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THE GOLDEN PEN AWARD

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A TRIBUTE TO JOSEPH WILLIAMS ON THE OCCASION OF HIS BEING PRESENTED WITH THE GOLDEN PEN AWARD BY THE LEGAL WRITING INSTITUTE

George D. Gopen

Back in 1980, several people told me that I had to meet Joe Williams. We’d get along, they said. We thought alike. So at that year’s Conference on College Composition and Communication, I looked him up and tracked him down. That day changed my life. Everything I know about the teaching of writing that I learned from another person, I learned from Joe. No one else understood the language as well or knew so well what to do with that knowledge.

Composition teachers and dermatologists are very much alike: In both cases, their patients never die, but neither are they ever completely healed. Therefore, they have to keep coming back for more help. In both cases, there seems continually to be a nagging sense of at least partial futility, of the impossibility of progress.

Why, for 200 years before the 1980s, had there been no real progress made in this country in the teaching of writing? Because most of the people involved in that effort were teachers of Freshman Composition. What are the professional results for these teachers at the end of the term? If they teach it poorly, what is the punishment? They have to teach it again next term. If they teach it well, what is their reward? They get to teach it again next term. There is no accountability. But if they were writing consultants for a world-class law firm, they would have to come up with something that works, that works fast, and that makes a permanent difference, or they would not be invited back. It makes sense that the first great breakthrough in the teaching of writing came, therefore, from a world-class writing consultant. And before Joe Williams, there were no world-class writing consultants.

By 1980, Joe had conceived of a methodology of rare and powerful promise, something that actually had a chance to make a dif-

* © 2006, George D. Gopen. All rights reserved. Professor of the Practice of Rhetoric, Duke University.
ference, quickly and permanently. He invited two of his colleagues at the University of Chicago, Gregory Colomb and Frank Kinahan, and myself to go on the road to see if we could make something of it. The firm was named Clearlines. The three of them also developed it on the undergraduate level at the University under its charming and now famous name, the Little Red Schoolhouse.

The accomplishing of this major challenge called for confidence and courage, knowledge and know-how, focus and ferocity. These are the primary characteristics of Joe Williams—along with his piercing intelligence, his scholarly thoroughness, and his capacious eye for patterns and the big picture.

You have to be a fearless person to walk into the legal departments of IBM and Bank of America with a new theory, as yet unexposed to the harsh light of the professional marketplace. You also have to be resourceful and imaginative. I am reminded of a cold winter day in the early 1980s when Joe showed up at a Chicago law firm to give an eight-hour lecture, only to find that no one knew where the box of handouts had gone. He tap-danced adroitly and engagingly for forty-five minutes—until someone discovered the missing box, hidden in the rear of the room under someone's carelessly discarded overcoat.

At first, these extremely sharp lawyers beat up on us on a regular basis: They punched holes in the theories; they challenged the assumptions; they argued the examples. We dragged ourselves back to Chicago, month after month, patching and repatching the holes until the original theories, honed through our experience and practice, withstood and finally pre-empted lawyerly attacks. By the late 1980s, we knew we were really onto something. Firms were no longer hiring Joe and his friends just because it seemed the moral and logical thing to do—to make some kind of effort to “help” their lawyers better handle the language. They hired us because we gave them something that actually worked. And it worked not primarily to make an individual legal document better, but rather to make better writers of the lawyers, permanently.

The good effect spread even by osmosis. One international firm was inviting us twice a year into its home office in Chicago to teach a new batch of twenty lawyers for four days. By the third or fourth year of this association, we were noticing that our new students, who as yet knew nothing of our approach, were already writing better than their predecessors, just because they were surrounded by others who were already writing more effective prose.

Joe has been the consultant to the stars. I don’t know how many clients he has had by now, but here are just a few of them that we of Clearlines handled in the 1980s:
the law firms of
  Jenner & Block
  Fulbright & Jaworski
  Vinson & Elkins
  Dewey Ballantine
  Skadden Arps
  Morgan, Lewis & Bockius
  Pepper Hamilton

and the legal departments of
  IBM
  Bank of America
  Eli Lilly
  Pfizer, Inc.
  Union Carbide.

I offer this list not only to reflect Joe’s ability and his professional standing but also to give some sense of what ripple effects his teaching has had. After a quarter century of teaching our approach to the language, I never go three weeks without someone stopping me on the street or in a grocery store or in an airport to tell me that since they took my writing workshop, they have never had a publication refused or a grant application turned down. Joe has taught thousands of lawyers in person, but through my teaching, and Greg Colomb’s teaching, and especially through Joe’s powerful and elegant book, *Style: Ten Lessons in Clarity and Grace*, now in its eighth edition and widely acclaimed as the best book ever written on writing, scores of thousands have come to understand new and effective ways to control the English language. And they can actually use this information, with stunning effects.

In Ezra Pound’s 1938 book, *Culture* (popularized later as *Guide to Kulchur*), he tells us that Confucius was asked, “If the Prince of Mei appointed you head of the government, to what [would] you first set your mind?”1 Confucius answered,

> To call people and things by their names, that is by the correct denominations, to see that the terminology was exact . . . . If the terminology be not exact, if it fit not the thing,

1 Ezra Pound, *Culture* 16 (New Directions 1938).
the governmental instructions will not be explicit, if the instructions aren’t clear and the names don’t fit, you can not conduct business properly.

If business is not properly run, the rites and music will not be honoured, if the rites and music be not honoured, penalties and punishments will not achieve their intended effects, if penalties and punishments do not produce equity and justice, the people won’t know where to put their feet or what to lay hold of or to whom they [should] stretch out their hands.

That is why an intelligent man cares for his terminology and gives instructions that fit. When his orders are clear and explicit they can be put into effect. An intelligent man is neither inconsiderate of others nor futile in his commanding.²

Brilliant. But Confucius did not understand language the way Joe Williams does. The great breakthrough of the Clearlines or Little Red Schoolhouse approach, birthed by this Golden Pen honoree and developed with him by those fortunate few of us who have had the honor and pleasure of working with him, produces this central insight: Readers of English take the great majority of their clues for how to make sense of a text not from word choice nor from word recognition but from structural location. To put it more simply, where a word appears in a sentence tells a reader what to do with it. Get the placement right and the word wrong, and more people will understand what you mean than if you get the word right and the placement wrong.

For those unfamiliar with this approach, let me offer a single, simple example. Take the phrase “since 1981.” You might think, at first glance, that you “know” what that phrase “means.” If I were to argue that it means different things when placed in different contexts, you might well be willing to agree without much of a struggle. But the new news, the news Joe Williams has brought to us so strikingly, is that “since 1981” will “mean” different things depending on where in the sentence it appears—at its beginning, middle, or end. Put it at the beginning:

\textit{Since 1981, blah blah blah has happened.}

What do most readers of English think will come next? A chronology:

\textit{Since 1981, blah blah blah has happened. In 1983, . . . and then in 1987, . . . and then in 1992 . . . .}

² Id. at 16–17.
Put it at the end of the sentence:

_Blah blah blah has happened since 1981._

Now most readers of English will expect not a chronology but rather information as to why 1981 was such a watershed moment:

_Blah blah blah has happened since 1981. In March of that year . . . ._

Put it in the middle of the sentence:

_Now it makes no promise whatsoever where we might go from here. Its structural location tells us to treat it as helpful but incidental, non-controlling information._

There are five crucial questions that every reader of English must have answered correctly by the end of reading every sentence in order to make of that sentence the sense the writer intended:

(1) What is going on here?
(2) Whose story is this?
(3) How does this sentence link backward to the one I’ve just finished reading?
(4) How does this sentence lean forward to where I may be going from here?
(5) What is the most important piece of information in this sentence that I should be emphasizing the most?

All five of these crucial questions are answered primarily by _structural location_. We look in certain _places_ in a sentence to learn certain _things_. And _that_ is what Joe Williams has taught us. When I finish two days of lecture in a law firm, at least one person stops me on my way out the door to ask, with some exasperation, “Why didn’t anyone ever tell me this _before_?”

Why was Joe the person who was able to accomplish what no one in more than 200 years of language instruction in this country had previously been able to accomplish? I’ll give you my read on it. (He thinks this particular insight goes over the top or off the deep

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3 For those who wish to understand in a great deal of detail how this approach functions, see my book that explains it all for would-be teachers of the approach: _Expectations: Teaching Writing from the Reader’s Perspective_ (Pearson/Longman 2004).
end, but he's wrong on this one, and I'm right.) On the one hand, composition teachers traditionally have spent most of their energy trying to help students find things to say to fill up pages that otherwise need not have been filled. Their focus is on their students and how they can make their way successfully through the course. Linguists, on the other hand, care primarily about how the language functions and how it is put together. Their focus is on the language itself and not on its use in the world. When I brought a linguist friend into my composition classroom in 1978 to be of help, he told the class he had no help to offer them. Joe is the first person to bridge this gap successfully—to take linguistic knowledge and apply it in the real world of professional communication.

He is a renowned linguist, author of one of the best books ever written on the history of the language. But then he took what he knew, and especially what the Prague School of Linguistics had taught him, and channeled all that knowledge with his prodigious energy into the task of figuring out how real people in the real world could better make their language represent their thoughts so readers could actually understand what they were trying to say. He did this by figuring out how readers go about the act of reading. We all know about this process unconsciously in our role as readers; Joe’s work has helped us learn about it consciously in our role as writers. And then the great bonus: We discovered for real—although we had always presumed it in theory—that writing better makes you think better, which makes you write better, which makes you think better, and so forth. Usually we think of this kind of revolving door as a vicious cycle. Joe Williams has changed all that into a virtuous cycle. And for doing that, he is justly the recipient of this year’s Golden Pen Award. He is a great man.

Joseph Williams is Professor Emeritus of English at the University of Chicago.
George,¹ thank you very much. That was a generous introduction, and I am grateful and pleased for those words, especially coming from an old colleague and friend whose work I have read and profited from.

When Joe Kimball notified me that the Legal Writing Institute had selected me for the Golden Pen Award, I said that I was as honored and pleased as I was astonished. I would have been more accurate had I said that I was as honored and pleased as those who participated in my first legal writing seminar twenty-five years ago would be astonished if they found out I was standing here this evening. It was not an auspicious start.

Earlier, I had taught doctors some principles of clear writing. I based them on the idea that if I could understand how readers read and how features of a text lead readers to make different judgments about text’s clarity and quality, then I could tell writers what features to look for in their texts. In fact, most of my research career has been devoted to that issue: how do features of a text influence how we read and judge it?

At a cocktail party one evening, more than twenty-five years ago now, I had been talking with a lawyer about my work. He said he knew of a law firm in downtown Chicago that might be interested in my ideas. I said that if the participants could send me some samples of their writing, I would study them and suggest revisions, based on the principles of style that I had developed over the years. I thought it would be an amiable exchange among colleagues—I would share my research with them and suggest how they might write more clearly; they would share their views with me and be grateful for my criticism—so little did I know about the nature of lawyers.

Well, it took the lawyers about ten minutes to chew me up and spit me out. The only satisfaction I got was that when they finished with me, they turned on each other. So I figured there was nothing personal here; it was just the nature of the beast.
What we disagreed about were my revisions of their writing, of course—all aimed at making their prose clearer, more direct, and more readable. They in return gave me reason after reason why their sentences had to be exactly as they had written them. When I hadn’t changed the meaning of their sentences altogether, I had erased nuances of qualification and subtleties of their legal analysis. At that point, I had no real comeback, even though I thought their reasons were largely spurious and defensive. But who was I, not even a lawyer, to disagree?

Over the years, I’ve learned to deal with lawyers, particularly how to tame them in the first ten minutes of a seminar. I give them a pair of examples like these to read:

(a) Any determination of the reasonableness of the conduct in question is not dependent on the official’s knowledge of constitutional standards of protection, but rather by the official’s reasonable belief at the time that his actions were not objectively in violation of the constitutional rights of the arrestee.

(b) The Court will determine whether an official acted reasonably, not by whether the official knew about constitutional standards of protection but rather by whether the official reasonably believed that he was not objectively violating the arrestee’s constitutional rights.

Then I ask them two easy questions:

(1) Given a choice between reading another twenty pages written like the first or second version, which would they choose? (The answer is always (b).)

(2) Why? (The answer is always some version of “It’s clearer, less dense, and more concrete.”)

I then point out to them that words like clear, dense, and concrete don’t refer to what they are reading, to what is objectively on the page, but rather to what is subjectively going on in their heads, to how they feel: clear means “I understand this easily”; dense means “I feel like I’m struggling to get from one end of this sentence to the other”; concrete means “I get a clear picture in my mind of what’s going on here.”
Then I ask them two hard questions:²

(1) What can they point to on the page that makes them feel as they do?

(2) If you were managing the person who wrote the less clear sentence, what would you tell that person to revise it into its clearer version?

Once the lawyers realize that, for the most part, they can’t answer either of those questions satisfactorily, the rest of the day goes more smoothly because they know I know something that they don’t, but want to.

Over the years, I’ve learned to mix in lots of examples from everyone’s writing (the examples are always anonymous) and to find examples of their writing that others in the room would never defend. I’ve also learned to anticipate the standard but flimsy justifications of spurious complexity. Here are three examples.

The first example: At a law firm in New Jersey, at the end of the day, a young man came up to me looking distinctly unhappy. He had on his bespoken three-piece suit, his power tie, and $200 shirt; his razor-cut hair was impeccable. His look probably cost more than the car I was driving that year. “Professor Williams,” he said, “we’ve just spent three years learning how to sound like lawyers, and now you want us to sound like ordinary people!” He was right about both my intent and his anxiety. He looked like a lawyer, and by God, he was going to sound like one. And here I was asking him to surrender a big part of his getup—a feature that signaled who he thought he was—a feature that was as important as his suit and haircut. He was not yet confident enough in his legal abilities to say what he had to say straight out, without any aura of complicated vocabulary or sentence structure. So the first defense of complexity has to do with image: I have to sound like a lawyer. It is an understandable impulse, but not a valid one, especially if we think about it from the point of view of the reader. Readers need to have confidence in their counselors, but rarely does that confidence depend on gratuitously complex language.

² I always tell new associates that for the next few years, their success will depend on how well they write; thereafter, it will also depend on how well the people who work for them write, so they must learn not only to write well themselves, but also how to give useful advice to others.
A second example: At the National Judicial College in Reno, Nevada, I taught the same material for about fifteen years, but using, of course, court decisions and other judicial texts as examples. I remember sitting with one judge who not only wrote in complicated sentences but seemed always to hold off revealing his decision until the last sentence, at the end of an argument organized to be a seeming narrative of his thinking, rather than as a series of logical steps. I asked him why he didn’t just begin with his decision, so that readers could fit his argument into a framework that would make the direction of his argument clear. He answered that if he stated his decision first and organized his argument logically, he would seem to have made up his mind before he thought through the case. He wanted to give readers the experience of discovering what he discovered (something he had discovered well before he wrote the first word of his decision, of course). So a second defense of complexity has to do with the writer’s need to make readers share their experience. This might be a desirable complexity if most readers wanted to share that experience. But for the most part, they emphatically do not.

A third example and defense of complexity: I did not witness this event, but it has been reported to me as true. An international group of lawyers was working on a complex agreement. They projected each page of the agreement on a screen so that all could see it and work on it together, until they came to a provision that no one could understand. They all adjourned to call their home offices to ask if anyone there understood the provision. No one did. When they re-assembled, they decided to keep the provision, because, as they said, “You never know.” It is not clear to me that caution justifies incomprehensibility. When I asked whether anyone tried to revise the passage simply as an exercise in understanding it better, I was told no one did because who knew whether the clarification would be reliable, and in any event, everyone would likely come up with a different version. One can only wonder how parties might then settle a disagreement over the meaning of the passage.

There are other far-fetched justifications for complexity, but we could go on forever listing them. For me, I was happy to be prepared to anticipate them before they arose.

But over the years, I noticed something else: I had to choose examples of complex writing very carefully, because some sentences that seemed to invite revision often resisted it. These were rarely written by new associates, but rather by very experienced attorneys who were almost invariably themselves excellent writers. In

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3 A side-bar generalization: Summer and first-year associates are most resistant to
fact, for the rest of this talk, I’d like to offer a defense of certain kinds of complexity.

Here, for example, is a sentence that, I think, resists quick and easy revision. (I suspect I will be inundated with revisions proving otherwise.)

The periodic disclosures made by registrants and the materials generated in the preparation of periodic disclosures offer a promising source of information regarding an assured’s evaluation of its potential environmental liability, its estimates of clean-up costs, and its assessment of probable insurance coverage.

I’m not saying that this sentence could not be improved, but it resists easy revision into the agent/subject-action/verb style that I’ve peddled all these years.

More interesting are those cases in which the complexity might be justified, even when revision is possible. A favorite example is from a case that just about every first-year student has to read: Benjamin Cardozo’s Palsgraf v. Long Island Railroad Co. After an admirably clear, crisp, and concise account of how the scales happened to fall on Ms. Palsgraf, Judge Cardozo sinks into a syntactic swamp that characterizes what the public thinks most legal writing is like. The question is whether his language is as necessarily complicated as I have been told by some that it must be. Here is a passage from early in that decision:

If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to someone else.

It has all the qualities of opacity that I have discussed in Style: an abstract introductory phrase, a main clause with a long abstract subject followed by an empty verb and followed by several abstract nouns derived from verbs.

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4 162 N.E.2d 99 (N.Y. 1928).
5 Id. at 99.
The question here is whether a revision along these lines would clarify those ideas while preserving their meaning:

If a person who was ordinarily vigilant could not foresee that the guard acted in a hazardous way, then Ms. Palsgraf must also have thought that the guard acted in a way that seemed innocent and harmless to her. So she cannot make that action a tort because it happened to wrong someone else (though the wrong apparently did not risk the bodily security of that other person).

Now, I have been told that my revision loses some of Cardozo’s nuances of meaning. I candidly don’t see them, but they may be there (though I confess I am not at all sure what that last parenthetical clause is supposed to add).

The problem is, how would we know that they would be discerned on an ordinary reading (analogous, perhaps, to Cardozo’s “ordinary vigilance”). To find out, we might have one group of readers read the original passage from Palsgraf and another group of readers read my revision, then ask a third party, not privy to the exercise, to test their understanding. But even if those reading my version seemed to understand the issues better, what would that prove? Would such a test reveal whether the subtle nuances were understood? We have to wonder whether a nuance that no one notices is really there (if a tree falls in a forest . . .).

My point is this: I have said that we can’t make any blanket claim that one kind of syntactic structure is intrinsically better than another: short, familiar, concrete subjects followed by verbs expressing the action that subject is involved in, versus long, abstract subjects followed by empty verbs. Some complexity cannot be revised without at least distorting the meaning. The problem is, how do we decide when that is the case? It is, in fact, not obvious.

There are some cases, however, in which we could revise complex prose into something simpler while retaining the underlying meaning, but we should not, because the syntax itself is part of the meaning. In these cases, complexity has a necessary rhetorical force. As an example, I cite one of the two most important legal documents in our history: The Declaration of Independence.7

Imagine that Thomas Jefferson gave us his final draft and asked us for suggestions. If we blindly followed my advice about

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7 The other is the Constitution, of course.
short, concrete, active subjects and specific verbs, we would offer something like this:

Well, Mr. Jefferson, I like most of this document. That middle part where you nail George is punchy and direct, because you followed our advice about short, concrete subjects:

- He has refused his Assent to Laws . . . \(^8\)
- He has forbidden his Governors to pass Laws . . . \(^9\)
- He has refused to pass other Laws . . . \(^10\)
- He has called together Legislative Bodies at Places unusual, . . . \(^11\)

And the last couple of paragraphs have the same directness:

A Prince, whose Character is thus marked . . . NOR have We been wanting . . . We have warned . . . We have reminded them . . . We have appealed . . . They too have been . . . We must, therefore, acquiesce . . . WE . . . solemnly Publish and Declare, That these United Colonies are . . . that they are . . ., they have full . . . We mutually pledge . . . \(^12\)

But to tell you the truth, I think that first paragraph needs work. It’s full of abstractions, and worse, a lot of them are in the subjects of your sentences, the worst place if you want your writing to be clear, direct, and concise. I’ve revised some of your sentences along the lines of the rest of the document. Here’s the original. I’ve underlined subjects and boldfaced verbs that should be changed.

(1) WHEN, in the Course of human Events, it becomes necessary for one People to dissolve the Political Bands which have connected them with another, and to assume among the Powers of the Earth, the separate and equal Station to which the Laws of Nature and of Nature’s GOD entitle them, a decent Respect to the Opinions of Man-

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\(^8\) Declaration of Independence \([\¶ 3]\) (1776) (emphasis added).
\(^9\) Id. at \([\¶ 4]\) (emphasis added).
\(^10\) Id. at \([\¶ 5]\) (emphasis added).
\(^11\) Id. at \([\¶ 6]\) (emphasis added).
\(^12\) Id. at \([\¶¶ 30–32]\) (emphasis added).
kind requires that they should declare the Causes which impel them to the Separation.13

(2) Prudence, indeed, will dictate that Governments long established, should not be changed for light and transient Causes; and accordingly all Experience hath shewn, that Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the Forms to which they are accustomed.14

(3) But when a long Train of Abuses and Usurpations, pursuing invariably the same Object evinces a Design to reduce them under absolute Despotism, it is their Right, it is their Duty, to throw off such Government, and to provide new Guards for their future Security.15

(4) Such has been the patient Sufferance of these Colonies; and such is now the Necessity which constrains them to alter their former Systems of Government.16

Here’s what I’d suggest. I’ve underlined the new simpler, shorter, and more concrete subjects and boldfaced the new, more energetic verbs and adjectives:

(1) When in the Course of human events, we decide that we should dissolve the political . . . , then if we decently respect . . ., we should explain why we . . .

(2) If we are prudent, we will not change . . . we have learned through experience . . .

(3) But when in a long Train of Abuses and Usurpations we see a design to reduce us under absolute Despotism, we will exercise the right and duty to throw off such Government and to provide new Guards for our future Security.

13 Id. at ¶ 1 (emphasis added).
14 Id. at ¶ 2 (emphasis added).
15 Id. (emphasis added).
16 Id. (emphasis added).
Because we have had to put up with that, we now alter our former Systems of government.

See, the idea is to get rid of all that abstraction at the beginning of sentences in favor of short, punchy subjects and verbs. Do that and your prose gets a lot more direct and readable. What do you think?

I think it is fair to say that Jefferson would respond something like this:

You don’t get it. It’s true that I wanted to hammer George as the cause of our problems, so I made him the subject and acting agent of all his violations of our liberties. And it’s true that I then made us the subject and acting agent of what we’re doing, declaring our independence. But I want that opening paragraph to do more than say what we’re doing. Those sentences you don’t like all argue that some external agency, some higher power independent of our mere will and desire, is constraining us, to act. Your version makes it seem that we just decided one day that we should declare our independence, that it was just a matter of our desire. But that would undermine our rationale for being forced to act only after long sufferance. It was important that we not be acting subjects of verbs, but rather objects. So the first part was written as it was to lay down the big principles that force a people to act when certain conditions exist; the second part lays out that George created those conditions; the third part is the logical deduction: we must act, not because we choose to but because we have been forced to, but it is still we who act. Thanks for the help, though.

My point here is not just that complexity is not always bad; it is not even that it is sometimes necessary to preserve meaning. Sometimes, it is rhetorically required (in the eighth edition of Style, I make these same points about some points of stylistic complexity in Abraham Lincoln’s Second Inaugural Address).

I don’t think that if I hadn’t spent my life in the academic world teaching clear and direct writing that I would have understood as well as I think I now do how complexity and simplicity work together. It would have been too easy for me to insist that simple principles of the kind I have written about should be applied always and everywhere, just for the sake of easy reading. I would have been wrong to do that.
But thanks to a great many extraordinarily talented writers among the lawyers I have worked with, I now know better.

I am deeply grateful for this award, and I am flattered beyond my ability to express how pleased I am by the words on this plaque you have given me: “For all the lessons that he has taught us, we thank him with this award.” The truth is that the lessons have gone in both directions. So I will say to you as representatives of all those good writers in the legal profession, for all the lessons that you have taught me—I thank you.
REASONABLE ACCOMMODATIONS FOR UNREASONABLE REQUESTS: THE AMERICANS WITH DISABILITIES ACT IN LEGAL WRITING COURSES

Suzanne E. Rowe*

A law student turns in papers late throughout the year; often papers are filled with spelling problems. In the spring, the student fails to submit the appellate brief by the due date. Three weeks later, the student asks the professor for an extension, based on a suspected learning disability for which the student has not yet been tested. This seems an unreasonable request, but the professor fears appearing insensitive and worries about violating federal anti-discrimination law. How should the teacher respond?

I. INTRODUCTION

If pressed too far, the Americans with Disabilities Act could harm a key population it was intended to serve—law students

* © 2006, Suzanne E. Rowe. All rights reserved. Associate Professor and Director of Legal Research and Writing, University of Oregon School of Law. The Author appreciates the contributions of participants in the Legal Writing Institute’s Writers Workshop in Port Ludlow, Washington, and the Institute’s biennial conference at Seattle University in 2004. Thanks are also due to the research assistants who contributed to this Article over several years, especially Rachel Melissa Martin, Melissa Seifer, Jennifer Hisey, and Harvey Rogers. This Article is dedicated to Professor Adam Milani.

