Six respondents attributed the difference to the influence of a few students, offering comments like these:

- “Some sections are influenced by individual personalities of a few students and develop a section-wide ‘attitude.’”
- “This usually occurs when a few vocal students decide they know better than the professor how the class should be taught.”
- “Sometimes a few dissatisfied students can spread their discontent to the class.”

Five others said that classes with unusual numbers of weak students had given the lower ratings, with one commenting, “Usually the class that did less well overall gave the lower marks.” Four respondents attributed the difference to the time of day a class was taught or the room where it met. One of these said an early morning meeting time was not well received, while another said evening students are more appreciative and often give higher ratings. Another respondent reported that a group who had more demanding teachers for their other courses became “bitter and frustrated” and therefore gave lower ratings. A female respondent saw lower ratings from a class that had a “gender mis-balance,” with 85% male students.

Other respondents found the reason for the different ratings mysterious. One said, “This can be quite an enigma.” Another concluded, “This is as much a mystery to me after [more than ten] years of directing as it was when I started. Class chemistry is sometimes inexplicable.” Another longtime writing professor wrote that some students connect with a teacher and others do not, and some classes seem unresponsive but still give good ratings. “I have no explanation for this,” the professor wrote.


8. Whether Student Ratings Affect Classroom Rigor and Grade Inflation

The respondents were also asked whether they or others at their schools had refrained from doing something they thought pedagogically sound because it might cause lower ratings and whether they believe the ratings contribute to grade inflation and lower rigor in law schools. The responses to these items are shown in Table 5.

Table 5

Responses about effects of student ratings on classroom rigor and grade inflation

<table>
<thead>
<tr>
<th>Item</th>
<th>Number and percent of respondents answering “yes”</th>
</tr>
</thead>
<tbody>
<tr>
<td>A teacher in respondent's program refrained from doing something pedagogically sound because it might cause lower student ratings</td>
<td>17 (33%)</td>
</tr>
<tr>
<td>Respondent refrained from doing something pedagogically sound because it might cause lower student ratings</td>
<td>13 (25%)</td>
</tr>
<tr>
<td>Student evaluations contribute to a lessening of rigor in law school courses</td>
<td>16 (31%)</td>
</tr>
<tr>
<td>Student evaluations contribute to grade inflation in law school courses</td>
<td>11 (21%)</td>
</tr>
</tbody>
</table>

Respondents’ comments for these items covered a wide range. Some were adamant that they would not let student ratings change their standards or grading practices; one wrote that such changes would be “educational malpractice.” A respondent from a highly ranked law school\textsuperscript{203} said, “Our students are smart people. . . . I believe that the best course evaluations go to teachers who hold the students in the highest professional — and personal — regard,”\textsuperscript{204} and two respondents from other schools expressed similar thoughts. A few said the ratings do not cause grade inflation at their schools because they are held to a strict curve, although one

\textsuperscript{203} The school ranks in the top thirty law schools in the \textit{U.S. News & World Report} rankings for 2004. For a list of those schools, see http://www.usnews.com/usnews/edu/grad/rankings/law/brief/lawrank_brief.php.
\textsuperscript{204} McKeachie has theorized that easy teachers may be less appreciated in schools with “stronger academic cultures.” McKeachie, \textit{supra} n. 65, at 1220.
of these acknowledged giving fewer grades below “C” because of the ratings. Others said teachers at their schools did not change their teaching to get higher ratings because the ratings are not highly weighted or, in one case, because the adjunct professors teaching the writing course were not concerned about ratings. One respondent wrote that the ratings do not seem to affect rigor because “Somehow, the idea that students are in the best position to evaluate the effectiveness of a teacher who is training them in something they have never really done and may not be able to do (either practically or cognitively) lacks support in my school.”

Others believed that the drive for higher ratings often does affect grading and rigor. One simply said, “It happens all the time,” while another answered “many times.” The 33% of the respondents who had observed such effects mentioned the following measures that they or others took:

- simplifying matters more than might be best for the development of “independent critical thinking,”
- providing more help than seemed appropriate (for example, providing students with specific cases and arguments for a memorandum),
- not grading some early assignments,
- grading “too easily,”
- not handing back graded papers before the ratings are completed, even though seeing the papers earlier might help the students,
- holding back critical comments about the students’ writing,
- not holding students accountable for things like coming to class late, being unprepared, and turning in assignments late,
- not telling a student she is rude or out of line,
- lightening the workload,
- refraining from emphasizing citation form,
- “playing” to the evaluations, and
- being “less willing to try new things.”
9. Additional Positive and Negative Effects of Student Ratings

The respondents were also asked to identify positive and negative effects of ratings not covered elsewhere on the questionnaire. They identified the following positive effects (parenthetical numbers indicate the total number of similar responses):

- They help new teachers to improve and more experienced ones to brush up if they need to; they keep professors “on their toes.” (4)
- Student ratings are a “safety valve to allow the students to let off steam.” (4)
- Good ratings encourage instructors to keep working hard. (3)
- They help the director to identify problems. (3)
- Student ratings make the instructors sensitive to the power they wield when they grade. (1)

Respondents also identified the following negative effects (parenthetical numbers indicate the total number of similar responses):

- Bad evaluations can be “devastating” and concern about them can “taint the teaching process.” “Students can be nasty. These comments sour us on our students.” (8)
- “They create a ‘sink or swim’ situation for new instructors”; early negative evaluations can “undermine a prof’s confidence” and “cast a shadow on subsequent years of teaching.” (4)
- “Anonymity allows the problem students to bash even when all the other students are constructive.” (3)
- The ratings “promote an opportunity for students to take their grades out on their instructors.” “A student is much more upset by critique than mere grading.” (4)
- “Far too much emphasis” is placed on them for retention and promotion. (4)
- One or two negative comments may be given credence way out of context and number. (1)
• The rating forms do not gather relevant information, so teachers are judged on inapplicable criteria. (3)
• “Student ratings are the tail wagging the dog. How can a fourteen-week law student judge whether she has been taught skills relevant to the practice of law?” (3)
• Students inflate the ratings in the belief that the instructors will see them. (1)
• Ratings “reinforce the idea that education is an entertainment business rather than an academic pursuit.” (1)

Whether the ratings’ effects are positive or negative was not always a simple determination for the respondents. One wrote that giving students a voice is both positive and negative. Another believed that the disadvantages of the ratings are “outweighed by the fact that teachers are simply more accountable with evaluations and therefore more careful about their performance generally.”

10. Respondents’ Experience with Students Who Changed Their Minds about a Teacher after Completing the Course

The respondents were also asked whether a former student had ever told them that he or she had a negative opinion of a legal writing teacher while in the course but later changed that opinion. Thirty-nine (75%) of the respondents said “yes,” and seventeen (33%) have heard such comments more than ten times. Former students have explicitly told fifteen of the respondents (29%) that their opinions are now different from those expressed on their student rating forms. One respondent reported frequently hearing statements like this: “I hated the class and how much work you made us do, but this summer I was really thankful for all I’d learned.” Students told another respondent that “they didn't realize how important [the course] was until their first clerking job,” and several other respondents reported similar comments. A former student even asked one teacher how to make amends for an unkind evaluation.
C. Discussion

The respondents to this survey are experienced law school teachers and most supervise other teachers. Their observations, while not necessarily representative of all law professors or legal writing directors, provide some insight into the use and effects of student ratings in the law school setting. Many of the respondents’ observations are congruent with previous research, but some of them identify issues that have not yet been studied in depth.

The respondents reported that student ratings are the single most-used source for teacher evaluation in their writing courses (Table 2), and they identified several benefits of the ratings. The ratings have helped most respondents improve their own teaching. Some also reported that the ratings flag issues with the instructors they supervise and provide an opportunity for students to vent grievances.

At the same time, many of the respondents believed they had seen biases in the ratings. (Tables 3 and 4.) When they identified reasons for different ratings than they expected based on classroom observations, only a few said they thought the classroom observer had overestimated or underestimated the teacher’s competence. Instead, they identified reasons that related mostly to course grading and standards.

Thirty-seven percent of the respondents reported seeing grades negatively affect ratings, a bias that has been repeatedly identified in the literature. This effect may be particularly strong in legal writing courses because of the critiques and grades the students receive before completing student rating forms. Significantly, all the respondents reported that students in their courses receive some sort of feedback from which they either know or can infer an expected grade before they complete the rating forms. (Table 1.)

Other top explanations for anomalous ratings relate to course standards, including critiques of writing, requirements that students do their own analysis, and the course’s heavy workload. The
effect of rigor on ratings has not been studied extensively, but some commentators have expressed concerns that higher standards may lead to lower ratings.\footnote{For example, law professor Richard Markovits stated that law students’ “desire for the ‘right answers’ and their reluctance to think hard” cause them not to appreciate “lucid though complicated expositions of complex arguments.” Markovits, supra n. 16, at 422; see also Hocutt, supra n. 8, at 62 (stating that, to get higher ratings, professors may teach simple facts instead of complex skills); but see Cashin, supra n. 26, at 6 (stating that students give higher ratings to courses with heavy workloads).} The responses to this survey indicate that they may do just that, suggesting that student ratings may at times actually penalize good teaching.\footnote{These beliefs are consistent with Marlow-Shafer’s explanation for her data. She theorized that the workload of the course and the critiques given throughout the semester may be reasons why writing professors tend to receive lower ratings for writing courses. See Marlow-Shafer, supra n. 17, at 127 tbl. 3, 130–131.}

Thus the ratings can lead to “pander pollution,” as Professor Crumbley called it.\footnote{Crumbley, supra n. 72, at 7.} Perhaps because some professors may be reluctant to reveal that student ratings influence them to lower standards,\footnote{See Haskell, supra n. 4, at 2 (stating that “some faculty are embarrassed to admit that student evaluations may influence their professional behavior in the classroom”); Trout, supra n. 10, at 60 (suggesting that professors may be reluctant to admit that they lower standards to get higher students ratings).} there is a paucity of data on this point.\footnote{A recent study documented the tendency of student ratings to lower rigor at one university. Birnbaum, supra n. 157, at 6} However, in this survey, a third of the respondents reported that those in their programs have lowered standards because of student ratings, one-fourth said they have done this themselves, and nearly a third believe the ratings contribute to a decrease in rigor in law schools. (Table 5.) Legal academics should be concerned that these notable percentages reported such troubling effects on course rigor.

Women teachers’ gender was also thought to negatively affect some ratings, an observation that is consistent with previous findings to that effect.\footnote{See supra nn. 119–130 and accompanying text (discussing the effect of instructors’ gender on student ratings).} And where teachers received higher ratings than expected, the top explanation was that the teacher was popular for reasons unrelated to teaching performance, which is consistent with data showing that personality affects ratings but not learning.\footnote{See supra nn. 108–118 and accompanying text (discussing the effect of instructors’ personality on student ratings).} Respondents also reported that some students revise negative views of the writing course after they complete it, sometimes after they acquire work experience in the field. This contrasts with reports outside the legal academy that students do not...
change their minds about their ratings\textsuperscript{215} and warrants further study.

The respondents reported that student rating forms sometimes contain nasty, vindictive comments. In light of this, it is not surprising that several respondents think the ratings have a negative effect on morale. One respondent with six to ten years’ experience explained, “I set aside one day each summer on which I do no other work. Reading the evaluations is one of the most painful things I do. I seem to take the positive ones for granted; the negatives strike deep.”

IV. CONCLUSIONS AND PROPOSALS

“Those clothes sound lovely,” thought the Emperor. “If I wore them, I could find out who in my kingdom is not good at his job, and I’d be able to tell the bright people from the stupid ones. Yes, I must have that cloth woven immediately.”\textsuperscript{216}

There is an “Emperor’s New Clothes” aspect to student ratings.\textsuperscript{217} Just as the emperor’s subjects in the Hans Christian Anderson tale kept quiet about his nakedness, many academics are reluctant to say that the ratings emperor’s clothes are, if not missing, tattered enough to need some serious attention. Yet the literature and the results of this survey show that, like the emperor’s clothes, student ratings do not accurately reveal who “is not good at his job.” Indeed, the ratings’ potential for bias and even outright inaccuracy and their unintended negative effects are well documented.

The lowered standards that the ratings sometimes cause are particularly problematic in legal writing courses.\textsuperscript{218} As gatekeepers to the legal profession, law schools have a special obligation to up-

\textsuperscript{215} See Wachtel, supra n. 60, at 193.
\textsuperscript{217} See Greenwald, supra n. 25, at 278 (characterizing the author’s reaction on first researching student ratings as resembling that of the child who recognized that the emperor’s touted new clothes were missing).
\textsuperscript{218} See Centra, supra n. 3, at 63 (stating that teaching behaviors in multi-section validity studies may not be as suited to “higher level outcomes such as critical thinking or synthesis”), Wilbert McKeachie, Instructional Evaluation: Current Issues and Possible Improvements, 58 J. Higher Educ. 344, 345 (1987) (stating that achievement tests typically measure factual recall instead of “higher-level outcomes such as critical thinking or problem solving—the outcomes usually taken as most important in higher education”).
hold academic standards. Lawyers must be able to analyze complex material, deal with ambiguities, and solve problems, abilities that are not fostered by handing students digests of black-letter law.\textsuperscript{219} But some students prefer to have material simplified for them.\textsuperscript{220} Law professor Kissam believes that student rating forms exert significant influence on law professors to do just that instead of focusing on analytic skills.\textsuperscript{221} As D’Amato pointed out, the person who is hurt by this is “[o]nly the poor future client.”\textsuperscript{222}

Encouraging law students to make anonymous assessments is particularly ironic. Lawyers cherish the right to confront witnesses and exclude hearsay in the courtroom, but law schools solicit “anonymous, unconfrotted, uncross-questioned, unexamined hearsay” that affects professors’ careers.\textsuperscript{223} “Imagine,” Abel wrote, “what any of us would do as a scholar, an advocate, or a judge if confronted with our own incredibly sloppy evaluation procedures, or what passes as ‘evidence’ of our good or bad teaching.”\textsuperscript{224}

Several changes in the student ratings system can address these issues, starting with a holistic approach to teacher evaluation, which will diminish excessive reliance on student ratings. The following steps toward a more holistic approach have been endorsed by a wide range of scholars.

First, student ratings should not be the major or sole source of information about teaching for personnel purposes.\textsuperscript{225} Theall and

\textsuperscript{219}See Abel, supra n. 17, at 436 (stating that teaching black-letter law is incompatible with demonstrating the law’s internal contradictions).

\textsuperscript{220}See Hocutt, supra n. 8, at 62 (stating that student ratings sometimes motivate professors to stop “teaching complex intellectual skills in favor of teaching simple facts and figures”); McKeachie, supra n. 65, at 1219 (stating that “[m]any students prefer teaching that enables them to listen passively”).

\textsuperscript{221}Philip Kissam, \textit{The Decline of Law School Professionalism}, 134 U. Pa. L. Rev. 251, 273 n. 59, 274 (1986) (concluding that importing student ratings from the undergraduate setting to law school “seems wildly inappropriate”); see also Markovits, supra n. 16, at 421 (calling use of the ratings in law schools “indefensible”).

\textsuperscript{222}D’Amato, supra n. 174, at 494.

\textsuperscript{223}Platt, supra n. 162, at 451.

\textsuperscript{224}Abel, supra n. 17, at 452.

\textsuperscript{225}See e.g. Cashin, supra n. 26, at 6 (stating that “student ratings are only one source of data about teaching and must be used in combination with multiple sources of data”); d’Apollonia & Abrami, supra n. 26, at 1205 (stating that student ratings should be just one component of a comprehensive system of faculty evaluation); McKeachie, supra n. 65, at
Franklin, for example, flatly declared that decision makers should “[n]ever make the mistake of judging teaching or overall performance on the basis of ratings alone.” Instead, ratings should be treated as one part of an overall picture of an instructor’s teaching effectiveness.

Second, scholars agree that the users should not exaggerate the probative value of student ratings data. The rating forms are not sufficiently valid and close distinctions among scores are not meaningful enough to support fine distinctions based on numeric rankings.

Third, those who use the ratings, including law school and university administrators, must be educated about their appropriate application in order to avoid misusing their data. Among other things, users must remember that “research findings generalize from a sample to a population and do not guarantee that every situation will be explained.” They must also realize that it is unfair to compare ratings across courses. This is especially so with the legal writing course in light of Marlow-Shafer’s findings that instructors who teach both legal writing and another course tend to receive higher ratings in the other course.

Fourth, researchers generally agree that merely providing teachers with ratings data does not markedly improve teaching.

1222 (stating that all the experts contributing to a symposium issue agree that ratings “should be supplemented with other evidence”); Seldin, supra n. 7, at A40 (stating, “There is much more to teaching than what is evaluated on student rating forms.”).

226 Theall & Franklin, supra n. 42, at 51; see also Centra, supra n. 3, at 79 (stating that studies showing bias and only modest validity indicate “the need to supplement student evaluation information with other sources when assessing teaching”); Abrami et al., supra n. 35, at 459 (stating that the ratings support “only crude judgments of effectiveness” which must be “made with caution” and supplemented by data from other sources).

227 See d’Apollonia & Abrami, supra n. 26, at 1205 (citing sources for the point that “[i]n general, experts recommend that comprehensive systems of faculty evaluation be developed, of which student ratings are only one, albeit important, component”); Weinbach, supra n. 160, at 34 (stating that student ratings data “should be regarded as one rather suspect component of a total package of evaluation input”).

228 See McKeachie, supra n. 65, at 1223 (noting that small differences in ratings “are unlikely to distinguish between competent and incompetent teachers”).

229 Abel, supra n. 17, at 428, 452; McKeachie, supra n. 65, at 1219, 1223; Seldin, supra n. 7, at A40.

230 Abel, supra n. 17, at 452–53; McKeachie, supra n. 65, at 1223; Theall & Franklin, supra n. 42, at 52.

231 Theall & Franklin, supra n. 42, at 51.

232 See id. at 51–52 (asserting that “[i]t would be grossly unfair to compare the ratings of someone teaching a graduate seminar with ten students to the onetime ratings of someone teaching an entry-level required course with an enrollment of two hundred”).

233 Marlow-Shafer, supra n. 17, at 127 tbl. 3.

234 See Cohen, supra n. 70, at 336–337.
It is imperative to provide them with resources on how to improve. Researchers have cautioned that using ratings without offering such resources for improvement is “punitive.” For legal writing teachers, this may mean providing resources from both the education and legal writing fields.

Scholars generally agree on the above four suggestions. They also agree that teachers who receive midterm comments from students tend to receive better course-end ratings. About halfway through a course, at a teacher’s own initiative, students may be asked what is working well and what they would like to see changed. Professors can obtain such information informally and maintain it themselves outside the summative evaluation process. Professor Roth has published an example of a short form aimed at eliciting this information.