1 The student in this vignette is a composite, drawn from cases and anecdotes.

2 This Article’s topic was the theme of the annual program of the Association of American Law Schools (AALS) Section on Legal Writing, Reasoning, and Research in Atlanta, Georgia, on January 5, 2004. Panelists included Dean Laura Rothstein (Louis D. Brandeis School of Law, University of Louisville), Jeanne Kincaid (Shareholder, at Bernstein, Shur, Sawyer & Nelson), Richard Ludwick (then Assistant Dean for Student Affairs at the Levin College of Law, University of Florida, and now Vice President for Enrollment Management and Student Affairs at Albany Law School), Joan Van Tol (Corporate Counsel, Law School Admission Council), and Hulett Hall Askew (then Director of the Georgia Office of Bar Examiners, and now Consultant to the Section of Legal Education and Admissions to the Bar of the American Bar Association). As moderator, I benefited greatly from their presentations, and I attempt to give them appropriate credit in this Article by referencing a panelist’s last name (e.g., Rothstein at AALS). The AALS did not record section programs that year, but a summary report of the legal writing program and these panelists’ presentations is available at Suzanne E. Rowe, The ADA in Legal Writing Courses, AALS Sec. Newsletter, Leg. Writing, Reasoning, & Research 1 (Spring 2004) (available at http://faculty.law.lsu.edu/aals). Small portions of this Article were published earlier in that report.

with learning disabilities.\(^4\) If these students receive accommodations that do more than level the playing field,\(^5\) they may graduate without developing essential skills in legal analysis, organization, writing, research, oral communication, and citation, and will be, as a result, unable to practice law successfully.\(^6\)

By enacting the ADA,\(^7\) Congress recognized that millions of persons\(^8\) have physical and mental disabilities\(^9\) and society’s his-


\(^5\) An assistant dean with visual disabilities stated that members of the disabled community favor strict application of the ADA. They want the ADA only to level the playing field for those with true disabilities, enabling them to be evaluated and to succeed on the same basis as all others. See Ludwick at AALS, supra n. 2; see also G.R. Overton, *Accommodation of Disabled Persons*, B. Examr. 6, 8 (Feb. 1991) (stating that “few disabled persons will seek an advantage by requesting more than they need”); but see Eichhorn, supra n. 4, at 36 (quoting a dean who suggested that students who are “more desperate than they are disabled” may take advantage of the broad definition of learning disabilities to seek excessive accommodations).


\(^9\) 42 U.S.C. § 12101(a)(1). The number estimated in 1990 was 43 million. Id. In 1997, the Census Bureau reported that one in five of all Americans have some disability and one in ten have a severe disability. U.S. Census Bureau, *Census Brief: Disabilities Affect One-Fifth of All Americans*, http://www.census.gov/prod/3/97pubs/cenbr975.pdf (accessed Jan. 1, 2007). Focusing specifically on the population of those who are likely to become law students, a 2004 article noted that one in twenty-five undergraduates had a learning disability. Bill Schackner, “*Invisible* Disability Now Visible on Campus”, Pitt. Post-Gazette (Sept. 5,
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Historical discrimination against these individuals affected areas as significant and diverse as employment, housing, public accommodations, and education. Through the ADA, Congress sought to end this discrimination by requiring employers, public entities, and private owners of places of public accommodation to provide “reasonable accommodations” to give persons with disabilities equal access to employment and public services. Law schools and universities responded to the Congressional mandate by establishing disability offices and now routinely provide students with such accommodations as extra time and quiet rooms for exams. While some professors or administrators initially may have felt uncomfortable with these accommodations, their increased use on law school admission tests, on semester examinations at law

11 In Titles I and II of the ADA, this requirement is implicit in the definition of a “qualified individual with a disability” who is covered by the ADA. See 42 U.S.C. §§ 12111(8), 12112(5) (requiring “reasonable accommodations” for a person with a disability who can perform essential employment functions); 42 U.S.C. §§ 12131(2), 12132 (requiring “reasonable modifications to rules, policies, or practices” for a person who meets the essential eligibility requirements for receiving services provided by a public entity). In Title III, the requirement is stated in the definition of discrimination. 42 U.S.C. § 12182(b)(2)(A)(ii) (“failure to make reasonable modifications in policies, practices, or procedures” is discrimination). Following the requirements of the ADA, standards for accrediting law schools also require provision of “reasonable accommodations.” ABA, 2005–2006 ABA Standards for Approval of Law Schools stand. 213, http://www.abanet.org/legaled/standards/standards.html (accessed Jan. 1, 2007).
12 Title I of the ADA addresses discrimination in employment situations.
13 Title II prohibits discrimination by public entities, while Title III applies to private operators of places of public accommodation.
14 Levy, supra n. 4, at 86; see also Schackner, supra n. 9 (“Judging by sheer volume of programs, colleges and universities are doing more than ever to accommodate—and in some cases actively recruit—these students.”).
15 See Alfreda A. Sellars Diamond, L.D. Law: The Learning Disabled Law Student as a Part of a Diverse Law School Environment, 22 S.U. L. Rev. 69, 92 (1994) (listing the following as accommodations law schools should expect: extra time on tests; exam readers; separate testing rooms; oral or taped versions of the exam; oral or taped answers rather than written answers; permission for a student to clarify a question before answering; allowing alternative methods to demonstrate the student has mastered material; additional paper or scratch paper for students with writing difficulties; modified exam schedules to allow adequate time to rest; and alternatives to computer-scored answer sheets); see also Adams, supra n. 4, at 275; Eichhorn, supra n. 4, at 32; Kristin Stanberry & Paul Grossman, Attorney Paul Grossman on Legal Rights for College Students with LD, http://www.schwablearning.org/articles.aspx?r=847 (July 12, 2004).
16 Van Tol at AALS, supra n. 2; see Agranoff v. LSAC, 97 F. Supp. 2d 86 (D. Mass.
schools nationwide,\textsuperscript{17} and on bar examinations\textsuperscript{18} shows that accommodation is now part of the legal education landscape, at least in terms of examinations.\textsuperscript{19}

Less clear is what constitutes appropriate accommodation in law school courses when students are required to research and write papers, conduct client interviews, negotiate with opponents, make class presentations, or participate in oral arguments. The ADA does not require schools to provide unlimited accommodations; any accommodation that would “fundamentally alter”\textsuperscript{20} a program of study is not required.\textsuperscript{21} In the context of paper courses and skills courses, what would constitute a fundamental alteration? How should professors and administrators determine when a student has made an unreasonable request, and how should the school respond?\textsuperscript{22}

This Article begins by explaining the requirements of the ADA, including tracing its close relationship to the Rehabilitation Act of 1973. The Article then explores the current literature in law

\textsuperscript{17} See Diamond, \textit{supra} n. 15, at 92.


\textsuperscript{20} 42 U.S.C. § 12182(b)(2)(A)(ii) (defining discrimination to include “a failure to make reasonable modifications in policies, practices, or procedures, . . . unless . . . making such modifications would \textit{fundamentally alter} the nature of such goods, services, facilities, privileges, advantages, or accommodations” (emphasis added)); 28 C.F.R. § 35.130(b)(7) (2005) (“A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would \textit{fundamentally alter} the nature of the service, program, or activity.” (emphasis added)).

\textsuperscript{21} Falcone \textit{v. U. of Minn.}, 388 F.3d 656, 659–660 (8th Cir. 2004) (“The University was not required to tailor a program in which [the plaintiff] could graduate with a medical degree without establishing the ability to care for patients.”).

\textsuperscript{22} Susan Johanne Adams, \textit{Because They’re Otherwise Qualified: Accommodating Learning Disabled Law Student Writers}, 46 J. Leg. Educ. 189, 203 n. 61 (1996) (questioning the extent of accommodations required by law and whether some accommodations may defeat “an important purpose of the curriculum”).
and science concerning learning disabilities. Finally, the Article examines specific requests that may arise in courses with intensive writing, research, or skills components and analyzes appropriate responses to reasonable and unreasonable requests.

In sum, this Article endorses full provision of reasonable accommodations that allow students with learning disabilities to compete on a level playing field with their classmates. It enthusiastically supports use of innovative teaching techniques that not only prove effective for students with learning disabilities, but also improve the educational experience of all students. The thesis of the Article is that provision of excessive or inappropriate accommodations may harm students with learning disabilities by preventing them from developing the complete set of skills needed to practice law. Because students are just learning what those skills are, students with learning disabilities—long accustomed to advocating on their own behalf—may request accommodations that tilt the playing field too far and that could leave the students unprepared for practice. Faculty and administrators need to anticipate these requests and respond appropriately.

23 Two helpful websites for more information are www.AHEAD.org, the site of the Association on Higher Education and Disability, and www.heath.gwu.edu, the site of the HEATH Resource Center, which is affiliated with George Washington University.

24 Stanberry & Grossman, supra n. 15. See section VI infra for some examples of such teaching techniques, and sources cited infra at note 201.

25 Over-accommodation is a disservice to many of the law school’s constituents. The student with a learning disability may not master fundamental skills in analysis, research, writing, and client representation if the student receives excessive accommodations. Other students with disabilities may be the target of unfair prejudice if classmates or teachers view all students with disabilities as incapable of succeeding without over-broad accommodations. Students without documented learning disabilities may be penalized if over-accommodation tilts the playing field too far in favor of the learning disabled student. The collegial atmosphere of the school could decline if classmates perceive learning disabled students as receiving unwarranted help. The law school’s course of study may be diluted by over-accommodation, potentially causing harm to the public if attorneys are unable to meet their professional obligations because in school they received extra accommodations that are not realistic in the practice of law.

26 Anecdotal evidence suggests that some law schools have tended to over-accommodate students who claim to have disabilities. This tendency is likely supported by laudable (or at least understandable) goals: wanting all students to succeed, trying to satisfy the ADA, and hoping to avoid litigation.
II. REQUIREMENTS FOR ACCOMMODATIONS UNDER THE AMERICANS WITH DISABILITIES ACT AND THE REHABILITATION ACT

The Americans with Disabilities Act (ADA) prohibits discrimination against a qualified individual with a disability on the basis of the disability.\(^{27}\) Title I of the Act prohibits discrimination in the employment context;\(^{28}\) Title II prohibits discrimination by public entities in the provision of services, programs, and activities;\(^{29}\) and Title III prohibits discrimination by private entities that operate places of public accommodation.\(^{30}\) Law schools are covered by both Title II and Title III by virtue of their educational relationships with students. Title II defines public entities to include state and local governments as well as their departments, agencies, and other instrumentalities,\(^{31}\) which includes state universities and law schools.\(^{32}\) Title III defines places of public accommodation specifically to include postgraduate private schools and other places of education.\(^{33}\)

Prior to the enactment of the ADA, individuals with disabilities were able to bring suit under the Rehabilitation Act of 1973 (generally referred to as Section 504), which was intended to empower individuals with physical and mental disabilities “to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society.”\(^{34}\) The Rehabilitation Act prohibits discrimination by entities receiving federal funding against an otherwise qualified individual with a disability solely on the

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\(^{27}\) This prohibition is distinct from the prohibition of the Rehabilitation Act, which requires that the discrimination be “solely” on account of the disability. *Compare* 42 U.S.C. § 12182(a) (ADA), *with* 29 U.S.C. § 794(a) (2000) (Rehabilitation Act).

\(^{28}\) See 42 U.S.C. § 12112(a). Title I is codified at §§ 12111–12117.

\(^{29}\) See 42 U.S.C. § 12132. Title II is codified at §§ 12131–12165, although §§ 12141–12165 are limited to public transportation provided by public entities.

\(^{30}\) See 42 U.S.C. § 12182(a). Title III is codified at §§ 12181–12189.

\(^{31}\) *Id.* § 12131(1).

\(^{32}\) See *Wong v. Regents of the U. of Cal.*, 192 F.3d 807, 811 (9th Cir. 1999) (plaintiff’s cause of action against state university proceeded to judgment; complaint alleged harm under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act); *U. of Wash.*, 15 N.D.L.R. ¶ 125 (OCR Nov. 30, 1998) (plaintiffs brought claims for violation of Title II of the ADA and Section 504, alleging law school’s tuition fee structure discriminated against students with disabilities who had been granted accommodations for extended time to complete the law school program of study).


basis of the disability. Because law schools receive federal funding, they are covered by the Rehabilitation Act as well as the ADA; the passage of the ADA did not significantly change the obligations of law schools to students with disabilities. Students can and do sue under both the Rehabilitation Act and the ADA.

The ADA draws extensively from the Rehabilitation Act. Congress intended for the standards in the two acts to complement each other, despite the use of updated terminology in the ADA. Congress used “individuals with disabilities” in the ADA, rather than “handicapped individuals,” to reflect the terminology current in 1990 and to respect the preferences of those who have disabilities. The ADA and its regulations interpret the terms “disabilities” in the ADA and “handicaps” in the Rehabilitation Act as substantively equivalent. Because the requirements of the ADA and the Rehabilitation Act are almost the same, courts use cases de-
decided under the two statutes to support each other almost interchangeably.\footnote{Dubois, 950 F. Supp. at 757 (“Much of the case law which existed under the Rehabilitation Act has become precedent for many ADA decisions.”).}

\textbf{A. The Student Must Be a Qualified Individual with a Disability}

Both the ADA and the Rehabilitation Act protect only individuals with disabilities who are otherwise qualified for the position or service that they seek.\footnote{29 U.S.C. § 794(a) (protecting from discrimination an “otherwise qualified individual with a disability”); 42 U.S.C. § 12132 (protecting from discrimination by a public entity a “qualified individual with a disability”).} The ADA defines a qualified individual with a disability as

an individual with a disability who, with or without reasonable modifications to rules, polices, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.\footnote{29 U.S.C. § 794(a). Whether an individual is qualified is intertwined with whether the accommodations the person needs in order to participate or receive the service are reasonable. \textit{See infra sec. II(C)}.}

The Rehabilitation Act similarly protects only an “otherwise qualified individual with a disability.”\footnote{42 U.S.C. § 12131(2). Title I of the ADA provides a very similar definition for employment situations: “The term ‘qualified individual with a disability’ means an individual with a disability who, with or without reasonable accommodation, \textit{can perform the essential functions of the employment position that such individual holds or desires}.” 42 U.S.C. § 12111(8) (emphasis added).} A law student with a disability must assert she is a qualified individual\footnote{48 Because the focus of this Article is accommodations for students who are enrolled in law schools, the Article does not specifically examine admissions decisions based on whether a student is qualified to enroll or readmissions decisions after a student’s performance falls below that required to continue study.} with a disability to initiate the process of receiving accommodations under the ADA.\footnote{49 \textit{See Scott v. W. St. U. College of L.}, 10 N.D.L.R. ¶ 38 (9th Cir. Apr. 21, 1997) (holding that a student could not have been dismissed because of his disability when he did not inform the university of the disability until after being dismissed); Summer v. N. Dakota C. of L., 15 N.D.L.R. ¶ 14 (9th Cir. June 19, 1996) (holding that a student was not discharged by medical school because of a disability when he informed medical school of a disability but was not otherwise qualified to receive accommodations); \textit{Zukle}, 166 F.3d at 1046–1047 (examining burdens of proof in case involving medical student with learning disabilities); \textit{Marlon v. W. New England College}, 27 N.D.L.R. ¶ 70 (D. Mass. Dec. 9, 2000) (noting school “must have known or been reasonably expected to have known” of disability); \textit{Leacock v. Temple U. Sch. of Med.}, 14 N.D.L.R. ¶ 30 (E.D. Pa. Nov. 25, 1998) (holding that a student who failed to notify medical school of learning disabilities had no claim under Sec-}
school of a disability, the school has no duty to provide accommodations, and the student cannot later claim discrimination by the school. The first step for a student to show that she is a qualified individual with a disability is to show she has a disability that is recognized under the ADA. The ADA defines a disability as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual; a record of such an impairment; or being regarded as having such an impairment.” A physical or mental impairment includes “specific learning disabilities” as well as physiological disorders and conditions, disfigurement, anatomical loss, and mental retardation. However, “[i]n merely having an impairment does not make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.”

Major life activities include learning, reading, and working, as well as more basic activities such as walking, seeing,
hearing, speaking, and breathing. A disability under the ADA is an impairment that “substantially limits” one of these activities by preventing or significantly restricting an individual’s ability to perform the activity. The issue is the impairment’s effect on a specific individual’s ability to perform a major life activity, not merely the diagnosis of impairment. In the law school context, for example, a student who has been diagnosed with dyslexia but who self-accommodates sufficiently to be unimpaired in learning does not have a disability under the ADA. Another student with the same diagnosis who is significantly restricted in learning does have a disability under the ADA. The determination of disability must be made on a case-by-case basis.

B. The Student Must Provide Appropriate Documentation

The student must prove the existence of a disability through documentation that meets three criteria: it must be sufficiently recent, it must address the disability at issue, and it must have
been prepared by a qualified evaluator. While, in general, documentation is considered sufficiently recent if tests have been conducted within the past three years, that period should be viewed as a rule of thumb, not an absolute requirement.

Some disabilities are unlikely to change in adulthood, so repeating disability testing to meet a three-year rule may impose an unnecessary expense on students. It may be sufficient for the results of earlier tests to be reviewed by a qualified evaluator who considers the new academic pursuits the student is undertaking.

In addition to being recent, the documentation must be on point for the disability the student claims. The documentation should explain the testing and evaluation that was conducted. Courts focus on the type of disability at issue to determine which test should be used in each situation. The learning disability tests that appear most often in disability cases include some form of the Woodcock or Woodcock-Johnson Test, the Wechsler Adult

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An early article on law students with learning disabilities encouraged use of teaching techniques designed to assist learning disabled students even for students that one only suspected of having learning disabilities. See Adams, supra n. 22, at 190. While these techniques frequently help all students learn more effectively, teachers should take care not to extend special accommodations to select students thought to have learning disabilities. Until a student documents the existence of a learning disability, a teacher providing special accommodations may be tilting the playing field rather than leveling it.

63 Rothstein at AALS, supra n. 2; see also Guckenberger, 974 F. Supp. at 115, 133 (school's requirements allowed waiver of three-year retesting requirement where medically unnecessary; guidelines of the Association for Higher Education and Disabilities stated that five-year period is acceptable for students tested after age twenty-one); Quinnipiac U., 24 N.D.L.R. ¶ 151 (OCR Jan. 31, 2002) (law school not required to accept as documentation of a learning disability an IQ test administered six years earlier when the student was seventeen years old).

64 In post-secondary education, the student bears the costs of testing and evaluation.


66 See Argen, 860 F. Supp. at 88–91 (finding certain evaluation methods more established and objective than others).


68 See Gonzales v. Natl. Bd. of Med. Exams., 225 F.3d 620, 624 (6th Cir. 2000); Bartlett, 970 F. Supp. at 1102. The trial court in Bartlett, however, found that the Woodcock Reading Mastery–Revised Test had shortcomings for testing a law graduate because it does not test automaticity, the ability to not have to deliberate when decoding a word; it is too
Intelligence Scale, and the Nelson-Denny Reading Test. The student’s documentation must also provide an authoritative diagnosis of the disability. In instances where students provided only vague letters that did not identify specific disabilities, the denial of accommodations has been upheld. In addition to a diagnosis of disability, the documentation must list accommodations that will address the disability.

The documentation a student submits to show disabilities should be completed by a qualified evaluator. Who is qualified may vary depending on the disability and the recommendations involved. In a battle of experts, courts have considered the experts’ academic credentials and accomplishments and their experience in the field. In Guckenberger v. Boston University, however, undergraduate students with learning disabilities argued successfully that the university’s requirement that evaluators be “medical doctors, licensed clinical psychologists, and individuals with doctorate degrees” was too narrow. Other experts in learning disabilities may be equally qualified despite having different credentials. A relevant consideration in determining the qualifications of an evaluator of law students is whether the evaluator was deemed satisfactory by another educational institution.

While the opinion and recommendation of a qualified evaluator should be respected by the school, the school does not have to

easy because it is designed to test children; and it does not measure slowness because it is not timed. 970 F. Supp. at 1113–1114. The court found that tests like the Woodcock Reading Mastery–Revised are poor tests of learning disabilities in adults and that test scores cannot be used alone to determine whether or not a learning disability exists. Id. at 1114.

69 Dubois, 950 F. Supp. at 759.
70 Badgley, 19 N.D.L.R. ¶ 169.
71 Kaltenberger, 162 F.3d at 437 (school was reasonable in rejecting handwritten note from a medical doctor that simply stated the plaintiff was being treated for ADHD).
72 Id.; see also Colombini v. Bd. of Dirs. of Empire College Sch. of L., 21 N.D.L.R. ¶ 186 (N.D. Cal. 2001) (Rehabilitation Act case).
73 Carten v. Kent St. U., 78 Fed. Appx. 499, 500–501 (6th Cir. 2003) (“A publicly funded university is not required to provide accommodation to a student under the ADA or Rehabilitation Act until the student provides a proper diagnosis of his claimed disability and specifically requests an accommodation.” Id. (citing Kaltenberger, 162 F.3d at 437)).
74 Guckenberger, 974 F. Supp. at 136–137 (giving great weight to the guidelines of AHEAD, the Association for Higher Education and Disabilities).
75 See e.g. Argen, 860 F. Supp. at 88.
77 Id. at 136.
78 See id.
79 D’Amico v. N.Y. St. Bd. of L. Examinrs., 813 F. Supp. 217, 222 (W.D.N.Y. 1993) (giving “great weight” to opinion of physician who had treated plaintiff for over twenty years and had “impeccable credentials”).
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accept the student’s documentation at face value. The documentation a student provides to the school should be reviewed by a knowledgeable evaluator, who may be part of the law school itself, part of a university-wide disability office, or a consultant hired by the university. This evaluator should have experience with the ADA and should understand the requirements and essential functions of the course of study.\(^80\) For the student to receive the most appropriate accommodations—those that best suit the student and respect the requirements of the curriculum—cooperation between the evaluator, the law school administration, and the professor is critical. Any professor or dean of students concerned about appropriate accommodations should learn who on campus is making accommodation decisions and share information about the program of study the student wishes to follow.

C. The School Is Not Required to Fundamentally Alter the Course of Study

Once the evaluator accepts the student’s proof of the existence of a disability and the student has requested accommodations that the evaluator determined would enable the student to succeed,\(^81\) the burden shifts to the school to determine whether the accommodations are appropriate.\(^82\) Each school should have an established process for determining whether a student is entitled to an accommodation and what accommodations are reasonable.\(^83\) The process may differ from school to school, and each school may have a different philosophy toward granting requests. At the extremes, a litigation-averse school may provide every accommodation requested, while another school may deny most requests.\(^84\) It is criti-

\(^{80}\) Rothstein at AALS, supra n. 2. See discussion in section VI(A) infra on determining the essential elements of a legal writing course.

\(^{81}\) Title I of the ADA, which covers employment, uses the term “reasonable accommodation,” while Title II uses the term “reasonable modification.” Courts tend to use the terms interchangeably. See Wong, 192 F.3d at 816 n. 26.

\(^{82}\) Zukle, 166 F.3d at 1047. Some requests may be completely unreasonable and may be rejected easily. For example, a request for an automatic bonus on all exams is unreasonable. See Eichhorn, supra n. 4, at 58.

\(^{83}\) An example of a law school handbook explaining relevant procedures is that of the University of Louisville. It is available at http://www.louisville.edu/brandeislaw/admissions/disabilities_handbook.pdf.

\(^{84}\) Ludwick at AALS, supra n. 2. Of course, even extremely supportive schools become involved in litigation. See Powell v. Natl. Bd. of Med. Examrs., 364 F.3d 79, 87 (2d Cir. 2004) (“[N]othing suggests that [the school] did anything other than support [the plaintiff] in her efforts to succeed.”).
cally important that the school follow its own procedures and that the inquiry focus on the individual's particular circumstances.\textsuperscript{85} Again, in order to reach the best outcome, the decision maker should be trained in evaluating learning disabilities and should understand the essential elements of the student's academic program.

A crucial interplay exists between the school's determination of whether accommodations are appropriate and the student's proving that she is an otherwise qualified individual who meets the essential requirements of the course of study.\textsuperscript{86} Accommodations are not appropriate—and are not required by the ADA—if they lower academic standards or fundamentally alter the program.\textsuperscript{87} For example, the Office of Civil Rights held that Villanova University School of Law was not required to modify essential aspects of its program in order to accommodate a student with disabilities who requested, among other accommodations: (1) having “complex examination questions broken down clearly into their various parts in outline form or numbered subsections,” and (2) “being allowed to generate comprehensive detailed outlines instead of essays on her examinations.”\textsuperscript{88} The school refused, arguing that both complex exam questions and essay answers were essential to the academic program. Complex exam questions test “the ability to understand and analyze a complex factual situation, to recognize the material facts and their relevance, to identify essential issues, to prioritize these issues and then to develop an organized response, applying legal principles to the facts and considering all alternatives in a coherent way.”\textsuperscript{89} The law school also asserted that essay answers develop and test a student's ability “to articulate conclusion[s] clearly and persuasively, demonstrating sound and persuasive reasoning”; thus, allowing the student simply to outline her answers would have fundamentally altered the

\textsuperscript{85} Childress v. Clement, 5 F. Supp. 2d 384, 391 (E.D. Va. 1998) (considering on a case-by-case basis a situation in which a student charged with plagiarism claimed to suffer dysgraphia).


\textsuperscript{87} Rothstein at AALS, supra n. 2; see also Zukle, 166 F.3d at 1049–1051 (upholding medical school's decision to dismiss student with learning disabilities who requested a modified semester schedule, extra time for reading course materials, and a decelerated program schedule).

\textsuperscript{88} Villanova, 16 N.D.L.R. ¶ 170.

\textsuperscript{89} Id.
academic program.\textsuperscript{90} The school was not required to modify its course of study in order to accommodate the student.\textsuperscript{91} Because the student’s evaluator admitted the student could not succeed without these accommodations, the student was not an otherwise qualified individual.\textsuperscript{92}

Similarly, the Supreme Court in \textit{Southeastern Community College v. Davis}\textsuperscript{93} held that a nursing school had not violated Section 504 in denying admission to a hearing-impaired applicant because she did not meet the program’s qualifications.\textsuperscript{94} The applicant could not understand normal spoken speech, but relied on lip-reading.\textsuperscript{95} The school decided that this impairment would make it impossible for her to participate in the clinical program or to safely practice as a nurse.\textsuperscript{96} Stating that “[a]n otherwise qualified person is one who is able to meet all of a program’s requirements \textit{in spite of} his handicap,”\textsuperscript{97} the Court rejected the applicant’s arguments that some course requirements may be dropped for her and that she might receive individualized assistance from an instructor when dealing with patients.\textsuperscript{98} These accommodations would have fundamentally altered the curricular program and thus were not required by Section 504.\textsuperscript{99}

\textbf{D. The School Is Not Required to Take on Undue Burdens}

Accommodations that would place an undue administrative or financial burden on the school are not required. Undue burden is defined as “significant difficulty or expense.”\textsuperscript{100} Whether a requested accommodation would create an undue burden depends in part on the nature and cost of the accommodation, and the financial resources of the school or university.\textsuperscript{101} Courts seem more likely,

\begin{itemize}
\item \textsuperscript{90} \textit{Id.}
\item \textsuperscript{91} \textit{Id.}
\item \textsuperscript{92} \textit{Id.}
\item \textsuperscript{93} 442 U.S. 397 (1979).
\item \textsuperscript{94} \textit{Id.} at 414.
\item \textsuperscript{95} \textit{Id.} at 401.
\item \textsuperscript{96} \textit{Id.} at 401–402.
\item \textsuperscript{97} \textit{Id.} at 406 (emphasis added).
\item \textsuperscript{98} \textit{Id.} at 407.
\item \textsuperscript{99} \textit{Id.} at 409–410.
\item \textsuperscript{100} 28 C.F.R. § 36.104 (2005).
\item \textsuperscript{101} 28 C.F.R. § 36.104 provides the following factors for consideration:
\begin{itemize}
\item (1) The nature and cost of the action needed under this part; (2) The overall financial resources of the site or sites involved in the action; the number of per-
\end{itemize}
however, to find that a requested accommodation imposes an undue burden when the action would fundamentally alter the program as opposed to when the action requires financial expense.