Other, more controversial suggestions have also been proposed. Some scholars contend that evaluators can reduce some of the ratings’ detrimental effects by eliminating their quantitative aspect—that is, by not using numbers and norms. Also, to shed some light on the potentially biasing factors, forms can ask for the student’s gender and expected grade, because these factors have been found to influence ratings.

An additional suggestion by several researchers is to use only questions aimed at specific behaviors, like whether the professor arrives on time. General questions like “How do you rate your teacher?” invite students to rate teachers on amorphous feelings.

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235 Cohen, supra n. 42, at 127 (explaining that while ratings alone improve teaching “only modestly,” the assistance of a consultant increases improvement); McKeachie, supra n. 50, at 6–7 (explaining that improvement is more likely to occur if the teacher has “help from an experienced consultant”); Theall & Franklin, supra n. 42, at 53 (stating that resources for teacher improvement are “part of a complete system and cannot be omitted.”)

236 Theall & Franklin, supra n. 42, at 53


238 Roth, supra n. 17, at 625, app. C.

239 See Abel, supra n. 17, at 453 (recommending that quantitative ratings not be used); McKeachie, supra n. 65, at 1223 (stating that norms should not be computed).

240 See supra nn. 119–130 and accompanying text (discussing the effect of teachers’ and students’ gender on student ratings) and nn. 93–107 and accompanying text (discussing the effect of expected grades on student ratings).

241 See Stanfel, supra n. 49, at 122 (stating that the forms should be made up of questions about specific behaviors that can be verified); Williams & Ceci, supra n. 75, at 23 (stating that fair questions should ask about specific behaviors rather than general attributes that may be “permeated with impressions unrelated to whatever it is we assume we are measuring”).
instead of actual performance.\textsuperscript{242} Notably, 77\% of the respondents to this study who said student ratings helped them improve their teaching identified feedback about specific behaviors, rather than general comments, as helpful.\textsuperscript{243}

It has also been suggested that students be asked to sign their names to the forms. This seems to be a radical suggestion in the student ratings culture, partly because research has shown that ratings are higher when students sign them.\textsuperscript{244} “The hypothesis is,” Cashin has written, “that requiring students to sign their names inflates the ratings because some students are concerned about possible reprisals.”\textsuperscript{245} This statement, however, assumes that the lower, anonymous ratings are the accurate ones. Another hypothesis is that students sometimes use the cloak of anonymity to indulge whims or grudges,\textsuperscript{246} and that only opinions they are willing to sign are sufficiently weighty to be considered for personnel decisions.

Other proposals concern mathematical adjustments to ratings data. Several scholars have recommended that formulas be applied to adjust the data to counteract the tendency of ratings to promote lower grades and rigor.\textsuperscript{247} Such adjustments, however, would make the ratings process still more cumbersome. Moreover, no formula could adjust for all the biasing factors that have been identified as well as those that have not, but formulas would invest the ratings with yet more mysterious, sacred numeracy. For these reasons, I do not recommend them here.

The bluntest suggestion is to eliminate mandatory student ratings altogether,\textsuperscript{248} at least for summative purposes.\textsuperscript{249} Legal

\begin{thebibliography}{9}
\bibitem{242} Hocutt, supra n. 8, at 57.

\bibitem{243} Supra pt. III(B)(6).

\bibitem{244} See Cashin, supra n. 26, at 6 (citing studies).

\bibitem{245} Id.; see also Centra, supra n. 3, at 77–78 (stating that student ratings are higher when students identify themselves, and therefore, the forms should be anonymous).

\bibitem{246} See Abel, supra n. 17, at 452, 454 (stating that students sometimes seek revenge through the ratings); Platt, supra n. 162, at 451 (stating that the rating forms might be used to “settle grudges”).

\bibitem{247} E.g. Johnson, supra n. 7, at 50 (suggesting adjustments to evaluations to mitigate the biasing effects of grading policies); Anthony G. Greenwald & Gerald M. Gilmore, No Pain, No Gain? The Importance of Measuring Course Workload in Student Ratings of Instruction, 89 J. Educ. Psychol. 743, 750 (1997) (suggesting adjustments to ratings to consider student workload and grading leniency); Stapleton & Murkison, supra n. 87, at 28 (proposing a formula that would take into account learning production and expected grades to guard against the ratings’ tendency to lower rigor).

\bibitem{248} See e.g. Gray & Bergmann, supra n. 79, at 46 (arguing that universities should “get rid of this inaccurate, misleading, and shaming [student rating] procedure”); Hocutt, supra n. 8, at 55 (suggesting that student ratings should be discontinued); Platt, supra n. 178, at

writing teachers could still gather information to improve their teaching by voluntarily drafting, administering, and retaining their own forms. These customized forms can provide information specific to the particular teacher and course and thus be more helpful than forms used for summative purposes. And students may believe that the teacher who drafts them has a sincere interest in obtaining their constructive opinions.

Whether student ratings are eliminated or retained, evaluators can employ a holistic approach by drawing on other helpful sources that are well supported in the literature. Some respondents to this survey already incorporate such practices. Others may wish to consider the alternatives below.

One helpful source of information about teaching is the teaching portfolio, now in widespread use in undergraduate schools. Prepared by the teacher, the portfolio contains course materials such as syllabi, assignments, and marked student papers. It also includes the teacher's reflective statements about her goals and any efforts she has undertaken to improve her teaching. The portfolio provides an opportunity for the teacher to describe the course and the students and to comment on the student ratings. An early promoter of portfolios has explained that portfolios work because they "capture[] both the individuality and the complexity of teaching." Teaching portfolios can be helpful for both formative and summative teacher evaluation, providing information

39 (arguing that American universities should “abolish anonymous evaluations”).

249 See Ericksen, supra n. 161, at 136 (urging evaluators to "eliminate the questionable practice" of using student ratings for personnel purposes because that encourages teaching to the evaluation); Weinbach, supra n. 160, at 34 (stating that student ratings should be de-emphasized in personnel matters in order to uphold academic standards).

250 See e.g. Seldin, supra n. 7, at A40 (recommendimg teacher portfolios); Trout, supra n. 10, at 60 (recommendimg “less noxious” tools like “[n]arrative evaluations, self-evaluations, peer visitation and review, and intensive focus-group interviews”).

251 See supra pt. III(B)(5).

252 Thomas Bartlett, What Makes a Teacher Great?, Chron. Higher Educ. A8, A9 (Dec. 12, 2003) (stating that portfolios are now used in more than 2,000 colleges); see also Lowman, supra n. 1, at 298; McKeachie, supra n. 237, at 283–284.


255 Bartlett, supra n. 252, at A9 (quoting Peter Seldin).

256 See Dailey, supra n. 253, at 152–154 (explaining that the reflection involved in assembling a portfolio can encourage a teacher to improve his or her performance). When used for summative purposes, portfolios in a particular school may be more helpful if they follow a common format. See McKeachie, supra n. 237, at 284 (stating that a portfolio used for summative purposes "should be prepared according to guidelines developed by the de-
that is more complete and nuanced than numbers on anonymous forms.

A newer variant on the teacher portfolio is the course portfolio, which focuses on a single course, describing the teacher’s goals and how they were or were not achieved.257 This may be the kind of portfolio best suited for evaluating legal writing teachers, many of whom teach only writing courses.

Evaluators can also visit classes. Scholars of peer review have studied that process intensely in recent years and offer numerous suggestions for effectively accomplishing it, including using teams of peers to provide a well-rounded view of an instructor’s teaching.258 Evaluators can develop guidelines to provide structure for this process,259 and the teams can include trained evaluators from outside the law school in order to eliminate bias that may arise from friendships or rivalries.260

Evaluators can also obtain student feedback through methods other than student rating forms. They can conduct methodologically sound student focus groups (not random discussions).261 They can also request reaction essays or invite students to write letters to the instructor about the course experience.262

Finally, evaluators can discuss the whole process with the teachers themselves to obtain broader information than they would get from student rating forms.263 The evaluators can meet with the teacher before visiting the class to gain an understanding of the teacher’s goals and planned approach.264 And the teaching portfolio can be the focus of a meeting between the teacher and
colleagues in which all participants benefit from a reflective discussion and sharing of ideas.265

Legal writing professionals must be cognizant of these points in their own decision making and in dealing with administrators who rely, often unduly, on student ratings. Although the above measures are more time consuming than relying on simple numbers, saving time is not an excuse for excessive reliance on an evaluation method with demonstrated flaws. A holistic approach to teacher evaluation will significantly reduce the influence of student ratings and refocus attention on student learning as the appropriate goal of the legal writing course.

265 See Dailey, supra n. 253, at 156–159 (discussing "portfolio roundtables").
INTEGRATING TECHNOLOGY: 
TEACHING STUDENTS TO 
COMMUNICATE IN ANOTHER MEDIUM

Pamela Lysaght**
Danielle Istl***

I. INTRODUCTION

The dominant classroom approach in first-year Legal Writing courses is to teach the fundamental skills of legal analysis and reasoning, problem solving, written communication, and research — if research is fully integrated into the writing course — primarily through vehicles such as legal memoranda; pretrial, trial, and appellate briefs; and client letters.¹ Oral communication is most often taught ancillary to the pretrial or appellate brief.² These

¹ This Article is based on a workshop the authors presented at the Legal Writing Institute’s 2002 Conference, “Reflections and Visions,” at the University of Tennessee College of Law. Some of the materials at this workshop were originally presented at the Institute for Law School Teaching 2001 Summer Conference, “Assessment, Feedback, and Evaluation,” at Gonzaga University School of Law. At that presentation, the Authors’ focus was “Evaluating Students in the Internet Age.” This Article brings together and expands upon what was emphasized at both workshops. The Authors thank Craig Smith and Anthony Palasota for their editorial assistance.

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³ Associate Director of the Applied Legal Theory and Analysis Program for the J.D./LL.B. Program offered by University of Detroit Mercy School of Law and University of Windsor Faculty of Law.

¹ See Ralph L. Brill et al., ABA Sec. of Leg. Educ. & Admis. to the B., Sourcebook on Legal Writing Programs 12–21 (LEXIS L. Publg. 1997); ALWD & Legal Writing Institute 2000 Survey Results, question 20 (survey conducted by Jo Anne Durako) (copy available at online http://www.alwd.org) [hereinafter ALWD/LWI 2000 Survey Results]. According to the Survey, client letters are not as pervasive as memoranda and appellate briefs. The typical paradigm may be expanding even beyond memoranda, briefs, and client letters as increasing numbers of first-year legal writing programs introduce students to the fundamentals of drafting documents and legislation. See id. Comparative survey results for this question from the 2001 ALWD/LWI Survey are not available because of a technical problem with the construction of the 2001 Survey. Comparative results from the ALWD/LWI 2002 Survey are consistent with the 2000 Survey: office memoranda and appellate briefs are more pervasive than client letters and there is a growing trend to introduce first-year students to document drafting. ALWD & Legal Writing Institute 2002 Survey Results, question 20 (survey conducted by Jo Anne Durako & Kristin Gerdy) (copy on file with authors) [hereinafter ALWD/LWI 2002 Survey Results].

² ALWD/LWI 2000 Survey Results, supra n. 1, at question 21. Some schools also
fundamental skills are a lawyer’s essential tools in the practice of law. And few would deny the efficacy of the venerable vehicles through which these skills are taught.

Yet technology is creating new tools and vehicles for the study and practice of law. For example, technology is changing the way we teach and administer our legal research and writing programs — many Legal Writing teachers use course web pages and listservs, online and embedded edits, and presentation software. Others use synchronous and asynchronous discussion groups to continue classroom discussion beyond the classroom environment.

Technology is also rapidly increasing access to legal information on the Internet, as well as providing new ways for lawyers to communicate with clients and juries.

As Legal Writing teachers take advantage of technological advances to enhance the delivery and administration of their courses, they should consider providing students with the opportunity to integrate technology — beyond word processing — as a vehicle for formally communicating. Because the Internet provides the opportunity to incorporate in-class exercises and reports to the senior partner as vehicles for developing students’ oral communication skills. Id. The 2002 Survey Results are consistent with this data, and, in fact, demonstrate a growing trend to include in-class presentations and reports to the senior partner. In 2000, thirty-four programs reported including an in-class presentation and sixteen included an oral report to the senior partner. In 2002, the numbers grew to 43 and 31 respectively. ALWD/LWI 2002 Survey Results, supra n. 1, at question 20. This increase may be partially due to the slightly higher response rate. In 2000, 137 schools, or 78%, responded. ALWD/LWI 2000 Survey Results, supra n. 1, at i. In 2002, 154 schools, or 83%, responded. ALWD/LWI 2002 Survey Results, supra n. 1, at i.

3 ALWD/LWI 2000 Survey Results, supra n. 1, at question 43; see also ALWD/LWI 2002 Survey Results, supra n. 1, at question 43 (including results from the 2001 Survey). According to these Surveys, course e-mail listservs are the most prevalent, followed by use of smart classrooms. A majority of respondents do not use online edits or create course web pages (including use of TWEN and Blackboard).

“Computer-based instruction” is another effect of technology. This form of instruction has been defined as a “model of learning that is currently being marketed in law schools and the profession, specifically legal materials provided on a hypertext database, coupled with the encouragement that students and lawyers use laptops and databases to organize information. In some instances, the experience is also one of distance learning . . . .” Molly Warner Lien, Technocentrism and the Soul of the Common Law Lawyer, 48 Am. U. L. Rev. 85, 105 (1998). Professor Lien’s article eloquently explains that technology, in some instances, can change the process of legal reasoning in harmful ways, and that lawyers will more wisely use technology if they are aware of its potentially negative consequences. Her calls for caution were helpful in designing this technology unit.


5 Technology is affecting law practice in other ways, as well. For example, case- and document-management systems are revolutionizing law-office administration.

6 The need to train students in using technology to communicate with clients is not
portunity for students to participate in a “more truly exploratory educational experience,” an additional element could include requiring students to conduct Internet research (i.e., excluding Lexis and Westlaw), which may not be a common component of most Legal Writing courses.

Not only do employers seek advanced technology skills generally, but “[i]n law practice today, presentation software skills are critical for presentations to juries, boards of directors, and potential clients.” Indeed, the plethora of practice materials and Continuing Legal Education programs devoted to presentation software suggests that clients and juries increasingly expect verbal presentations to be accompanied by computer graphics and visual aids.

Furthermore, with the explosion of free information on the Internet, common sense suggests that law firms will increasingly integrate these sources into existing research conventions. Students, therefore, need to familiarize themselves with websites on which they can readily locate legal authority so that when commercial databases are no longer available to them free of charge, they will be able to successfully use the Internet for legal research.

With this in mind, coupled with informal surveys of hiring partners at local law firms about what skills and knowledge students should have to competently enter the legal profession, the Applied Legal Theory and Analysis Faculty at University of Detroit Mercy (UDM) designed a technology unit that requires students to use and assess (1) the Internet as a research tool and (2) presentation software as a vehicle for communicating their

limited to formal correspondence and presentations. Professor Lucia Silecchia has stated that because the electronic age has spawned new types of legal writing, Legal Writing programs need to train students how to communicate in such types of informal correspondence as electronic mail. Lucia Anne Silecchia, Of Painters, Sculptors, Quill Pens, and Microchips: Teaching Legal Writers in the Electronic Age, 75 Neb. L. Rev. 802, 844–845 (1996).


8 The ALWD/LWI Surveys, supra n. 1, have not specifically solicited information about whether Internet resources beyond Lexis and Westlaw are taught in Legal Writing programs. Question 19, which asks for information about the scope of research training in the first year, includes a category of “other.” Twenty-two respondents marked this category in 2000, eighteen in 2002. (There is no reliable data for this question because of a technical difficulty in the construction of the 2001 Survey.)


analyses to a client. This technology unit comprises fifteen hours of in-class time, including workshops in which students work in law firm “groups” to solve a legal problem using only the Internet as a research tool (excluding commercial databases), and informally evaluating the various legal Internet websites they visit. The end product is a software presentation that students prepare in which they present their advice to the corporate client.

Additional goals of this technology unit include familiarizing students with the Convention on Contracts for the International Sales of Goods (CISG); further promoting students’ analytical and problem-solving skills; replicating the collaborative experience often found in law firms; and introducing students to client interviewing.

At a time when clients’ expectations with respect to the technological ability of their attorneys are re-shaping what it means to be a competent attorney, LRW professors may wish to consider how they can better prepare their students, through the use of technology, to meet these expectations.

This Article provides a basic methodology for designing a technology unit. We include within this methodology a discussion of our experiences in designing and implementing UDM’s technology unit.

II. DESIGNING AND IMPLEMENTING A TECHNOLOGY UNIT — CHOICES AND CONSIDERATIONS

A. Considering Institutional and Programmatic Parameters

Changes in existing course content of a Legal Writing program can involve institutional considerations and will almost always involve programmatic considerations. As to the former, the addition of a technology unit, which is admittedly not a traditional writing assignment, might have to be approved by a curriculum committee or Legal Writing and Research committee. Further, institutional philosophies might have to be considered. For example, does the Legal Research and Writing program have access to the

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12 Others have noticed the need for training in collaborative writing. See e.g. Silecchia, supra n. 6, at 831.
13 Maria Perez Crist, Technology in the LRW Curriculum — High Tech, Low Tech, or No Tech, 5 Leg. Writing 93, 96 (1999).
technological support that developing and implementing a technology unit requires? Are there adequate resources for students to conduct Internet research and to prepare and present their software presentations? Often all faculty members are competing for their law school’s limited technological resources. More fundamentally, is the institutional culture favorably predisposed to the use of technology as a research and communication medium; or will including a technology unit be viewed as somehow less than pedagogically sound? If electronic technology is to become an accepted pedagogical tool, there must be support and commitment from law school administration and faculty.

Programmatic considerations will vary from school to school, but some of the more basic include whether the technology unit can be incorporated into an existing program, whether the existing program can be modified to include a technology unit or portions of one, or whether including a technology unit will require additional course credit. Rather than modify an existing program or add an additional credit, another possibility would be to create an entirely new one- or two-credit course.

There were a number of institutional and programmatic considerations we faced in designing and implementing UDM’s technology unit. The context in which the technology unit arose included a highly structured first-year legal research and writing program and curriculum reform. The Applied Legal Theory and Analysis Program (or ALTA, UDM’s first-year legal research and writing program) was designed as an integrated research and writing program that takes a contextual approach to teaching the fundamental skills of legal research, legal analysis and reasoning, problem-solving, and communication by focusing on conceptually

14 Id. at 110–111.
15 Lasso, supra n. 4, at 54.
16 For a checklist for law faculty considering the implication of technology in their classes see Richard Warner et al., Teaching Law with Computers, 24 Rutgers Computer & Tech. L.J. 107, 171 (1998), and Crist, supra n. 13, at 123, for an adaptation of that checklist for the needs of LRW faculty.
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difficult doctrines from contracts.\textsuperscript{18} Students learn and apply these doctrines at increasingly sophisticated levels in the context of preparing various documents, including memoranda, client letters, pleadings, interrogatories, contracts, and an appellate brief, as well as participating in a moot court competition. There was no room to add another unit of assignments, and we were reluctant to modify existing assignments. Rather than modify the existing ALTA program, we requested and were granted an additional credit hour — from five credits to six.\textsuperscript{19}

B. Defining the Scope of the Problem

As with designing any assignment, there are choices about the scope of the problem. Should students be required to research an unfamiliar body of law, or should the unit build on previously acquired legal knowledge? How challenging should it be? What resources are available on the Internet? How reliable are they?