Cases in which courts have not found an undue burden include those where the requested accommodation may include some financial cost or an increase in time and effort but does not fundamentally alter the program. A daycare center was required to accommodate an autistic child by training staff members to better interact with the child, using supportive tools such as visual flashcards, providing a daily written schedule, and playing special games and activities with the child. The court found the cost of implementing these accommodations was not undue because the training was available for free, the supportive tools were given to the daycare center for free, the cost of making a daily schedule with paper and markers was little, and the games and activities were already available to the daycare center. The time and effort spent on the requested accommodations were also not undue because the training took only two and one-half hours and the time and effort of using the flashcards, making a schedule, and playing games were not unduly burdensome.

Other accommodations not found to be unduly burdensome are the provision of interpreters to deaf students and the installation of wheelchair lifts on school buses. One court noted that a university considered the provision of interpreters “costly” at between $5 to $10 per hour, but stated that some students could use fellow students as note takers and a state agency would pay for the interpreter services for students in programs likely to lead to employment. The university was required to pay for interpreter

sons employed at the site; the effect on expenses and resources; legitimate safety requirements that are necessary for safe operation, including crime prevention measures; or the impact otherwise of the action upon the operation of the site; (3) The geographic separateness, and the administrative or fiscal relationship of the site or sites in question to any parent corporation or entity; (4) If applicable, the overall financial resources of any parent corporation or entity; the overall size of the parent corporation or entity with respect to the number of its employees; the number, type, and location of its facilities; and (5) If applicable, the type of operation or operations of any parent corporation or entity, including the composition, structure, and functions of the workforce of the parent corporation or entity.


103 Id. at 1039.

104 Id.


106 Id. at 749.
services for students “for whom the provision of an interpreter is the only method by which they will have meaningful access to the class.”107 As for the installation of wheelchair lifts on buses, the court found that the cost of $15,000 was not unduly burdensome considering the university’s $1.2 million annual transportation budget.108

When determining whether an accommodation is an undue burden, administrators must consider alternative means of accommodating a student, reviewing “their feasibility, cost and effect on the academic program.”109 In Davis, the early Rehabilitation Act case concerning a hearing-disabled nursing student, the United States Supreme Court focused on the substantial adjustments to the existing program requested by the student.110 The Court also noted, however, that technological advances could enhance opportunities for disabled individuals to participate in a program without altering the program’s goals or imposing an undue burden financially or administratively.111 In such instances, the Court noted that insisting on the continuation of “past requirements and practices might arbitrarily deprive genuinely qualified handicapped persons of the opportunity to participate in a covered program.”112

Although courts tend not to discuss alternative means of accommodation extensively, a few general principles seem clear. Feasibility analyses should include the limits on an individual teacher’s time.113 It may be unreasonable to ask a teacher with a high course load or student-teacher ratio to meet daily or even weekly with a learning-disabled student to provide administrative and analytical guidance to keep the student on track.114 Regarding costs, a school that is already strapped for funding may not be able to buy very expensive technological equipment;115 a reasonable

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107 Id. at 749 n. 5.
108 Id. at 751.
110 Davis, 442 U.S. at 410.
111 Id. at 412.
112 Id.
113 Cf. Roberts v. KinderCare Learning Ctrs., Inc., 896 F. Supp. 921, 927 (D. Minn. 1995) (ADA case finding that a short-staffed daycare center was not required to provide one-on-one care to a disabled child, which would impose an undue burden: work would pile up, resulting in the center’s director having to work into the night to compensate.).
114 But see Adams, supra n. 4, at 292 (suggesting micromanagement by the teacher as an appropriate accommodation).
115 As noted above, in other situations, courts consider factors such as size of the organization, the number of patrons it serves, and the ratio of the cost of the modification to the
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alternative may be to allow the student to study at a site that can provide access to the equipment for a reasonable rental fee.

III. ENSURING JUDICIAL DEFERENCE TO ACADEMIC DECISIONS

A majority of federal circuits defer to the faculty in academic decisions under the ADA and the Rehabilitation Act, so long as faculty and administrators follow reasonable, established procedures. Courts respect the faculty’s “professional judgment” and recognize that the judiciary is “ill equipped to evaluate the proper emphasis and content of a school’s curriculum.” In a due process case brought by a medical student who had been dismissed from the University of Michigan, the United States Supreme Court stated:

When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty’s professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.

In an early, highly respected Rehabilitation Act case, *Wynne v. Tufts University School of Medicine*, the First Circuit extended this principle to disability cases, but added two significant qualifications. First, the academic institution must submit a factual record indicating that it sought “suitable means of reasonably accommodating” the student. This record must demonstrate that

the relevant officials within the institution considered alternative means, their feasibility, cost and effect on the academic

profit of the organization. Such factors seem reasonable for law schools as well.

116 *Zahle*, 166 F.3d at 1047 (Ninth Circuit agreed with First, Second, and Fifth Circuits that academic decisions deserve deference, while noting that the range of deference ranges from “considerable” to “reasonable”).

117 See *Wong*, 192 F.3d at 822–823.


120 *Ewing*, 474 U.S. at 225; see also *Anderson v. U. of Wis.*, 841 F.2d 737, 741 (7th Cir. 1988) (citing *Ewing* in claim brought by a law student under the Rehabilitation Act).

121 932 F.2d 19, 25 (1st Cir. 1991).

122 *Id.* at 25–26.
program, and came to a rationally justifiable conclusion that the available alternatives would result either in lowering academic standards or requiring substantial program alteration.\(^\text{123}\)

Second, in disability cases, the school must go beyond traditional academic norms to consider new approaches, devices, and technological advances that may provide appropriate accommodations.\(^\text{124}\)

Within these parameters, courts defer even when they would have reached a different conclusion or consider a faculty decision imprudent.\(^\text{125}\) This deference extends to academic judgments regarding whether a student is otherwise qualified, whether an accommodation is reasonable,\(^\text{126}\) and whether a requested accommodation would fundamentally alter the program of study or modify essential elements of the program.\(^\text{127}\) A school cannot hide discrimination behind the guise of an academic decision,\(^\text{128}\) however, and the school has the burden of proving that it “conscientiously considered all pertinent and appropriate information in making its decision.”\(^\text{129}\) If a school shows that its requirements have a “rational relationship” to the program of instruction and are essential to its academic program, then the school’s decision not to modify its program in order to provide requested accommodations should be respected.\(^\text{130}\) Thus, if schools institute reasonable standards and follow them, schools should not be concerned that the courts will second guess school decisions.\(^\text{131}\)

\(^{123}\) Id. at 26 (in summary judgment case, these facts must be undisputed and show as a matter of law that the school had sought reasonable accommodations); see also Betts v. Rector \& Visitors of U. of Va., 967 F. Supp. 882, 886–888 (W.D. Va. 1997) (courts defer unless the university’s decision is arbitrary, an abdication of professional judgment, or without rational basis), rev’d in part on other grounds, 191 F.3d 447 (4th Cir. 1999).

\(^{124}\) Wynne, 932 F.2d at 26. See section VI(B) infra for a discussion of advances in technology since Wynne was decided in 1991.

\(^{125}\) See Ewing, 474 U.S. at 227 (noting the faculty’s decision may have been “unwise”); Amir, 184 F.3d at 1029 (faculty’s decision to keep the student with the same supervisor after the student filed a grievance against her may have been “imprudent,” but the student’s request for another supervisor was not a reasonable accommodation).

\(^{126}\) Wynne v. Tufts U. Sch. of Med., 976 F.2d 791, 795 (1st Cir. 1992); McGregor v. La. St. U. Bd. of Supervisors, 3 F.3d 850, 859 (5th Cir. 1993); Wong, 192 F.3d at 817; Amir, 184 F.3d at 1028.

\(^{127}\) Villanova, 16 N.D.L.R. ¶ 170.

\(^{128}\) Wong, 192 F.3d at 822–823.

\(^{129}\) Id. at 823; see also Singh, 368 F. Supp. 2d at 62, 69 (refusing “blind deference” when dean read disability report but gave it no weight in decision to dismiss plaintiff).

\(^{130}\) Villanova, 16 N.D.L.R. ¶ 170.

\(^{131}\) Rothstein at AALS, supra n. 2.
IV. PREDICTING A STUDENT’S ABILITY TO PRACTICE LAW

Likely lurking near the surface of any debate about accommodations is the question of whether a certain student will be able to practice law successfully. Certainly, lawyers with learning disabilities have been successful in a variety of positions; two prominent examples include a judge in New York and a senior attorney with the Office of Civil Rights in San Francisco. They have shown that it is possible to perform the analytical work of lawyers extremely well, either by self-accommodating or by receiving work accommodations to compensate for their learning disabilities.

While expecting success and providing reasonable accommodations, faculty and administrators should be realistic about what it takes to practice law. If a student is over-accommodated in law school, but not on the bar exam or in practice, the student may have been better off without the accommodation in law school. Certainly performing without accommodations in law school would be more difficult—and possibly unfair to the student academically—but that may give the student a clearer idea of what the real world of law practice may look like. If a student will not be able to perform in a law practice setting, the student

133 Stanberry & Grossman, supra n. 15 (discussing his experiences with dyslexia).
136 Ware v. Wyo. Bd. of L. Examrs., 973 F. Supp. 1339, 1357 (D. Wyo. 1997) (rejecting plaintiff’s argument that she deserved on the bar examination the same accommodations provided in law school).
137 Kincaid at AALS, supra n. 2.
138 Farrell, supra n. 9 (arguing that giving a student extra time to complete a journalism assignment does not make sense because students will not have that accommodation in a journalism career).
should know that before investing three years and thousands of dollars to obtain a degree. Even when providing an accommodation, the faculty and administration might consider how that accommodation may affect the student’s success in the future. One expert suggests that the school give a disclaimer to the student, alerting him to this concern, even when accommodation is granted.\(^\text{139}\)

Hiding behind the debate about accommodation is the question of who should determine a student’s ultimate ability to practice law. The public expects those who have graduated from law schools and have been licensed by the state to be competent to practice law, though the public may give little thought to which body was ultimately responsible for the decision.\(^\text{140}\) Some academics prefer to leave the gate-keeping role to the bar examiners,\(^\text{141}\) with no assurance that bar exams serve this function well.\(^\text{142}\) These academics may be forced to assume more responsibility for preparing students for practice because the American Bar Association—the accrediting body for law schools—now requires schools to provide all students with substantial instruction in professional skills.\(^\text{143}\) Law schools that still primarily teach students to think

\(^\text{139}\) Kincaid at AALS, supra n. 2.

\(^\text{140}\) William A. Mehrens et al., Accommodations for Candidates with Disabilities, 63 B. Examr. 33, 35 (Nov. 1994) (noting the unfairness to the public, which “reasonably expects to be protected from those not truly disabled who can only pass the [bar exam] under special accommodations”).

\(^\text{141}\) The assumption that the bar examiners are the gatekeepers is shared by others. See Overton, supra n. 5, at 7 (“[Bar examiners] are one of the gate-keepers to the profession of law. It is your responsibility to test ability while protecting the public.”).

\(^\text{142}\) Compare Stuart Duhl & Gregory M. Duhl, Testing Applicants with Disabilities, B. Examr. 7, 11 (Feb. 2004) (stating that an “otherwise qualified individual” taking a bar exam is “any applicant who has a ‘disability’ and has satisfied the state board’s ‘essential eligibility requirements’ (e.g., is of the minimum age, holds a degree from an accredited law school, has paid an exam fee) . . .”), with Marjorie Ragosta, Testing Bar Applicants with Learning Disabilities, B. Examr. 11, 12 (Feb. 1991) (suggesting determination of appropriateness of accommodations includes the criterion of “whether the test task changed by the modification is critical to the performance of the job in question”).

\(^\text{143}\) The ABA is the accrediting agency for law schools; the Council of the ABA Section of Legal Education and Admissions to the Bar approves appropriate standards for accreditation and ensures that law schools are meeting them. Standard 302(a)(4) requires “substantial instruction” in “other professional skills generally regarded as necessary for effective and responsible participation in the legal profession.” Interpretation 302-2 encourages schools “to be creative in developing programs of instruction in professional skills,” and then lists the following areas that fulfill the standard: “[t]rial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting.” The 2005–2006 ABA Standards for Approval of Law Schools are available at www.abanet.org/legaled/standards/standards.html.
about law, rather than to perform the work of lawyers, will need to modify their curricula. Even without this push by the ABA, law schools should follow the example of medical schools, which routinely evaluate students in their communication skills relating to patients, their ability to diagnose problems, and other practical aspects of medicine.\(^{144}\)

One possibility that schools can consider grows from the recent trend toward exploring a wider range of degrees than the traditional *juris doctor*. Law schools may begin to offer a degree for students who will not practice law. A degree that does not qualify the student to sit for the bar could provide certain students with the education desired while protecting the public and the school's bar passage rate. This degree may appeal to a wider segment of the current student population, including those who intend to go into business or politics, as well as any students with learning disabilities who need excessive accommodation to succeed with the traditional law program. Having an alternate degree would give law schools an option for the struggling student with learning disabilities who claims, “But I don’t intend to practice law anyway.” Anecdotal evidence suggests that many of these students do take the bar exam—perhaps several times—without success. For purposes of the ADA, this alternate degree would encourage students not otherwise qualified for the traditional program to continue to consider the broader employment options of legal education.

V. UNDERSTANDING LEARNING DISABILITIES

While most professors probably recognize that some of their students have learning disabilities, perhaps few professors understand

\(^{144}\) While medical students are graded on interpersonal skills and professional behavior, law students are not. Compare *Rossomando v. Bd. of Regents of the U. of Neb.*, 2 F. Supp. 2d 1223, 1225 (D. Neb. 1998) (listing dental student’s official deficiencies, including preparation, professional behavior, ability to build positive relationships, control of emotional expression, response to constructive criticism, and acceptance of responsibility), with *Rothman v. Emory U.*, 123 F.3d 446, 449 (7th Cir. 1997) (noting problems with interpersonal skills, handling stress, and coping with problems). This theme was explored at the 2001 conference of the Association of Legal Writing Directors; proceedings are published in the first issue of the Association’s Journal. See Thomas R. Fisher & Daniel B. Hinshaw, *Models from Other Disciplines—What Can We Learn from Them?* 1 ALWD 165 (2002) (presentation on the curricula and goals of architecture and medical schools, in context of preparing students to be professionals, with an introduction by Richard K. Neumann, Jr.); see also David Weisbrot, *What Lawyers Need to Know, What Lawyers Need to Be Able to Do: An Australian Experience*, 1 ALWD 21, 35–50 (2002) (advocating the re-orientation of legal education toward a greater emphasis on professional skills training).
stand what this label means in terms of a student’s difficulties. As recently as 1996, an author began an explanation of learning disabilities by stating that the learning disabled student is not retarded. 145 Few professors today would consider a student with learning disabilities to be retarded, but finding a clear, understandable definition that passes both scientific and legal muster is difficult. 146

A. Defining Learning Disabilities

Regulations under both the ADA and the Rehabilitation Act include “specific learning disabilities” in their definitions of physical or mental impairments, 147 but neither of these statutes nor the regulations under them defines learning disabilities. The Individuals with Disabilities Act (IDEA), the federal law requiring that children with disabilities have access to free and appropriate public education, describes learning disabled students as having a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. 148

IDEA goes on to explain that such disorders include “such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.” 149

Professor Lisa Eichhorn lists characteristics that experts from various fields generally agree pertain to learning disabilities:

(1) Learning disabilities cause significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities.

(2) Learning disabilities are presumed to be caused by central nervous system dysfunction.

(3) Learning disabled people tend to have average or above average intelligence . . . .

145 Adams, supra n. 22, at 191.
147 28 C.F.R. § 35.104 (ADA Title II); 29 C.F.R. § 1630.2(h)(2) (ADA Title I); 34 C.F.R. § 104.3(j)(2)(i) (Rehabilitation Act).
149 Id.; see 34 C.F.R. § 300.541 (2006) (outlining criteria for finding a specific learning disability under IDEA).
People with learning disabilities have a dramatic discrepancy between their educational aptitude and their actual educational achievement.

People whose aptitude-achievement discrepancies are caused primarily by visual, hearing, or motor disabilities; mental retardation; emotional disturbance; or environmental, cultural, or economic disadvantage are not learning disabled.

Learning disabilities are chronic, although their manifestations may vary somewhat throughout a person’s life.

People—especially children—with learning disabilities may exhibit behavioral abnormalities such as difficulty focusing on a task, inability to get along with peers, and high levels of impulsive behavior.150

The scientific community discusses learning disability from the standpoint of neurological dysfunction.151 It is widely agreed that a learning disability is “a neurological disorder, a dysfunction of the central nervous system that affects an individual’s ability to store, effectively process, and/or transmit information to others.”152 Learning disabled individuals experience deficits in one or more of the following areas: attention, reasoning, processing, memory, communication, reading, writing, spelling, calculation, coordination, social competence, and emotional maturity.153 Work with functional magnetic resonance imaging (FMRI) has shown the neurobiological basis for dyslexia.154

Courts have referred to science experts and scientific publications to understand and define learning disabilities. One frequently cited source is the Diagnostic and Statistical Manual of Mental Disorders (DSM), published by the American Psychiatric Association.155 The most recent volume, DSM-IV-TR, was published in

150 Eichhorn, supra n. 4, at 34–35 (footnotes omitted).
152 Id. at 9.
153 Id. (citing Rehabilitation Services Administration).
155 Am. Psychiatric Assn., Diagnostic and Statistical Manual of Mental Disorders DSM-
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2000, incorporating research through the late 1990s. It describes learning disorders—including Reading Disorder, Mathematics Disorder, and Disorder of Written Expression—as existing when “the individual’s achievement on individually administered, standardized tests in reading, mathematics, or written expression is substantially below that expected for age, schooling, and level of intelligence.” Underlying abnormalities in cognitive processing may be associated with learning disorders. These abnormalities include “deficits in visual perception, linguistic processes, attention, or memory, or a combination of these.”

The most common learning disorder is Reading Disorder, also known as dyslexia, which accounts for about 80% of learning disorders. Because reading disabilities are the most common in the general population, they are likely the most common learning disability faced in law schools. Symptoms of reading difficulty include the inability to distinguish similar letters and the inability to associate sounds with letter symbols. While dyslexia may cause the student to reverse letters and numbers, the disability affects much more than that. One court described a reading disorder as affecting the student’s “visual processing as it relates to reading comprehension and rate when under timed constraints” and concluded that the student took longer “to read and to absorb information than the average person.” The student’s reading comprehension under timed constraints was in the second percen-


Although the DSM uses the term “disorder,” it recognizes that concepts such as “disability” also define the same phenomenon. Id. at xxx–xxxi.

Id. at 49.

Id. at 50.

Id.

Id. at 51–52.

Id. at 52; see also Schackner, supra n. 9 (noting that one in twenty-five college students has a learning disability).

See e.g. In re Stoller, 261 Neb. 150 (2001) (bar applicant with dyslexia); Quinnipiac U., 24 N.D.L.R. ¶ 151 (law student with learning disability); DePaul U., 4 N.D.L.R. ¶ 157 (law student with dyslexia and other learning disabilities).

DSM, supra n. 155, at 52; see also Stern, 220 F.3d at 907 (defining dyslexia as the “inability to read, spell, and write words, despite the ability to see and recognize letters”) (quoting Dorland’s Illustrated Medical Dictionary 516 (28th ed., WB Sanders 1994)).

Gallet, supra n. 132, at 743 (explaining that dyslexia can make it difficult to make words out of letters, to stay on one line while reading, and to read words in order without skipping ahead).

Zukle, 166 F.3d at 1043 (quoting in part the student’s diagnosis).
tile, while her reading comprehension without time restrictions was in the eighty-third percentile.\textsuperscript{166}

A second learning disorder that may affect law students is Disorder of Written Expression. This disorder is characterized by “grammatical or punctuation errors within sentences, poor paragraph organization, [and] multiple spelling errors.”\textsuperscript{167} Another characteristic is excessively poor handwriting,\textsuperscript{168} but the increasing prevalence of computers in law schools decreases the impact this may have on a student’s success. Another learning disorder, Mathematics Disorder, primarily affects recognizing, understanding, and using numbers and mathematical symbols.\textsuperscript{169} This disorder is less likely to be problematic in law school, though in courses like Accounting for Lawyers and Business Transactions, it could cause difficulties.

In addition to science texts, courts rely on experts to describe learning disabilities. In \textit{Guckenberger}, the court relied on a Yale medical professor’s description of dyslexia as a neurobiological condition that interferes with the “ability to acquire speech, reading, or other cognitive skills” by a normally intelligent person.\textsuperscript{170} Based on the expert’s testimony, the court described dyslexia as “a reading disability that is the result of a phonological processing deficit, or ‘decoding’ problem. A dyslexic’s ability to break down written words into their basic linguistic units is impaired.”\textsuperscript{171}

\textsuperscript{166} \textit{Id.} at 1043 n. 5.
\textsuperscript{167} \textit{DSM, supra} n. 155, at 55. Given that these symptoms overlap with laziness and inattention to detail, teachers should be sensitive to the varying causes of writing difficulties without presuming a disability that has not been proved.
\textsuperscript{168} \textit{Id.; see also Childress, 5 F. Supp. 2d at 390 (concerning student who claimed dysgraphia and other written language disorders)}; \textit{Gallet, supra} n. 132 (describing judge’s difficulties with handwriting).
\textsuperscript{169} \textit{DSM, supra} n. 155, at 53; \textit{see also Bennett College, 7 N.D.L.R. ¶ 26 (May 15, 1995)} (concerning college student with learning disability in mathematics).
\textsuperscript{170} \textit{Guckenberger, 974 F. Supp. at 130}. The court called dyslexia the most common learning disorder, noting that approximately 80% of those with learning disabilities have dyslexia. \textit{Id.} at 130–131.
\textsuperscript{171} \textit{Id.} at 130 (footnote omitted). While most of us can sound out unfamiliar words like WATSALÉEKA, the letters do not break into familiar patterns for a learning disabled person. Every word may look more like WXTSLLKC. Suzanne E. Rowe, \textit{Presentation, Reasonable Accommodations for Unreasonable Requests: The ADA in LRW} (LWI Conf., Seattle, Wa., July 2004) (comment by Debby Parker).
B. Defining Attention Deficit

Although often lumped with learning disabilities,172 Attention Deficit Hyperactivity Disorder (ADHD) is not technically a learning disability,173 but a separate class of Attention-Deficit and Disruptive Behavior Disorders.174 Perhaps 30 to 40% of students with learning disabilities also have ADHD,175 and ADHD is covered by the ADA.176 ADHD is defined in the current DSM as “a persistent pattern of inattention and/or hyperactivity-impulsivity that is more frequently displayed and more severe than is typically observed in individuals at a comparable level of development.”177

Characteristics of inattention include failing to pay close attention to details, making careless mistakes, and having difficulty persisting with a task until it is completed.178 “Tasks that require sustained mental effort are experienced as unpleasant and markedly aversive.”179 Work habits and the work itself suffer from lack of organization.180 Individuals showing inattentiveness seem not to be listening and tend to miss appointments.181 Manifestations of hyperactivity tend to be associated with children who fidget and squirm.182 In adults, “symptoms of hyperactivity take the form of feelings of restlessness and difficulty engaging in quiet sedentary activities.”183 Related to hyperactivity, impulsivity is shown through impatience. In the classroom, the student may speak out of turn or interrupt with comments, rather than waiting to be recognized by the teacher.184

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173 A helpful website on ADHD is www.chadd.org, the site of CHADD (Children and Adults with Attention Deficit/Hyperactivity Disorder).
174 The DSM does not include ADD as a separate disorder, though students, professors, and administrators continue to use the term out of familiarity.
176 See Axelrod, 36 F. Supp. 2d at 50–51.
177 DSM, supra n. 155, at 85 (emphasis added).
178 Id.
179 Id.
180 Id.
181 Id. at 85–86.
182 See id. at 86.
183 Id.
184 Id.
Many scientists believe that ADHD is caused by neurological deficiencies in brain circuits\textsuperscript{185} that cause the brain to be unable to maintain attention at a constant level.\textsuperscript{186} Medications that increase the brain’s chemicals, called neurotransmitters, keep the circuitry running at a steady level and allow the student to focus.\textsuperscript{187} Because degrees of impairment exist along a spectrum, symptoms vary widely and diagnosis is challenging.\textsuperscript{188} Thus, teachers should not try to make diagnoses and provide accommodations to students who appear to have ADHD, but teachers should be aware of symptoms so that they can suggest reasonable accommodations for students who have proved through professional diagnoses that they have an impairment and are substantially limited in their learning as a result.

\textit{C. Identifying and Understanding Students Who May Have Learning Disabilities}\textsuperscript{189}

Law faculty have no duty to determine which students have learning disabilities, unlike teachers of elementary and secondary school students.\textsuperscript{190} Being attuned to some of the telltale signs, however, may enable a teacher or administrator to suggest that a particular student might be tested and may make a law teacher more sensitive to the needs of learning disabled students.\textsuperscript{191}

\begin{itemize}
\item \textsuperscript{185} See Silver, \textit{supra} n. 175.
\item \textsuperscript{187} Id.
\item \textsuperscript{189} Professor Richard Neumann’s excellent plenary presentation at the Rocky Mountain Legal Writing Conference in March 2006 addressed “Attention Deficit Disorder, Dyslexia, and Legal Writing.” His handouts (copies on file with the Author) include bibliographies on ADD, ADHD, dyslexia, and other learning disabilities, as well as excerpts from articles and books that can help a teacher recognize students who may be affected.
\item \textsuperscript{190} See LD Online, \textit{College Students and Disability Law}, http://www.ldonline.org/article/6082 (accessed Jan. 7, 2007) (colleges not expected to make accommodations until a student provides notification and corroborating documentation of disability); \textit{compare} 20 U.S.C. § 1414 (2000) (IDEA; requiring the state or local educational agency to perform initial and subsequent disability evaluations on a child once a request for that evaluation has been made by the child’s parent or by a state or local agency), \textit{with} 42 U.S.C. § 12112(b)(5)(A) (ADA; defining discrimination as not making reasonable accommodations to the \textit{known} limitations of the disabled individual).
\item \textsuperscript{191} Early in my teaching career, I had an encounter with a student who I now realize may have had learning disabilities. During an office conversation, she clearly was well prepared, understood the subject matter, and was motivated to succeed. When she tried to
\end{itemize}
As noted in the previous section, learning disabilities are often described as “processing” disorders. To illustrate, consider the various processes a person must master in order to read:

- Focus attention on the printed marks and control eye movements across the page;
- Recognize the sounds associated with letters;
- Understand words and grammar;
- Build ideas and images;
- Compare new ideas to pre-existing understanding of the material; and
- Store ideas in memory.\textsuperscript{192}

A student with a neurological circuit that does not efficiently perform one or more of these processes will not be a strong reader. The student may be able to engage in the material orally, and the student may be able to produce quality written work given enough time, but reading may be a continuing struggle.\textsuperscript{193}

Professor Susan Adams has examined the cognitive processes required to write the type of text necessary in law schools and has provided helpful indicators that various students who are unable to do so may have learning disabilities.\textsuperscript{194} While some learning disabled students’ writing problems may be limited to grammar and mechanical aspects of documents, other students may be un-

\textsuperscript{192} LD Online, \textit{supra} n. 186.

\textsuperscript{193} Consider arriving at work one day to be told that you must sign your name with your left hand. Those of us who are left-handed would think nothing of this rule; everyone should be able to accomplish this simple task as well as we can. Those who write best with their right hand could eventually learn to write a legible signature with their left hand, too, but at what cost of time and frustration?

\textsuperscript{194} Adams, \textit{supra} n. 22, at 200. Her work is especially important because many of the readily available lists of telltale signs for learning disorders are geared to young children. Of greater help are the descriptions of an adolescent student with learning disabilities: the student cannot remember or understand material she has just read, has difficulty spelling a word consistently within one document, works very slowly, struggles with abstract concepts and generalizations, does not focus adequately on details, or misreads instructions and information. See Coordinated Campaign for Learning Disabilities, \textit{Starting Out}, http://www.focusonlearning.org/startingout2.htm (accessed Jan. 7, 2007); Schwab Learning, \textit{Learning Disabilities—An Overview}, http://www.schwablearning.org/articles.asp?r=25 (accessed Jan. 7, 2007).
able to organize and synthesize the quantity of information involved in producing a document.\textsuperscript{195} The writing of students with learning disabilities is more often shorter and less interesting than that of their non-disabled classmates.\textsuperscript{196} Moreover, the learning disabled student’s mistakes are not consistent,\textsuperscript{197} and she may be unable to recognize her own errors and make necessary corrections.\textsuperscript{198}

Some symptoms of ADHD that may be particularly noticeable in law students include making careless mistakes and failing to pay attention to details, not paying attention for sustained periods, struggling to follow instructions, losing things, forgetting activities, and having difficulty with organization.\textsuperscript{199}

Most law students are highly motivated, whether by the joy of learning, the fear of failure, or at least the concern about paying off school debt. If a law student who is motivated and seems able to engage topics orally is struggling to keep up or produce quality work, it may be appropriate to suggest that the student be tested for learning disabilities or ADHD.

\section*{VI. RESPONSES TO REQUESTS FOR ACCOMMODATION OF LEARNING DISABILITIES IN LEGAL WRITING COURSES}

Against this backdrop of statutory requirements and scientific understanding of learning disabilities, this Section begins by explaining the foundation a professor needs to lay by determining those essential elements of a course that cannot be changed without fundamentally altering the program of study. Then it examines various requests that students with learning disabilities may make and suggests reasonable responses to each.\textsuperscript{200} While a detailed discussion of teaching techniques is beyond the scope of this Article, other writers have explored techniques that are valuable not only to learning disabled students but also to their classmates, and some of these pedagogies are discussed in response to particu-
lar accommodation requests. Using these pedagogical techniques widely may improve teaching in general and may decrease the need for accommodations for students with learning disabilities.

A. Goals and Essential Elements

To ensure that ADA accommodations do not undermine the goals of a course, a professor must decide what those goals are and determine which elements of the course are essential to meeting those goals. The American Bar Association’s Sourcebook on Legal Writing Programs, now in its second edition, lists seven goals for the first-year legal research and writing course. At the end of the course, students should (1) understand the American legal system; (2) know how to analyze facts, issues, and legal authorities; (3) be able to conduct legal research efficiently using both print and online sources; (4) know how to communicate effectively both in writing and orally; (5) recognize relevant ethical issues that arise in the legal profession; (6) understand the roles attorneys fill in advising and advocating for clients; and (7) be able to solve legal problems by applying knowledge and skills.

In courses requiring interviewing, negotiation, or counseling, the ability to think quickly under pressure, to develop empathy for the client, to demonstrate appropriate “people skills,” and to under-

201 E.g. Adams, supra n. 22, at 205–214. For example, the “process” method of teaching legal writing is especially helpful to learning disabled students, but it is effective for all students. See also Jessica Elliott, Presentation, Teaching Legal Research, Writing, and Analysis to Students with Learning Disabilities (LWI Conf., Knoxville, Tenn., July 2002) (presentation outline on file with the Author).

202 Eric B. Easton et al., Sourcebook on Legal Writing Programs 6–12 (2d ed., ABA 2006). The first edition lists seven goals for the first-year legal writing course: (1) teaching the American legal system; (2) teaching research skills; (3) providing hands-on experience in analysis, reasoning, and advocacy to solve complex legal problems; (4) inculcating principles of clear and accurate written expression; (5) providing experience in drafting common legal documents; (6) helping to teach professionalism and ethics; and (7) teaching students to become independent self-educators. Ralph L. Brill et al., Sourcebook on Legal Writing Programs 5–8 (ABA 1997).

203 Easton et al., supra n. 202, at 6–7.

204 Id. at 7–8.

205 Id. at 8–9.

206 Id. at 9–10.

207 Id. at 10–11.

208 Id. at 11.

209 Id. at 11–12. The Sourcebook concludes that this goal may be the most challenging because “it requires the professor to teach the students how to teach themselves to recognize and fill the gaps in their knowledge.” Id. at 12.
stand the interrelationship between lawyering skills will likely be added to the list of course goals.210

Once the goals of the course are clear, its essential elements must be determined. One national expert on the ADA in university settings suggested that the essential elements of a legal writing course include analytical ability, research skills, case synthesis, organizational skills, persuasiveness, editing, proofreading, and timeliness.211 The Sourcebook agrees, offering more detail to describe specific writing, reasoning, and research skills that should be learned in the first-year writing course. According to the initial Sourcebook, critical writing skills include case synthesis, organization, factual analysis, sensitivity to document format, writing style, and citation form.212 Reasoning and analytical skills include understanding the court system; knowing how to identify the critical parts of cases and how to synthesize cases; understanding statutory interpretation; knowing how to analyze policy arguments relevant to cases and statutes; being able to apply cases, statutes, and policy to solve legal problems; and using different types of reasoning (fact-based, doctrinal, or policy-based) and analysis (e.g., the totality of the circumstances).213 Research skills include not only bibliographic knowledge of sources such as cases, statutes, constitutions, rules, secondary authority, and finding tools,214 but more importantly how “to plan and execute a research strategy by choosing the most useful secondary sources, drafting tentative research issues, locating the pertinent primary authorities, evaluating the usefulness of these sources, and knowing when to quit researching.”215 The second edition of the Sourcebook stresses the importance of both print and online resources in developing professional competence in legal research.216

Many of the abilities underlying the essential elements of a legal writing course are interrelated,217 making accommodation decisions all the more challenging if accommodating one aspect of

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210 See id. at 33–35 (evaluating lawyering skills such as interviewing, counseling, and negotiating).
211 Kincaid at AALS, supra n. 2.
212 Brill et al., supra n. 202, at 16–17. The second edition supports these ideas as well, though the focus tends more toward explaining best practices than describing foundational concepts.
213 Id. at 18–19.
214 Id. at 26–27.
215 Id. at 27.
216 See Easton et al., supra n. 202, at 27.
217 See id. at 14–17.
the course means compromising another. Analytical ability is required for virtually every assignment in a writing or skills course. A student must be able to analyze the facts and the client’s question in order to identify the legal issues, determine whether authorities discovered through research are pertinent, apply the authorities to the legal issues, and organize the answer either in writing or orally. Research skills include knowledge about various legal resources, an understanding of the process in which resources are used both individually and as part of a research strategy, and the ability to analyze and organize the authorities located through research. Closely related to analytical and research skills is the ability to synthesize multiple authorities into a cohesive rule of law. Similarly related is the organizational ability to keep various authorities discrete in the writer’s mind while understanding the relationships among them. Organizing the research in ways that promote clear analysis and effective writing is also essential. Even a seemingly mundane task like correctly citing authorities requires an understanding of legal systems and legal analysis.

Writing, editing, and proofreading are related but distinct tasks, and realizing their differences may be important in making accommodation decisions. Writing involves analysis and synthesis of legal authority and facts, initial organization of thoughts, and expression in a format that conveys the writer’s thoughts to others. Merely outlining is not a replacement for writing. Editing is the process of revising text to achieve greater coherence and clarity. Editing may include shifting paragraphs to better show the logical progression of an argument, adding thesis sentences to paragraphs, and moving sentences within a paragraph to improve unity and coherence. Editing also includes selecting the most accurate word for a particular idea and using it consistently, and

218 This initial step may take place orally, through use of a Dictaphone.

219 See Villanova, 16 N.D.L.R. ¶ 170 (upholding law school’s decision not to allow student to outline essay answers); but see Chapman U., 16 N.D.L.R. ¶ 200 (OCR Mar. 22, 1999) (allowing graduate student with carpel tunnel syndrome and arthritis to outline exam answers).

writing with professional fluidity and style.\textsuperscript{221} Proofreading is a more mechanical task that addresses spelling, grammar, punctuation, citation format, and document format. If considered on a spectrum, writing is the essential lawyering skill, while proofreading is a task that could be performed by a trained assistant. Editing falls somewhere between the two. Researching, analyzing, writing, and editing all require time, and meeting deadlines may be an essential element of writing courses or any other courses that simulate real-world situations. For example, in a negotiation course, a legal writing course, or an advanced litigation practice course, the ability to meet deadlines both enables the course to run smoothly—because other assignments often hinge on earlier assignments—and provides important training in legal practice.

\textbf{B. Specific Requests}

After determining the essential elements of the course, professors must decide—in conjunction with appropriate administrators and students\textsuperscript{222}—whether the requested accommodation would lower essential standards or fundamentally alter the program. Students in the highly competitive law school environment are becoming increasingly aggressive in seeking a diagnosis of disabilities and in requesting accommodations,\textsuperscript{223} but faculty and administrators should not feel pressured into making unwise decisions simply to appease an aggressive student.\textsuperscript{224} As long as the school follows its process and documents its steps in considering the student’s requests, it should not fear an adverse outcome in a suit by an aggressive student. On the other hand, if faculty and administrators cave to every demand of a student claiming disabilities, the playing field may tip too far in favor of that student to the disad-

\textsuperscript{221} Oates et al., \textit{supra} n. 220, at 709–822 (explaining “correct writing” by addressing grammar, punctuation, and mechanics); Ramsfield, \textit{supra} n. 220, at 467–484 (comparing this step to the “finishing” stages of building).

\textsuperscript{222} The ADA requires an interactive process. \textit{See e.g.} Wong, 192 F.3d at 818–819 (observing that mere speculation that a suggested accommodation is not feasible falls short of the reasonable accommodation requirement because of the duty to gather information from the disabled individual and qualified experts to determine which accommodations are necessary).

\textsuperscript{223} Kincaid at AALS, \textit{supra} n. 2.

\textsuperscript{224} A strong argument for a school not providing a requested accommodation is that the school does not provide the requested service to anyone. \textit{See Rodriguez v. City of N.Y.}, 197 F.3d 611, 616 (2d Cir. 1999) (finding that because New York Medicare law did not require provision of the required service to anyone, a disabled person had no right to the service).
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vantage of non-disabled classmates.\textsuperscript{225} Furthermore, the student may survive law school only to find herself unable to pass the bar or find success as a lawyer. Given the debt load of most recent graduates, soft-hearted faculty members should ask whether they are truly helping a student who graduates in debt and is unable to pass the bar or find legal work.\textsuperscript{226}

1. *Requests for More Time on Writing Assignments*

One frequent request by students with learning disabilities is for more time to complete assignments. The additional time is needed because the student’s disability prevents the student from working at the same speed as non-disabled peers. One court summarized a physician’s description of a law student’s language processing disability this way:

\begin{quote}
[Plaintiff has difficulty with spatial relationships, which interferes with his ability to perform reading comprehension tasks at a rate competitive with non-disabled persons . . . and should be given double time for the bar examination in order to place him on a level playing field with non-disabled individuals.\textsuperscript{227}
\end{quote}

The request for more time is different for the types of assignments that are typical in legal writing classes than for the timed law school exam or bar exam.\textsuperscript{228} The critical question is what the course is teaching and why deadlines are important for each assignment.\textsuperscript{229} In a first-year legal writing course, assignments are

\textsuperscript{225} In addition to actual unfairness, faculty and administrators should also consider whether certain accommodations may result in perceived unfairness that could harm the school’s learning environment. One commentator noted that classmates of law review competitors who receive what are perceived to be unfair advantages “are likely to be intensely resentful.” Adams, *supra* n. 4, at 294; see also Ragosta, *supra* n. 142, at 12 (noting that fairness on the bar exam should be considered from the perspective of both the disabled and the non-disabled candidates).

\textsuperscript{226} See Farrell, *supra* n. 9 (relaying the story of an undergraduate who admitted that a “tough-love” approach was helpful and questioning the effectiveness of typical accommodations).

\textsuperscript{227} *Argen*, 860 F. Supp. at 86 (denying plaintiff’s request). The *Argen* court found for the Board because its expert witness, in determining that the plaintiff was not a qualified individual with a disability under the ADA, used an “objective standard” to make his determination, as opposed to the plaintiff’s experts’ “undefined and unquantified standards.” *Id.* at 91. See the discussion of time allowed for pop quizzes in section VI(B)(9) *infra*.

\textsuperscript{228} Exams are discussed separately in section VI(B)(9) *infra* because few legal writing classes use them.

\textsuperscript{229} This question is especially important when students at different schools complete their writing assignments across a range of periods. If two schools both claim to test student writing in “real life situations,” but one school provides two weeks for students to draft a
often incremental, with later assignments building on earlier ones. This progression is designed to help all students master fundamental skills before moving on to more sophisticated projects, though it may be especially beneficial to students with learning disabilities. To benefit from the progression, the student must complete and receive feedback on one assignment before beginning the next. If a student with learning disabilities steps out of the progression or skips some assignments to allow more time for others, the student may miss essential elements of the course, and thus be harmed by the accommodation.

Moderate accommodations on writing assignment periods or deadlines may sufficiently assist the student without altering the program, placing an administrative burden on the teacher, or disadvantaging classmates. For example, a student could be given instructions for a major assignment the day before the class meets, enabling the student to read the assignment before class, rather than during it as her non-disabled classmates would. The student would be better prepared for the class discussion without receiving a substantial advantage. Another moderate accommodation may be to allow a student with learning disabilities an extra day for proofreading (or for receiving proofreading help, as discussed below). Providing extra time may be especially appropriate at the beginning of law school, as the student is adjusting to the new academic environment.

More significant time extensions may not be feasible because of the impact on the student, the professor, and classmates. In addition to the pedagogical sacrifice made when a student does not follow the course progression, allowing extra time for assignments may place an extra burden on a teacher who must comment on and return papers quickly, and in some instances hold an individual conference with each student. Schedules for teachers and stu-

\begin{footnotes}
\footnote{Brill et al., supra n. 202, at 13–14.}
\footnote{See supra sec. V(C) (exploring the processes of reading and writing).}
\footnote{See infra sec. VI(B)(5).}
\footnote{See Runyan & Smith, supra n. 4, at 330.}
\footnote{The initial Sourcebook suggests line-by-line comments aimed at teaching students “how to make writing and analytical decisions.” Brill et al., supra n. 202, at 41–42. The Sourcebook also notes that “[m]uch of the best learning happens in individual conferences.” Id. at 45; accord Easton et al., supra n. 202, at 60.}
\end{footnotes}
students in writing courses tend to be extremely tight, especially when a professor carries a high student-teacher ratio.\textsuperscript{235} If a student receives extra time to complete an assignment, the professor may not be able to mark and return it before the next assignment is made without stretching an already tight schedule. Or the student may have to attend a conference on one assignment while simultaneously working on a later assignment that is supposed to build on the earlier work. This overlap may make the conference confusing to the student, and it may be difficult for the teacher to recreate the learning situation of classmates days or weeks before. Given the downside of overlapping assignments, the professor may believe that it is pedagogically unsound to assign the next paper in a sequence until the preceding paper has been submitted and marked, which would place the student out of sequence with the rest of the class and add another burden to the professor. An additional concern for professors is that anonymous grading—\textsuperscript{236} which some professors and students value—may be compromised because the professor would likely know which student was following a different syllabus.

Classmates might also be disadvantaged by the extra time given to a student with learning disabilities. Groups may have to make adjustments to their schedules to allow someone still working on an earlier project to participate. An opponent in oral arguments may not receive opposing counsel’s brief at the same time as other students in the class.\textsuperscript{237} In a course mirroring trial practice, if students submit the complaint in one class with the expectation of receiving a classmate’s answer in the next class, providing extra time to a student with learning disabilities may make the class

\textsuperscript{235} In 2006, the \textit{Sourcebook} recommended legal writing class sizes of no more than thirty-five students, depending on the commitment of the school to the professor and the professor’s other obligations. Easton et al., supra n. 202, at 95. Tenure-line professors with no other teaching obligations should teach no more than thirty to thirty-five students. \textit{Id.} at 89. Professors with long-term contracts should teach no more than thirty to forty-five students, though a ratio higher than thirty-five to one is likely to be counterproductive. \textit{Id.} at 95. Short-term professors with no ability to participate in faculty governance should teach no more than thirty-five to forty-five students. \textit{Id.} at 100. The average student-teacher ratio in 2006 was forty-four to one. \textit{2006 Survey of the Association of Legal Writing Directors and the Legal Writing Institute} question 82 (available at www.alwd.org) [hereinafter \textit{2006 ALWD/LWI Survey}]. The 2006 survey reported the responses of 184 law school in the United States, for a 94% response rate. The survey is available at http://www.alwd.org.

\textsuperscript{236} If arguments take place over several days or weeks, a possible accommodation would be to give the student with learning disabilities and his oral argument opponent one of the last times for argument, ensuring them time to read each other’s briefs.

\textsuperscript{237} \textit{2006 ALWD/LWI Survey}, supra n. 235, at question 17 (indicating that in 60% of responding schools, all or some of the major writing assignments are graded anonymously).
administratively impossible or unfair to other students. Moreover, if a student submits a paper long after the rest of the class, that student’s grade may not be subject to any class curve mandated by the school.

Still, students with learning disabilities may legitimately need longer to process information. The best response to a legitimate request for more time may be not to provide extra time on individual assignments but to permit the requesting student to take a lighter course load. The student could take longer on each writing assignment without stepping out of sequence and without creating administrative burdens on the professor or disadvantaging classmates. This accommodation may be especially appropriate during any semester in which the student is enrolled in an intensive skills course like legal writing or must complete a major paper.\textsuperscript{238} The school does not have to allow the student to dictate which courses will be taken, however, or to make concessions for a learning disabled student that would be a substantial alteration to the curriculum.\textsuperscript{239} The student must accept that one consequence of light-loading will be more tuition if the school charges by term rather than by credit hour.\textsuperscript{240}

Unlimited time to complete an assignment would never be a reasonable accommodation.\textsuperscript{241} That accommodation would never be available in law practice and would place undue administrative burdens on the school.\textsuperscript{242} Moreover, if a student does not learn of her disability until after the assignment is submitted (or after the deadline passed), the teacher should not have to make retroactive accommodations.\textsuperscript{243} If a student learns of her disability after failing a course or disqualifying from school, a faculty committee

\textsuperscript{238} Runyan & Smith, supra n. 4, at 330–331 (also discussing the possible need for students to complete law school in more than three years).

\textsuperscript{239} See Zukle, 166 F.3d at 1049 (deferring to medical school’s decision regarding interrupted course of study for learning disabled student).

\textsuperscript{240} U. of Wash., 15 N.D.L.R. ¶ 125 (holding that this fee structure is not discriminatory when applied to all students regardless of disability).

\textsuperscript{241} See Pandazides v. Va. Bd. of Educ., 804 F. Supp. 794 (E.D. Va. 1992), rev’d, 13 F.3d 823 (4th Cir. 1994) (unlimited time to take teacher certification exam was not a reasonable accommodation “because similar modifications could not be expected in the job of teaching. . . . [T]he real world requirements do not permit totally unlimited time to accomplish work in the classroom such as reading and correcting students’ work, working directly with students in groups or as a whole unit, or writing comments and directions for them about their work.”); see also Zukle, 166 F.3d at 1044 (quoting medical school dean’s statement that “[a] physician does not have extra time when in the ER”).

\textsuperscript{242} Rothstein at AALS, supra n. 2.

\textsuperscript{243} See U. of S.F., 17 N.D.L.R. ¶ 61 (OCR Mar. 11, 1999) (school accommodated student after learning of his disability, but he still disqualified based on his cumulative GPA).
should consider the new information in reviewing a petition to repeat the course or to be readmitted.\textsuperscript{244}

2. \textit{Requests Regarding Legal Research}\textsuperscript{245}

Conducting legal research is a required portion of most first-year legal writing courses,\textsuperscript{246} and complete integration of writing, analytical, and research instruction has long been viewed as the most pedagogically sound approach.\textsuperscript{247} In a completely integrated course, students may be asked to complete assignments including library exercises, research logs describing the research process and time devoted to each task, research notebooks containing copies of key sources and briefs or outlines of key authorities, and summaries that require students to select and explain the most relevant sources found.\textsuperscript{248} Students may request accommodations in any of these assignments and at various stages of independent research on a major assignment.

a. Completing Administrative and Bibliographic Work

At the most basic level, students with learning disabilities may struggle with the record keeping that is necessary in research projects. Addressing these purely administrative concerns should be fairly simple. For example, some courses require students to record their time and research activities in research logs. A student with learning disabilities may be able to keep such a research log by using a Dictaphone. A secretary could transcribe the log, as would likely happen in practice, or the professor could grade the assignment by listening to the recording.

When a research assignment is primarily bibliographic, as opposed to analytical, only knowledge of how to use individual resources is likely being tested, so breaking a complex research prob-

\textsuperscript{244} \textit{DePaul}, 4 N.D.L.R. ¶ 157 (in evaluating a law student for readmission, school must at least consider the disability and the student’s ability to succeed with appropriate accommodations).

\textsuperscript{245} In the fundamental research course, students should be exposed to various forms of conducting research even if their disability will restrict them to certain types of research in practice. For example, a student with physical disabilities who may not expect to use books should at least be able to converse with others about books.

\textsuperscript{246} See 2006 ALWD/LWI Survey, supra n. 235, question 18.

\textsuperscript{247} Brill et al., supra n. 202, at 20–24.

\textsuperscript{248} Id. at 25–26.
lem into smaller parts may be reasonable. Therefore, a professor can provide more assistance to a student with learning disabilities without concern for providing excessive accommodation. One example of such an assignment is a self-guided introduction to secondary sources, which is already highly directive. Another example is a worksheet that asks students about bibliographic details of a particular research project, rather than the overall process of research. The teacher may need to provide a few interim steps on these assignments for the student with learning disabilities, but this seems a reasonable accommodation. Because bibliographic assignments tend to break tasks into discrete questions, the learning disabled student may actually excel at them.

On research worksheets, a common issue for students with learning disabilities is skipped questions. If students can work collaboratively on the worksheets, a classmate may naturally keep the student with learning disabilities from omitting answers. If students must work on their own or at least complete their own worksheets while working in groups, a simple accommodation would be to have a secretary or teaching assistant quickly look over an assignment to ensure that the student has answered every question.

b. Identifying Legal Issues and Analyzing Research Results

On a more complex research assignment, such as independent research for an appellate brief, the primary focus may be analytical, rather than bibliographic. For example, identifying and analyzing complex legal issues may be the goal of the assignment. In these instances, if a student requests accommodations beyond general guidance, a professor may need to be wary. As in the Villanova case, the professor should not be required to break a complex research problem on a multi-issue appellate brief into discrete issues just for students with learning disabilities. This dissection of complex legal problems is one of the essential skills being taught. Not requiring such analysis would fundamentally alter

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249 But see Villanova, 16 N.D.L.R. ¶ 170.
250 Some schools still teach research separate from writing, so most early research projects will fall into this category. 2006 ALWD/LWI Survey, supra n. 235, question 18 (showing that fifty-three programs still teach research separate from writing).
251 Villanova, 16 N.D.L.R. ¶ 170.
the course for the student with learning disabilities and create inequities between that student and her classmates.

Recognizing that research and analysis are interdependent skills, teachers should not allow librarians or student assistants to conduct the research for students with learning disabilities. For example, locating the relevant pages of a West digest is more than a mechanical task; it requires deciding from among a variety of topics and key numbers which are most likely to index the most helpful cases. Then it requires the researcher to skim the entries and determine quickly whether the topic and key number selected is proving to be relevant, and if it is, to select the most promising cases.

Reading and analyzing authorities is the most critical part of legal research. No student should be able to have classmates, research assistants, librarians, or professors read and brief authorities for them, as this would fundamentally alter the course. To accommodate for learning disabilities in reading, a student may need more time, but the student cannot skip this critical step in legal research.

c. Organizing Research Results

Often, students organize their research results into folders or notebooks. This organization eases the use of the materials throughout the research and writing processes. If this organization is merely mechanical, not analytical, assistance may be appropriate. An assistant could help the student with learning disabilities tab authorities, put them in binders or folders, and even highlight headings to make them easy to locate. This work would be similar to the help that an attorney might receive from a paralegal or secretary.