In defining the scope of UDM’s technology unit, there were two principal parameters we had to address — beyond fitting within the existing contextual philosophy of the ALTA course. The first parameter we encountered in designing this unit was the technology itself — both as a research tool and as a vehicle to communicate. Practically, there had to be free resources available online.\textsuperscript{20} Moreover, the Internet site(s) selected for the problem had to be reliable. A website’s reliability is dependent upon a number of facts, the most significant of which is who publishes the site.\textsuperscript{21} Other factors, such as who contributes to the site, the editing of...
the site, and the frequency with which the site is updated, are also relevant.\textsuperscript{22}

The Pace University Law School CISG website\textsuperscript{23} is highly reliable and provides a wealth of CISG materials — everything we needed to design the problem and everything students needed to resolve the problem.\textsuperscript{24} CISG is a fairly lengthy treaty (101 Articles) that could be fairly intimidating to first-year law students. For this reason, we decided to focus the problem on articles involving parol evidence.\textsuperscript{25}

Pedagogically, we were cognizant of how technology can affect legal reasoning. Students jump from hypertext link to hypertext link, cutting and pasting as they go along, and miss the nuances of the court’s reasoning.\textsuperscript{26} We were also mindful of the risks involved in integrating technology in one’s course: “It is essential to integrate electronic technology in a pedagogically sound way or we will accomplish little more than technologizing unsound teaching.”\textsuperscript{27} Despite our best efforts to improve student learning, we run the risk of hindering learning if technology is used ineffectively.\textsuperscript{28} The value of technological tools depends on how and why we use them.\textsuperscript{29} Professors are already aware of some of the negative influences technology can have in the classroom.\textsuperscript{30} We wanted a balanced approach; we did not want to emphasize technology simply for technology’s sake. Rather, we wanted a problem that provided an opportunity for students to assess certain technologies as ancillary to the lawyering process.

Second, we wanted an international law problem. Our primary reason for focusing on international law was two-fold: We wanted to add a comparative element to the course — especially involv-
ing the sale of international goods — so that that students could compare and contrast international law with domestic law, Article 2 of the Uniform Commercial Code. Most important for our purposes, the technology unit would also be included in the LRW course for UDM’s joint-degree program with the University of Windsor Faculty of Law.31 Since Canada is also a signatory to the CISG, this statute seemed an appropriate place to begin.32

At a more practical level, we wanted a change of pace from the rest of the year, which can be a fairly frenetic existence for students and Legal Writing professors alike. And we wanted to replicate as much as possible the collaborative experience in law firms.33 Thus, the problem had to be complex enough to warrant a collaborative experience.

### III. BUILDING A SKILLS AGENDA FOR A TECHNOLOGY UNIT

A technology unit provides a vehicle for incorporating a number of lawyering skills.34 Of the six principal categories set out below, UDM’s technology unit emphasizes communication, research, and practice. Broadly speaking, these lawyering skills can be categorized under doctrine, analysis, communication, research, practice, and ethics.35 Certainly, crafting an assignment is not a linear process — from defining the scope of the problem to building a skills agenda. One necessarily informs the other; the two tasks of

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31 Students in the J.D./LL.B. program receive degrees from University of Detroit Mercy School of Law and University of Windsor Faculty of Law. Students must satisfactorily complete 104 credit hours of course work within three academic years. The program was launched in Fall 2001.


33 ABA Standard 302(d) requires that law schools “shall provide students with adequate opportunities for small group work through seminars, directed research, small classes, or collaborative work.” ABA Sec. Leg. Educ. & Admis. to the B., ABA Standards For Approval of Law Schools and Interpretations, http://www.abanet.org/legaled/standards/chapter3.html (accessed July 30, 2002).

34 Brill et al., supra n. 1, at 15 (discussing a skills agenda as one of the characteristics of a good legal writing assignment).

35 We have found these broad categories helpful in designing all of the ALTA writing assignments as they assist us in developing and articulating discrete skills within each of the broader categories.
problem design and building a skills agenda are typically conducted in concert. And, on any given assignment, some categories will predominate over others. Balance across the categories is achieved through multiple assignments over the course of the academic year.

A. Doctrine

All Legal Writing assignments teach substantive law. Often the type of problem — predictive memorandum, trial brief, appellate brief — and the timing of the assignment affect the choice of suitable doctrinal material, as does the individual professor’s doctrinal interests. This is also true in designing a technology unit. As discussed above, we set out to create an assignment that would introduce students to international sales law in the context of resolving a legal problem. At a more discrete doctrinal level, we wanted them to examine a concept they were familiar with in contracts through an international lens. The CISG’s treatment of parol evidence proved to be highly suitable.

B. Analysis

Similar to doctrinal considerations, the type of assignment and timing of the assignment may dictate the analytical goals. An early memorandum will often focus on basic factual analysis and case synthesis, while a more complex memorandum or appellate problem will often require statutory analysis, including examination of legislative histories. Our own analytical goals in selecting the CISG included requiring students to work through legislation that was new to them (although they would have had some basic introduction to it in their contracts course) and to reinforce skills taught on earlier assignments, specifically statutory analysis and case synthesis.

C. Communication

Traditional writing assignments do not typically present the rich array of possibilities for teaching both oral and written communication that a technology unit provides. At most, a trial or appellate brief assignment will include an oral report to the supervising attorney, the written brief, and oral advocacy. A technology unit provides opportunities for students to report to the supervis-
ing attorney, provide an oral presentation through the use of presentation software, prepare handouts for the client, and prepare a follow-up client letter. Although we intended to include all these opportunities, we ultimately decided to phase-in the client letter the second year. This allowed us to concentrate during the first year of implementation on Internet research and oral communication accompanied by a software presentation, while working through doctrinal material we had not taught before. A follow-up client letter may not be a necessary component, depending upon the type of problem. But we anticipated, and ultimately determined, that the problem we designed was sufficiently complex to warrant a follow-up client letter because students were required to provide a detailed analysis, which is not generally possible with a software presentation alone. This limitation of presentation software in some situations is, of course, part of the pedagogical experience in teaching students to assess the technology.

D. Research

Most writing assignments can provide excellent vehicles for teaching research in context.\(^{36}\) The same is true of the technology unit. Building in a research component to this unit is, of course, not necessary to having a technology unit. An existing problem can be modified to include a software presentation to a “client.” But this unit does provide an opportunity to require students to use and assess free Internet resources, which were particular skills we wanted students to master, and to learn how to integrate free Internet resources with commercial databases. (The latter may be fairly minimal, which was our experience; students were required to verify cases through commercial databases.) For some law students, having to use only the Internet for a legal research problem may seem like an inefficient use of time given that commercial services are now so easy to use and manipulate.\(^{37}\) However, we wanted students to become aware of how much free legal information is available on the Internet. Moreover, because our problem involved an international treaty, it was important that students learn that some potentially relevant cases decided under this treaty are not available on Westlaw and Lexis.

\(^{36}\) Teaching various research resources and strategies may involve collaborating with the librarians, if they teach the research component.

\(^{37}\) Geist, supra n. 4, at 161.
As mentioned above in designing the scope of the problem, there must be suitable free Internet resources — at least enough to get started — if the principal goal is to teach students how to integrate free resources with commercial databases. There is a wealth of government sites and an increasing number of specialized sites hosted by academic institutions that may be suitable for designing the Internet research component of a technology unit.  

E. Practice

While a practice component can be a feature of almost any traditional Legal Writing assignment, the technology unit provides a vehicle for introducing a number of discrete lawyering skills, including collaboration, client interviewing, client counseling, and maintaining timesheets.

Creating a collaborative learning experience was a key goal in designing the technology unit for three reasons. First, as previously mentioned, it replicates the law firm experience to some extent. Second, students feel less isolated. Third, it was an opportunity for the ALTA faculty to teach students how to collaborate and work as a team.

Requiring students to glean their facts through a simulated client interview provided them with an opportunity to learn the importance of fact gathering in problem solving. Counseling clients had been introduced in an earlier unit of assignments, but the technology unit provided a simulated experience of giving advice through an oral presentation enhanced by the use of technology with a follow-up client letter. Finally, requiring students to maintain timesheets was a very small, but nonetheless practical, requirement. We wanted students to become familiar with accounting for their time in “representing” a client.

F. Ethics

Building in an ethics — or professional responsibility — component comes easily to Legal Writing professors. A number of rules

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38 One useful compilation is SurfLess LLC, Law Quickly & Easily on the Internet (SurfLess LLC 1999).
39 Brill et al., supra n. 1, at 35 (explaining how canned fact patterns do not replicate the way lawyers gather facts and suggesting that facts be presented through simulated client interviews).
naturally lend themselves to class discussions, including the parameters of zealous representation, confidentiality, and the duty to disclose adverse authority.\footnote{For the importance of a writing assignment including an ethical component, see id. at 8.} Because we discuss a number of professional responsibility rules throughout the course, we used this assignment as an opportunity to focus on those Michigan Rules of Professional Conduct relating to client counseling.\footnote{For the J.D./LL.B. students, the Michigan Rules of Professional Conduct were compared to the Law Society of Upper Canada Rules of Professional Conduct, which govern lawyers in Ontario.} Additionally, requiring students to maintain timesheets provides the professors with an opportunity to discuss the appropriateness of billing a client for all the time spent on the file when a new lawyer is learning a new area of law.

IV. IMPLEMENTING THE TECHNOLOGY UNIT

Implementing a multifaceted assignment with a broad skills agenda presents certain logistical and pedagogical challenges. In particular, incorporating practice skills in a collaborative law-firm setting requires making choices about how to incorporate some of the skills, how to structure several of the classes, and, ultimately, how to assess the students’ work. Our strategies for creating a supervised collaborative learning environment, incorporating client interviewing, teaching Internet research and effective software presentations, and client counseling are discussed below, followed by a brief explanation about how we assessed the students’ work.

A. Collaborative Learning

Early on, we recognized that it would be important to create law-firm teams that were based on the individual students’ varying abilities in non-legal Internet research and presentation software, as well as in legal reasoning and writing. A few weeks before the problem was assigned, we surveyed students on their experiences in basic non-legal Internet research and in using presentation software. Each collaborative group, or small law firm, was balanced between “experienced” and “not very experienced.” Each group was also balanced with respect to analytical and writing skills.
Scheduling an ample number of in-class workshops devoted to working on the problem provided the ALTA faculty with opportunities to monitor students’ progress and intervene when necessary. Additionally, we required each team to meet with the “supervising attorney,” who was played by the ALTA faculty, and to provide a progress report. This session was scheduled for three reasons: to replicate what most students would experience as early as the following summer; to afford them the opportunity to receive feedback about their work in a fairly “safe” environment and to build their confidence in this discrete skill; and, finally, to allow us, through questioning, to keep students focused.

B. Client Interviewing

Client interviewing was introduced through readings and a lecture. The lecture was accompanied by a software presentation, for two reasons. First, we thought it was appropriate for students to see their professors using the very technology they were being required to use. Indeed, students are more likely to learn better if the professor herself is able to use modern technology. Second, we wished to demonstrate an example of what, in our view, was an effective software presentation.

Teaching client interviewing also presented us with a practical challenge; individual interviews for each group were not feasible. Therefore, we had an actor play the role of the client and a lawyer play himself. Students were told nothing about the type of problem they would be resolving — only that they would be required to gather their initial facts from the client interview and conduct some initial research within their groups, then each group could ask follow-up questions at a subsequent “interview” where their professor played the part of the client. We intend to modify this by bringing in several lawyers as guests to serve as the client for each group of students, which will permit the students to be even more involved in the client interview process and receive valuable feedback from practicing attorneys.

The second interview was intended to be more than an opportunity for additional fact gathering; it was also structured so students could develop some rudimentary skill in asking pertinent questions in a professional way. At the end of this session, the

42 Crist, supra n. 13, at 96.
ALTA faculty switched roles — from client to professor — and discussed students’ interviewing techniques, including phrasing of questions and tone.

C. Teaching Internet Research and Presentation Software

The surveys we conducted indicated that most students already had substantial experience in non-legal Internet research. This was consistent with data showing that, by college age, students’ primary mode of communication and learning is the computer. Consequently, we focused discussions on mega-search engines that might be suitable for legal research, Internet resources that compile governmental and academic websites, and websites that discuss criteria used in evaluating Internet resources. We grappled with how much to “teach” the students with respect to Internet research, especially when so many identified themselves in the surveys as “very proficient.” We chose to highlight not only the advantages of this type of research, but also the disadvantages. For example, Boolean searches can at times be either under-inclusive or over-inclusive. Students who identify themselves in the surveys as very proficient in Internet research may not have considered this. Moreover, many of them do not use a search engine that is best-suited for the research project, but rather stick with the ones with which they are most familiar.

The surveys also revealed that approximately half the students had experience with presentation software. Consequently, we made sure there were students with experience in software presentation in each group to assist the others in learning how to use the technology. We scheduled class time to discuss character-

43 Lasso, supra n. 4, at n. 91 (indicating that, according to the U.S. Census Bureau, by 1999, 89% of American college students used computers).


45 Ehrenberg, supra n. 10, at 7.

46 Sites that are of assistance in learning PowerPoint, at both basic and advanced levels, include Sonia Coleman, Tutorials for Windows, www.soniacoleman.com/Tutorials/tutorials.htm (accessed July 25, 2002) (somewhat advanced with multi-media); Ezresearch,
istics of effective software presentations. To prepare for these discussions, we required students to conduct Internet research on how to create effective software presentations.\footnote{Some helpful sites include: Getty Images, \textit{Presentations}, www.gettyworks.com/projects/presentations/ (accessed July 20, 2002) (see in particular the Related Articles links); UCLA Office of Instructional Development, \textit{Presentation Software}, www.oid.ucla.edu/FNMC/whprestn.htm (accessed July 20, 2002); and Strategic Communications, www.strategiccomm.com (accessed July 25, 2002) (various articles are available via the Resource Library link).}

\section*{D. Client Counseling}

Students had previously been introduced to client counseling in the context of preparing a client letter the first semester. The technology unit required them to build on that experience in a more sophisticated context and in another medium. The classes devoted to workshops provided excellent opportunities to discuss audience and strategies for counseling the client while using presentation software technology as a medium. This would include giving advice (again keeping in mind the technological medium), determining the depth of analysis in the oral presentation, preparing accompanying handouts, and writing the follow-up client letter as an extension of the oral presentation.

\section*{E. Assessment}

The structure of the technology unit provided several opportunities for the ALTA faculty to give oral feedback. This feedback was provided during class discussions on Internet research and effective software presentations, at the conclusion of the second
client interview, during the workshops, and at the meeting with the supervising attorney. Students also received oral feedback at the conclusion of all their software presentations to the client. Before we implemented the problem, we developed a detailed checklist to evaluate the presentation to the client based on quality of research, completeness and accuracy of analysis, quality of advice, effective use of presentation software technology, oral presentation skills, and ability to answer questions.

The second year of implementation, which included the follow-up client letter, required us to consider whether to grade the oral presentation and client letter separately or together, as one unit. We decided to evaluate them as a unit, looking for an appropriate balance between the depth of treatment required in the oral presentation with the software technology and the depth of treatment necessary in the follow-up client letter — including elaborating, if appropriate, on issues or themes raised by the client during the oral presentation.

V. THE FINAL PRODUCT: STUDENTS’ PRESENTATIONS AND THEIR EVALUATIONS

The students’ presentations to the “client,” once more played by the ALTA faculty, were a pleasure to watch. In almost all cases, they were very professional. Moreover, each one was aesthetically unique. As expected when we grouped the teams by varying abilities, the quality of the analyses, while not uniform, was fairly similar.

One cautionary note, however, on the presentations themselves — how smoothly they run technologically may be dependent on the available technological resources. For example, a portable LCD projector may not be compatible with the computer being used until the computer’s display settings are changed. Using one notebook computer that is compatible with the LCD projector for all the student presentations is a way to avoid this problem.

The students’ reaction to the technology unit has been enthusiastic. Feedback from evaluation forms, coupled with post-course discussions with the students, indicates that they found several aspects highly useful: client interviewing, Internet legal research, introduction to the CISG, and the use of presentation software to

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48 Crist, supra n. 13, at 114.
assist in an oral presentation. The first year we implemented the unit, a very few students complained about the collaborative process because there was a “slacker” in their group. While this is always a risk in group projects, the following year we decided to spend additional time during the workshops discussing methodologies for working together as a team, building on each other’s strengths, and ways to divide the labor. The result was even fewer comments — in fact, most of the ALTA faculty received no negative comments — about having to work in teams.

VI. CONCLUDING THOUGHTS

A full year of planning preceded implementing UDM’s technology unit, and we phased-in the full requirements over a two-year period. As a consequence, we were able to anticipate potential problems and develop ways to address them. The implementation has been very successful and we consider the unit to be a key component in our legal research and writing curriculum. Ideally, as legal educators we should prepare our students “not only to think like lawyers in a modern and technological society, but also to use technology in a way that enhances their human relationships with their clients and society.”49 In our view, this technology unit accomplishes both these goals.

Reflecting on certain choices we made, we want to highlight three of them. First, using the CISG as the doctrinal foundation for the problem works very well.50 Students thoroughly enjoy the international component, finding it highly relevant in a global economy. Moreover, they learn a valuable lesson — international contract law is not necessarily consistent with domestic contract law. Indeed, there are some notable differences between the CISG, the Restatement (Second) of Contracts, and Article 2 of the Uniform Commercial Code. Further, the problem itself can be easily modified from year to year, or, alternatively, expanded to include additional assignments such as pleadings, pre-trial briefs, and trial briefs.

50 If you would like a copy of the UDM ALTA unit, which includes the assignment requirements, facts of the problem, a detailed timeline, the analysis, and the evaluation forms, please contact either of us at lysaghtp@udmercy.edu and istldc@udmercy.edu.
Second, using technology in this way seems to improve the students’ ability to learn the doctrinal material in a manner that does not involve an inordinate amount of class time because the students are actively involved in preparing their own technological presentation. This active involvement on the part of students is not dissimilar to the hands-on preparation involved in students’ first-year moot court oral arguments: “Not only do [students] remember what they learned for their moot court problems, but most of the knowledge of the law used for those problems was acquired with little expenditure of class time.”51 Additionally, students feel comfortable with technology. Empirical data supports the conclusion that student learning is enhanced by the use of technology52 particularly since law students of today grew up in a digital age, are technology savvy,53 and tend to be visual learners.54

Third, ending the academic year with this unit provides a nice transition. Students are just completing their intensive appellate brief assignment, which includes a moot court competition, as they begin to work on this problem. For this reason, they welcome the change of pace. Using technology in the classroom in this way also has the potential to bring life to course content that otherwise may not be appealing to all students.55 Additionally, it increases students’ confidence and reduces the anxiety they often feel with the law school experience.56 Finally, students seem to appreciate working in a collaborative law-firm setting — many even blossom. From our perspective, the transition is more than a change of pace; it is a passage that helps prepare our students for the practice of law in a way that traditional legal writing assignments cannot.

51 Byron D. Cooper, The Integration of Theory, Doctrine, and Practice in Legal Education, 1 J. ALWD 51, 58 (2002).
52 Lasso, supra n. 4, at 47 (citing David J. Maume, Jr. & Ronald W. Staudt, Computer Use and Success in the First Year of Law School, 37 J. Leg. Educ. 388, 389 (1987)).
53 Id. at 19.
54 Id. at 29.
55 Austin, supra n. 9.
56 Lasso, supra n. 4, at 59.
I. INTRODUCTION

Many law school Legal Writing programs are now using websites containing program descriptions, syllabi, course materials, discussion boards, and links to online research and writing resources. Several of these websites have links to online university writing labs (OWLs), which provide students with easy access to information about grammar, punctuation, and style. The more comprehensive OWLs also have interactive grammar quizzes, information on the writing process, links to pedagogical resources for writing teachers, ideas on paragraph organization, and PowerPoint workshops on various topics related to writing. Some of the materials available on these websites increase awareness of different writing genres, test student understanding of grammar through interactive quizzes, encourage reflection on the writing process, and stimulate thinking about rhetorical strategies and options.

University OWLs provide an excellent resource for law students, but because they are not designed for an audience of legal writers, they also have significant limitations. They do not, for example, offer information about the genres of legal writing, nor do they address some of the specific problems first-year students typi-
cally encounter in completing their early writing assignments. Information on overall organization, paragraph development, argument structure, research, and citations would have varying degrees of relevance to students writing legal documents. Such limitations suggest that the time may be ripe for examining the possibility of online legal writing centers modeled on college and university OWLs.

A law school online writing center would differ from course websites or writing program homepages in that it would not contain the materials for a specific course, but would instead extend the resources of the school’s Legal Writing program, writing specialist, or writing tutors. Like most OWLs, it would provide resources to all student writers in the law school: One-L students with their first legal skills assignments, new law journal editors, moot court participants, and students in upper-level writing seminars. Ideally, a law school’s writing center would be a resource to which students and alumni return again and again as they face new challenges with their writing.

In addition to providing support for the general student population, an online writing center could contain pedagogical resources tailored to the needs of small groups of students who may feel marginalized by their law school experience. One such group, called “experienced writers” in the discussion that follows, is made up of mature students who come to law school armed with extensive writing background. These writers may have difficulty understanding the conventions of legal discourse and may struggle with transferring their writing expertise to the context of law school. A second group, first-generation college students, may bring a lack of confidence and feelings of insecurity into their legal writing classes. The third group, “L2 Law Students,” is composed of students for whom English is a second language. These students may need additional resources to help them with both their sentence-level writing and the larger, rhetorical and cultural issues they face as they confront their writing assignments. This article begins with a brief review of the scholarship on OWLs, followed by a discussion of the ways in which the interactive and multimedia capabilities of an online writing center could provide curricular support to the general law school population. The article will then turn to the

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4 Linguists and teachers of English as a Second Language use “L2” to refer to the students’ second language. See generally e.g. Ilona Leki, Understanding ESL Writers: A Guide for Teachers 3 (Boynton/Cook 1992).
II. ONLINE WRITING LABS

Although the acronym “OWL” was not used until the early 1990s, the first online writing centers appeared in 1986. Since then, however, the number of such sites has increased dramatically, and as of June 2002, the International Writing Center Association lists 341 OWLs on its website. OWL mission statements vary, as do the materials and services they offer. In general, however, OWLs “represent an attempt to expand writing center services via the Internet and/or to create new types of services in the new medium.” OWLs typically offer a variety of resources to students and faculty: handouts, links to other websites, PowerPoint and hyperlinked workshops, and online databases. Some OWLs also provide grammar hotline archives, synchronous and asynchronous contact with writing tutors, listservs, and newsgroups.

Researchers have found that OWL resources can be beneficial to Writing Across the Curriculum Programs, community college writing programs, and high schools. Proponents believe that OWLs also provide a convenient way to distribute resource materials to faculty, students, tutors, and the community. Posting information such as Frequently Asked Questions, for example, “al-

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low[s] tutors to spend less time answering routine questions and more time tutoring.”  

12 OWLs also extend the resources of the writing center to all students, including those who work and are thus less available for on-campus tutoring. In addition, OWLs permit a wide variety of educational partnerships that transcend geographical borders. The Kentucky Writing Center Association, for example, uses OWLs to give writing centers across the state an opportunity to exchange information about how to use technology to engage students in active learning.  

Similarly, the University of Michigan’s OWL provides online peer tutoring to “college students, teachers, high school students and business people worldwide.”  

Some researchers have found that email tutoring offers many of the benefits of face-to-face conferences.  

15 Online tutorials may, in fact, free tutors and their clients from some of the physical and temporal constraints posed by an on-campus writing lab. Advocates also note that online environments seem to transform the type of work students and tutors do, and thus have the potential to “expand the audiences for student writing and, in this way, expand the possibilities of what might be said in a university community.”  

Others are more cautious about online tutorial services:  

Despite all the technological advances [in OWLs], students still need human interaction to help them write more effectively. Computers, hardware and software, T1 cables, interactive video conferencing, homepages, online writing centers, modems, networks, and the like, all offer technological ease of processing and producing text. Only a human voice, a reader, and, in the context of a tutoring session, a face across the table can give contextual feedback to the writer in real-time – when it is most im-

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12 Shadle, supra n. 8, at 5.  
16 David Coogan, Electronic Writing Centers: Computing the Field of Composition 32 (Ablex Publg. 1999).  
17 Id. at xix.
important. An email message can provide a certain degree of encouragement; a smiling tutor simply provides more!\textsuperscript{18}

Critics of online writing labs also point out that they can be used as a way to perpetuate ineffective teaching techniques and undesirable classroom hierarchies. One critic, for example, traces OWLs back to the unsuccessful “writing labs” at the beginning of the twentieth century, which were seen “as a solution to overcome the frustrations and failures of teaching students to write.”\textsuperscript{19} Early writing labs emphasized “drill-and-practice” teaching techniques that required students to “master” grammar and mechanics before moving on to more “substantive” writing concerns:

My experiences . . . have made me skeptical about the relationship between writing centers and instructional technology, and this skepticism stems from what I have seen as several persistent and misguided ideas: the belief that "fundamentals" of language must be mastered before moving on to "real" writing tasks; the use of drill-and-practice exercises to teach those fundamentals; and the combination of that drill with higher and higher technology, whether that technology is in the form of a stimulus-response-reinforcement textbook or a beeping, blinking, if not talking, computer.\textsuperscript{20}

A related concern is that so many OWLs “consist primarily of the contents of old filing cabinets and handbooks — worksheets, drill activities, guides to form — pulled out of mothballs, dusted off and digitized . . .”\textsuperscript{21}

Critics also point out that some OWLs exist only in cyberspace and offer no online or face-to-face tutoring. Such sites provide a way for schools to offer inexpensive, if ineffective, resources for remedial students.\textsuperscript{22} Many writing professionals involved in tech-


\textsuperscript{19} Neal Lerner, \textit{Drill Pads, Teaching Machines, and Programmed Texts: Origins of Instructional Technology in Writing Centers}, in \textit{Wiring the Writing Center} 119, 120 (Eric Hobson ed., Utah State U. Press 1998). In his critique of Online Writing Labs, Lerner has intentionally omitted technologies such as “synchronous and a-synchronous environments, hypertext writing, and multi-media documents,” which “have the potential to fundamentally change the very nature of what it means to teach and learn writing.” \textit{Id.} at 119.

\textsuperscript{20} \textit{Id.}


\textsuperscript{22} Lerner, \textit{supra} n. 19, at 119–120.
nology-assisted writing pedagogy are concerned that the “lure of technology to offer ‘easy’ solutions to complex problems is powerful.”

As debate about OWLs continues, critics and advocates alike agree on at least one point: OWLs are here to stay. Technology is changing the way students write, and “writing centers without technology . . . will soon find themselves no longer in sync with how writers write and with what writers need to know about writing processes as they are affected by technology.” Both sides in the debate also point to the need for more research on the pedagogical implications of using online writing resources and tutorials. In the following sections, this article will examine the pedagogical implications of a law school online writing center by focusing first on the general student population and then on three smaller groups of students.

III. GENERAL USE OF A LAW SCHOOL ONLINE WRITING CENTER

Like many university OWLs, a law school’s online writing center could provide faculty and students with a library of useful resources: handouts, PowerPoint presentations, bibliographies, and model documents with commentary. Faculty members could incorporate these materials into their curricula in a variety of ways. Any number of writing center materials, for example, could be used as part of an in-class writing activity involving editing, revising or peer feedback. In addition, professors might refer to the writing center as part of their feedback on student papers, recommending that students use resources that address their individual needs. Students might also turn to the writing center as part of their own self-assessment process or as a guide when they begin writing in a new genre. Moreover, writing center pages for law reviews or moot court societies might provide a sense of continuity for student organizations during the transition from one leadership board to the next.

An important educational benefit of technology is that it offers “more opportunities for feedback, reflection, and revision,” all of

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23 Id. at 120.
24 Hobson, supra n. 21, at ix.
26 Natl. Research Council, How People Learn: Brain, Mind, Experience, and School 195
which are extremely important in developing strong writing skills. An online writing center can exploit the interactive capabilities of technology to provide feedback to students on various aspects of their writing. Interactive quizzes can test students’ knowledge of grammar, usage, punctuation, and vocabulary. In addition, more complex interactive exercises can guide students through critical thinking about organization, logic, or rhetorical strategies. Online heuristics can also help students explore their own writing processes and offer suggestions that encourage reflective writing and editing practices.

The multimedia capabilities of the Internet can have other valuable pedagogical implications as well. In designing legal writing curricula, for example, most law school programs attempt to bring the world of legal practice into the classroom. Most early writing assignments, in particular, ask students to write memoranda to senior partners or supervising attorneys. Yet many students come to law school with little frame of reference for the real world of legal practice or the audience they address in their assignments. Many writing problems, particularly in the first year, originate in misconceptions about audience or purpose. Web pages that link students to the world of legal practice can enhance their understanding of audience and encourage a sense of professionalism. Audio or video clips of practicing attorneys, judges, and other legal professionals speaking about their experiences as writers and readers can easily be preserved on web pages. Development of a better sense of audience is just one of the ways in which an online writing center might help prepare students for the writing they will do in their profession.

An online writing center can also provide pedagogical tools and scaffolds to help students as they develop new skills or begin writing in a new genre.27 Strong critical reading skills play an important role in students’ ability to produce good writing and thoughtful legal analysis.28 Research into the reading process has

27 See generally id. (suggesting that using technology for “scaffolds and tools” is one of the ways in which technology can promote learning). “The challenge for education is to design technologies for learning that draw both from knowledge about human cognition and from practical applications of technology that can facilitate complex tasks in the workplace. These designs use technologies to scaffold thinking and activity, much as training wheels allow young bike riders to practice cycling when they would fall without support.” Id. at 202.

28 Elizabeth Fajans & Mary R. Falk, Against the Tyranny of Paraphrase: Talking Back to Texts, 78 Cornell L. Rev. 163, 180 (1993). “Writers who read merely as consumers have writing problems that cannot be adequately attributed to difficulties with ‘skills’ like organ-
shown that there are significant differences between the reading strategies of expert and novice readers. Moreover, there is some evidence to suggest that there may be a correlation between students’ reading strategies and their first-year law school grades. Thus, online writing center materials that support student efforts to improve their reading skills would be a valuable component to helping improve their legal writing.

One pedagogical tool for developing reading ability involves modeling the reading strategies of an expert. As figure 1 illustrates, an online writing center can provide students with the opportunity to compare their reading of a legal text with that of an experienced expert.

Figure 1
An audio file allows students to click on a speaker icon and listen to a law professor or practicing attorney comment on a case.

Figure 2

The student controls the pace of the reading and may stop to take notes and restart the commentary. Other writing center pages could display the marginal notes the expert wrote while reading and commenting on the case.\textsuperscript{32} Pages that offer a visual comparison between the note-taking styles of expert and novice readers could be quite compelling to students who highlight texts for their case briefs but take no marginal notes.

These writing center materials provide important scaffolding for both reading and writing processes. They alert students to the critical demands of close reading and the limits of reading for the purpose of mechanically briefing cases. The website can help the students reflect on their reading skills and encourage them to engage in self-assessment. Moreover, the interactive multimedia features of the website make possible the design of materials to match different types of learning styles.

\textsuperscript{32} Bean, \textit{supra} n. 31, at 138.
As the reading resources discussed above illustrate, online writing center materials can provide pedagogical support for each step in the writing process. In preparation for writing their first predictive memo, for example, students could see and interact with materials on reading cases, briefing, prewriting strategies, organizational grids, outlining, paragraph structure, editing, and grammar. In each case, the materials could be adapted to the interactive multimedia capabilities of the web. The online writing center offers the flexibility of providing these resources to faculty and students alike as the need arises.

IV. THE EXPERIENCED WRITER IN LEGAL SKILLS CLASS

“Mary” had completed a Ph.D. in Comparative Literature immediately before coming to law school. Having just finished her doctoral dissertation, Mary thought of herself as an experienced, expert writer. Her description of her graduate school writing was articulate and reflective: “When I wrote about literature, I was in charge of the text. My goal was to explore the multiple layers of meaning in the [literary text] and view it in terms of its complexity. The purpose of my written work was to say something original.” After one semester, Mary had developed an extremely negative view of legal education. She interpreted her first-semester law school experience as a demoralizing “hazing” process and believed that the “level of perfection” required in the Legal Skills assignments was too high. She perceived of the faculty attitude toward students as condescending and felt that her professors were not sensitive to the process of transition to law school.

Like students in other educational contexts, law students come to formal education with a range of prior knowledge, skills, beliefs, and concepts that significantly influence what they notice about the environment and how they organize and interpret it. This, in turn, affects their abilities to remember, reason, solve problems, and acquire new knowledge.34

33 To protect their identities, students’ names and some personal details have been changed.
34 Natl. Research Council, supra n. 26, at 10.
Some students, like Mary, arrive at law school confident of their expertise as writers. They have published books and articles in fields other than law; they have doctorates or advanced graduate degrees that required dissertations; or they have worked as editors. Since “the contemporary view of learning is that people construct new knowledge and understandings based on what they already know and believe,” it would seem that these expert writers have a significant advantage over their peers in legal writing classes. Such, however, is not always the case.

Educational researchers have found that “[s]ometimes the knowledge that people bring to a new situation impedes subsequent learning because it guides thinking in wrong directions.” Different disciplines have different ways of structuring and organizing information, and therefore “to have an in-depth grasp of an area requires knowledge about both the content of the subject and the broader structural organization of the subject.” Legal Writing professionals have known for some time that first-year students need to learn more about the discourse conventions of law before they are able to become proficient legal writers. Joseph Williams has noted specific predictable characteristics of novice legal writers: they focus on concrete features of a legal problem; their writing contains information that would be self-evident to an expert; their writing may contain “episodes of incoherence,” and they may exhibit a lack of dexterity in using the language of the law. Even students with extensive writing experience before law school may exhibit some of these characteristics.

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35 Jessie C. Grearson, Teaching the Transitions, 4 Leg. Writing 57 (1998). As Grearson points out, “[m]any of our students are professionals with distinguished backgrounds and significant levels of expertise in other discourse communities and other professional communities. It is hard to be considered a novice when one is otherwise an expert for eight hours of the day, hard not to have a chance to draw on that source of experience or self-respect.” Id. at 72.


38 Natl. Research Council, supra n. 26, at 225.

39 Id. at 226.


41 Williams, supra n. 40, at 18.
There may be differences, however, in the ways in which law students who are also experienced writers approach their early legal writing assignments. In a study of the writing journals kept by first-semester law students, some differences emerged between “Richard,” an older student who had published extensively before coming to law school, and his less experienced classmates. Unlike his classmates, Richard was accustomed to writing multiple drafts and spent considerably more time on his writing assignments. He also spent more time analyzing his audience and reflecting on a wider context for his writing assignments. Most significantly, however, he was more resistant to some of his professor’s suggestions, preferring instead to trust his own judgment. Unfortunately, Richard’s attempt to think independently led him in the wrong direction in his legal analysis. His lack of success in early writing assignments led to his increased frustration as the semester continued.

While all students need help in making the transition to the conventions of legal writing, experienced writers such as Mary and Richard may benefit from a curricular approach tailored to their specific needs. Adult learners are self-directed:

[They] have a self-concept of being responsible for their own decisions, for their own lives. Once they have arrived at that self-concept they develop a deep psychological need to be seen by others and treated by others as being capable of self-direction. They resent and resist situations in which they feel others are imposing their wills on them.43

These students may need a fuller explanation of the context for their writing assignments. Moreover, “since [their] most potent motivators are internal (job satisfaction, self-esteem, etc.),”44 they may be more sensitive to negative feedback on writing assignments. As educational researchers have found, “[adults’] motivation is frequently blocked by such barriers as negative self-concept as a student.”45

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44 Id. at 68.
45 Id.
An online writing center can be a helpful component in designing a curriculum for the professional writer. The writing center provides a convenient method of disseminating information about educational research on the nature of expertise.\footnote{Dailey, supra n. 2, at http://faculty.quinnipiac.edu/law/dailey/The%20Expert%20Writer%20and%20Legal%20Writing%20Class_files/frame.htm} Making such information available would acknowledge the professionals’ expertise as writers and provide them with information about why certain aspects of expertise do not transfer readily to other fields.

Providing students with an opportunity to examine disciplinary assumptions and conventions can help them to understand more about how formal aspects of writing are linked to the ways in which knowledge is constructed in a given field.\footnote{Judy Kirscht, Rhonda Levine & John Reiff, Evolving Paradigms: WAC and the Rhetoric of Inquiry, 45 College Composition and Commun. 369, 374 (1994).} Writing workshops with experienced writers from a variety of fields provide an ideal forum for encouraging reflection on the conventions of a discourse community. Examining samples of their own professional writing, students can exchange information about specific areas of comparison: document format and redundancy, multiple audiences, use of authority, internal logic of document content, and writing style. This process of actively exploring conventions in different disciplines can help these students build on their strengths as experienced writers:

The disciplines are introduced as centers of inquiry rather than as banks of knowledge, and disciplinary conventions are presented as emerging from communally negotiated assumptions about what knowledge is and about the methods of shaping it. The forms and conventions of the disciplines become, in turn, tools used consciously to aid students in moving beyond the boundaries of previous belief systems and in exploring new perceptions.\footnote{Id.}

By using this structured process of inquiry, students are better able to use their prior writing experience as a foundation for their legal writing.