If an essential part of the course is organizing research material based on analytical content, it may be a fundamental altera-

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252 At this juncture, it can be helpful to remember the distinction between physical limitations in reading print material and analytical limitations in understanding an individual case and synthesizing it with other material. Physical limitations must be accommodated, but persons providing assistance need guidance on what is appropriate. For example, a visually impaired student should be able to use a computerized or human reader, but human readers should not break cases, statutes, or other authorities into their components, as that is an essential skill. As another example, a student who uses a wheelchair should receive assistance in retrieving books when resources are not available online, but the person retrieving the books should not make analytical choices about which books would be most relevant.
tion of the course for a student to receive help in organizing the research material into a notebook. Similarly, if an essential element of the course is differentiating between various resources and determining which are highly relevant, which are mildly helpful, and which are irrelevant, then the student should not receive accommodations that reduce the professor’s ability to test those skills.

3. Requests Concerning Organization and Synthesis of Ideas

After analyzing research results and organizing authorities, the student must move from a notebook of research materials to an organized thesis. This step requires essential lawyering skills, as students must synthesize diverse authorities and create an outline. All students should be required to complete these tasks, though a number of techniques for accommodating students with learning disabilities may be helpful for all students and could be shared with the entire class. For example, students who have difficulty organizing material in a traditional outline format may benefit from a “free write” in which they simply write as much as they can, as fast as they can. Once the ideas are printed on paper (perhaps in large type), the student can read through the text and highlight the major points. Next, the student should read the “free write” again and color code ideas to match the major points. The student can then cut and paste these points on the computer to create a rough outline.

Another possibility for imposing organization on scattered research ideas is a form of nonlinear outline. One option is the “bubble chart.” The student writes ideas on a sheet of paper, enclosing individual ideas in bubbles. Then the student draws lines between related ideas, showing connections between them. Another option is the “whirly bird.” The whirly bird begins with a circle at the center of a sheet of paper that names the topic of the project.

253 Law schools could learn from medical schools, which evaluate students individually on their ability to “put things together” in diagnosing and to communicate thoughts effectively. If a student is struggling in organizational skills or setting priorities, recommendations are made by the evaluators. See Wong, 192 F.3d at 812.

254 Suzanne E. Rowe, Unblocking Writer’s Block, Or. St. B. Bull. 37, 38 (Oct. 2006); see also Mary Beth Beazley & Christina L. Kunz, Presentation, Understanding Writer’s Block (LWI Conf., June 1998).

Major ideas related to the topic form major branches from the central circle. These branches can extend in any direction. Supporting ideas are added so that they branch off from one of the major branches. Electronic options for organization of ideas include computer-supported outlines. These are becoming increasingly sophisticated and helpful. Note that while the professor may lead students through this organization and synthesis exercise in early assignments, each student must develop these skills for more independent work and for practice.

4. Requests for Assistance with Writing and Editing

Because legal analysis continues to take place as the writer turns ideas into complete sentences, no student should be allowed to submit a mere outline or notes in place of a memo or brief. Through writing, students prove their ability to analyze the legal issue at hand. The placement of ideas relative to each other is critical. The selection of one word over another may have important legal implications. A student who struggles with written expression can accomplish “writing” orally, at least initially, by recording thoughts on a Dictaphone. Whether the student himself transcribes the recording, or whether an assistant is allowed to do so, likely depends on the severity of the disability. If an assistant transcribes the student’s work, the student must be given strict deadlines to keep the assignment on track, though this may raise concerns for a student with time management problems. The assistant must not provide any editorial services during transcription.

“Editing,” as used in this Article, addresses more substantive changes to a document. Editing occurs, for example, when a writer adds a topic sentence, moves a paragraph to a more compelling point in the argument, or chooses a more precise word. If one of the goals of the course is to teach clear written expression of legal analysis, allowing an outside editor may subvert this goal. If an editor is provided, the editor should receive written instructions and perhaps even meet with the professor or administrator to discuss the boundaries of help that can be offered. If the editor is allowed to suggest changes, the student must decide whether to ac-

256 Id. at 8.
257 William K. Zinsser, Writing to Learn vii–viii (Harper & Row 1988) (“We write to find out what we know.”).
cept or reject the suggestions. The teacher could then require a log explaining the editing suggestions made and the reasons the student accepted or rejected them.

5. **Requests for a Proofreader**

Proofreading addresses the more mechanical aspects of a written document: spelling, grammar, format, and citation. If the policies of a particular course allow all students to receive help from outside proofreaders, no special concern exists for accommodating learning disabled students in this regard. If, however, a course goal is to teach students careful proofreading skills, a course policy may prevent anyone from reading the students’ papers other than the teacher or a teaching assistant.

Even if students are generally required to proof their own documents, some help is readily available to all students. Word processing software could be required (e.g., spell checkers and grammar checkers); in fact, some professors now require all students to use these programs and attach to the paper a printout showing that they did.\(^{258}\) The help provided by this software is limited, however. For example, my word processor is notorious for labeling complete sentences as fragments, while skipping over true fragments. Thus, the learning disabled student—like every other student—should use electronic tools merely as a preliminary step in proofreading. In addition to using generic software corrections, students should be encouraged to identify their particular proofreading problems and use the “Find” feature to locate possible instances of the problem. If, for example, the student tends to misspell words in such a way that a spell checker will not catch the errors (e.g., misspelling “statute” as “statue”), the student can use the “Find” feature to locate the problem words.

Allowing use of citation software on legal writing papers is more problematic than requiring spell checkers and grammar checkers. Not all students have access to the software, and it can be expensive. Moreover, much of the available citation software is even less reliable than spelling and grammar software. If a professor is confident in the reliability of a particular citation software package and the student is able to pay for it, a reasonable accommodation may be to allow only learning disabled students to use it.

\(^{258}\)The wide availability of these word processing tools is evidence of the enormous increase in technological assistance resources over the past decade.
When the software becomes more reliable and commonly available, of course, teachers may begin requiring all students to use it.

Beyond electronic tools, human proofreaders may provide reasonable accommodations for discrete tasks that a good secretary could be expected to perform. An assistant could proofread the paper for just the types of problems created by the student’s learning disability. Depending on the severity of the disability, the assistant could simply mark the line on which an error appeared or mark the error itself, without providing the correction. Before the assistant is allowed to review the student’s paper, the assistant should meet with the professor or disability coordinator to ensure that the assistant is providing no more help than is warranted. A few extra days may be needed for the assistant to review the work and the student to make corrections. The student may need to agree not to make substantive changes past the due date.

6. Requests Related to Class

a. Class Participation

Some students are overwhelmed by the prospect of being called on in class. If the ability to participate orally in class is hampered by a learning disability, accommodations may be appropriate. The professor should be told of the types of participation that are affected—for example, reading aloud—and the student should be excused from performing those functions. The common anxiety that most students feel about being called on must be distinguished; the student with learning disabilities should not be excused from participation simply because she shares this anxiety. The smaller size of the writing class and the opportunities to meet with the professor outside of class will likely diminish the fear of being called on.

259 Some professors may be uncomfortable with this accommodation because they remember that, in practice, it was available only in large firms with round-the-clock secretaries or editorial staff. Otherwise, secretaries leave work promptly at 5:00 p.m., and colleagues rarely have time to proofread another attorney’s work carefully. Confidentiality concerns prevent attorneys from asking family members or friends to provide proofreading services.
b. Note Taking and Recording

Frequent classroom accommodations for students with learning disabilities are (1) providing the notes of a classmate, and (2) allowing the student to tape record the class period. While these accommodations seem quite reasonable in large lecture classes, they may not be reasonable in a skills class like legal writing. A professor may legitimately think that the ability to listen to a lecture, participate in a discussion, and simultaneously record relevant information is an essential lawyering skill. If so, the professor would need to demonstrate that this ability is a skill being taught and evaluated in the class, perhaps through reference to goals laid out in a class syllabus. Then a student’s access to notetakers and tape recordings may appropriately be limited. Even if access to those resources is not limited, the professor may have concerns about whether the accommodated student is gaining the maximum benefit from the course or learning to function in a profession where note taking is often critical and where colleagues and clients may balk at being recorded.

The accommodations decision should involve a number of factors. If the student with learning disabilities is unable to both participate in class activities and take effective notes, the professor will need to decide which is more important. Assuming class participation is most important, the question of how to provide notes creates other challenges. Having a classmate take notes may not be a viable option in the interactive environment of a writing class where students frequently work in small groups and engage in role-playing exercises. Moreover, the professor must consider whether a classmate would likely be able to participate in those activities and take notes as well. Additional considerations include whether the notetaker should be a student predicted to perform at the ability level of the student with learning disabilities (perhaps by comparing GPAs or LSAT scores). If a top student is selected for note taking, the playing field may be tilted in favor of the learning disabled student, and classmates may argue that they would all benefit from sharing a top student’s notes. Some professors address these concerns by providing their own notes to the class, but if students know in advance that the teacher’s notes will be available, the students may show less interest in the class discussion.\footnote{Experience and observation have shown many of us that when students know that they will receive “the answer” in the form of the teacher’s notes at the end of class, the stu-
A difficulty involved in providing notes—whether by a classmate or the teacher—is the level of detail included in the notes. Unless the notes provide the detail of a stenographer, recording every word, they will necessarily summarize and synthesize the material, depriving the student with learning disabilities of the opportunity to glean important information from the flow of conversation. \(^{261}\)

A better solution in most classes may be to allow the learning disabled student to bring a tape recorder. This method has the benefit of recording exactly what is said so that the student with learning disabilities can listen later and glean important information on her own. Tape recordings do have their own drawbacks in this setting, however. The recording may not be clear when multiple conversations take place simultaneously during small group activities or role-playing exercises in which students are far from the microphone. Classmates may balk at being recorded. In these instances, the provision of some notes may be necessary.

Another difficulty in memorializing class discussion occurs when the professor writes spontaneously on white boards, overheads, or ELMO machines. This is one instance in which a classmate could transcribe the notes verbatim and provide them to the student with learning disabilities. Alternatively, new technology allows the professor to save and distribute these “chalkboard” type notes after class. \(^{262}\)

Yet another problem arises if a class exercise includes sharing examples from other students. Often in my class, I pass out samples related to the assignment, we review them in class, and then I collect them. Similarly, a colleague projects student work in a PowerPoint presentation and leads students through a critique of the work. These methods allow the teacher to provide specific instruction on the current assignment but do not allow copying from the sample after class. While these methods are effective for all students, the learning disabled student may need time before or after class to review the samples carefully in order to gain the same level of benefit as other students. The student needs to be
warned not to mimic the samples too closely, or the playing field will have tilted too far in the other direction.

Peer editing in classroom settings creates additional problems for the learning disabled student. As a classroom exercise, peer editing allows students to receive immediate feedback on their work and to check their progress against their classmates, all within a controlled environment in which the professor is available to answer questions. A learning disabled student, however, may not be able to absorb the information in a classmate’s paper quickly enough either to make meaningful comments or to analyze the similarities and differences between the classmate’s work and the student’s own effort. To accommodate this student, the professor may need to collect the papers before class and allow the student with learning disabilities to review the classmate’s paper with more time. This obviously cuts down on the time students have to complete the assignment, which likely works against the learning disabled student and creates additional administrative steps for both students and the professor.

\[\text{c. Professionalism}\]

In some classes, students may lose points for coming to class tardy, failing to turn in homework, not completing administrative tasks on time, or behaving unprofessionally in their dealings with classmates and law school staff. A student with learning disabilities or ADHD should not be excused from these expectations. In one disturbing case, the court granted a preliminary injunction re-admitting a high school student with ADHD because he had received a low, although passing, grade on the final paper, but had been dismissed because of an “Unsatisfactory” mark for effort.\(^{263}\) The student had a history of being unprepared and late with his assignments, missing classes, and failing to meet the faculty’s expectations.\(^{264}\) The court believed it was “reasonably probable that the apparent lack of effort” shown by the plaintiff “was a natural and probable consequence of his learning disorder, rather than an unwillingness to complete his poor, but passing, paper assignments on time.”\(^{265}\) In a related situation, a commentator suggested that a student who has a disorder manifested by “poor time use

\(^{263}\) See Axelrod, 36 F. Supp. 2d at 47–50.  
\(^{264}\) Id. at 48.  
\(^{265}\) Id. at 52.
and planning habits” might be able to work out arrangements with a professor so that being absent or tardy would not count against the student. The commentator suggested having someone record the class, getting notes from a classmate, and meeting regularly with the professor to discuss the course material. The court’s decision in Axelrod and the commentator’s suggestions seem to go too far because, instead of helping the student learn to meet professional deadlines, the professor is providing special treatment that is unavailable to other students and generally unavailable in the workplace.

Such preferential treatment is not required by the ADA. The teacher should not be expected to overlook a student’s shortcomings or to micromanage the student’s schedule to ensure that deadlines are met or format rules followed. A professor with a reasonable student-teacher ratio may well want to help a student create a calendar for completing assignments. In a class with a high student-teacher ratio, however, the professor should not be expected to become the executive assistant for each student with learning disabilities. Actually, in a course like legal writing, the professor is likely to provide all students with a class-by-class list of assignments, ensuring that no one falls too far behind. Going beyond this class-wide help may ask too much of the professor and certainly is not required by the ADA.

7. Requests to Avoid Oral Presentations

Oral communication is an essential lawyering skill and many legal writing classes include some form of formal oral exercise. Most schools require students to present an appellate brief argument; many also require pretrial or trial motion arguments, office reports to a senior attorney, or other in-class presentations. While some students with learning disabilities may dread

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266 Adams, supra n. 4, at 284.
267 See id. at 291 (admitting that such micromanagement places great demands on the professor’s time).
268 See MacCrate Report, supra n. 6; see also Adams, supra n. 4, at 292.
270 Id. According to the 2006 ALWD/LWI Survey, appellate oral arguments were required by 147 schools, pretrial motion arguments by 74 schools, trial motion arguments by 31 schools, oral reports to senior partners by 56 schools, and in-class presentations by 82 schools.
these oral assignments, other such students will likely look forward to them as opportunities in which to excel. They may prefer oral communication and see an appellate argument, for example, as the opportunity to prove how well they understand the course material.

If students with learning disabilities try to avoid oral presentations, they should be reminded that even attorneys who do not pursue careers in litigation or appellate advocacy may find themselves making presentations to boards of directors or legislative committees. Thus, a school generally should not waive the requirement for an oral argument, but some accommodations may be appropriate. A student with learning disabilities may need a few minutes longer than classmates, and judges may need to be informed of the student’s specific disability so that they are patient. A student who stutters or suffers panic attacks in addition to having learning disabilities may be allowed to conduct the oral presentation without classmates present. These accommodations need to be accompanied by a reminder to the student that real judges may not be patient and extra time may not be allowed. If the student with disabilities is carrying a lighter load and the school has the resources, the student could be allowed an extra practice round in a familiar setting with familiar judges, then expected to perform the oral argument under the same conditions as classmates.

8. Requests Regarding Conferences

The individual conferences required in most legal writing courses are an excellent way for students with learning disabili-

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271 See Wong, 192 F.3d at 814 (describing medical student with a learning disability who struggled with oral presentations, showing uncertainty and needing more time to answer).

272 Adams, supra n. 4, at 292; Runyan & Smith, supra n. 4, at 331–332 (noting that some students with learning disabilities may prefer oral communication).

273 Adams, supra n. 4, at 292 (also suggesting using judges whom the student knows or limiting outside observers during the student’s argument).

274 A colleague who attended my presentation of this paper at the LWI conference in Seattle told of an attorney with an obvious and serious stutter who wanted to be a litigator. He convinced his first boss to give him that opportunity. He begins trials by talking to the jury about his disability, admitting that it is worse when he is nervous, and assuring them that as the trial moves forward they will notice his stutter less and less. This attorney has become very successful.

275 2006 ALWD/LWI Survey, supra n. 295, question 82 (indicating that legal writing faculty spend on average almost fifty hours each semester in student conferences that are
ties to work on their writing. Conferences tend to be tailored to each student, so the professor can work in ways that fit a student’s strengths and weaknesses without labeling these as ADA accommodations. A student with processing difficulties may, however, need a few extra minutes for a conference so that she can review short portions of her paper before discussing them, take notes so she remembers ways to improve her writing, and practice proofreading with the professor’s assistance. So that the student is not stigmatized or classmates are not unduly concerned that another student has a longer conference, the student with learning disabilities could be allowed to schedule her conference at a separate time or at the end of a block of conferences.

The scheduling of conferences may be challenging for students who have difficulty organizing their daily affairs and remembering appointments. These are tasks that lawyers must be able to accomplish, and the professor should be wary of providing too much flexibility for the student to learn such critical skills. In one case, a school was not required to provide a student in a physician assistant program additional time when student did not sign up for a physical exam until midway through the testing period. Following this reasoning, legal writing teachers should not be required to add conference times if a student with learning disabilities does not sign up until the last minute.

9. Requests Concerning Exams and Pop Quizzes

Few exams are given in classes that teach practice skills, or that use legal research, writing, or other practice skills to gauge analytical skill. If exams are given, students with learning disabilities should likely receive the same accommodations as in other courses, including extra time, a quiet room, regular breaks, large

required or strongly recommended).

276 Adams, supra n. 22, at 209–211.
278 See id. at 279–281, 326, 346 (suggesting that the professor concentrate on one problem at a time, teach grammar with examples from the student’s work, rather than from a textbook, and ensure that the student leaves the conference with a short written summary of key points covered in the conference).
279 See id. at 283–284 (noting that a student who experiences problems in proofreading may benefit from doing so while the professor monitors her progress).
280 Dubois, 950 F. Supp. at 760.
print, and colored overlays. The accommodation given depends on the goal of the exam.

When law school exams are intended to test the student’s doctrinal knowledge or problem-solving ability (i.e., not intended to test speed), allowing a student with learning disabilities more time on exams is an appropriate accommodation. In this situation, the professor designing an exam presumably expects students to be able to complete the exam in the time available. Thus, providing extra time for students with learning disabilities to complete the exam is a reasonable accommodation. Most often, students are provided with double time or time-and-a-half, but the time allowed depends on the severity of the student’s disability, and each accommodation should be considered individually.

If the goal of an exam is to test the student’s ability to perform under strict time constraints or to test how much work a student can produce in a specified time, then allowing a student with learning disabilities extra time would undermine the exam. In that instance, restricting all students to the set time would be appropriate. Of course, the faculty member must prove that the goal of the exam is to test speed, which is difficult.

The student with learning disabilities does not have the right to request a certain exam format. As discussed earlier, a law school was upheld in its decision to require essay exams. The Office of Civil Rights rejected the student’s request to be able to outline answers rather than write them in full, deferring to the law school’s rationale for providing essay exams. Similarly, a court upheld a medical school’s decision not to allow a student with dyslexia to supplement answers on a multiple choice exam by writing essays or responding to oral questioning.

281 See also Askew at AALS, supra n. 2 (bar exams); Van Tol at AALS, supra n. 2 (LSAT).
282 See e.g. Kaltenberger, 162 F.3d at 436 (explaining the situation of a student in a medical program who was allowed extra time and other accommodations but still failed).
283 See also Badgley, 2000 U.S. Dist. LEXIS 16925 at *2 (“[LSAT] is timed to ensure that the results can be interpreted fairly across a broad range of candidates.”).
284 On the LSAT, some students receive just a few minutes extra for each section. See Van Tol slides on LSAT accommodations, www.law.uoregon.edu/faculty/srowe/ADA (accessed Jan. 8, 2007).
285 Rothstein at AALS, supra n. 2.
286 Id. (noting that it is rare for a professor to be able to demonstrate that speed is being tested, though the claim is often made).
287 Supra sec. II(C).
288 Villanova, 16 N.D.L.R. ¶ 170.
289 Stern, 220 F.3d at 909 (noting that the school’s accommodations were sufficient and
Different, administrative difficulties are created by a professor who gives pop quizzes. The student who receives extra time on exams should receive extra time on a pop quiz, but should the student come early (defeating the surprise) or should the class wait while the student finishes? Other accommodations, such as a quiet room, may not be feasible in the pop quiz situation. If the pop quiz is given as a way to test students’ preparation for class, other methods are readily available. Professor Sophie Sparrow recommends requiring students to submit homework assignments as the “ticket” to class. This alternative ensures that students are prepared, does not devote class time to the quiz, and keeps the playing field level for students with disabilities.

10. Additional Requests

A law school is not required to provide a special class for learning disabled students. Moreover, a special class may segregate and stigmatize the participants by identifying them to their peers. As one expert has noted, the school has “no legal duty to re-teach, repackage, or reformulate” the curriculum. Any time the effort required of the professor becomes overwhelming, the school should ask whether it is—in essence—asking the professor to teach the student a special class geared to that student’s disabilities. That effort is not required.

A student should not be allowed to switch to a different instructor simply because of the student’s disability. This request is most likely to occur in a year-long course in which students continue both semesters with the same instructor. Unless the request can somehow be tied to the student’s disability, the school has no duty to comply.

Individual tutoring for a student with learning disabilities would be required only if tutoring is available to all students. If tutors are available, for example through office hours open to all students, those students with disabilities should be encouraged to

that other students may benefit from the requested modification as well).

290 Sophie Sparrow, Presentation, Maximize Class Time: Give Students Specific Written Directions (LWI Conf., Seattle, Wa., July 2004).
291 See Adams, supra n. 22, at 205.
292 Stanberry & Grossman, supra n. 15.
293 See Amir, 184 F.3d at 1029 (upholding university’s decision not to assign disabled student to a new clinical supervisor because the request was not related to the disability).
294 Stanberry & Grossman, supra n. 15.
take advantage of their services. Furthermore, if the professor assigns tutors to work with struggling students, a student with learning disabilities may meet that threshold.

A professor should know the student’s specific disability only if necessary for deciding whether an unusual accommodation is reasonable. While every student’s situation must be considered individually, no particular reason exists for the professor herself to know a student’s disability if the types of accommodations requested are within the range the professor has previously discussed with the disability coordinator and decided are reasonable. Certainly there must be some point in the decisionmaking process at which someone understands both the disability and the academic goals of the course, but that person could be the assistant dean for student affairs or the on-campus evaluator, not necessarily the professor.295

A student should not be able to identify herself on a paper or exam as disabled. Each accommodation must be related to the student’s disability,296 and identification does not seem to meet this test. In addition, identification could create preferential treatment.297

VII. CONCLUSION

As law schools welcome increasing numbers of students with learning disabilities, professors and administrators need to know how to respond to requests for disability accommodations. Knowing the requirements of the ADA is especially important when a request seems unreasonable because it would give the student an

295 Mr. Grossman suggests that students not reveal their disability unless they will request accommodations. Id. A corollary to this suggestion would be not to notify the teacher of a particular disability unless necessary. A legitimate question is whether the student who wants to reveal this information is hoping that the teacher will be sympathetic. Mr. Grossman’s general admonition to students would seem appropriate in this circumstance: “your status as a person with a disability will do very little or nothing to excuse poor performance.” Id.; see also Garcia v. St. U. of N.Y. Health Scis. Ctr., 2000 U.S. Dist. LEXIS 13561 at *35 (E.D.N.Y. Aug. 21, 2000) (noting that preferential treatment based on a disability is not a reasonable accommodation, but merely lowers the standard of performance).

296 See Amir, 184 F.3d at 1029; Stern, 220 F.3d at 908–909 (upholding school’s denial of a requested accommodation when the student could not show a nexus between that accommodation and the student’s disability).

297 Question posed at AALS and response by Rothstein at AALS, supra n. 2; see 29 C.F.R. app. pt. 1630 (explaining that the ADA “does not guarantee equal results, establish quotas, or require preferences favoring individuals with disabilities over those without disabilities”).
unfair advantage, alter the fundamental requirements of the course, unduly burden the school, or keep the student from learning fundamental skills required to practice law. Faculty and administrators also need to understand what learning disabilities are and how they affect a student’s ability to learn, so that a student with a learning disability is not brushed over as someone who is lazy or unconcerned with fulfilling class requirements.

Applying the ADA to requests in courses requiring writing, legal research, and other practice skills can be much more complicated than providing accommodations in large lecture courses. By carefully considering the fundamental requirements of each course and knowing examples of reasonable accommodations in various scenarios, professors and administrators can provide reasonable accommodations while ensuring that all students learn the essential elements of the course.

Students with learning disabilities can—and do—succeed in law school and in practice. They will continue to do so as long as their reasonable requests for accommodations are met with reasonable responses.
Using a Literary Case Study to Teach Lawyering Skills: How We Used Damages by Barry Werth in the First-Year Legal Writing Curriculum

Jeanne Kaiser
Myra Orlen

First-year law students arrive for their first day of classes with varying perceptions about the practice of law and what it means to be a lawyer. Although some students have first-hand knowledge of the profession based on their work in a law office or from family members who are attorneys, many students base their entire conception of what it means to be a lawyer on images from popular media. Thus, many students open their books on the first day of law school filled with visions created by Law and Order, Court TV Network, and Legally Blonde. Most law school professors would agree that these images are woefully inaccurate pictures of the actual practice of law; however, most first-year classes have as little in common with the actual practice of law as do the adventures of Bobby and Eleanor in The Practice. Instead, traditional first-year courses are taught through a study of appellate decisions, using the Socratic approach to lead students, it is hoped, toward an understanding of legal doctrine. Classes often focus, at least in the beginning of the year, on concepts that are obsolete in many jurisdictions, such as estates in land and demurrers. Consequently, a student’s original perception—that lawyers spend their days making eloquent speeches in the court room—might be replaced by an equally inaccurate perception that lawyers spend all day holed up in a room reading legal decisions from prior centuries.

* © 2006, Jeanne Kaiser and Myra Orlen. All rights reserved. The Authors teach in the Legal Research and Writing Department of Western New England College School of Law, Springfield, Massachusetts.
1 Law and Order (Wolf Films, Inc. 1990–present) (TV series).
Legal research and writing programs combat these conflicting images by creating legal writing problems that are both instructional and reflective of the real world of legal practice. A good legal writing problem serves the twin goals of teaching basic research, writing, and analytical skills, and introducing students to the professional life of a lawyer. One way to achieve these goals is to use one of the excellent literary accounts of complex litigation written for the enjoyment and education of the general public as a basis for legal research and writing assignments. These books provide students with accurate, if sometimes painful, pictures of complicated litigation, along with the very real stories of people who are caught up in that litigation. Moreover, not only are such books filled with potential legal writing assignments, but the students who read them know that these assignments are drawn from the real-world experiences of actual lawyers.