Supporting materials on a writing center website can be used in conjunction with the workshop to give the students a model for analyzing the discourse conventions of their own writing. In addition, sample legal documents with hyperlinked commentary can guide students through points of comparison to writing in other
fields. With this background, the students are better prepared to participate in the collaborative dynamic of the workshop with less guidance from the professor. The website can also provide these students with the opportunity to set up their own writing community. They can exchange ideas in a chatroom, post questions and comments on a discussion board, or share their observations about moving into a new discourse community.

An online writing center offers the potential to apply years of scholarship on writing in the disciplines to the needs of students for whom the transition to law school produces particular challenges. Whether the materials are used in conjunction with a workshop or students go through the materials on their own, such a mini-curriculum helps students who would otherwise feel alienated from their Legal Skills classes to have a more positive attitude. Moreover, if invited to post their thoughts on the website, they can contribute to helping other similarly situated students learn.

V. THE FIRST-GENERATION COLLEGE STUDENT

“Andrew” was the only son of immigrant parents. His father was a stone mason, and his mother was a homemaker. Andrew graduated from a vocational high school that prepared him for a job in the service industry. When Andrew decided to go to college, he faced a number of obstacles. No one in his large, extended family had ever gone to college, and his parents did not support his decision to continue his education. Andrew nevertheless put himself through a community college and eventually transferred to a four-year college and graduated. Although he did well enough in most of his courses to get into law school, he was always very self-conscious of his writing. His professors had frequently noted grammar errors in his papers, but he did not know how to correct them. He was always too embarrassed to ask questions about grammar because he thought that he should have mastered such material in elementary school.

Like Andrew, students from immigrant or working class backgrounds often feel marginalized by the educational experience.

Studies have shown that first-generation students enter college less prepared than their “continuing generation” counterparts.\textsuperscript{50} First-generation students also have less emotional support from their families, have more responsibilities outside of class, and spend less time participating in cultural and social events on campus.\textsuperscript{51} Despite these factors, first-generation students do as well academically as their peers, but they drop out of school at a higher rate.\textsuperscript{52} Moreover, although they begin college with confidence in their academic abilities, they soon experience “self-doubt.”\textsuperscript{53} Since the reason for the high attrition rate is not academic failure, researcher Penrose suggests that the price of staying in school is just too high for these students. “Quantitative evidence paints a picture of discomfort and isolation due to weaker academic preparation and lack of familiarity with the norms and values of academic culture, often exacerbated by a lack of understanding at home and greater family and work responsibilities.”\textsuperscript{54}

Mina Shaughnessy describes the conflict some students experience when they attend college:

College both beckons and threatens them, offering to teach them useful ways of thinking and talking about the world, promising even to improve the quality of their lives, but threatening at the same time to take from them their distinctive ways of interpreting the world, to assimilate them into the culture of academia without acknowledging their experience as outsiders.\textsuperscript{55}

Nowhere is this conflict more evident than in the writing class, where their use of language is so closely tied to their identities.\textsuperscript{56}

First-generation college students can experience a sense of “linguistic exclusion” in their efforts to learn the language of academic discourse.\textsuperscript{57} Mike Rose describes this experience in recalling his early writing in graduate school:

\textsuperscript{51} Id.
\textsuperscript{52} Id. at 455.
\textsuperscript{53} Id. at 456.
\textsuperscript{54} Id. at 445.
\textsuperscript{56} Id.; Rosina Lippi-Green, English with an Accent: Language, Ideology, and Discrimination in the United States 12–13 (Routledge 1997).
\textsuperscript{57} Mike Rose, Lives on the Boundary: A Moving Account of the Struggles and Achieve-
My writing, by now, was pretty good, but it contained the
telltale signs of its origins: sociolinguistic gaffes (using
different than rather than different from, lie for lay, drug
for dragged) and run-of-the-mill misspellings (Isreal,
aquaint, prestige) as well as confusions that elicited from
my professors’ witty jabs in the margins: writing emersing
for immersing or chaplin for chaplain — a blunder that,
in this context was like having your fly open at a cotil-

dion.\textsuperscript{58}

Students who are painfully conscious of gaps in their educa-
tional backgrounds may not believe that such gaps can possibly be
filled by reviewing material they have failed to learn in the past.

[Remedial students] open their textbooks and see once
again the familiar and impenetrable formulas and dia-
grams and terms that have stumped them for years.
There is no excitement here: \textit{No excitement. . . .} There is,
rather, embarrassment and frustration and, not surpris-
ingly some anger in being reminded once again of
longstanding inadequacies.\textsuperscript{59}

Nevertheless, legal readers will be unforgiving of grammatical e-
rors, and the risks of using non-standard English in legal docu-
ments are high. As Shaughnessy explains, “the truth is that even
slight departures from [standard written English] cost the writer
something, in whatever system he happens to be communicating,
and given the hard bargain he must drive with his reader, he usu-
ally cannot afford many of them.”\textsuperscript{60} Thus, it becomes one of the
goals of the Legal Skills professor to help these students gain a
sense of control and empowerment over their written language.

Despite their feelings of inadequacy about their writing skills,
first-generation college students have internalized a great deal of
unconscious knowledge about grammar. Studies have found that
“[n]ative speakers of English, regardless of dialect, show tacit mas-
tery of the conventions of standard English, and that mastery

\textsuperscript{58} Id. at 71.
\textsuperscript{59} Id. at 31.
\textsuperscript{60} Shaughnessy, supra n. 55, at 12–13, see also Larry Beason, \textit{Ethos and Error: How
Business People React to Errors}, 53 College Composition & Commun. 33 (2001) (reporting
that business people develop a negative view of writers who make certain types of errors).
seems to transfer into abstract orthographic knowledge through interaction with print.”\textsuperscript{61}

Linguists have referred to this unconscious knowledge as “Grammar 1” and define it as “the internalized system of rules that speakers of a language share.”\textsuperscript{62} Patrick Hartwell illustrates Grammar 1 by asking students to identify the rule for ordering English adjectives of nationality, age, and number.\textsuperscript{63} Although invariably no one can identify the rule, all students are able to arrange the words “French,” “the,” “young,” “girls,” and “four” in the correct order: “The four young French girls.”\textsuperscript{64}

Helping students understand that they can tap into their own unconscious knowledge of grammar can guide them toward productive editing strategies. Students who read their work aloud, for example, may be able to discover many of their own errors by noting the differences between their intention and the writing on the page. Some writing professionals recommend techniques of “error analysis,” which David Bartholomae describes as

\begin{quote}

a theory of language production and language development, that allows us to see errors as evidence of choice or strategy among a range of possible choices or strategies. [Errors] provide evidence of an individual style of using the language and making it work; they are not a simple record of what a writer failed to do because of incompetence or indifference.\textsuperscript{65}
\end{quote}

Error analysis is an important tool for helping professors understand the underlying problems with a student’s writing.

Once students understand the notion of error analysis, they are in a better position to work productively and collaboratively with their professor or the writing specialist.

By having students share in the process of investigating and interpreting the patterns of error in their writing, we can help them begin to see those errors as evidence of hypotheses or strategies they have formed and, as a conse-


\textsuperscript{63} Hartwell, \textit{supra} n. 61, at 410.

\textsuperscript{64} Id.

\textsuperscript{65} David Bartholomae, \textit{The Study of Error}, 31 College Composition & Commun. 253, 257 (1980).
quence, put them in a position to change, experiment, imagine other strategies. Studying their own writing puts students in a position to see themselves as language users, rather than as victims of a language that uses them.\textsuperscript{66}

Error analysis is a particularly helpful technique in working with law students because so many of their “writing problems” are rooted in some basic misconception about the writing assignment or some aspect of the legal content of their papers. Students who avoid writing conferences or tutorials out of a misguided sense of embarrassment may lose the opportunity to gain a sense of control over their writing or find the confidence they need to improve.

An online writing center can be particularly helpful in addressing the needs of first-generation students, who may defer seeing writing specialists or tutors because of time constraints and feelings of isolation. The online writing center, available twenty-four hours a day, can provide easily accessible resources to students with multiple responsibilities for family and work. Presentations or exercises on the website, for example, can alert first-generation students to their unconscious knowledge of grammatical structures. Web materials can also be used as part of a writing workshop that encourages students to tap into what they know about grammar and guides them toward more productive editing strategies. Using the hyperlinked structure of a website, students can explore a number of different presentations of the same information and use the format that best helps them. Moreover, hyperlinked or interactive editing exercises can help students identify some of the points they need to review.

The writing center also provides a conduit for advertising the services of the writing specialist or writing tutors. The tone of writing center materials can project a welcoming, non-judgmental attitude toward students who need extra encouragement to take advantage of individual tutorials. Through the writing center, students can access contact information about tutorial services and get a sense of what they might expect when they make appointments. Penrose notes that “[first generation] students’ self-perceptions represent critical factors in the college experience. Helping students see themselves as members of the academic community may be the most important challenge faced in the university at large and in writing classrooms in particular.”\textsuperscript{67}

\textsuperscript{66} Id. at 258.

\textsuperscript{67} Penrose, supra n. 50, at 458.
writing classes face similar challenges when first-generation college students begin law school. Providing materials specifically designed for these students is one way of addressing their needs as writers and helping them become confident members of the academic community.

VI. THE L2 LAW STUDENT

“Zhun Lee” was a quiet first-year student from China who sought the help of the writing specialist principally because he had trouble with the use of articles in English. He had studied English in China and had excellent command of most grammatical constructions, but although he was a conscientious student, he struggled with his legal writing assignments. Moreover, although he never spoke of these problems with any of his professors, he had trouble adjusting socially to law school. He withdrew at the end of two semesters.

International students may have specialized problems that are difficult to address in the law school classroom. They may find the American educational experience, for example, quite different from their expectations. The relationships between students and teachers may be more informal than they are in their home countries, and they may not be accustomed to the type of class participation that is characteristic of American law schools. Their assumptions about deadlines or punctuality may be different from their professors’, and they may have attitudes toward gender roles that make their encounters with female professors awkward.\(^68\)

Although L2 writers may have very strong basic writing skills before they are admitted to law school, some of their surface errors with articles, prepositions, verb tense, and word choice may be immediately apparent to their professors. Excessive attention to surface errors, however, may prove ineffective as a pedagogical strategy. Researchers draw the distinction between language acquisition, the “unconscious absorption of language” that takes place when speakers use real language for real communication, and language learning, the process of “consciously studying the rules of a language.”\(^69\) They note that “most of what we can do when we know another language is the result of acquisition.”\(^70\)

\(^{68}\) Leki, supra n. 4, at 47–51.
\(^{69}\) Id. at 15.
\(^{70}\) Id.
Thus, while professors may be tempted to focus on grammar and usage mistakes in their feedback on student writing, such “error correction” has little effect on language acquisition:

> [C]omprehensible input in the form of reading promotes acquisition of written language; learning rules of grammar, punctuation, and so forth is useful only to monitor, or edit, writing, not to create it; writers are stymied in their development by affective variables caused by their past failures and by criticism of their past attempts to write.\(^{71}\)

Because “affective variables” are so important to second language acquisition, a classroom atmosphere that “minimize[s] fear, nervousness, and self-consciousness” is the best setting for L2 writers.\(^ {72} \)

More successful pedagogical strategies involve helping students focus initially on substantive content and more global rhetorical concerns. This approach is generally more desirable because it engages the students in “important learning [and] moves them into an area where they can progress more rapidly and more productively.”\(^ {73} \) International students do face numerous culture issues associated with the audience, purpose, and rhetorical features of writing. For the L2 writer, the audience is unfamiliar,

someone from another culture with a different understanding of distinctions like relevant/irrelevant, logical/illogical, someone who has a very different, culturally determined sense of what constitutes proof of an argument, what an argument is, who may construct an argument, and even who may write [it].\(^ {74} \)

Moreover, international students may have basic misconceptions about the purpose of writing in American legal genres.\(^ {75} \)

\(^{71}\) Id. at 18. “Errors in such late-acquired, troublesome features of English as prepositions and the article system may simply have to be tolerated until the students’ exposure to English — the amount of comprehensible input they have taken in — is sufficient for them to internalize correctly the way these features of English function.” Id. at 19.


\(^ {73} \) Leki, supra n. 4, at 4.

\(^ {74} \) Matthew A. Edwards, *Teaching Foreign LL.M. Students about U.S. Legal Scholarship*, 51 J. Leg. Educ. 520, 520 (2001). “[International students] may not know how U.S. legal scholars talk with each other, which my experience shows is difficult to learn by osmo-
All students enter a new discourse community when they begin law school, and all students must learn to understand “rhetorical considerations that in themselves define the U.S. legal community.” Nevertheless, as Jill Ramsfield has noted, L2 law students “may need more explicit cues about our legal culture” than they can glean through the inductive method of teaching that takes place in most law school classrooms. For example,

[w]hile the U.S. community insists on logical analysis and celebration of individual thought, other legal communities expect quotations and arrangement of authority; while U.S readers expect proper attribution to sources through a specific citation system, other communities may tolerate copying from sources and abbreviated citation.

Ramsfield recommends using pedagogical techniques that include contrastive approaches that “compare[e] legal systems and analytical paradigms across cultures and disciplines.” Building on the work of Robert Kaplan, teachers of English as a Second Language have used contrastive approaches for decades to teach writing, and legal writing texts have begun to include discussion of rhetorical preferences of different cultures. Contrastive approaches can indeed be useful in helping students understand the implicit requirements of writing in a specific culture:

Since even different discourse communities within a single culture have different expectations of writing (for example, preferred length of sentences, choice of vocabulary, acceptability of using first person, extent of using passive voice, degree to which writers are permitted to interpret, amount of metaphorical language accepted), it makes

\[ \text{sis alone. Absent an adequate understanding of the role of U.S. legal scholarship, many foreign students' papers are overly descriptive and insufficiently prescriptive.} \]
some sense that different cultures would have different expectations of writing, and that students, who have lived in their own cultures, gone to school, and read books, would have built up structural schemata . . . reflecting discourse prevalent in their cultures.82

International students who are strong writers in their native languages may find contrastive approaches particularly beneficial because there is evidence that students are able to “rely on strategies they employ in their [first language] writing” when they write in English.83

Many of Ramsfield’s suggestions for incorporating contrastive pedagogical approaches into the law classroom are particularly relevant to teaching writing. She suggests, for example, that professors might define more explicitly the identifying features of the United States legal discourse community,84 an approach that would be helpful to L2 and native English speakers alike. In addition, professors could use examples from other legal cultures to illustrate analytical paradigms,85 and then use those paradigms for legal problem solving.86 They could “demonstrate contrasting treatments of legal language”87 and offer more supplementary materials, such as “charts, illustrations, and definitions” peculiar to the subject matter of the class.88 Such approaches, she argues, “can illustrate the structure, assumptions, and tradition of U.S. paradigms and thus hasten novices’ facility in using them.”89

A law school’s online writing center could offer a number of resources that support contrastive approaches to teaching writing. The website could, for example, introduce students to cultural rhetorical preferences by providing some examples of an L2 student’s

82 Leki, supra n. 4, at 92.
83 Id. at 77. As Leki explains, [While language proficiency may have an additive effect on the quality of a text, language proficiency in and of itself appears to be an independent factor in the students’ ability to write well in L2. Expert L2 writers with less language proficiency are not impeded in their use of global cognitive strategies in writing by their lesser ability in language; by the same token, inexperienced writers with greater fluency in English are not able to tap into more effective writing processes by virtue of their greater proficiency in English.

84 Ramsfield, supra n. 75, at 193.
85 Id. at 194.
86 Id. at 195.
87 Id.
88 Id. at 196.
89 Id. at 185.
writing in English with hyperlinks to the writer’s explanation of the cultural factors that shaped her writing decisions. In addition, sample documents that illustrate various genres of American legal writing could also be hyperlinked to commentary that explicitly identifies rhetorical preferences or analytical paradigms.

**Figure 3**

As figure 4 illustrates, the commentary could point out inductive and deductive reasoning, use of authority, factual analysis, and other conventions of legal discourse. Such documents could benefit both the international student and the native English speaker because they would clarify the expectations of a discourse community that is new to all the students.

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The library of materials available on an online writing center could also include a variety of hyperlinked documents of varying levels of complexity that illustrate rhetorical features of different cultures. International students may be happy to contribute materials that offer insight into their own legal systems and cultures. An online writing center that houses such materials communicates an important message of inclusion to our international students and helps the native English speakers see their own legal system in a more global context.

Many university OWLs now link to websites designed specifically for L2 students. These sites can be very useful in providing resources for students who need a quick clarification of an idiom or grammar point. Generally, however, ESL websites have few materials that would be helpful to law students. They are usually pitched to a lower level of expertise than most law students have attained, and although they offer games and entertaining materials, they seem to have been designed for high school or undergrad-

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uate students. Moreover, ESL websites have yet to offer pedagogical resources that explore cultural rhetorical preferences.\footnote{But see Purdue University, supra n. 3, at http://owl.english.purdue.edu/handouts/esl/eslaudience.html (explaining the conventions of American Academic writing); id. at http://owl.english.purdue.edu/handouts/pw/p_ameraudience.html (explaining the conventions of American business writing).} Thus, a law school’s online writing center could fill a need for our international students by providing additional context for their writing assignments and helping them understand the conventions of the American legal discourse community.

**VII. CONCLUSION**

A law school’s online writing center has the potential of offering writing resources that move beyond ineffective “drill and practice” pedagogies to “us[e] technology to make a real difference in our classrooms.”\footnote{Marilyn Cooper & Cynthia Selfe, Computer Conferences and Learning: Authority, Resistance, and Internally Persuasive Discourse, 52 College English 847, 867 (1990) (referring generally to the use of technology as a resource in teaching writing).} As the National Research Council has pointed out,

>[c]omputer-based technologies can be powerful pedagogical tools — not just rich sources of information, but also extensions of human capabilities and contexts for social interactions supporting learning. The process of using technology to improve learning is never solely a technical matter, concerned only with properties of education hardware and software. Like a textbook or any other cultural object, technology resources for education — whether a software science simulation or an interactive reading exercise — function in a social environment, mediated by learning conversations with peers and teachers.\footnote{Natl. Research Council, supra n. 26, at 218.}

An online writing center can address the needs of all law students by presenting scaffolds and tools for learning, by connecting the classroom to the legal community, and by providing opportunities for feedback, reflection, and revision. The writing center’s materials can be used in a variety of law school contexts: writing workshops, writing classes, seminars, students’ extracurricular activities, and individual student tutorials. Handouts, online presentations, interactive exercises, and writing samples with hy-
perlinked commentary are just a few of the ways that the resources of the writing center can serve student needs.

Another important contribution of an online writing center is its ability to provide curricular materials specifically designed for small groups of students who may feel marginalized by the traditional law school curriculum. A writing center, especially in conjunction with writing workshops and tutorials, can help these students feel more comfortable in their Legal Skills classes and reduce much of the frustration that keeps them from learning effectively. The writing center also offers a means for these students and others to establish small writing communities that “meet” or discuss common issues on line. These writing communities can cut across the lines of individual classes and bring together students who may not otherwise have the opportunity to share their common challenges.

An online writing center will not, of course, replace the one-on-one conferences with the writing specialist, tutor, or writing professor. It can, however, be a valuable resource to advertising the support services offered by the law school and project the type of tone that will encourage students to seek individual help when they need it. In addition, as an extension of the services of the writing specialist or writing tutor, the writing center can offer some of these support resources to any student in the law school who needs them.
THE LAW PROFESSOR AS LEGAL COMMENTATOR

Amy Gajda*

This compilation of short papers and discussion on law professors' media involvement is the result of the panel, “Op-Eds and Talking Heads: Legal Commentary for a Lay Audience,” co-sponsored by the American Association of Law Schools' Legal Writing, Reasoning and Research and Mass Communication Law committees and held during the AALS annual meeting in Washington, D.C., in January 2003. The participants — Benjamin Wittes of the Washington Post, Linda Greenhouse of The New York Times, Peggy Robinson of The Newshour with Jim Lehrer, Ian Ayres of Yale, Erwin Chemerinsky of the University of Southern California, Pam Karlan of Stanford, and Arthur Miller of Harvard — all have extensive media experience as reporters, writers, producers for media, or law professors involved as media commentators.

I became interested in the subject for three reasons. One, I am a former journalist who covered legal topics. Two, I am currently the legal commentator for National Public Radio stations in Illinois. And three, I directly faced the issue of law professor expertise a few years ago.

Back then, I wrote an opinion piece for The New York Times on political campaign fundraising and how similar its tactics were to those the United States Senate had just voted against in the Sweepstakes Reform Act, legislation meant to curb overzealous magazine-subscription-and-sweepstakes companies. The New York Times published my piece and media attention started flowing; other reporters, other commentators, radio programs all called me and interviewed me about the piece in general. But my turning point, perhaps, came about two weeks later when a producer from 60 Minutes called. He first told me that he wanted to produce an investigative report based on my Times opinion piece. He then asked me the crucial question: “Are you an expert in this area?” Pause.

You can imagine the dueling devil and angel on my shoulders. If I told him “yes,” Morley Safer would surely come to my office and I’d be launched into national expertdom. My family and

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friends would see me on 60 Minutes. If I told him “no,” they’d turn elsewhere for their expert even though it was my op-ed that started it all.

I listened to the more angelic of the two advisors and I told the 60 Minutes producer that my knowledge wasn’t based on any special scholarly work that I’d done in the area and that I didn’t teach any related class. So they interviewed a political scientist from the University of Virginia instead.

That story highlights two aspects of the panel presentations and discussion. Perhaps too many law professors would have answered “yes” without hesitation. I still wonder if I was foolish not to. Second, it’s tough to get your foot in the door. But once your foot is in there, the door swings open rather easily, and you, too, can become a media darling.

But “media darling” is a somewhat controversial faculty position in law schools across the country. While many law schools have hired public relations and media professionals to guide them in their quest for greater news coverage, the same law schools may give very little, if any, tenure credit to professors who write for newspapers or appear on television. The public may have decided that it is interested in law. Big stories like Bush v. Gore, O.J., and Rodney King helped fuel that interest. But law schools continue to contemplate whether media involvement is right for law professors. The following short papers and discussion focus on that dilemma and, for those who would throw caution to the wind, the journalists and law professors also offer tips for those interested in media involvement.

Benjamin Wittes**

I’m here before you today with all the trepidation of the devil arising before a Southern Baptist congregation, having been asked to give the Sunday Sermon. When Amy asked me to speak here, I warned her that I had very little pleasant to say on the subject of law professors as pundits. I actually harangued her for some time on the subject. Quite to my surprise, she suggested that I repeat the harangue for you all, so here it goes — with the clear understanding in advance that the views I’m expressing are my own and do not reflect the position of the Washington Post.

**Editorial Writer, Washington Post.
The legal professoriate has performed quite disgracefully in the public arena in the last few years — in a fashion that calls its seriousness into question, very frankly. It has been at once politicized and more self-aggrandizing than informative to the public. In my view, law professors as a group need to think long and hard about whether they aspire to educate the public on matters within their professional expertise, or whether their role in the public arena should be — as in too many cases it has been — just to mouth off.

I don’t mean to suggest that there’s no appropriate role for law professors in the general interest public debate. Far from it. As American politics have become increasingly legalized, the proper role of specialists in explaining and commenting on technical matters — some of great political moment — has grown commensurately. Law being the language of democracy, those who study law seriously have a natural role to play in explicating the way the tectonic plates are moving in democratic government. Such a role would be unobjectionable, even laudable. And I don’t mean any of what I am about to say to sound critical of those who have ventured into the public sphere to educate their fellow citizens on matters about which they actually know something.

But in recent years, we’ve actually seen something else emanating from the legal academy. We’ve seen professors trading on their name chairs to talk about issues far outside their professional competence, and often quite ignorantly. Even worse, we’ve seen professors making perfectly indefensible statements, often in high profile forums within their supposed areas of professional expertise. These statements fail not only to meet basic academic standards; they fail to meet rudimentary journalistic standards, as well. Let’s not kid ourselves about what law professors are doing: they are playing the Bill O’Reilly game — only with the prestige of our nation’s finest universities behind them.

Now, this is a matter about which I confess to having a bit of a chip on my shoulder. Academics tend to reflect a certain contempt for journalists. We are, after all, mere popularizers and dilettantes, right? And I hear that we never do original scholarship and that our work is derivative. Many of us, it’s whispered, don’t even have advanced degrees. So there’s a tendency among professors to pull rank in arguments with journalists, and to argue from a point of view of authority. Academics do that not just with journalists but with the public at large. The citizenry is meant to admire professors as an intellectual elite — which, traditionally, professors
have been. But what then are we to make of the — not to put too fine a point on it — gibberish that passes for public utterances from some very esteemed professors? Exactly what am I supposed to think when Cass Sunstein and Ronald Dworkin sign an ad in the newspaper during the election controversy that refers to, and I quote, “a constitutional majority of the popular vote?” What am I to think when Bruce Ackerman proposes in the London Review of Books that the Supreme Court should have resolved the election controversy by issuing an injunction for which no party to the litigation had moved, against a nonparty to the litigation? What am I to think when any number of law professors accused Ken Starr of ethical misconduct — a finding that no competent adjudicatory mechanism has ever validated? None of these professors, as far as I know, has ever publicly said that they were wrong in light of the various investigations of the subject — all of which exonerated Mr. Starr. What am I to think of the recent spree of conservative professors who have argued that the filibuster is unconstitutional now that President Bush’s judicial nominees are being held up using it?

I could go on — actually for quite a long time; I’ve compiled quite a mental list of nonsense. My point is that I don’t know a lot of journalists who’ve made errors of this magnitude and suffered no professional embarrassment as a result. Our profession simply doesn’t tolerate that — as the recent bloodletting at The New York Times demonstrates. And what’s so disturbing to me about what law professors are doing now, is that the most irresponsible statements seem to be coming from the leading lights of the profession, who seem to be suffering no professional consequences for not just being wrong, but being spectacularly, indefensibly, and, sometimes, let’s face it, illiterately wrong. It’s as though the whole profession has collectively made the judgment that standards that apply when you write for a rarefied audience of a few dozen people who might read a law review, simply get waived when you happen to be addressing 250 million of your fellow citizens. I confess that I fail to see the logic of that judgment. I really don’t see why the more democratic the debate becomes, the lower the standards should be. And I also believe that this judgment — to the extent the academy tolerates it — will have consequences and should have consequences. As the press and the public come to see the professoriate as essentially no different from — except, perhaps, a little bit less honest than — Karl Rove and Jim Carville, it will come to regard law professors not as educators but essentially as a
group of political operatives looking for space on television and in newspapers to advance their own political agendas.

At the end of the Wizard of Oz, the Wizard assures the Scarecrow, who, you’ll recall, is looking for a brain, that he actually doesn’t need one. Where he comes from, the Wizard says, there are these things called universities, and they’re stocked with people called professors. And the Wizard says “and they have no more brains than you have. But they do have one thing you haven’t got: a diploma.” In her description of this event, Amy promised that, amongst other things, this would be a primer for people interested in catching the wave. I have only one piece of advice, which is that a diploma isn’t a roving license to expound on the world and beat the data until it confesses. Your countrymen aren’t idiots, and even if you have something that they haven’t got, they will see through you if you behave like one.

Peggy Robinson

I don’t quite have the same strong feelings that Benjamin Wittes does, although obviously I’ve been in the position to watch, in many ways, the legal profession as well as legal professoriate change dramatically over the last twenty-some years.

They’ve changed because of what’s happened in my business: the onset of twenty-four-hour cable channels and the need for commentators. That, I think, has increased the desire for warm bodies in the seats. I come from what I hope is a totally different approach to this. I need — and my whole program is based on — intelligent discourse. We bring people on, hopefully, who have some expertise to talk about an issue and to put them in some sort of context. I can only address this issue really from my perspective as the producer of our program.

We firmly believe that our mission is partially an educational one. And much that we do on our program is to educate; we strive to educate. We give you the news. Our goal, more than anything, is to present two perspectives with the explicit notice that these are advocates for a particular side or that they represent particular points of view that we want to bring out on a particular issue.

Legal affairs at The Newshour has a relationship with Jan Crawford Greenburg, who covers the Supreme Court for the Chi-
We call upon her to be our eyes and ears in the Supreme Court. And what she does and the primary function of her role on our program is to provide our listeners with a glimpse inside that courtroom. Jan provides a description of the case, the arguments, and the interaction between the Justices and the attorneys who are arguing the case. That’s a regular feature of our program. If the story is newsworthy enough, we will bring on attorneys or law school professors to advocate the different sides. We try very hard to make it clear that advocating is what they’re doing. We don’t try to put somebody in a commentating role as such. I resist the role of commentator. What we’re trying to do is not necessarily provide a forum for somebody to commentate but rather to assess, to analyze, to educate.

We tend to look at issues when they’re before the Supreme Court. And there’s a long time in the court process to do that. I have the luxury of an hour five nights a week with segments anywhere between eight to twelve minutes. Part of the job of my anchors is to try to facilitate the conversation so that you get beyond point A, and maybe to B and then to C. That way, you get to bring out a variety of points and issues.

I think that having law professors commentate is a good idea. When they have particular points of view, I think it’s important to bring them on programs such as mine in a fashion where they can articulate those views but not be unchallenged. We challenge them by including people who are opposite them and with anchors who ask relevant and specific questions to draw out information. I’m not adverse to people in the academy being part of the journalism craft. But there are particular roles and we need to define very carefully how we use that expertise.

I thought I would talk a little bit about what I want out of the legal academia and about our relationship with it. I don’t share Benjamin’s adversarial sense or a sense that there’s just a bunch of useless drivel going on out there. If I see 200 law professors signing a petition that runs in the paper, I could shrug at it, but it doesn’t offend me. As he said, law is the language of democracy.

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and I don't see anything wrong with people chiming in, whether they have law degrees and teach at a law school or whether they don't, for that matter.

More generally, I don’t see a real dichotomy between journalists who write about law, teachers who teach about law, lawyers who practice law, and judges who judge law. I see us all as part of a community — a self-defining community of people who are extremely interested in this subject and in what it means for the country. I feel myself in an ongoing dialogue with all those kinds of people. I’ve been known to read law journal articles. I’ve been known to write them. People send them to me constantly. They pile up. I don’t always respond, but sometimes, almost two years later, I’m leafing through a stack looking for something on some particular subject, and I’ll find something and give that person a call. They probably figured it ended up in the circular file a long time ago, but that’s not necessarily the case.

There are a few ways in which journalists tend to use legal academics, and it’s a symbiotic and mutual use. Some of them are good ways, and some of them, I think, are not so good. One good way is for journalists to reach out to law professors. Just say, “Here’s some development, what does it mean?” As a journalist, you have a Rolodex of people who are proven quantities, are accessible, and are responsive. If you call them and they don’t work out, you don’t call them the next time. I also talk to people about general background kinds of things. Then there’s the situation where you want somebody who speaks as a known authority to make a key point in the story, to wrap things up, or to validate a point. Some people are very good at that and some extremely smart, productive scholars are not very good at that. I think that pundits may be born and not made. Some people have that facility. Those are the kinds of people that I think journalists would tend to go to for that kind of need, as opposed to general background.

The third way is one that I see a lot, and I disapprove of it journalistically. It is a story about a court decision that consists of a string of quotes from five or six or ten professors — some saying it’s X, some saying it’s not X. That story leaves readers, I’m sure, scratching their heads. There’s a lot of expertise in that story, but the person writing that story hasn’t performed one of the major functions for which he or she is being paid — to work through the material himself or herself with whatever experience or smarts he or she can muster that day and come to some kind of point. Not a contentious point or an advocacy point, but an answer to whether
this development is important or not. It’s up to the journalists to tell the reader that, and not just five professors who say this and five professors who say maybe not. I hope I never use law professors in that way, although it’s very comforting for editors. They actually like to see that, especially when the editors aren’t all that sure of the credentials of the reporter.

I remember when I was very new on the Supreme Court beat, although I wasn’t new at the Times or in writing complicated stories because I’d done a lot of political writing before. I was new on the beat and new in the Washington bureau. I’ve forgotten what the topic of the story was, but the editor asked me to write an analysis and it didn’t really have any quotes in it, though I was pretty sure what I was saying. The editor came to me and said, “Well, this is okay, but if you quote some law professors in this piece I can get it on page one.” And I was kind of offended. And I wound up on page D-25. I try to resist getting the quotes in there just for the sake of sort of dressing up a story. I don’t think that’s a very honest or legitimate use of the professoriate.

We do live in a culture of celebrities, and I know that from the exponential increase in the last three or four years in the public relations departments of law schools. A number of law schools have gotten pretty aggressive in sending out a press release saying, “Here are five cases on the Supreme Court docket and here are our five experts on our faculty.” Sometimes they send out press releases containing packaged quotes from a law professor about a pending case. I don’t know what they expect the people who receive this to do with it. Although once in awhile, I do call people who are brought to my attention through press releases, if they have some connection to the case. I can think of one example — a school that was not high in the rankings sent me a press release reporting that a professor I had never heard of had filed an amicus brief in a particular case. Obviously this guy knew the case, and I called him and he was great. He added to my understanding of the case.

That is what I’m looking for, but it’s a tough market, and I am sympathetic to its demands, in part because I’m married to a practicing lawyer who is a bit of a pundit these days because his area of expertise is military law. He’s quoted often, so I get to see how this works from both sides.

People are welcome to send me their stuff as long as they’re not too sad or offended if I don’t get back with them.
My comments will focus mostly on how to break into the citadel. But I have a brief response to the criticism of the punditry. I think it would be better to judge us by our best contributions and not our worst. I particularly take exception to the criticism of Bruce Ackerman, who pointed out the lame duck problem with impeachment\textsuperscript{4} and argued that NAFTA might be unconstitutional.\textsuperscript{5} These observations represent, I think, the highest level of issue spotting and are something that a nonlaw professor is not likely to have been able to do. Those were excellent op-eds. If these things are so incredibly terrible and clearly on their face wrong, then the op-ed editors are doing a very bad job. I think that the system is working better than that.

On the primer side, let me speak briefly. One thing to start: I’m a fan of sound bites. It increases your chances to send in a query with your twenty-five-word description of what the op-ed is going to be about instead of writing the whole eight hundred words. More likely, to get attention, it actually signals that you’re more of an insider and you’re not taking the trouble to write up the whole thing. It also fits, if you haven’t heard it, that you should write the piece as if you’re going to lose half of your readers every paragraph.

The other issue of primerism is a slight criticism of the process. I think there are a number of market failures in the op-ed market, and I’ll talk briefly about three of them.

The first is a real bias against nonobvious solutions. I’ve done some empiricism on this, sending out research assistants to read the first two paragraphs of every op-ed in The New York Times, The Wall-Street Journal, The Washington Post, and The L.A. Times. And much less than five percent of the op-eds are on nonobvious solutions. There are some that would be fairly characterized as obvious solutions: I see that somebody is beating his children and he should stop. You can fight against this and write about the nonobvious solutions, as I sometimes do. But I tend to

\textsuperscript{3}William K. Townsend Professor of Law, Yale Law School. In addition to serving as the William K. Townsend Professor of Law at Yale Law School, Professor Ayres has a joint appointment at Yale School of Management. Professor Ayres currently teaches courses in law and economics and corporate finance.

\textsuperscript{4}Bruce Ackerman, \textit{Testimony Submitted to the House Committee on the Judiciary}, http://classes.lis.edu/archive/manheimk/371d1/Ackerman.html (Dec. 7, 1998).

think that the nonsolutions pieces that say instead, “Isn’t it odd that we’re prosecuting Linda Tripp,” or “I’m mad as hell pieces,” such as “I’m mad as hell that students are surfing,” are much more likely to get picked up. This is in contrast to a piece suggesting a nonobvious way that we could radically reduce the inefficiencies of the dock workers’ strike. Or there’s a nonobvious way that we could redeem the telemarketing industry with a couple dozen words in the new “don’t call” statute. Those op-eds are not going to place and nonobvious solution op-eds aren’t going to place either.

I was talking with a friend of mine who writes for the Times magazine. He said, “But Ian, don’t you understand, this is an opinion page?” My opinion is that we should have this much less socially costly mechanism for strikes and lock-outs. That doesn’t quite fly with editors and it’s a real constraint. Writing about things that you’re angry about that are odd, and that have obvious solutions, have a better chance of getting placed.

A second factor is the difficulty in publishing new facts. You can have new theoretical insights, and those can get published, but not new facts. Newspapers want to maintain a monopoly on reporting new facts. You can fight against that and try to submit op-eds with new facts in them; but, instead, my advice is to work with the system, and let reporters report your new facts. Next month, for example, I’m going to have a new study that says that passengers tend to tip African-American cab drivers a third less than white cab drivers. Right now I’d predict this can get some play. But there’s no chance that I can directly write this up and report on it myself, not on the op-ed page or any other place. I must send it to somebody else who will write it. Maybe it would be different if I wrote it up separately in an academic journal, and then wrote a piece commenting on my findings. But that’s the second kind of market failure that, for some reason, any fact that you come up with yourself, you can’t write about.