For two years at Western New England College School of Law, we successfully used a literary account to acquaint our students with an authentic picture of litigation, while still teaching the rudiments of legal research and writing. The book we used was Damages, Barry Werth’s gripping account of a medical malpractice case.

This Article details our use of Damages in the first-year legal research and writing program at our school. Section I describes the pedagogical objectives that we sought to achieve by using the book and reviews the literature about the best practices in teaching. Section II describes the substance of the book and, briefly, how we used the book both to teach discrete topics and as a source of legal research and writing assignments. Section III details our evaluation of the use of the book and how it served to achieve our teaching goals. Finally, Section IV provides our conclusion and plans for the future.

I. PEDAGOGICAL OBJECTIVES

We decided to use Damages in our first-year legal research and writing classes to serve several goals. Primarily, we wanted to
provide our students with a more accurate perception of litigation than is commonly provided in the media and popular culture. We wanted the students to see that litigation is not a process that begins at the outset of a one-hour television show or at the beginning of a two-hour movie and is resolved by the end, always with a predictable result and usually with the good guys prevailing. We wanted them to see that litigation is, instead, usually a long, sometimes tedious process, in which a case will, at times, lie fallow for months and at other times will consume the lives of all involved. We also wanted them to see that a lawsuit usually involves no clear heroes and villains and that the outcome is usually mixed. Finally, we wanted our students to see the hard, hard work and intense persistence that goes into being a good lawyer. We were intrigued with how the eagle-eye view of a lawsuit provided by Damages could help us achieve this goal.

Moreover, we believed that the use of a narrative like Damages could help accomplish the pedagogical goal of law schools everywhere: to teach students to “think like lawyers” by showing them how lawyers think. Damages is only one among a growing number of books devoted to telling “lawyer stories.” Using lawyers’ stories in the law school curriculum is important because those stories show lawyers applying doctrine in the real world. While traditional courses using casebooks containing edited appellate decisions have obvious value in teaching doctrine and analysis, the use of well-written attorney narratives provides a realistic backdrop for exposing students to the practice of law. Using such narratives in the first-year legal research and writing curriculum allows students to step into the shoes of practicing attorneys, while learning the skills that they need to become successful lawyers.⁶


⁷The use of attorney stories or narratives is not limited to legal research and writing courses. Lawyer stories also belong in the teaching of legal ethics. E.g. Carrie Menkel-Meadow, Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics, 69 Fordham L. Rev. 787 (2000). Attorney stories have been used to teach torts, Tom Baker, Teaching Real Torts: Using Barry Werth’s Damages in the Law School Classroom, 2 Nev. L.J. 386 (2002), and civil procedure, Kevin M. Clermont, Teaching Civil Procedure through Its Top Ten Cases, Plus or Minus Two, 47 St. Louis U. L.J. 111 (2003). In fact, at the University of Missouri School of Law at Columbia, Damages has been used in a multidisciplinary seminar, encompassing such topics as writing, torts, and alternate dispute resolution. Melody Richardson Daily, Chris Guthrie & Leonard L. Riskin, Damages: Using a Case Study to Teach Law, Lawyering, and Dispute Resolution, 2004 J. Dis. Res. 1.
Next, we thought that the use of a narrative like *Damages* would illustrate for students the difference between writing as a lawyer and writing for other purposes. Our students often struggle because the skills that they need for legal writing are different from the skills that they needed for the writing they did in their undergraduate programs. Students often have difficulty understanding why the skills they used so successfully in other contexts are not working for them in their legal research and writing assignments.

A narrative account such as *Damages* illustrates why different writing techniques and styles are necessary for different audiences and forms of communication. Students can easily see the difference between an author’s purpose in writing a book meant to tell a story to a popular audience and a lawyer’s purpose in writing a brief, a client letter, or a motion for one of the clients in that same story. The students can further see that every author is required to make choices, whether the writer is an attorney writing on behalf of, or to a client, or an author making dramatic and narrative choices for a book’s readers. A nonfiction account of a real case thus can provide the opportunity to teach about the writer’s voice and audience.

The next advantage of using a legal narrative is to provide a source of legal research and writing assignments. Many good ways exist to develop a legal research and writing problem; however, we hoped that using a narrative from a real case would add a level of genuineness to our assignments. We felt that by using *Damages* as a source of assignments, not only would we be able to achieve our usual goal of constructing writing and research projects of increasing complexity, but we would also be able to enrich that process by drawing upon a factual backdrop far better than any we could have created ourselves and one that students would know came straight from the real world.

Finally, we hoped that using *Damages* would give us the opportunity to enrich our curriculum beyond the rudimentary tasks of teaching research and legal writing. Legal narratives provide the opportunity to discuss topics based on the social issues presented by the narrative facts, as well as topics related to broader lawyering issues. Topics may include developing a theory of the

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9 We were able to discuss what happens when something goes wrong in the provision of health care and there is no clear answer as to why. In this context, we discussed tort law
case, finding an expert witness to support that theory, handling ethical issues that arise during the course of litigation, addressing quandaries presented by the settlement process, and grappling with difficulties that arise when clients come from a different cultural or economic class than the lawyer.\textsuperscript{10}

**II. DESCRIPTION OF THE BOOK**

*Damages* is the story of a childbirth that went horribly wrong. In April 1984, Donna Sabia went to Norwalk Hospital in Connecticut to deliver twin sons. Her pregnancy until that point had been uneventful, but after a brief and tumultuous labor, one of the twins, Michael, was stillborn. The other, “Little Tony,” was born with brain damage so serious that it left him severely disabled.\textsuperscript{11} He is blind and cannot walk, talk, understand language, or even perform the most basic self-care.\textsuperscript{12} Werth recounts the story of the birth and the ensuing medical malpractice litigation in riveting detail. He reports the perspective of all parties involved in the litigation: the twins’ parents, the obstetrician who delivered the twins, the hospital executives, and the nurse and nurse-midwife involved in the birth, as well as all the attorneys involved in the complex litigation. The book follows the litigation from its inception, two and one-half years after the twins were born. It then tracks the case through the discovery process, including multiple expert depositions, two mediation attempts, and final settlement of the case for over seven million dollars.\textsuperscript{13}

At the end of the book, the medical cause of Michael’s death and Little Tony’s disability remains unknown. All aspects of the litigation, however, are fully explored. Werth reveals, for example, the impact of the lawsuit on Donna and Tony Sabia’s marriage and their struggles to raise their disabled child. Werth also focuses on the disruption to the life and career of the obstetrician, Maryellen

and whether it represents the best way to provide for individuals who suffer bad medical outcomes.


\textsuperscript{11} Werth, supra n. 5, at 14–20.

\textsuperscript{12} Id. at 245.

\textsuperscript{13} Dr. Maryellen Humes, the obstetrician, settled the claim against her for $1,350,000, almost the entire amount of her malpractice insurance policy. Id. at 212. Norwalk Hospital settled its claim separately following mediation. Id. at 365.
Humes, who delivered the twins but was involved in Donna Sabia’s care for less than two hours after the phone call alerting her to come to the hospital.

Throughout the book, the parties and their attorneys grapple with questions that should interest any aspiring lawyer, including the role of truth in a medical malpractice lawsuit, the effect such lawsuits have on medical malpractice insurance coverage and how a doctor practices medicine, how the amount and availability of liability insurance can drive a lawyer’s strategy, and the ethical and professional questions faced by the lawyers for all parties at each juncture of the litigation. The book also offers a very readable, nuts-and-bolts dissection of complex litigation, and provides the uninformed reader with a full picture of the way those lawsuits operate.

We were able to accomplish our primary goal—giving our students a true-to-life vision of litigation—simply by having them read the book. *Damages* captures the highs and lows of litigation in a way that no number of lectures or personal anecdotes could. By immersing the reader in the personal lives of all the parties—lawyers, plaintiffs, and defendants alike—the author provided a picture of litigation that is missing from the innumerable appellate decisions that students read during their first year of law school.

Our goal of enriching the curriculum was also largely accomplished by having the students merely read the book. Once the students had read *Damages*, we had a common point of reference for discussion of any number of topics, from the structure of the courts, to civil procedure, to issues of professionalism, to the benefits of alternate dispute resolution. This commonality gave us the opportunity, when we were teaching the basics of the legal system during orientation, to refer the students to an example with which they were all familiar. We also used the book in our orientation sessions that focus on professionalism. For example, during orientation, we divided the students into small groups for discussion. The issues raised in *Damages* provided a springboard for discussions about the ways that lawyers do behave, the ways that lawyers should behave, and the overall purposes of the American system of justice. A book like *Damages*, which contains so many am-

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14 We achieved this by having incoming students read the book over the summer. This was effective for two reasons. First, because *Damages* is 375 pages of often dense reading, the students benefited by getting it out of the way before they began their daily reading assignments for class. Second, when students arrived at orientation, we already had that common point of reference available.
Using a Literary Case Study to Teach Lawyering Skills

biguities, is ideally suited for encouraging good discussions on these issues.

Throughout the year, we brought the book into our discussions of many issues raised in class. For instance, during a negotiation exercise, we reminded the students of the two mediations in the book and the way that the approaches of the two different mediators led to two very different results. We also used the book to discuss questions of litigation strategy, the management of witnesses, and the general ebb and flow of litigation. The book provided a common point of reference, which the students knew was genuine, to serve as a basis for these discussions. Later in the first year of this program, we further enriched our curriculum by inviting author Barry Werth to present a lunchtime lecture. He gave the students insight into his writing of the book, his own opinions about the lawsuit, and the fate of the Sabias since the book was published, thus satisfying many points of the students’ curiosity.

As appealing as these uses were, our main use of Damages was as a source of legal writing and research assignments. We used Damages as an assignment source because we thought that the students would see these assignments in a different light than they do other first-year assignments, which they might wrongly believe are purely academic exercises chosen to accomplish vague or unimportant goals. We believed that knowing that the assignments came from real problems faced by real people during the course of litigation would help the students see the important role of legal research and writing in success in litigation and their need to master those skills.

We had no difficulty developing assignments from the contents of the book. The very filing of the Sabia case provided us with an excellent series of beginning assignments. The students know from their reading that the Sabias did not consider suing Dr. Humes or the hospital immediately after the birth. To the contrary, the Sabias were grateful for the sensitivity that they believed the medical personnel showed them in the aftermath of the tragedy. Donna Sabia went so far as to bring Little Tony into the hospital to show him off to the nursing staff.\textsuperscript{15}

Their attitude changed after Donna Sabia attended a support group for parents of a disabled child and met another mother whose child had been delivered by Dr. Humes. This mother, who had been embroiled in a messy lawsuit with Dr. Humes, strongly

\textsuperscript{15} \textit{Id.} at 29–30.
urged Donna and Tony to consult with her lawyers. The Sabias followed her advice, but not until two and one-half years after Little Tony’s birth. Consequently, the first issue in the Sabias’ lawsuit was whether the statute of limitations barred the malpractice claim.

We were able to devise three assignments from the Sabias’ case, each building upon the other, to help our students develop rudimentary research and writing skills. Prior to using Damages, our first legal research and writing assignment had almost always been to write an analysis of a fairly straightforward statute. We find this provides students with a relatively easy way to jump into legal analysis and communicate that analysis on paper. The statute-of-limitations problem that arose at the beginning of the Sabia case allowed us to use the lawsuit portrayed in Damages without departing from our usual plan. For the assignment, we simply had the students find the Connecticut statute of limitations and write a one- or two-paragraph memorandum about whether the Sabias’ action was time-barred, and if not, how long the law firm representing the Sabias had to file the case.

Prior to using Damages, we typically added a level of complexity to our next assignment by requiring the students to do the more advanced task of synthesizing a statute with cases. Again, we did not have to depart from this plan because of our decision to use Damages as a source for the assignment; however, this time, we did have to depart from the plot of the book. We created an imaginary character who attended the same support group as Donna Sabia. A newspaper article alerted her to the possibility that her child’s disability was related to medication she had been prescribed during her pregnancy. Because the child was already four years old, the students had to interpret case law to determine if any exception exists to the three-year statute of repose that Connecticut imposes on malpractice actions.

While the answer was straightforward, this assignment required the students to read

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16 Id. at 37–45.

17 The Connecticut statute provides that parties alleging medical malpractice have two years from the date of the incident, the date of discovery of malpractice, or the date that malpractice reasonably should have been discovered in which to bring a suit. The statute also contains a three-year statute of repose that bars all claims brought over three years after the date of the incident. Conn. Gen. Stat. Ann. § 52-584 (West 1991).

18 See id.
Using unedited cases to determine whether the suit could be brought. The students were required to communicate their answers and their reasoning in writing to a fictional senior partner in a law firm representing the child.

The final and most complicated assignment in this trilogy related to an issue that the actual Sabia litigation addressed: whether the Sabias’ suit was timely even though it was brought more than two years after Little Tony’s birth. The “discovery rule” is written into the Connecticut statute of limitations, and a number of appellate level cases in the state provide a good interpretation of the rule. Generally, our goal with our third assignment is to force the students to cope with a more complex fact pattern and both to find and to use a number of cases that are either analogous to, or distinguishable from, the case that they are handling.

Using Damages for this fairly routine first-year assignment provided some additional and interesting intricacies for the students. Typically, in an assignment of this type, we would give the students a fictional narrative that included limited facts, such as those relating to the reasonableness of the Sabias’ failure to recognize that malpractice might have caused Little Tony’s injuries until he was over two years old. Instead, however, we had the students glean the facts relevant to discovery from the text of Damages.

By employing Damages, this assignment more closely paralleled the practice of law than our usual canned provision of the facts to the students. Werth included in the book excerpts from both Donna and Tony Sabia’s depositions in which they testified about how their original faith in their doctors was transformed into their ultimate conclusion that Little Tony had been harmed by medical malpractice, and the students had to derive the facts from those depositions. While this method of deriving facts had the disadvantage of being more difficult for the students, it had the distinct advantage of showing the students how lawyers gather facts and then put them together to construct their arguments and legal theories. It also helped us accomplish our goal of illustrating that the students must tailor their writing for the audience who will receive it. Many students were tempted to use the dramatic and informal writing style that Barry Werth used in conveying the

20 Werth, supra n. 5, at 87–103.
story of Little Tony’s birth and its aftermath. We were able to show them how this writing style was not necessarily appropriate in a legal memorandum.

Taken together, these three statute-of-limitations assignments accomplished our pedagogical goal of giving the students a growing understanding of statutory interpretation and the need to synthesize statutes and cases when solving a particular problem for a client. We hope that they also gave the students an understanding of why statutory interpretation and legal synthesis are so important and how they fit into the course of litigation. The statute of limitations was especially important in this set of assignments because we reminded the students that if the lawyers were unable to show that the Sabias complied with the filing deadline, it would be fatal to their entire claim.

We also used Damages for one more research and writing assignment in both years that we have used the book, though we significantly changed the assignment in the second year. The first year that we used Damages, we had the students write a longer objective memo stemming from a claim of negligent infliction of emotional distress (NIED) advanced by the Sabias’ lawyers on behalf of Donna Sabia. In the text, the claim remained subject to an undecided motion for summary judgment when the lawsuit was settled.21 Consequently, the issue was never resolved. This issue caught our attention, not just because it was unresolved in the book, but because NIED writing problems are common in first-year legal writing curricula. Such problems are well-suited to the first-year class because NIED claims generally require the students to analyze a number of relatively straightforward factors and apply them to the factual situation presented to them.22

The problem generated by Damages, however, as is often the case when real-world problems are used in an academic setting, turned out to be somewhat more than we bargained for. Rather than providing a standard first-year factor-analysis problem, it presented a number of issues of first impression that are being

21 See id. at 331.
22 The tort of bystander NIED was first established in Dillon v. Legg, 441 P.2d 912 (Cal. 1968). In that case, the California Supreme Court determined that recovery was available if the plaintiff suffered emotional trauma from observing an accident, and (1) the plaintiff was near the scene the accident; (2) the shock resulted from a contemporaneous observation of the accident; and (3) a close family relationship existed between the plaintiff and the primary victim of the accident. Dillon, 441 P.2d at 920. Other jurisdictions have adopted this or similar standards. See e.g. Dziokonski v. Babineau, 380 N.E.2d 1295 (Mass. 1978); Sinn v. Burd, 404 A.2d 672 (Pa. 1979).
vigorously litigated in Connecticut’s trial courts, without guidance from the appellate courts. First, although in *Damages*, the lawyers involved in the case viewed the claim as a case of bystander emotional distress, the lower courts in Connecticut have engaged in a continuing dispute about whether a woman giving birth to her children is truly a bystander to the event. Most lower courts have determined that the woman is not a bystander and that an NIED claim involving childbirth should be viewed as a direct injury.23 Direct-injury NIED claims in Connecticut are analyzed in a completely different way than bystander cases. Thus, the students’ first task was to determine whether this was a case of direct victim or bystander NIED, a difficult assignment given the lack of binding appellate authority.

Then, because a number of trial level cases do view childbirth NIED claims as bystander cases,24 the students had to analyze whether recovery was available to Donna Sabia under this theory. This raised yet another thorny problem for first-semester law students because of the unsettled nature of this aspect of the law in Connecticut. The lower courts disagree about whether bystander NIED claims are cognizable when the plaintiff’s distress stems from witnessing an event related to medical malpractice. Connecticut came late to the national trend of allowing bystander claims for close family members.25 Nonetheless, dicta from a case decided before Connecticut adopted bystander liability makes it extremely unclear whether such claims are available in medical malpractice cases.26 Connecticut’s trial level courts have seen a spate of litigation about this issue, with about half of those courts deciding that such claims are available and half deciding that they are not.27

25 In 1988, twenty years after California established the tort of bystander NIED, see supra note 23, Connecticut declined to follow California’s example when considering such a claim in the medical malpractice context. Maloney v. Conroy, 545 A.2d 1059, 1061 (Conn. 1988). Maloney involved a woman who watched her mother die over the course of several days due to alleged malpractice by her doctors. 545 A.2d at 1060. The Connecticut Supreme Court did an about-face eight years later in Clohessy v. Bachelor, 675 A.2d 852 (Conn. 1996). In that case, which involved a mother who watched as her child was struck and killed by a car, the court decided to follow the national trend and adopt the tort of bystander NIED. Clohessy, 675 A.2d at 860.
26 Maloney, 545 A.2d at 1063–1064.
This lack of resolution in Connecticut courts added significant difficulty for the students, both in analyzing the problem and in organizing their memos.

This difficulty was not entirely bad, however. While the problem was more difficult than we initially anticipated, it provided an excellent lesson in the importance of precedent along with the persuasive value of trial level cases. The students witnessed the disarray that results when a hotly contested issue remains unresolved at the appellate level. They also were able to weigh the relative value of various trial level decisions. Some of those decisions reflected hasty and shallow analysis by the courts, whereas others involved a careful study of precedent and thoughtful dissection of the law. Both types of opinions gave the students a model—first of what their work should not look like, and second of what they should aspire to in their own work.

In the end, we decided that this assignment, while valuable, was too complex for the place and time we had given it in our curriculum. The students received the assignment at the end of their first semester, while their mid-term exams were looming. The assignment demanded much of their time and intellectual energy at a point when they were anxious to begin preparing for their exams. Because of these concerns, we recast the assignment as the persuasive brief that forms the basis of the students’ year-end moot court argument. We also simplified the problem by making the father, not the mother, the plaintiff in the NIED claim. This eliminated the problem of having to determine whether the plaintiff was a bystander or a direct victim of the NIED: the father clearly was a bystander. Thus, we eliminated this complication while retaining the complexity of the problem and the breadth of the nonbinding authority. Fortunately for our teaching goals, the Connecticut Supreme Court has not yet resolved whether bystander NIED recovery is available in a medical malpractice case.

III. EVALUATION

The advantages of working with a narrative like Damages were quite apparent throughout both years that we used the book. It provided a real-life picture of litigation to brand new members of the legal profession. It also raised numerous issues involving legal ethics, professionalism, and justice in the adversarial system. Students were able to view their clients as whole people, with problems and lives beyond the litigation. The students also knew that
the legal research and writing problems we used were completely authentic and, in fact, had been raised and argued by real lawyers in a real case. *Damages* also provided a backdrop for many conversations throughout the year about a wide variety of topics: mediation and negotiation, zealous advocacy, and stereotypes of all sorts of people from the working-class Sabias to the polished hospital executives.

One unanticipated benefit of working with *Damages* was that it has great value in the overall curriculum and, thus, can help integrate legal writing instruction with doctrinal instruction. *Damages* contains lessons for many law school classes besides legal research and writing. It can be used in torts, insurance law, health law, professional responsibility, alternate dispute resolution, and civil procedure, just to name a few. A number of our faculty at Western New England College read the book after we assigned it to the first-year students. Of those, quite a few committed themselves to discuss the book in their classes. Shared use of a text fostered both greater collegiality and greater collaboration between doctrinal and legal research and writing faculty.

Working with a narrative text did present some drawbacks. The biggest of these was “Sabia fatigue.” At a certain point in the semester, the students were anxious for assignments that did not involve the Sabias or medical malpractice. This problem was probably exacerbated by the depressing and emotionally intense nature of the Sabia case. We addressed this in the second year of our use of the book by assigning the first three *Damages*-related problems in the first semester and leaving the larger assignment on NIED until the end of the second semester. In between, we used lighter assignments, for instance, a copyright problem pitting the creators of South Park against the creators of Star Wars.28

Even the weariness over the Sabias’ case provided us with teaching moments. We asked our students to remember that most litigation lasts years, rather than a semester. We also reminded them that when they enter the profession, they will not only have to write motions and memos about clients; they will have to meet with them and answer their phone calls as well. In other words, in

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28 The Star Wars assignment was inspired by Susan McClellan and Connie Krontz’s presentation on July 1, 2002, at the 2002 LWI Conference in Knoxville, Tennessee. The presentation was entitled “Effectively Teaching Arguments: What Works and What Doesn’t: Teaching Coherency in Three-Part Harmony.” Susan McClellan is the Director of the Externship Program at the Seattle University School of Law, and Connie Krontz is a member of the legal writing faculty at the Seattle University School of Law.
addition to legal research and writing, new lawyers must learn patience and fortitude.

We were also somewhat concerned that the book provides too cynical a picture of the practice of law for new law students who are, we hope, somewhat idealistic and committed to obtaining justice for their clients. *Damages* portrays the adversarial system in full swing. For instance, when the respective attorneys searched for experts, they did not search for expert testimony about what really happened; rather, they searched for experts who could assign the blame where it was most advantageous for their clients. Similarly, none of the lawyers seemed particularly concerned that Dr. Humes settled her case for almost her entire insurance policy limit, even though the evidence developed during discovery appeared to exonerate her from any responsibility for the bad outcome.

Despite our concerns, few of the students seemed upset to learn that litigation would not necessarily lead them on a search for the truth. To the contrary, this seems to be one area in which the media has successfully educated the public on the role of the lawyer. Students typically believed that the *Damages* lawyers acted appropriately, as long as they vigorously represented their clients and stayed within the bounds of the ethical rules. Most students seemed quite comfortable with the prospect of fulfilling a similar role in the future.

**IV. CONCLUSION**

The use of *Damages* enriched the first-year curriculum sufficiently to justify using it for a third consecutive year, though we continue to tweak the way in which we use it. In fact, we look forward to the possibility of using it four years in a row so that every student in either the part-time or full-time program at Western New England College will have the book as a common point of reference. Our use of *Damages* as a basis for first-year legal research and writing assignments will leave our students with both the research and writing skills they need for their new profession and a more accurate picture of the real world of the practicing lawyer.
BUILDING CREDIBILITY IN THE MARGINS: AN ETHOS-BASED PERSPECTIVE FOR COMMENTING ON STUDENT PAPERS

Kirsten K. Davis*

In 2003, the National Commission on Writing in America’s Schools and Colleges, sponsored by the College Board, issued a report discussing the state of writing instruction in American education.1 The Commission concluded that the teaching of writing at all levels of education is the “most neglected” subject in the core curriculum.2 In the effort to raise the priority of writing, the Commission recommended that educators ensure that writing assessment3 is “fair and authentic.”4


2 Natl. Commn. on Writing in Am.’s Schs. & Colleges, supra n. 1, at 3.

3 “Assessment” in composition circles takes on two distinct but related meanings. First, when discussing formal writing “assessments” such as statewide writing competency testing for high school students, “assessment” means the process of “deciding what to measure, selecting or constructing appropriate measurement instruments, administering the instruments, and collecting information.” James D. Williams, Preparing to Teach Writing: Research, Theory and Practice 297 (3d ed., Lawrence Erlbaum 2003). Second, when discussing basic principles about how to teach writing, “assessment” often means the specific way in which a particular piece of writing is evaluated. Charles R. Cooper & Lee Odell, Evaluating Writing: The Role of Teacher’s Knowledge about Text, Learning, and Culture 299 (Natl. Council of Teachers of English 1999). In this sense, evaluation does not mean “grading.” Grading is “a final judgment about how well or poorly one has written a particular piece of writing,” whereas “[e]valuation . . . can happen at any point in the writing process” and does the detailed responsive work grading does not. Id. at viii. This Article focuses on evaluation rather than grading.

“Fairness” in the context of the writing course means that writing assignments “measure what was actually taught,” “produce valid inferences about knowledge and skill mastery,” are “administered appropriately,” and are “evaluated properly and accurately.”\(^5\) When applied to writing assessment and evaluation, “authenticity” means that assignments designed to assess student writing “faithful[ly] replicat[e] . . . the circumstances of process-orient[ed] writing instruction” and “honor’ elements of the writing process.”\(^6\)

Determining fairness and authenticity in writing instruction is not limited to looking at the appropriateness of assignments in relation to course content or observing the teacher’s conduct in the classroom.\(^7\) Rather, evaluating “fairness” and “authenticity” in the context of teaching writing also requires giving attention to the more individualized interactions between teacher and student, particularly when teacher and student are playing the roles of reader and writer. When legal writing professors read and evaluate student papers, for example, they make student-specific “judgments . . . about students and their progress”\(^8\) in becoming competent members of the legal discourse community.

At the same time, however, students are making their own judgments—not only about the content of the writing course but also about the degree to which the evaluator possesses the traits to be fair and authentic in the evaluation. In other words, in their interactions with their legal writing professor, students judge whether their professor possesses the wisdom relevant to the area of writing being taught, whether she is trustworthy as a guide

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\(^5\) Williams, supra n. 3, at 308.