A third market failure — and this isn’t relevant to a lot of people — is that there’s a real bias against saying positive things about for-profit companies. You cannot praise a for-profit company on an op-ed page. A few years ago, I did some empiricism suggesting that Lojack had a surprisingly large general deterrence effect. People generally had an interest in this, but Lojack’s a for-profit company. There are some real constraints about the types of ideas that can get on an op-ed page. You’d be tilting at windmills to try to get these things placed. I’d say that if you want to get inside the citadel, work within the system.
And finally, I find that the process of writing op-eds keeps me honest. It makes me state my ideas more clearly and makes me certain that I’m not just using jargon for its own purpose. But would I do it if it were anonymous? That’s the real test.

Erwin Chemerinsky

I think that one of the most important things that I do as a law professor is serve as a media commentator. It’s my opportunity to educate the public about the law. When I’m on television or radio or quoted in the newspaper, I’m educating a much larger classroom then I’ll ever see in any law school.

I also think one of the most important things I’m doing is educating journalists about the law. I’m not talking about Linda Greenhouse; she knows more constitutional law than any law professor I know. I’m talking about the conversations I regularly have with reporters for local newspapers who don’t regularly cover the legal system — the reporter for the Pasadena Star or the San Bernardino Sun, who is covering a legal issue for the first time. A large percentage of the time, maybe even most times when I talk to reporters, I’m not quoted in the newspaper. What I’m there for is to explain and provide background material for the reporter. I remember during the O.J. Simpson case, almost every night at ten o’clock, an anchor on the local ABC affiliate would call me at home. I was doing daily work for the CBS affiliate, so I never once appeared on ABC or her show during the trial. But she wanted to be sure she understood the legal issues that she was going to discuss the next day. We usually talked about a half-hour before she would go on the eleven o’clock news. It wasn’t about my being on television, it was about my opportunity to educate a journalist about the law. So I don’t share Mr. Wittes’ perspective of an adversarial relationship with journalists. In my experience in talking with journalists, I’ve come away with the highest regard for them. I regularly teach a class at U.S.C. with a journalist for the L.A. Times, Henry Weinstein, who’s one of the best reporters I’ve ever met. We teach about media and the law so the students can hear both the perspective of the journalist and the law professor.

I also think that as a media commentator, I am at times advocating positions I believe in. When I write op-ed pieces, I’m adv-

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6 Erwin Chemerinsky is the Alston & Bird Professor of Law at Duke Law School. In January 2003, Professor Chemerinsky was the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics and Political Science, University of Southern California.
cating things I care about. I don’t believe that there’s any tension between being an advocate and a scholar. I’m often an advocate in appellate courts. I’ve frequently been an advocate in the legislative process, so I think it’s completely acceptable to also be an advocate in the media.

But I do think being a media commentator is often a difficult role. During the O.J. case, which was the first time I was ever doing this on a daily basis, I constantly saw ethical issues in being a commentator. When I had such an ethical issue, I’d call my friend Laurie Levenson who was playing the same role during the O.J. case, and she would often call me. We decided that when the trial was over that we would write a law review article on the ethics of being a commentator. It turned into three separate law review articles on the ethics of being a commentator.7 We proposed a voluntary code of ethics for commentators; obviously it would have to be voluntary in terms of the First Amendment.8 We’re pleased that the American Bar Association, the American Trial Lawyers Association, and the American College of Trial Lawyers have all favorably considered this.

The code would call for a duty of competence for commentators.9 For example, I will never comment on any case until I’ve read that decision. I don’t believe that any law professor or lawyer should. I will never comment on trial proceedings unless I’ve either seen them or read a transcript of the trial proceedings. Mr. Wittes criticizes law professors for making inaccurate statements. I totally agree that it’s indefensible for any lawyer, any law professor, or any commentator, to do that. I will never speak in any area outside my expertise. I refer journalists to my colleagues or others in the city and the country who are real experts in that area of the law.

A second thing that the code of ethics needs to address is the duty to avoid conflicts of interest.10 If I have any involvement in a case, I believe I have the affirmative duty to tell the reporters interviewing me about that. I believe there’s an affirmative duty on

8 See Ethics III, supra n. 12, at 742–754.
9 Ethics III, supra n. 12, at 742–743.
10 Id. at 744–746.
the part of any commentator to disclose any possible conflict of interest.

I also think it’s very important that there be a self-awareness about the role we’re serving as commentators. Sometimes when I am a commentator I try in the most neutral fashion I can, knowing no one can be really neutral, to explain the law. There were many times during the *Bush v. Gore* litigation when I saw my role as one of being as neutral as I could, to explain just what was going on. There are other times when I’m there to be an advocate, when I’m paired with somebody from the opposite perspective, for example. But I need to be very self-conscious of my role, asking, “Am I here to try to neutrally describe the law or am I here to advocate a position?” All the while, I recognize that that line can often be blurred. And to the extent that Mr. Wittes is criticizing law professors for not being aware of that line, again, I would agree with him.

A code of ethics also needs to deal with issues of confidentiality.11 I’ve had instances where judges have called me, talked about a particular case they were handling, and then reporters called to talk to me about the case. I don’t feel I can then have that conversation. During the O.J. case, I regularly would be in the situation of running into lawyers who were involved in the case, who’d want to tell me things that weren’t yet public, and they knew that I’d be on television the next day and I was worried that they were just using me or spinning me. I see it as the commentator’s duty to clarify what’s confidential and what’s on the record.

I could go on about all of these, and Laurie and I have written about the topic in detail.12 And so to respond to Mr. Wittes, if his criticism is that law professors at times are inaccurate, then I think he’s absolutely right and we’ve failed in our duty. If he’s criticizing law professors for times when they are advocates of positions, then I disagree because I think it’s completely appropriate for law professors to be advocates so long as it’s clear in what we’re doing.

Finally, I should address the issue of how one becomes a commentator. I think a lot of it is being in the right place at the right time. I’ve never called any reporter to ask to comment. Being in Los Angeles and teaching constitutional law made it natural to be called in certain situations. The only advice I could give any-

11 Id. at 746–747.
12 Ethics III, supra n. 12, at 742–754; see also Ethics II, supra n. 12, at 913–941; Ethics I, supra n. 12, at 1303–1339.
body is to return journalists’ calls if you want to be a commentator. And remember that they’re on a deadline. I think that the way that I became a commentator is that I returned everybody’s phone call and I tried to return journalists’ calls as quickly as possible because I knew that they’re on tight deadlines. Returning their calls tomorrow doesn’t help them if they’re working on the story today.

In terms of op-ed pieces, just send them out, and if the first newspaper doesn’t take it, you can send it to another newspaper. It’s not like law reviews where you can do multiple submissions, you have to do them one at a time. But I’ve generally found that if you’re willing to keep trying with different newspapers, it is usually possible to get a piece published and one thing does lead to another. At the L.A. Times, I was able to build a relationship with an op-ed page editor, and he would call me sometimes to ask if I wanted to write about a particular issue. That kind of a relationship develops over time.

I think I am a better teacher because of the work that I’ve done as a commentator. I think it’s helped me in being more precise in articulating ideas. I think I’m a better commentator because of the work that I do as a scholar. So I see the roles as entirely compatible and not all as in tension.

Benjamin Wittes responds

In response to points made by Linda Greenhouse and Erwin Chemerinsky, I should clarify that I don’t actually disagree that there’s no tension between speaking in public and scholarly work or that there’s necessarily an adversarial relationship between the press and professoriate. In fact, as many of you know, I talk to law professors literally every day and I share Linda’s sense that there’s a general dialogue between us and that we’re all essentially part of the same conversation. And I also would say that if all professors observed the ethical strictures that Professor Chemerinsky has outlined, I think my issue would take care of itself. I don’t actually think he and I are disagreeing at all.
My experience may be somewhat distinctive; although I’ve had a fair degree of contact with reporters during my career in the academy, I think I was probably invited to be on the panel because of my Warholian fifteen minutes of fame. One of my specialties is regulation of the political process and with the election of 2000, I hit the jackpot. If you pick an obscure-enough topic on which to become an expert, when your number comes in, it really comes in.

Much of what I think has already been addressed by the other panelists. So let me organize my remarks the way they taught me when I worked for the Riverbank Elementary School News: Who, What, When, Where, and Why.

On the “Who,” I can’t emphasize enough that it’s important to know who the reporter is with whom you’re speaking, since that will tell you a lot about the level of knowledge the reporter has. If I talk to Linda [Greenhouse], or to Chuck Lane of The Washington Post, or to Nina Totenberg of National Public Radio, they know the legal issues really well. And they may know a lot more than I do about details of the particular case they want to discuss. Often what expert reporters are asking you to do is to put the case they’re covering in the context of other cases and relatively fine doctrinal issues.

If, on the one hand, you’re talking to a sports reporter who’s been referred to you by the legal affairs reporter — because he wants you to explain public accommodations laws, and why Augusta National can exclude women from its golf club — you need to tailor your remarks in a very different way. When a four-year-old asks you, “Where do babies come from?,” that calls for a very different answer than you would give if you were asked the same question on a college biology exam. So it’s important to know something about who is asking the questions.

The “What” question. There’s a big difference between occasions on which you are the author — op-ed pieces, for example, or on-camera appearances — and times when you’re essentially providing background information. On the former occasion, you’re often being asked for more factual, objective information. For ex-

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13 Kenneth and Harle Montgomery Professor of Public Interest Law, Stanford Law School. At Stanford, Professor Karlan teaches constitutional litigation, civil and criminal procedure, and legal regulation of the political process. In addition to her teaching responsibilities, Professor Karlan currently serves as Commissioner of California’s Fair Political Practices Commission.
ample, if a reporter asks you, “How many times have courts ordered ballots to be reallocated between candidates in an election?,” she’s not asking you, “How do you feel about this?” She isn’t asking you, necessarily, “Do you think it should happen in Florida?” She’s simply asking you if this ever happens. And that’s a piece of information. Eighty percent of the time when I talk to a reporter about the state of the law, I don’t get quoted and I wouldn’t expect to get quoted.

The “Where.” There’s a big difference between talking to print journalists and talking to broadcast journalists. When I talk to a reporter like Henry Weinstein of the *L.A. Times*, we might spend an hour on the telephone discussing all the nuances of the issue he’s covering. By contrast, if I’m talking to a television reporter, I might get twelve seconds. My favorite example of this is the time I was called by *Good Morning America*, which sent a stretch limousine to pick me up at 2:00 a.m. to take me to an ABC affiliate station in San Francisco on the morning the Florida trial court was set to rule on the recount in *Bush v. Gore*. The opinion was only seven pages long so it took me three minutes to read it. And then Diane Sawyer asked, “So Pam, do you think they’re going to appeal?” And I said, “Yes.” And she said, “Thank you very much,” and they put me back in the limousine and sent me home. That’s the extreme version of this phenomenon. But if you are talking to broadcast journalists, be aware that you cannot give a fifteen-minute statement to them. Even when I appeared on the Lehrer *Newshour*, which is probably the network show that gives guests the most time to comment, you have no idea how fast time moves until you’ve done it once.

Still, you have to prepare a lot. That’s one of the things I really want to emphasize if you’re going to do any kind of commenting where you are appearing in public. Even if you’re going to talk to a print reporter, you need to know what you’re talking about. The ratio of preparation time to face time should be roughly what it is in your classroom teaching. I probably spent five or six hours preparing for each of my *Newshour* appearances, reading things in preparation for eight-minute interview segments. And I don’t think that was over-preparation. Sometimes a lot of it was wasted in the sense that it wasn’t preparation for the question I ended up being asked. But you do not want to make a fool of yourself on television, because I guarantee you that people you have not seen since high school will see you and they will call you up and you will get letters and e-mails from them. If you’re on the West Coast,
you will get the e-mails before you even get to see yourself appear because a lot of these stories are being done live on the East Coast and have a three-hour delay. And in the three hours between when you did the show and when you get to watch yourself, you will get thirty e-mails from people saying, “You idiot.” You will feel much better if you know those people are wrong because you knew what you were talking about.

“When” should you appear? The point that a number of people have made but I can’t emphasize enough is that you should appear only if you know what you’re talking about. Do not revert to a junior high school mentality where you think, “If I don’t accept every date I’m offered, I’ll never go out again on a Saturday night.” Journalists appreciate it when you say to them, “I can’t come on your show. I don’t know enough about this.” I’ve gotten calls from people who’ve offered me op-ed slots and they say, “We want you to write about national security.” And I say, “But I don’t know anything about national security that I haven’t read in your paper.” If I read it in The New York Times, I shouldn’t be writing it in The New York Times. I should be writing it in The New York Times only if I have something special to say that rests on real expertise. So don’t be afraid to say “no.” And don’t be afraid to recommend other people who you think are really good; not every journalist will know all of the people you know who would be good commentators on something. If you say one time, “My good friend Erwin can talk about this,” reporters will still call you.

And lastly, the “Why.” We talked about the high purpose “why” — because we know things that are useful for other people to know and because we have points of view that we’d like to communicate — but there’s another reason why you should think about dealing with the media: because it’s actually a lot of fun. Many journalists are extremely smart and interesting, and you can learn a lot from them. Your parents will love it when you’re quoted in the newspaper or appear on television or radio. And so I recommend doing media, but remember that you have a day job and your day job comes first. So do not cancel classes to go on T.V. Do not kick students out of your office because a reporter has called. Do not forget that your major job is to teach and to write scholarship — not to be the intellectual equivalent of one of the people on the Jerry Springer Show: “Law Professors Who Ran off with Reporters When They Could Have Been Teaching Their Classes.”
I’ll end with one thing that Erwin suggested which has been true for me as well. Talking to people who are not lawyers is a really good way of learning to speak and think clearly about the law. That goes beyond appearing on television or radio or writing op-eds. I recommend that you go out and talk in the community as well, face-to-face with people. Talking to the League of Women Voters if you know about voting rights issues or talking to the local NAACP chapter about racial profiling. Talking to your university’s alumni groups. This kind of work improves your teaching and it also will improve your commenting because you’ll be used to talking about legal issues in a way that is real to real people.

Arthur Miller

It’s strange to sit here with this wonderful group of panelists and realize that twenty-four years have passed since I was teaching a class and thought that I saw two alums in the back of the room. They turned out to be the top executives at the ABC affiliate in Boston who’d come up with the crazy idea of trying to figure out whether there was a role for law on television. They had promised the FCC to do more local programming and they’d been told to go watch this crazy law professor at Harvard.

The class and I had been talking about the august subject of how you take depositions in Switzerland. So I could understand that they didn’t understand. But they said that there was an energy in the room and wondered if there was any way to translate that energy into television. That became Miller’s Court.

Now, why did I do it? Was it an ego trip? Sure. But what also motivated me was my role as an educator, just like the other people on this panel. As an educator, you must decide whether it’s worthwhile to educate those outside your classroom. And I’ve always felt that it was worthwhile.

I love journalists. I’ve had twenty-two years with journalists: good, bad, and indifferent. But I also love the law. I feared that if we left the law to journalists, they would make an irreducible number of mistakes and would never get it as right as possible. For example, they don’t understand what a denial of certiorari is.

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14 Bruce Bromley Professor of Law, Harvard Law School. Professor Miller’s research interests include civil procedure, copyright, and implications of computer technology for personal privacy. Professor Miller was appointed Professor of Law at Harvard in 1972; he was appointed to the Bruce Bromley chair in 1986.

15 *Miller’s Court* (PBS 1979-early 1990s) (TV series).
They don’t understand that innocent is not the same as a finding of not guilty. I felt, back then, that I could add something to public comprehension about one of society’s most significant systems. I am also aware of a media bias against law and lawyers because the law is dull and doesn’t produce good pictures for television and lawyers because they are ponderous unless they provide comic relief.

You can decide to be involved in media for a variety of reasons. You can be a reporter, but law professors are not reporters or gumshoes. We are and can be advocates. We can be educators. We can be translators. We can be pundits. And it’s important to understand that those roles are very different. Alan Dershowitz and I, for example, are the dearest of friends. We’ve both had lives in the media but we do very different things in the media. I view myself as an explainer, a translator. Alan goes on television to be an advocate. I’m not right, he’s not wrong. They’re different functions.

The critical thing is that you make a decision what it is you’re doing on any particular day. Am I here to translate, to educate, to explain, or am I here as I sometimes have been, because I love privacy and media people are destroying privacy? If you’re going to advocate, advocate. If you’re going to explain, explain. But don’t mix the two without marking your role because then you are a cheat. I didn’t do much opining on Good Morning America, but when I did, I would explain that I was in opinion mode. I once went on television, in the early days of O.J., with Alan. It was the only time Alan and I ever had any difficulty about a media appearance. Alan went on and on during the interview and never disclosed that he had been retained by the defense. So I mentioned it. I felt it was a matter of integrity. And he understood what I was doing. Know why you’re there, know what your function is, and don’t mix them up.

I’m a popularizer. I’m a trivializer, I’m a synthesizer, I’m a dilettante, a generalizer. I know that because Peggy Robinson has never called me in over twenty years to be on The Newshour. Never! That is absolute confirmation I have no expertness about anything. And that’s the right word: expertness, not expertise. Linda never calls me because I rarely deal with the Supreme Court. I deal with the other ninety-eight-and-a-half percent of the law.

I agree with my colleagues: Never go on to discuss a case unless you’ve read an opinion. But I disagree with my colleagues: Don’t be afraid to go on if the subject of the interview is not in your area of expertise but is one in which you feel competent to synth-
size issues, translate them, and project out the key elements. As an example, I don’t know beans about matrimonial law (which is why I’ve been divorced three times I suppose), but if Good Morning America asked me to do something on child custody, I would become an instant expert by talking with Linda Silverman on the NYU faculty. When the Pope got shot, I needed to learn the legal status of the Vatican, so I called up the Archdiocese in New York and became a three-minute expert. I wasn’t afraid to do it, as long as I was willing to commit to get the case information, digest and distill it, and translate and explain it. That’s what we do when we teach, you just have to do it on much shorter notice.

The only time I talked about an opinion without having read it was Bush v. Gore.\textsuperscript{16} Dan Abrams ran down the steps of the Supreme Court the night it came down, reading extracts and asked, “What does this mean, Arthur?” Dumb luck, I was right. But I don’t advise doing that except in extreme circumstances.

Now, some advice: Understand that you have no tenure in the media. Understand that in a real sense you are a commodity. You are the proverbial sponge. Once wrung, you will be discarded. Understand that the media people are not really your friends. They may be your partners, your collaborators, but not your friends. You must protect yourself. Don’t cancel classes. Develop internal standards for yourself. If they want you to discuss whether it’s a crime for a woman to go into a men’s room at intermission at a theater because there are inadequate toilet facilities for women, think about whether you want to discuss that.

Finally, face it, it’s fun. We live in one world and the media lives in another world. The ability to shift and float between the worlds creates a certain sense of exhilaration and excitement and sometimes you almost feel like you’re a Renaissance person. Look at me. My whole life is Federal Rule of Civil Procedure 12(b)(6) motions. To talk about the legal status of the Vatican to millions of people is a high. But watch out. When I was in my first year of doing Miller’s Court the station manager warned me that media activity can be as addictive as a narcotic and can lead to thinking that there is no life outside the camera. And that’s something you’ve got to protect yourself against.