\(^6\) Maurice Scharton, The Politics of Validity, in Assessment of Writing: Politics, Policies, Practices 53, 59 (Edward M. White et al. eds., Modern Lang. Assn. of Am. 1996). The concept of “authenticity” comes from expressivist composition theory and focuses on the individual’s commitment to both the content of the writing and the writing process. Id. As to individual commitment, “authenticity” means that the writer has convinced the reader that “the writer believes in, has a personal stake in, or is otherwise intrinsically invested in the writing.” Id.

\(^7\) For example, based on the instructions given and the standards described, an observer could sit in the writing classroom, review the class materials, and make judgments about whether the classroom teaching and writing assignments given to students are appropriate. An outside observer could determine whether a writing assignment was “fair” by looking at what learning outcomes it measured and how it was administered and evaluated. Another observer might question “authenticity” by asking whether students were guided through each step of the writing process—researching, prewriting, writing, revising, and editing—during the course. Classroom instruction and assignment design are outside the scope of this Article, however.

\(^8\) Williams, supra n. 3, at 297.
through the writing process, and whether she exhibits goodwill toward her students. That is, students’ judgments about the fairness and authenticity of the legal writing course relate not only to the content to which they are exposed, but also to their perceptions about the ethos—the intelligence, trustworthiness, and goodwill—of their teacher. So, fairness and authenticity in legal writing instruction are not merely a product of what is being taught and evaluated in the course but also are a product of how students construct who is doing the teaching and evaluating and in what spirit those activities are being done.

Constructing the legal writing professor’s identity as an ethical (or unethical) actor is not a solitary process; rather, it is a collaborative process that happens through the interaction between teacher and student. One of the places where this interaction between student and teacher takes place is in the recursive writing process: the student completes a writing assignment, the teacher provides written comments on that assignment, and the student responds to those comments by making revisions.

Not surprisingly, the commenting process provides a robust, yet routine, context in which legal writing professor ethos is constructed. Commenting is a “richly complex” and “highly context dependent” discourse that plays a significant role in the relationship between legal writing professors and their students. Legal writing professors give extensive, detailed feedback on student writing (perhaps more extensive than that given in other areas of writing instruction), and through this detailed commenting, they interact with the text to help guide the student to make revisions and to improve his or her writing on future assignments. “[P]roviding written individual feedback on law students’ papers is one of the most important, if not the most important, teaching moment legal writing professors have.” In this important process, based primarily on the textual “conversation” between student and teacher, students make critical and enduring decisions about their

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9 Id. at 316.
10 General composition teaching resources suggest that a “reasonable goal” for commenting is five minutes per paper, id. at 317, whereas legal writing professors report an average of forty-five minutes to one hour of commenting per legal writing paper, Anne Enquist, Critiquing and Evaluating Law Students’ Writing: Advice from Thirty-Five Experts, 22 Seattle U. L. Rev. 1119, 1142 (1999).
12 Enquist, supra n. 10, at 1129.
professor’s ability to be a fair and authentic guide into legal writing.

The legal writing professor’s ethos is important in the first-year writing course. First, most first-year law students are novices in the legal discourse community; thus, they are forced to rely on a purported expert—their legal writing professor—for much of the information they receive about the substance, organization, and style of legal writing. Moreover, because first-year students are required to write for an often imaginary future audience of judges, attorneys, and partners, students rely heavily on their professor as a “fair and authentic” stand-in for that unfamiliar audience. Finally, in many cases, feedback on a legal writing assignment is the first feedback and grade students get in law school, and numerous studies reflect the extreme stressors placed on law students as a result of grade competitiveness. Thus, the perceived competence, trustworthiness, and goodwill of the legal writing professor are important both for helping students enter the discourse community and also for helping students deal with law school stress, continue to accept instruction, and remain motivated.

Because of the dynamics of legal writing instruction, legal writing professors need to be concerned about how their comments on student papers enhance or detract from the professor’s positive ethos, impact interactions with the students after giving written feedback, and affect the students’ motivation to use the comments to improve the quality of their writing. Although articles have been written that give guidance to legal writing professors on the process of commenting, understanding commenting on student

13 For more on how novices navigate entry into a “secondary” discourse community, see James P. Gee, Literacy, Discourse, and Linguistics: Introduction and What Is Literacy? in Literacy: A Critical Sourcebook 525, 527 (Ellen Cushman et al. eds., Bedford/St. Martin’s 2001) (“Discourses are not mastered by overt instruction ... but by enculturation (apprenticeship) into social practices through scaffolded and supported interaction with people who have already mastered the Discourse ... ”).

14 See e.g. Gerald F. Hess, Heads and Hearts: The Teaching and Learning Environment in Law School, 52 J. Leg. Educ. 75, 78 (2002) (“Legal education literature documents a number of disturbing effects of law school on law students. ... A primary stressor is the grading and ranking system.”).

15 Studies looking at the link between teacher ethos and student learning suggest that if students perceive their instructor’s responses to their work as fair and authentic, based on wisdom and goodwill, then confidence can be built even if the students struggle with the writing. Conversely, the same studies imply that if the students perceive the evaluation as unfair, disingenuous, mean-spirited, or otherwise lacking in goodwill, the students will resist instruction. See infra nn. 42–50 and accompanying text.

16 See generally e.g. Berger, supra n. 11; Enquist, supra n. 10; Anne Enquist, Critiquing Law Students’ Writing: What the Students Say Is Effective, 2 Leg. Writing 145 (1996);
writing as a rhetorical process is a relatively unexplored area. Thus, this Article explores the rhetorical process by which a legal writing professor’s *ethos* is constructed and maintained in the commenting process and theorizes an “ethos of commenting,” which can offer legal writing professors a relationship-based, student-centered, and skill-building orientation toward the commenting process.

Understanding how commenting works to create or undermine the teacher-student relationship lies at the juncture of *ethos*, writing evaluation theory, and theories about marginalia, so this Article explores each of these in turn. First, the Article reviews the general concept of *ethos* and explores how it is constructed. Second, the Article reviews the existing literature underlying the practice of commenting on writing, both in general and in the specific context of legal writing, and explores how *ethos* is explicitly and implicitly relevant to composition theory. Third, the Article addresses the concept of marginalia—the annotations made in the margins of a text—and examines how marginalia interacts with the printed text and affects the construction of the marginalist’s *ethos*. The Article then draws upon these somewhat independent categories of exploration to develop eight theoretically driven principles that, if followed, can create a positive “*ethos of commenting*” in the legal writing instruction context and recommends related practical strategies for evaluators to construct a desirable commenting *ethos*. The conclusion suggests other research that might help further understanding of a constructive “*ethos of commenting*.”

I. COMMENTING, *ETHOS*, AND MARGINALIA

Commenting is a kind of discourse and is a rhetorical practice. “As writing teachers, we are unavoidably engaged in a rhetorical transaction with our students when we read and respond to student work.” In this discourse, the teacher uses the margins of the student text in the hopes of “speaking” to her student audience, attempting to persuade them to become involved with the text, to improve the writing, and to grow as a writer. Part of that persuasive appeal is the teacher’s *ethos*.

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17 Berger, *supra* n. 11, at 57.
18 *Id.* at 60.
Ethos impacts the relationship that develops between legal writing professors and students through the commenting process in three important ways. First, ethos is not a static concept comprising only qualities intrinsic to the speaker or writer; rather, ethos is constructed through exchanges between reader and writer. Thus, in the commenting process, ethos is ever-changing, contingent, and contextual; is built upon group memberships; and directly affects students’ learning. Second, writing evaluation literature has shown that elements related to ethos—expertise, authority, and tone, in particular—are relevant in composition and legal writing contexts. Finally, an examination of marginalia—the responsive, abbreviated commentary appearing in the margins of a document—reveals that the margins are a perfect location for a legal writing professor to interactively construct her “self” and the ethos accompanying that “commenting” self. In particular, this intersect of marginalia and ethos raises questions of ownership of the writing, authority, and voice in the text; the propriety of taking an oppositional tone in marginalia; and the necessity of role-playing in the commenting process.

A. The Concept of Ethos and Its Connection to Legal Writing Instruction

Often considered the most potent and important of Aristotle’s three artistic modes of persuasion—ethos (ethical appeal), logos (logical appeal) and pathos (emotional appeal)—ethos is classically considered the “persuasive force of a person’s character” or “argument from [an individual’s position of] authority.” In modern theory, ethos is also a location where an “individual’s . . . identity is constructed.” As the product of a negotiation between speaker and audience, writer and reader, ethos is contingent upon the particular characteristics of the speaker and the audience, and, in the context of education, plays an important role in stu-

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20 McCroskey & Teven, supra n. 19, at 90.
21 John S. Patterson, Ethos and the Correction of Compositions, 9 Teaching English in the Two-Year College 176, 176 (1983).
22 Halloran, supra n. 19, at 60.
dents’ perceptions of and willingness to engage in the learning process.

1. Ethos Generally

Ethos has three dimensions: intelligence, also known as “good sense,” “practical wisdom,” or competence; character, sometimes identified as trustworthiness; and goodwill, often identified as “caring” or “intention toward the receiver.” Generally, ethos, or “source credibility” as it is known in social scientific circles, is considered to be “a very important element in the communication process” and is “especially important in securing assent.” One way for speakers to secure assent is to “assess[] the characteristics of an audience and construct[] the discourse in such a way as to portray oneself as embodying those same characteristics.” Creating a sense of identification between speaker and audience is paramount to the persuasive appeal.

The goal of the speaker or writer in appealing to ethos is to create in the audience a strong and favorable impression of her own character, or, in other words, to create a “believable” and trustworthy identity. The speaker or writer not only does this with the reputation she brings to the rhetorical situation but also through her communication choices in the situation itself.

24 See e.g. McCroskey & Teven, supra n. 19, at 90 (“[G]enerally theorists have agreed that [ethos consists of] ‘competence,’ . . . ‘trustworthiness,’ . . . [and] ‘goodwill.’ ”).
25 Id.
28 Id. at 388.
29 See Kenneth Burke, A Rhetoric of Motives 55 (U. Cal. Press 1969) (“You persuade a [person] only insofar as you can talk his language by speech, gesture, tonality, order, image, attitude, idea, identifying your ways with his.”).
30 Halloran, supra n. 19, at 60.
31 The “rhetorical situation” is “a natural context of persons, events, objects, relations, and an exigence which strongly invites utterance[] . . . it needs and invites discourse capable of participating with the situation and thereby altering its reality.” Lloyd F. Bitzer, The Rhetorical Situation, in Contemporary Rhetorical Theory: A Reader 217, 219–220 (John L. Lucaites et al. eds., Guilford Press 1999).
2. Ethos and Group Membership

Ethos does not lie solely in the individual; rather, it is a “complex set of characteristics constructed [and sanctioned] by a group”\(^{32}\) based on that group’s values and beliefs. At these “point[s] of intersection between speaker or writer and listener[s] or reader[s],” ethos is constructed.\(^{33}\) Because ethos is a social act in a particular cultural context,\(^{34}\) the nature of the community determines an individual’s character; the writer’s group membership as well as the audience’s group identity play significant roles in the development of the writer’s ethos. Accordingly, understanding a particular writer’s ethos requires examining the “discursive communities [she is] mediating within and between.”\(^{35}\)

A writer’s membership in a particular group constructs her credibility, competence, and goodwill. Certain characteristics can be attributed to particular kinds of persons and groups,\(^{36}\) and, where other group members demonstrate certain ethical characteristics, a member of that group can be deemed to have those same qualities, whether or not the individual actually possesses those qualities herself.\(^{37}\) Through the acts of the writer’s group members, the ethos of both the group and each individual is expressed and shaped.\(^{38}\)

A writer’s ethos is not only dependent on the characteristics of those in her group, it is also impacted by the particular characteristics of the audience. That is, audiences are not passive recipients of a speaker or writer’s predetermined ethos. The nature of the audience is key in determining how important an individual speaker’s or writer’s ethos will be to that audience. When the audience lacks knowledge of the particular content of a text or speech or does not perceive that the subject of discussion is relevant to the audience members or the real world, the “total personality” or ethos of the speaker or writer becomes the focus of the reader’s re-

\(^{32}\) Reynolds, supra n. 23, at 327.


\(^{34}\) Reynolds, supra n. 23, at 327.

\(^{35}\) Id. at 333.

\(^{36}\) Halloran, supra n. 19, at 62.

\(^{37}\) Id. at 63.

\(^{38}\) Id.
This situation occurs when the audience “comes to the communication with little or no propensity to respond to the content of the message,” and thus the “personality of the [writer] emerges” as the only other reason the readers have for becoming involved in the substance. Conversely, when the reader possesses sufficient knowledge to evaluate the message content and can understand the immediacy of the content to his or her own life, the writer’s personality is subordinated in the persuasive process, and the ethos of the writer becomes less important.

Law students come to the legal writing classroom with a variety of preconceived notions about the law school and legal practice communities. Because legal writing professors simultaneously embody the role of law professor and lawyer (arguably more acutely than any other professor in the first-year curriculum because of legal writing’s strong emphasis on practice skills), students construct the professors’ personas based upon their memberships in these communities. Thus, legal writing professors take on the ethos of those communities, both local and global, and are impacted by what students believe about those groups.

Relatedly, the membership of first-year students in the “novice” community plays an equally significant role in constructing professor ethos. Arguably, because law students have little first-hand knowledge of law and legal practice, in those first months of law school, students rely heavily on the personality of their professors in engaging their intellectual curiosity and compelling them to become involved with the material. As students acquire more knowledge about the law and legal practice, however, they are more equipped to independently evaluate course content and information and understand its applicability to legal practice. As a result, ethos or personal persuasion becomes less important as students mature in the law, although arguably it always remains relevant to the professor-student interaction.

3. Ethos and Learning

Ethos is pedagogically important because it is directly related to how students perceive their relationships to their teacher and to

40 Id. at 122.
41 Id. at 122–124.
the learning process. The more credible a teacher is perceived to be, the more persuasive the teacher is and the more likely students are to learn from that teacher. With respect to competence, the more competent a teacher is perceived to be, the more likely students are to make themselves available to receive additional information from that teacher. Not surprisingly, “[c]ompetent teachers explain complex material well, have good classroom management skills, have the ability to answer student questions, and communicate effectively.”

With respect to character or trustworthiness, Aristotle’s second category of ethos, if students perceive their teacher as less trustworthy, they are likely to perceive him as less credible. “A teacher high in trustworthiness offers rational explanations for grading, treats students fairly, gives immediate feedback, and never embarrasses students or is verbally abusive towards students.”

Finally, the students’ perception of the teacher’s caring or “goodwill,” as measured through the teacher’s “empathy, understanding, and responsiveness,” is positively related to student perceptions of learning. Perceptions of caring are critical to success in the classroom:

Students will most certainly be more likely to attend class and listen more attentively to a teacher who is perceived to have their interests at heart [, and] it is more likely that the student will engage in more effort to learn what the teacher is attempting to teach.

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44 Id.
45 Teven & Hanson, supra n. 42, at 40.
46 Id.
47 Id.
48 Jason J. Teven & James C. McCroskey, The Relationship of Perceived Teacher Caring with Student Learning and Teacher Evaluation, 46 Commun. Educ. 1, 2 (1997); see also Teven & Hanson, supra n. 42, at 50 (“Teachers should attempt to . . . make more explicit caring statements to their students; . . . teachers will be perceived as more credible.”).
49 Teven & McCroskey, supra n. 48, at 8.
Interestingly, caring is not “the opposite of malicious intent. . . . [I]ndifference [alone may] make the student more suspicious of the teacher[]’s motives.”

For legal writing professors, the links between ethos and learning discussed above should be particularly relevant. Certainly, if legal writing professors orient themselves toward student success and satisfaction, ethos is critical in that it plays an integral role in attendance, effort, and enthusiasm toward the course. And, in the first-year writing course where students are making valiant but often unsuccessful attempts to master legal discourse, shoring up students’ positive perceptions is crucial.

B. Commenting on Writing: Perspectives from Composition and Legal Writing Pedagogy

Comments on student written work are seen generally as an “effective pedagogical tool,” and commenting on student writing remains an integral part of the writing teacher’s duties. Evaluation through commenting is important because it

requires us to answer all the hard questions that students should ask but often do not know, or dare, to ask: What specifically, seems strong about my work? What is not so strong? What might I do to make some progress, either in revising this draft or in working on a comparable assignment in the future?

Legal writing professors view the commenting process as critical to the student’s growth and development as a legal writer. Legal writing professors see the written comments as a way of helping students to get to know “what’s expected in the legal culture” and to get specific feedback on their work. Anne Enquist’s foundational article on commenting notes that the process of commenting is “the best way . . . of communicating with the student about [the] writing,” and is the “ultimate [means] for one-on-one . . . teaching.”

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50 McCroskey & Teven, supra n. 19, at 92 (quoting James C. McCroskey, An Introduction to Communication in the Classroom 110–111 (Burgess Intl. Group 1999)).
51 Williams, supra n. 3, at 314.
52 Cooper & Odell, supra n. 3, at viii.
53 Enquist, supra n. 10, at 1125–1132.
54 Id. at 1128 (quoting survey respondent Ruth Vance).
55 Id. at 1128–1129 (quoting survey respondents Cathleen Wharton and Jill Ramsfield); see also Mary Kate Kearney & Mary Beth Beazley, Teaching Students to “Think Like Lawyers”: Integrating Socratic Method into the Writing Process, 64 Temp. L. Rev. 885, 897
Although composition studies literature consistently concludes that there is no one right way to respond to and comment upon writing so long as one knows how to “choose and apply [comments] constructively,” certain techniques associated with good commenting have emerged. First, teachers should avoid the temptation to engage in stylistic and overly formalistic editing and instead give feedback that deals with the classic rhetorical concerns of invention, audience, and purpose. Second, others point out that purely objective evaluation of student writing is impossible because teachers cannot separate themselves from the contexts that surround the evaluation of a particular piece of writing; thus, evaluators need to “develop a higher level of consciousness, a kind of ‘thoughtfulness,’ often captured in the phrase ‘reflective practice.’” Relatedly, Linda Berger offers that legal writing professors should “use reflection[ ]” to help students become better writers.

A writing professor’s reflective practice should include considering the ethos necessary for successful commenting. Overall, research from the composition and legal writing fields suggests that the most effective ethos for commenting is one that displays expertise, objectivity, and a positive attitude, and empowers students in the writing process. By being sensitive to how students perceive (1) the professor’s authoritative position in the commenting process and (2) the tone of the professor’s comments, legal writing professors can develop these positive ethos characteristics in their commenting practice.

First, professors must display expertise while avoiding an overly authoritative persona. Students want, perhaps even demand, evaluator expertise—students want comments that are specific, detailed, and include examples. In other words, students expect the professor to have enough knowledge to give them specific guidance. Anne Enquist’s 1996 study of how law students per-
ceived the written comments of their legal writing professors confirmed that law students want in-depth explanations and examples.  

An additional facet of expertise is accuracy: students want their professors to be accurate commentators and to remember from one draft to the next what has been said about the students’ writing. In one study on the effectiveness of professor feedback in writing, a student noted that he had corrected the mistakes the professor had suggested and “still got marked off for them.” In the legal writing field specifically, veteran professors suggest that making mistakes in commenting, even on aspects of the writing as simple as grammar or citation form, can result in a loss of credibility with the student audience.

Professors can create a negative ethos in the commenting process by adopting an “authoritarian stance” in their commenting practice. To be better evaluators, professors should consider all of their “selves” they bring with them to the commenting process and subordinate the professor self that is “socially invested with power and authority.” One role to bring to the commenting process is the “student self” role. By engaging the role of the student self, the writing professor makes it her priority to recall the experience of not being in full control of her own writing and possessing incomplete knowledge about the writing process. By remembering this positioning, the professor can create a persona or ethos that is supportive and constructive and that empowers students to take ownership of and responsibility for their own writing rather than an ethos that makes the student the object of coercive comments.

Certainly, maintaining the balance between the authoritarian self and the student self in commenting is a careful process. As

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62 Enquist, supra n. 16, at 188.
63 Everhart, supra n. 61, at 38 (quoting student survey response).
64 Enquist, supra n. 10, at 1138.
66 Id. at 23.
67 Id. at 22 (asking, “[w]hat if we . . . placed ourselves in the role of student” when commenting on papers).
68 Id. at 27. Kearney & Beazley also note that
the legal writing teacher must also strive to respond in ways that encourage the students’ independence as legal writers. . . . It is all too tempting for the writing teacher simply to edit the students’ writing and tell them what revisions to make. Students do not learn as much from editing because they do not have to think and revise independently—the teacher has done the revision for them.

Kearney & Beazley, supra n. 55, at 899–900.
noted, students want an expert to help them learn the legal writing genre, so professors must exhibit enough expertise to provide helpful guidance. On the other hand, students need to be in charge of their own progress towards attaining their professional voices. Simply mimicking teacher writing and following explicit directions, while important to the learning process, is not enough for students to mature as legal writers; rather, they must be able to mature into professionals who recognize their own power to transform their ideas into recognizable legal documents. So, professor comments must be directed toward helping students claim this power. Thus, the student-self role for the writing professor is not one that lacks knowledge and experience or that takes a passive role in the teaching process; rather, it is one that is careful to position itself “alongside” instead of above the student and that is sensitive to the unique, interactive relationship the professor has with the student in the writing course.

Second, professor ethos is impacted, not surprisingly, by the way the students perceive the tone of the comments. Commenting on writing involves much more than the student understanding the comments; rather, the student is directly impacted by the tone of the comments. Student perception of a writing professor’s goodwill, that is, the professor’s concern for the learning experience of the student and her attention to fairness in the evaluating process, plays a significant part in the student’s construction of the teacher’s ethos. To establish and maintain goodwill, professors should articulate objective standards, adopt a “coaching” persona rather than a “judgmental” one, use discretion in the kind of and number of comments they write, and generally adopt a positive approach to teaching writing.

Balancing feedback between constructively critical comments and comments that point out the students’ writing strengths is important to maintaining a teacher-student relationship that keeps students open to receiving feedback. Students prefer positive comments to sarcasm and view positive comments as helping them improve their writing. Even more important to the study of ethos, student perceptions of the helpfulness of the comments is more powerful than whether the comments do actually help the stu-

69 See Berger, supra n. 11, at 71 (noting the rhetorical position of reflective responding as “next to”).
70 Patterson, supra n. 21, at 177–178.
71 Id.
72 Everhart, supra n. 61, at 22–23.
dents improve their writing. Particularly relevant to teaching the first-year legal writing course, where confidence in both writing skills and overall academic capability can be at an all-time low for students, student confidence in a stressful writing situation can be improved by positive reinforcement. And, for many students, simply having the confidence that they can be successful in the writing course can spell the difference between a productive writing-revising process and a disastrous one.

With regard to tone, Anne Enquist’s 1996 study showed that students characterized a negative tone as one that was impersonal, gave no encouragement, or was “distant.” Her subsequent survey of legal writing professors concluded that “positive feedback [is] an effective teaching technique” and warned against “sarcastic, angry, or overly negative comments.” “Over and over again [law students] said that they needed to know what they were doing right . . . partially because they needed the encouragement and partially because they needed help identifying their strengths so that they could build on them.” Terri LeClercq also concluded that law students respond best to positive comments and that, even though critical comments should be included in the commenting process, “feedback should be weighted toward the positive.”

In sum, both composition and legal writing literature point out that an evaluator creates an ethos for herself by her commenting choices. Because this commenting traditionally takes place in the margins of the student paper, the Article now turns to a discussion about the concept of marginalia, the new text that is created when a reader responds to an existing text by writing in its margins. An exploration of marginalia demonstrates that it is a unique discursive form that creates a dialogue between reader and writer and is a site for constructing ethos.

73 Id.
74 See Hess, supra n. 14, at 77 (“Large percentages [of law students] believe they were more articulate and intelligent before beginning their legal education.”).
75 Enquist, supra n. 16, at 168–173.
76 Enquist, supra n. 10, at 1132, 1148; see also Teven & Hanson, supra n. 42, at 41 (“[T]eachers who use verbally aggressive messages . . . are perceived as being less competent and caring.”).
77 Enquist, supra n. 16, at 168; see also Everhart, supra n. 61, at 25 (noting “[p]ositive paper markings heighten student[s’] awareness of their writing strengths”).
78 LeClercq, supra n. 16, at 422.
Making annotations in the margins of texts is an age-old practice dating back two-thousand years and is “among the most powerful weapons of textual supplement and mediation.” Filtered through the lens of the New Rhetoric movement, the modern process of creating marginalia represents a “transactional relationship” between reader and writer, annotation and text. Because marginalia is the reader’s response to the writer’s words that encroaches on the original writing’s physical space, it generally is seen as both oppositional and authoritive as well as transformative of the original. Because of these characteristics, marginalia is a location for constructing and maintaining the identity of the teacher-as-annotator.

H.L. Jackson, a contemporary scholar taking a comprehensive historical, theoretical, and critical view of marginalia, describes good marginalia as having the attributes of intelligibility, relevance, and honesty and also possessing four characteristics that make it a unique genre of discourse. First, marginalia is responsive; in making margin comments, the reader is engaged with the text and responsive to it. Marginalia has no “independent significance” or autonomy; it is prompted by and exists only because of the original text. Second, marginalia is personal, expressing the views of the annotator. Third, comments in margins are evaluative.
tive of the original text. Finally, the comments are economical because they are subject to the “physical constraints of the margins.”

Marginalia generally occupies three physical spaces in a modern text. First, comments can be placed in the side margins and generally represent the reader’s “running commentary” on the text. These marks can include simple marks of attention, such as underlining; marks of approval or disapproval, such as a check; and words or phrases, which can vary in length and can indicate anything from resistance to engagement. Second, comments can be placed at the beginning of the text, frequently “act[ing] as a mediator between the text and later readers.” Finally, comments can be placed at the end of the text to assess the work in its entirety. Regardless of its physical location, marginalia is both responsive and inextricably connected to the original text.