You have a day job. It is your job. It is what you were trained to do. Never, never, never give it up or compromise it.

\textsuperscript{16} 531 U.S. 98 (2000).
Question: Should you write opinion pieces or appear on television if you are not yet tenured? Should you identify yourself as a law professor with a certain law school?

Arthur Miller: I was so uptight about my decision to create Miller’s Court, I didn’t tell a single person in the Harvard community until the program went on the air and they discovered it. About the second week, one of my very senior colleagues came to me and said that he had watched the program the prior night. He told me that he really appreciated what I was trying to do but he then suggested that the program not identify me as a professor at Harvard Law School. That remark was crushing at the time. Time has proven him wrong, but I would say to you if you are not yet tenured, don’t do it. Don’t do it until you’re tenured and you are established.

Benjamin Wittes: I don’t have a problem with people using their law school titles and the names of their chairs to talk about things that are germane to the research that they do. I do have a problem with people who use the name of their chair as a point of authority that conveys to the public that this is a person who is learned in the subject about which they are speaking if the subject about which they are speaking is, in fact, something in which they have no relevant experience. That seems to me to be trumping up a credential that isn’t exactly relevant. It doesn’t make you an authority to say the things that you’re saying. However, if you’re doing a generic show about law and you’re a professor at the Harvard Law School, that strikes me as altogether relevant, and that doesn’t trouble me at all.

Erwin Chemerinsky: I would disagree a bit. First, whether you write op-eds as an untenured professor
should depend on your particular school. At some schools, it would be recognized as something that’s very important. At other schools, they’d rather you not do it. Obviously I agree that it can’t interfere with your teaching and your scholarship because that’s what you will be evaluated on in the tenure process. But whether you should or shouldn’t do it untenured depends so much on the culture of the school.

In terms of using your title, I agree with Mr. Wittes that you should only speak in areas where you’re competent. But any time I speak, people can use my title because it is an accurate description of my employment and position. My exact title is the result of a donor who gave a lot of money to the law school to have that be the title of the chair. That doesn’t mean those are the only things that I know about. So, I think that my title goes with me and then people can evaluate whether I am competent to say what I’m saying. But I don’t see any problem with using my title, because it is my title.

**Benjamin Wittes:** What about if you’re talking about a subject that’s only very distantly law-related?

**Erwin Chemerinsky:** If it’s about baseball, then I could do it, because I know a lot about baseball, but they shouldn’t use my title. Other than that, I shouldn’t be talking about it unless I know a lot about it. But no matter what I’m talking about, if somebody wants to say, “And he’s a professor of law at the University of Southern California,” that’s fine. Because that’s descriptively accurate.

**Benjamin Wittes:** But let’s go back to the baseball example for a minute. Because some of the punditry — and I accept Professor Miller’s distinction between punditry and explanato-
ry educational speaking — some of the punditry is exceptionally far removed from the areas of people’s actual expertise, or expertness — hardly less so than when you’re talking about baseball. Now if you say you’re explaining baseball in your capacity as a professor of law, that is ridiculous on its face. However, there are lots of situations in which the ridiculousness isn’t quite as obvious initially. And I’m saying that there’s a duty of candor on the part of a professor to identify the situations in which he has no professional expertise to bring to a particular discussion or, at the very least, not to pull rank in that discussion by trotting out a fancy academic title granted for work wholly unrelated.

**Erwin Chemerinsky:** I criticize any commentator who speaks outside of his expertise unless he or she has done enough research to become an expert. I think that the media shouldn’t be calling law professors to be talking about baseball unless it’s a legal issue regarding baseball and the person called is an expert in that. All I’m saying is, if I am competent to speak on an issue and if a reporter chooses to quote me about it, it is fine to say that I am a professor of law and political science at U.S.C., because that is accurate information.

**Question:** Can we blame journalists for this sometimes for calling not the true experts but the people who will, instead, give them the delightful, snappy ten-word answer that people want to hear or read?

**Linda Greenhouse:** That’s exactly my response. I don’t blame the law professors for putting their opinions out there. I do blame the appetite of editors for bestowing a credential that’s not germane. And that’s where we have to
be the gatekeepers in the culture of celebrity and not let everybody in.

Benjamin Wittes: I agree with that as well.

Question: I hope the reporter who called Amy and asked, “Are you an expert?” wouldn’t have relied only on her “yes” or “no.” If she had said “yes,” there should have been some checking to make sure she was indeed an expert. I am speaking on this sort of as a consumer. I’m not worried about the law schools. I think the law schools should have to take care of themselves. But I’m a little concerned about the public. There are a number of websites boasting of the law schools’ experts in certain areas and some journalists who want someone else to do their homework. Too many journalists, especially too many television journalists, fall into what I call “you-be-the-judge journalism,” without the rules of evidence. They put on advocate number one and advocate number two — both of whom may be lying. And the journalist at the end says, “Thank you very much. You be the judge.”

I wonder if it is possible and reasonable to say to the journalists that they need to distinguish between the explainer and the advocate in their stories. That would make them do their homework a little more and force them not to rely only on experts who call themselves experts. Some journalists let attorneys and law professors alike say whatever they want to say as an advocate and they don’t probe, they don’t question, they don’t find out facts. I think there are facts and experts out there to be found.

Peggy Robinson: I agree with you one hundred percent. I see part of the problem in my own job. As the producer for politics, education, and
legal affairs, I have a staff of reporters on whom I must rely. Those reporters are young and normally in their second or third job. They may lack the knowledge and courage to look outside the standard experts. Plus, there’s time pressure. We go on the air at six o’clock eastern standard time every night. I’ve got to have a body. We want the perfect guest, but a lot of times you’re dealing with young, inexperienced staff people who don’t necessarily know who that perfect guest would be. In theory, we’re looking for the perfect cast, but that doesn’t always happen. Instead, and it’s television that’s the chief culprit, they’re looking for a body. That’s the reality. And if you’re talking about CNN or about Court TV, then they need new bodies for shows every hour.

Linda Greenhouse: It is tough out here. I’ve been on both sides because I get called frequently by radio reporters from local radio stations who want a sound bite from me, I don’t do it. There’s nothing in it for me and I may not have much analysis to offer them at the time they call. The funniest example was just the other day. We have rotating weekend duty in the office and you show up and you write whatever happens that day. So I was tasked with writing an incremental development in the cloning story and my cloning story appeared in Monday’s Times. Sure enough, I was called by radio stations, asking if I could come on and talk about cloning. I didn’t even return the calls. It’s a window into the appetite out there because a minute of air time is an eternity but there are sixty of those every hour. It’s a big problem.

Question: I’ve been involved with these things in my state and in my community. I’d like the
professors to talk about their own experiences with colleagues in terms of internal consequences: colleagues who are jealous, colleagues who are hostile, administrators’ concerns that you need more focus on your scholarship, hate mail from readers, or threats from outside people. Those are consequences I’ve been afraid of in expanding my media involvement, because of the personal harm that could occur.

Ian Ayres: Just one clarification on the question of what writing you should do pre-tenure. We should divide it into different categories of publication. If you get a piece in *The New Republic*, or the *L.A. Times* or *American Prospect*, there’s just no way in the world that will hurt your tenure file, controlling for everything else. It’s definitely a plus factor to me. Secondly, if you write a scholarly piece that then gets media play, that’s only going to help your tenure, even if you help promote the piece and then give some interviews based on your scholarship. The thing that is more institutionally contingent and will definitely give rise to more resentment and questioning is if you comment not on your scholarship, but analyze, comment on the news that you haven’t created. That’s not as much as a plus factor. Don’t give reporters quotes all the time on any issue.

You mentioned hate mail. Certainly, if you are quoted in *The New York Times*, you’ll attract both the loons who will e-mail you about your statement and you’ll also get the producers for every local news show that need to fill time. But I never feel that my family is at personal risk, despite my media involvement.

Arthur Miller: I said before — very strongly — that if you’re pre-tenure, I’d advise against media involvement. I stick with that because
you will never know what your colleagues are saying in the lunchroom when you're not there. You will never know what kind of mail your dean gets. Maybe I'm just a scaredy-cat in my old age. And again, if you become a media commentator, stay within your field. That clearly will not hurt you. But if you stray into fraying toward the edges of your knowledge base, there are unseen risks.

Pam Karlan: You may well get some negative mail and really scary mail, particularly if you talk about anything that's at all controversial.

On the topic of negative mail, the three or four of the most negative letters I got during the entire election law thing were from second-year law students at various law schools who claimed I knew nothing about the law. I answered them — I actually answered almost all of the e-mails that I got. I viewed the answers as an opportunity to teach the students that good lawyers don't just shoot from the hip. It was important to me to show them that they needed to pay closer attention to doctrinal details.

As for truly scary letters, those tend to be on issues that people take personally. So, for example, conservatives did not write me incredibly nasty letters about my views on Bush v. Gore, because they won and they could afford not to. It's when I've talked about civil liberties issues that I've gotten really scary letters. The letters say that “People like you would be the first to go if al-Qaeda took over the United States.” And I have no doubt that, yes, I would be among the first to go. If you get letters that really scare you, contact your university's police department.
This leads to a slightly different point: you should learn what resources are available at your universities. Not just the police department, but also your university’s public affairs or media office. Often these offices have incredible expert media people. They know if there’s an up-link station on campus so you don’t have to go someplace else to tape broadcasts or they tell you where to place your op-ed or things like that.

But it is scary when you get e-mails because people obviously know your e-mail address. And if they got your e-mail address from the campus, they can also get your home address, unless you have that unpublished. Do I worry; do I look both ways when I come out of the door of my house in the morning? No, I don’t. But that one e-mail was scary enough that I wanted the university to take over.

**Erwin Chemerinsky:** I’ve gotten thousands of hate letters and hate messages. E-mail has made it much worse, but I remember the first op-ed I ever did, in *The New York Times* about sixteen years ago. It was the time that *Bowers v. Hardwick*\(^\text{17}\) was pending. It had the very simple point that sexual identity should be private. I got dozens of letters, some which were very vicious, saying that I deserved to die of AIDS. In recent times, I’ve received a lot of letters saying I should die in a Bin Laden bombing, that my family should die. Last year when I was co-counsel in one of the cases on behalf of Guantanamo detainees,\(^\text{18}\) I turned on my e-mail one morning and there were 200 hate messages. Unless the message

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\(^{17}\)478 U.S. 186 (1986).

\(^{18}\)Coalition of Clergy, Lawyers, & Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002) (naming Professor Chermerinsky as co-counsel).
says to me, “I’m coming after you and your family,” I just toss it in the trash. I never, ever respond to a nasty or hate message. I delete it because I don’t want to give them the satisfaction of responding.

My administration has been totally supportive. I know that both the dean and the president of the university regularly get letters from alums saying, “As long as you have that liberal Chemerinsky on the faculty, I’m not giving any more money.” I know my dean has a form letter response saying, “I don’t always agree with him, but we have academic freedom.” I’ve never had anything but support from the administration. To that extent, if colleagues have been other than supportive, they’ve only done it behind my back. Nobody’s ever said the slightest negative thing to me.

**Question:**

I do a lot of op-eds; I write in the area of civil liberties and I certainly agree with those panelists who suggest that it’s not only fun, but it has a great deal of impact. It certainly has for me. It’s a lot more time- and cost-efficient than writing law review articles, which I do, too, because I get paid to do them in summer. But my question is very specific. I’ve recently had difficulty getting articles published. One in particular is about the silence of the Islamic community in the United States in response to the killing of reporter Danny Pearl and in response to the terrorist incidents. To what extent is my difficulty in getting this particular piece published a reflection of an attitude of political correctness on the part of op-ed editors, and to what extent could it be that the newspaper op-ed editors are downsizing the number of outside contributors they are
accepting because they don’t want to pay them? They have a lot of syndicated columnists they could use instead.

**Benjamin Wittes:** I can’t address that in general because I work for only one editorial page rather than all of them. I can say that political correctness hasn’t encumbered our op-ed page. At least I hope it hasn’t. On the specific subject that you mentioned, I have personally seen a very large number of submissions related to that specific issue. I think all op-ed pages are inundated with such material. We get, for example, an average of about eighty op-eds a day — and that fluctuates depending on how dense the news is. It can go well over 100. We read them all. But on any given day, we tend to have no more than two outside pieces on our op-ed page. So you can do the math in your head and it’s not very favorable. This is not to discourage you from submitting op-eds; the diversity of submissions is what makes for an interesting page. But it is to say that you shouldn’t read a whole heck of a lot into the fact that a given op-ed has a hard time finding a home, particularly when it happens to be on the hottest issue of the day.

**Question:** I wonder if anyone on the panel might have advice for those of us from less prestigious schools. It has always seemed to me that the op-ed pages and the media are more accessible to those from the more elite schools, that the school status also gives their pedigree as experts more status. Our law review articles aren’t publicly disseminated in ways that allow the media to gauge for themselves whether we are experts, so how do we break into that op-ed world?
Linda Greenhouse: I think that you raise a good issue. I’m always aware of that. When I have the chance to interact with and quote a professor from a law school that I haven’t quoted from often, I’m happy to do it. Actually, I remember finding an expert from a lesser-known school on the Internet while searching for current developments in a story about September 11th. His clinic had represented some of the detainees in New Jersey. I quickly got a warm, follow-up letter from the law school, saying thank you for quoting us and here’s a list of our other experts. The visibility issue is a tough one. But be out there and people scanning the horizon will find you eventually.

Peggy Robinson: We’re always looking for new voices, different voices. Diversity is important to us, not just necessarily the caliber of the school. Expertise comes into it. I feel like we tend to go back to the same sources time and time again. And while, on one hand, I think that’s appropriate to develop that kind of relationship, I also think of people who are here at this meeting. There are a lot of you here and, yet, there are not a lot of you who are reflected on the evening television programs and I would like to see that change. I would like to have more information about you, what your interests are, what you’re writing about.

Ian Ayres: I think the institutional bias is there big time. There are two things you can do. One is write off-topic. Don’t do a September 11th op-ed. Try to find something quirky that editors haven’t been thinking about. And secondly, it’s good that The Washington Post reads all 100 submissions, but, as a writer, you should be skeptical of that. Make sure that you have
a killer lead, one that grabs them, because they will pay more attention to a Yale submission and, while I might get two of my paragraphs read, you might get just one. Make sure that the first paragraph makes you shine.

Question: I have sort of the opposite question. Pretend that someone calls you and tells you that they’d like to interview you on the radio for some analysis. What advice do you have for the naive interviewee on how to best protect herself from something that ends up being not what you would have wanted to see in print or on the air? Are there ground rules that people need to know about? Can you summarize, for the novice, what to think about?

Ian Ayres: Do everything off the record first and then come back and check quotes to go on record.

Erwin Chemerinsky: I have a slightly different answer than that. First, and this took me much longer to learn than it should have, if I’m being interviewed by a television reporter on tape, I know they’re going to edit and use only a soundbite. And if I have one or two points I want to make, I make those one or two points in response to almost any question they ask, because you don’t know what they are going to cut. Normally, we don’t want to repeat ourselves. But it’s ok if it’ll be edited because they’re not going to use you saying the same thing.

When you’re on live television and you don’t want to answer exactly the question asked, and you have something you really want to say, go ahead and say it. Again, it’s not like having to answer a question for a student. Obviously you need to know who the anchor is and what’s appropriate. Often if you don’t an-
answer the question, then they’ll just ask it again, but it’s okay to do it once to get your point across. I’ve also found with live television it’s often okay to suggest questions to reporters before going on the air.

With regard to being quoted and misquoted in the print media, my philosophy is to try to be as careful, as accurate, and as nuanced as I can. Rarely do I find myself misquoted; I’d say ninety-eight percent of the time the quote is exactly right. But sometimes it’s wrong, maybe it’s my fault, maybe it’s the reporter’s fault. Then I just forget about it. The newspaper will be on the bottom of the bird cage the next day. People won’t remember. I decided a long time ago that either I have to forget about it or stop doing it. You can’t obsess about it. Mistakes happen, maybe they’re mine, maybe they’re the reporters’. Usually it all comes up fine.

Pam Karlan: Just two other little points. First, as I said before, know the media person at your university. We have this fabulous guy at Stanford, Jack Hubbard, and he called me about a national cable program and then suggested that I not do it. He told me that the host’s style would not mesh with my style and that I would feel like I was on Jerry Springer. He told me that I wouldn’t like that. I later saw someone else on the show, and Jack was right.

If you’re going to do television, the absolute best show to do is the Lehrer Newshour because they take enough time with each story. Eight minutes is an eternity if you’re on television and it’s done live and you’re being interviewed. The Newshour staff doesn’t give you the questions ahead of time, but I would talk to a reporter maybe for an hour in the morn-
ing the day of the interview. I knew then what the anchor would be interested in talking about: maybe how appeals work in state courts. Or maybe equal protection. So I would go and read the cases. And then I would sit down before I went on and think about the topic and the three or four things that are most important within it. Obviously, you answer the question the reporter is giving you. I don’t think that you should go into an interview thinking that you will talk about your list of points no matter what the interviewer asks. But I knew my bottom line on the issues. So preparation is important. Prepare, prepare, prepare. It’s like class. Fifty minutes in the classroom, the first time, requires up to ten hours outside the classroom. Eight minutes on television—at least two hours of preparation.

The second thing is about not being quoted correctly. Don’t freak out unless you said to the reporter, “I think this is a very interesting case,” and the reporter instead quotes you as saying, “The defendant is not guilty, I did it.” Then you need to worry. But if it’s not something like that, one thing you can often do, especially if it’s a reporter you’ve dealt with before, is call him up, or send him an e-mail and say, “I think what I was trying to get at is ‘X’ and I saw in the paper it came across as ‘Y.’ Maybe I should be clearer next time about that.” Don’t worry terribly about it. But be very explicit if you don’t want to be quoted in a story. Tell the reporter at the very beginning, “I’ll be glad to talk to you about this, but you can’t quote me by name.” And I’ve never had a reporter who then quoted me by name.
Peggy Robinson: I don’t put guests on my program to make them look bad. It is live television, but it’s orchestrated to a certain extent. When Pam spoke with our reporter for an hour, that’s the pre-interview. We insist on pre-interviews so that we know what the guests are going to say. So part of my job is to put together a panel that meshes, whether it contains opposing views or various shades of one view. Being honest as a guest, being straightforward is very important. I can’t explain to my mother what I do as a senior producer. It’s putting on a show somehow and part of it is trying to find the right people for our studio discussions. We’re not trying to make you look bad, because then we look bad. We do the pre-interview to make sure that guests do not speak only legalese. We want to make sure that we’re getting the best guests, the ones that will help us put on a good segment.

Amy Gajda: Thank you all for coming and sharing your experience — and expertise.