New Rhetoric’s focus on transactional relationships makes marginalia—a discursive form that “records a transaction between two minds”—fit neatly within the New Rhetoric framework. First, marginalia does more than convey the reader’s response to the original text; it manages the responses of subsequent readers. “Even as [it] mediates between text and reader, [marginalia] produces fresh text that itself requires annotation.” Because of its interpretive power, it impacts the way in which the author of the original text interprets his own work. Thus, marginalia satisfies New Rhetoric’s vision that writing is a process that creates knowledge, not just communicates it.

dent papers because the identity of the teacher is known to the student. However, whether anonymous or known, the marginalist still expresses a personal view.

89 Id.
90 Id.
91 The term “modern” is used here because until the middle of the nineteenth century, interleaves, or the blank leaves of paper bound between printed leaves, were provided in many texts for the purpose of accommodating reader annotations. Jackson, supra n. 80, at 33.
92 Id. at 28.
93 Id. at 29–31.
94 Id. at 26.
95 Id. at 36.
96 Id. at 81.
97 Id. at 210.
98 Slichts, supra n. 80, at 10.
99 Id.
100 Berger, supra n. 82, at 156.
Second, marginalia is the type of “reflective conversation”\textsuperscript{101} that New Rhetoric views as critical to the writing process. “Put[ting] together” the meaning of a particular text requires interaction between “reader, writer, and text, all of which are embedded in context and language.”\textsuperscript{102} Finally, New Rhetoric suggests that one type of reading is “rhetorical,” where readers comment on and evaluate the text, “imagining a full rhetorical context.”\textsuperscript{103} Because margin comments are “in constant and complicated dialogue with the centered text and the world beyond” the paper,\textsuperscript{104} they reflect that kind of rhetorical reading.

Looking at marginalia from the viewpoint of creating legal writing professor ethos, concerns about marginalia as a mechanism for creating a positive teaching ethos become apparent. First, marginalia, which includes “marking essays,” is generally oppositional.\textsuperscript{105} It introduces “a new voice”\textsuperscript{106} into the text that is often one of defiance and challenge; the annotator approaches the process of making margin comments as one of “raising objections” to the text.\textsuperscript{107} Thus, the ethos of the annotator, almost by definition, starts as one of “rival,” which is not an ethos particularly conducive to teaching.

Second, this rival positioning in the margins can shift the position of power and authority in the document to the margins, creating an authoritarian ethos for the annotator.\textsuperscript{108} Although the original text is literally and figuratively “centered” on the paper and is generally considered the “principal” text,\textsuperscript{109} marginalia can decenter the original text, effectively “engag[ing] the reader in a lively debate with the centered text.”\textsuperscript{110} This oppositional and defiant identity gives the annotator considerable power because every

\begin{itemize}
  \item \textsuperscript{101} Id.
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} Id. at 171.
  \item \textsuperscript{104} Slights, supra n. 80, at 67.
  \item \textsuperscript{105} Jackson, supra n. 86, at 218.
  \item \textsuperscript{106} Jackson, supra n. 80, at 21.
  \item \textsuperscript{107} Jackson, supra n. 86, at 218; see also Ralph Hanna III, Annotation as Social Practice in Annotation and Its Texts 178, 183–185, 184 (Stephen A. Barney ed., Oxford U. Press 1991) (suggesting that annotation is an aggressive form of writing that “reconstitutes the [text’s] audience” as well as “delimit[s] [the author’s] possible meaning and relevance”).
  \item \textsuperscript{108} Hanna notes that “questions of annotation always come back to issues of communities and institutions, and consequently questions of power.” Hanna, supra n. 107, at 184.
  \item \textsuperscript{110} Slights, supra n. 80, at 8.
\end{itemize}
comment is a means of self-assertion and alteration of the original text.\textsuperscript{111} In addition to opposing the text, marginalia exercises authority over the original text and can manage a subsequent reader's response to it.\textsuperscript{112} If the annotator is already occupying a position of power, then the marginalia can take on even more significance and power in controlling the conversation. Not surprisingly, readers of annotated texts can sense the power differential; historically, the supplemental texts that arose from annotations have been "generally viewed with deep suspicion."\textsuperscript{113}

Linda Berger's exploration of using a reflective rhetorical model for responding to student writing reveals that teacher commentary carries "considerable rhetorical weight"\textsuperscript{114} and "inevitably and automatically undermines the authority of the student." Having lost authority as a writer, the student has lost control over the subject and the text."\textsuperscript{115} This authoritative power of marginalia over a legal writing student's text has been recognized: "margin/interlinear comments do 'fragment' the memo for the student . . . both physically and analytically. Writing in the margins may hinder the revision process by being a kind of physical or psychological barrier to the student's interaction with what he or she originally wrote."\textsuperscript{116}

Conversely, taking a "reflective rhetorical" stance\textsuperscript{117} can lessen the oppositional and authoritative ethos that might otherwise be developed in margin comments. That is, legal writing professors should respond to student writing in a way that places responsibility on (or gives power back to) the student for making both stylistic and substantive revisions.\textsuperscript{118} The tone of this kind of evaluation

\textsuperscript{111} Id. at 90.
\textsuperscript{112} See Jackson, supra n. 80, at 90 (noting that an annotator can "tak[e] over authorial functions").
\textsuperscript{113} Slight, supra n. 80, at 68.
\textsuperscript{114} Berger, supra n. 11, at 72. Teresa Phelps also points to the importance of developing one's own professional writing voice: "[L]egal writing is essentially an ongoing conversation and that re-visioning the act of writing as a lawyer in this way requires the development of a personal, professional 'voice.' One cannot converse without an authentic voice." Teresa Godwin Phelps, The New Legal Rhetoric, 40 S.W. L.J. 1089, 1089—1090 (1986).
\textsuperscript{115} Berger, supra n. 11, at 68 (quoting Jane Gebart Auten, A Rhetoric of Teacher Commentary: The Complexity of Response to Student Writing, 4 Focuses 3, 4—5 (1998)).
\textsuperscript{116} Enquist, supra n. 10, at 1140 (quoting survey respondent Jane Kent Gionfriddo).
\textsuperscript{117} Berger, supra n. 11, at 59.
\textsuperscript{118} Id. at 71.
creates the perception that the teacher “rhetorically sit[s] next to the writer, collaborating, suggesting, guiding, [and] modeling.”

A legal writing professor can cultivate this rhetorical persona by focusing not on her role as a legal writing professor but on “playing” the roles of various readers and evaluators with whom students will interact in their legal careers and adopting those personas. Linda Berger suggests that the legal writing professor can assume the identities of “credible and persuasive coach, more experienced fellow writer, average legal reader, or critical expert.” Even in taking on the role of the critical expert, the legal writing professor can adopt an identity that is not harsh and demanding but rather one that encourages the student to meet the high expectations of the expert. In any of these roles, the teacher relegates her professor persona to the background and instead brings to the fore the “real” audience of legal writing—clients, judges, and other lawyers.

What is most important about the professor’s role-playing function, however, is her ability to establish her ethos, or in other words, her credibility, in the role she chooses to play. Without credibility in the role, the professor will have a more difficult time persuading her student audience to adopt her viewpoint on the quality of the writing. In particular, the legal writing professor can establish credibility in the evaluative process by (1) sharing her experiences in the role she chooses to play in the evaluative process, and (2) reflecting, in both the margin comments and in her face-to-face interactions with students, that she shares “important values” with them. For example, if a writing professor wants to take on the role of “judge” in evaluating a student’s motion for summary judgment assignment, she might share in a classroom discussion her legal practice experiences as a judge reading and deciding summary judgment motions, as a litigator writing and responding to motions, or as a judicial clerk to a trial court judge reading and evaluating summary judgment motions.

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120 Id. at 80.
121 Berger suggests that it is important for a legal writing teacher to “establish her authority” to speak in a particular role. Id.
122 See id. at 81–82 (noting that a writing teacher can “establish common ground” with students by “gathering information . . . about their reading and writing values” as well as sharing her own).
123 Id. at 80.
Part of this same discussion could include asking students to step into the reader role and asking them what they would value in a "well done" motion. By emphasizing the ways in which the commenting role mirrors the professor’s “real life” experiences, the professor gains credibility as someone who can speak authentically in that role; by establishing a shared set of values around the writing assignment, the professor can create a sense of shared purpose.

Another way marginalia theory informs the construction of the legal writing professor’s ethos is through its recognition of “certified expertise.” Certified expertise results when an annotator borrows evaluative standards from other sources and identifies the sources of those ideas as part of the annotating process. The content of the legal writing course sets up the expectation that the professor will use certified expertise in the commenting process. First, professors offer students multiple texts that describe legal method, analysis, content, and citation. Additionally, when students learn legal analysis, they learn that legal writing draws heavily on certified expertise in the form of citation to authority to establish legal rules. Thus, by teaching students how to synthesize rules and cite to legal precedent, legal writing professors create an expectation in students that authority for particular points, propositions, or rules can be “found” in sources that are available for citation.

By looking to certified expertise as one way to respond to student texts, legal writing professors can take advantage of this expectation in their student audience. For example, drawing upon certified expertise in a margin comment may include giving the student a specific rule reference to a legal writing style manual for a suggested change to the student’s writing style. Because these types of changes often seem to be subjective changes that are a matter of personal preference rather than of discourse convention, the reference to an outside source can manage the way students respond to the comments by giving them an objective way to assess the evaluator’s authority and the marginalia’s validity.

H.L. Jackson warns, however, that certified expertise must be balanced with marginalia that has “an air of spontaneity,” which reinforces that the comments are honest and “passionate expres-
sion[s], [which demonstrate] proof of engagement.” 126 In the legal writing context, this suggests that comments that are overly formulaic, refer only to an outside source, and do not reflect an individualized response to the student’s specific text will be less effective and perceived as inauthentic. 127 Simply, if the legal writing professor does not appear engaged with the student’s writing, no amount of certified expertise will overcome the loss of goodwill that results from perceived disinterest or inattention.

II. PRINCIPLES FOR A POSITIVE COMMENTING ETHOS

In the context of legal writing instruction, the professor’s ethos is developed significantly in the margins of the student paper and affects the student’s perceptions of the professor’s fairness and authenticity. Not surprisingly, this ethos is not necessarily dependent on the ethos the professor has developed with the student in the classroom; a new, commenting ethos—one where the legal writing professor can develop a new persona with new characteristics—emerges in the space between what the student has written in the original text, what the professor has written in the margins, and how the student responds to that marginalia. At this intersection, where the student receives direct and often critical feedback on the highly personal act of writing, the student develops her perception of the intelligence, character, and goodwill of the professor as an evaluator. Based on the professor’s choices along with the rhetorical context in which those choices are made, a positive or negative ethos can be created in the margins that can ultimately impact the legal writing professor’s ongoing relationship with the student and the student’s success in acquiring legal writing skills.

Eight principles and some associated practical strategies for developing a positive commenting ethos in the legal writing evaluation context are provided below.

1. A commenting ethos is not static; it is the product of constant negotiation between reader and writer occurring in a broad context.

The negotiation of the professor’s ethos takes place when the professor reads and responds to the student’s writing and the stu-

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126 Id. at 210.
127 See Scharton, supra n. 6, at 59.
dent then reads the comments and reacts to them. Moreover, this negotiation occurs in a context that includes not only the specific boundaries of the writing assignment, the interactions in the writing classroom, and the information—both intellectual and social—drawn from law school environment, but also encompasses the whole of the student’s life experiences. As a result, the student’s pre-existing beliefs about the ethos of the professor (and perhaps of a larger legal writing program as well) help to form the context in which the marginalia and the main text interact and in which the student constructs his or her perception of the legal writing professor’s ethos.

Because of ethos’s negotiated status, legal writing professors taking an ethos-based approach to commenting should remember that they have significant power—within the larger contexts affecting the writing process—to shape a “virtual,” transactional relationship between teacher-as-reader and student-as-writer that is distinct from but interdependent with the classroom relationship. Yet, they should recognize that the student may or may not perceive this person as the same person who interacts with the student in the classroom because the professor’s role has changed from teacher to reader and evaluator in the commenting process.

Legal writing professors can honor the principle that ethos is negotiated by first imagining the commenting process as a dialogue between teacher and student and considering what type of commenting persona would invite the student into that dialogue. For example, in advance of commenting on papers, legal writing professors should attempt to collect information about their students, such as through the traditional “personal essay,” to get to know the students and better understand the individual contexts in which the comments will be received. Then, to the extent possible, comments can be tailored to those individual needs. Moreover, legal writing professors should assess the dynamics of the classroom and be aware that the margins of student papers may help to rehabilitate a negative classroom perception or, conversely, work to destroy a positive one. An awareness of the negotiated status of ethos and the students’ role in that negotiation can make the teacher more effective in offering margin comments.
2. A positive commenting ethos develops from employing rhetorical strategies that highlight the teacher’s membership in the professional legal writing community.

An ethos that appeals to students arguably leaves the professorial, authoritative persona out of the mix; the professor’s membership in the “legal writing professor community” is subordinated to other, more effective “selves” such as the “fellow legal reader” self. Arguably, developing an ethos that emphasizes the power imbalance between professor and student will do little to persuade the students that a legal writing professor’s comments are worth considering. Rather, it is that professor’s membership—or perceived membership—in the larger legal writing community that, in large part, makes her a credible source for legal writing instruction. 

Because students want to envision themselves as members of the legal community, marginalia that overtly reflects the expectations of that community creates a sense of authenticity in the professor’s comments. Thus, using margin comments to emphasize that community membership—the “fellow legal reader” role—develops a successful commenting ethos. Specifically, comments focusing on (1) the substantive content of the writing (for example, focusing comments on the quality of rule synthesis or fact analysis), (2) the expectations of the “real-world” audience (for example, beginning a comment with “A judge would expect . . .”), and (3) the purpose of the writing (for example, highlighting the differences between predictive and persuasive writing) places emphasis on the professor’s membership in the legal practice community and her competence within it.

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128 This experience might be different for “doctrinal” faculty who do not have a skills focus for teaching. Their perceived membership in the academic community associated with the particular doctrine they teach, as evidenced through scholarship, might be more meaningful to students in creating a positive ethos. However, even though perhaps a different legal community, students still likely expect authentic membership in that broader relevant community, and a perceived lack of membership would still be considered negative. This is not to say that legal writing professors’ expertise as teachers and scholars of legal writing is unimportant as a general matter. The point here is that in the margins of a student paper, membership in the practice community can be particularly relevant.

129 Anne Enquist notes that students like role-playing comments that remind them of the “real-world” reader they will have for their professional writing. Enquist, supra n. 16, at 185–186.
3. *Sensitivity to the power relationship between teacher and student and how it affects the way the student responds to the margin comments is critical to negotiating a perception of goodwill and competence.*

Because the professor generally holds a perceived superior position of knowledge and control in the learning environment, students bring that perception with them to their interaction with the professor’s comments. In other words, students tend to not see the marginalia as reader responses; rather, they see them as evaluator critiques. Because of this power imbalance, the mere physical presence of professor comments in the margins of student writing can result in an unintended flip-flop of the marginalia to the center of the text. Unless legal writing professors intend to divest students of their ownership in the text they have written, professors must pay careful attention to develop an *ethos* of commenting that reflects the trustworthiness of a responsive reader rather than the demands of an evaluator.

Attempting to take on the role of a “fellow legal reader” rather than of an evaluator can create an *ethos* that appeals to students. Assuming the personality of the “fellow legal reader” may help the professor phrase comments in the form of reader responses.¹³⁰ For example, an evaluator response might be “This is sub-standard analysis. Use analogies,” whereas a “fellow legal reader” might offer “This analysis doesn’t compare our facts to the *Smith* facts; it is less helpful to the lawyer/reader.” Although the difference in these comments is perhaps small, the positioning of the professor in the comment is significantly different—authority figure versus reader—and will affect the way in which the student perceives the goodwill and competence of the professor.

Additionally, being overt in the role that is assumed in the evaluative process can create a positive *ethos*. Because marginalia written at the beginning of documents can control how a reader perceives the remainder of the text, advising the reader of the persona assumed in the margins (for example, “For this draft, I am taking on the role of the supervising partner”) at the beginning of the assignments can reflect both an expertise and an investment in the text—but not an investment that is personal to the professor.

¹³⁰ Indeed, Berger suggests that teacher comments on early drafts (at the very least) be “fellow-writer comments, similar to those that a lawyer might make on a colleague’s early draft,” which appear in the margins and reflect the reader’s response to the text. Berger, *supra* n. 82, at 177.
in the teacher-student relationship. Moreover, if the professor is taking on a supervising lawyer persona in particular, overtly stating that role up-front can help students accept subsequent critical comments more positively because they are prepared to read comments that might be typical to a supervisor-subordinate relationship. Additionally, reinforcing that persona in a holistic end comment can remind students of the professor’s commitment to guiding the student into the practice community.

4. Professor trustworthiness and competence can be further developed by carefully tailoring comments to what has been taught in the legal writing classroom, to authoritative texts, and to community standards.

Students may lose trust in the teacher-as-annotator if they believe they are held to a standard not related to the course work. Thus, clearly articulating evaluation standards in advance of the assignment and tying those standards to readings and classroom instruction can be helpful. Moreover, to bolster perceptions of competence, a professor can access “certified expertise” in the marginalia by referring students to outside resources (rather than personal preferences) as the basis for the comments. Comments that rely on outside authority for support can take the emphasis off the professor-student relationship and emphasize the reader-writer relationship, a perspective that increases professor credibility because the professor is seen in the role of the expected future reader who will hold the student to the accepted standards of the discourse community.

For example, margin comments can refer students to specific pages in course texts for more explanation about or examples of ways to correct a particular writing problem. Alternatively, when returning the paper, the legal writing professor could provide a short article or excerpt from a practice-oriented text (such as a bar magazine article) that addresses ways to tackle a particular writing issue. Another option would be to provide students with a list of resources to help with specific problems (for example, rule synthesis, drawing analogies, or addressing counter-arguments) and then use margin comments to refer to specific sources on that list. Another strategy might be to keep a set of good “real world” examples of particular writing skills and attach relevant excerpts to the graded assignment. For example, an excerpt from an appellate brief that demonstrates the efficient use of language could give a
student struggling with wordiness a sense of why brevity matters in legal writing.

5. *In the early point of most law students’ careers, students have very little professional context for the legal writing they are asked to do; as a result, perceptions of professor trustworthiness and goodwill can be bolstered by student interactions with discourse community “insiders.”*

Students may have difficulty objectively judging whether evaluative comments substantively reflect the concerns they will face in practice. As a result, some students will have a difficult time seeing the relationship between paying attention to the comments and achieving their career goals (other than receiving a good grade). In this circumstance, the perceived credibility of the legal writing professor as a knowledgeable, authentic, trustworthy member of the community to which students aspire can be more powerful and persuasive than the rationality, accuracy, or helpfulness of the comments written in the margins of the students’ assignments. As such, the perception of professor’s trustworthiness and goodwill is particularly important because students may have little other basis on which to judge the effectiveness of their legal writing professor.

In dealing with the issue of the dominance of personal characteristics on persuasion in legal writing commenting, one rhetorical strategy (in addition to drawing upon certified expertise) is to make special efforts to give the students the context needed to evaluate the logic of the comments. To do this, a writing professor might invite guest speakers from the practice community—discourse “insiders”—to class to talk about what is expected of legal writers in the discourse community. That way, students can learn the perspective of someone outside the professor-student relationship, a perspective they could use to enhance their understanding of the professor’s marginalia on their papers. Another strategy might be to offer students materials written by judges and practitioners that describe what is expected in legal writing. Upper-level students can also serve as knowledge sources for students about “real world” legal writing; thus, having upper-level students come into the classroom and talk about their writing experience in summer clerkships and explain how the legal writing course helped prepare them for that experience, can help students pay more attention to comment *content* than to professor personality. If the professor has an upper-level student as a teaching assis-
tant, for example, encouraging that student to participate in classroom discussions on the expectations of the practice community can be a great way to offer students some “peer” expertise that can bolster the credibility of what the professor may write in the margins of a student assignment.

6. Offering personalized comments can enhance students’ perceptions of the professor’s trustworthiness and goodwill.

Comments that are personalized to the paper, directly address the text, and are detailed, show that the teacher is engaged in the paper. This creates a sense of authenticity and goodwill. The issue of personalized comments arises when legal writing professors use “global” comments to respond to student writing. Frequently, these comments take the form of word-processing macros that are inserted into the text for “common problems” or a numbering system in the margins to connect a writing problem in the student paper with a generally applicable sheet of comments.

As a general matter, universally applicable comments are useful in the commenting process. They permit a legal writing professor to be consistent and thorough in describing writing problems and prescribing remedies. Additionally, they are efficient; they permit the grading process to move more quickly. Moreover, they facilitate another principle of developing a strong commenting ethos; that is, they permit a legal writing professor to make good use of certified expertise by easily drawing students’ attention to outside resources where necessary.

On the other hand, however, a paper full of standardized comments might seem to a student to be mechanical, formulaic, and impersonal. They might suggest to a student that all legal writing must look exactly the same and that his or her own contribution to the personality of the assignment is unimportant. They might convey that the professor is not interested in the student as an individual, and the student may perceive the professor in a negative light.

Accordingly, even if universally applicable comments are used in the commenting process, a legal writing professor should take steps to ensure that her engagement with each student’s individual text is reflected in the comments. Strategies here might include using macros that encourage personalization; for example, a macro that originally read, “The analogy here is unpersuasive. Remember, only compare precedent facts that are relevant to the court’s holding,” might be modified to say, “The analogy here between
plaintiff’s back injury and the injuries in Jones is unpersuasive. Remember, only compare precedent facts that are relevant to the court’s holding; the defendant’s injury in Jones was not a fact the court relied on in finding causation.” Another strategy may be to write a few quick comments in the margins that directly address the specifics of the student’s writing along with a number that refers the student to a generally applicable comment sheet. In either scenario, the comments will be more effective from a credibility perspective because they suggest the professor was invested in and engaged with the student’s writing.

7. Carefully controlling the language of the marginalia can bolster student confidence as well as enhance perceptions of teacher goodwill and competence.

Although margin comments may raise objections to the text, the responses should not raise objections to the writer. Addressing the writer (“you”) in the margin comments, for example, creates an unnecessary opposition between reader and writer that can be seen as confrontational by the student; this type of language only enhances the “rival” role that comes from the inherent nature of marginalia. Rather, addressing the text (“it”) gives a personalized response in an impersonal way and uses the natural oppositional tone of marginalia effectively. For example, a comment that reads, “I don’t understand why you don’t address the favorable causation facts here,” might be revised to read, “This section doesn’t address the favorable causation facts.”

Even better, the comment might be revised to be a question: “How can this section address the favorable causation facts?” Using the margins to ask questions that guide revision changes the way in which the marginalia interacts with the text and the way in which ethos is constructed. The legal writing instruction community has already recognized the importance of a “sit-beside-the-writer” ethos in the margin comments that engages rather than commands the reader.131 Asking engaging questions can enhance learning: “[S]tudents learn the most when they are engaged in a dialogue with their teacher about their writing . . . .”132 Certainly, asking questions reduces the authoritarian ethos of the legal writ-

131 See generally Berger, supra n. 11.
132 Enquist, supra n. 10, at 1129 (quoting survey respondent Mary Beth Beazley); but see Enquist, supra n. 16, at 189 (suggesting “[t]oo many questions, especially terse questions, can create an antagonistic reaction from students”).
ing professor and reinforces the students’ power and authority over their own texts.

Moreover, in their work on using the Socratic method in legal writing instruction, Mary Kate Kearney and Mary Beth Beazley note that “[u]sing Socratic questions to comment also helps professors strike the proper balance between comments that are so vague that they give students too much responsibility for their revisions and comments that are so specific that they take away all responsibility for revision from the students.” Kearney & Beazley, supra n. 55, at 901. Anne Enquist writes that the questions must be written to allow the student “to determine what problem the instructor is pointing out and what solution would be acceptable.” Enquist, supra n. 16, at 189. Legal writing professors can use principles of ethos to guide them in drafting effective Socratic questions in the margins; questions should reflect the professor’s expertise as well as give the student enough information to empower him or her to make the expected changes, such as, for example, pointing the student toward a source of certified expertise for writing strategies or examples.

8. Perceptions of goodwill result when constructively critical comments are encouraging, professional, and engaging and are coupled with positive comments.

Comments that suggest a negative, incredulous, sarcastic response, expressed either through content or typeface (for example, “WHY DID YOU OMIT THE HOLDING?!?!?”) should be avoided. Rather, specific, detailed, and positive comments can create credibility because the tone suggests goodwill on the part of the teacher. For example, the comment “The summary of Jones’ facts is compelling, but the judge will expect to see the holding, too,” is likely to be more positively received. That is, the comment suggests that the professor does not have an agenda of just pointing out what the students do wrong; the professor is committed to a balanced assessment. And, if she must point out a problem with the assignment, the tone demonstrates it is done in the spirit of coaching students in meeting their professional goals.

133 Kearney & Beazley, supra n. 55, at 901.
134 Enquist, supra n. 16, at 189.
III. CONCLUSION

Regardless of how fair and authentic the professor believes the legal writing evaluation is, it is not unless students perceive it to be. Negotiating an ethos that reflects this fairness and authenticity in the margins of student papers is not an easy task and is rife with pitfalls; yet, the margins of student papers are key venues for legal writing professors to shape student perceptions and enhance student learning. A legal writing professor can develop a positive commenting ethos in marginalia discourse by focusing on competence, trustworthiness, and goodwill. A professor can demonstrate competence in marginalia through illustrating membership in the legal community, taking on a persona of the future legal reader the student will likely encounter, and offering detailed, personalized comments and Socratic questions.

Carefully tying the comments to the course content and other certified expertise can bolster trustworthiness and competence by demonstrating that students have been held to already-articulated standards and by giving them “objective” information by which to assess the value of the margin comments. An ethos of goodwill and balanced assessment can be developed by including positive comments along with constructively critical comments, emphasizing the relationship between the student’s work and the legal practice community, and orienting the comments toward the improvement of the text itself rather than toward the writer. Ultimately, attention to the ways in which marginalia acts as a negotiation and dialogue with students and affects the ways in which the students perceive the goodwill, competence, and trustworthiness of the legal writing professor can help to improve students’ learning experience and transition to the legal practice community.

Future research in this area would be worthwhile. In particular, exploring differences in how students construct ethos based on the group memberships of both students and professors can create an even more nuanced understanding of how commenting works. For example, does changing the gender of the student or the professor impact how the student constructs the professor’s commenting ethos? Additionally, the intersect between classroom ethos and commenting ethos might be explored. Can a “positive” ethos in the

136 See Eminem, The Way I Am, in The Marshall Mathers LP (Aftermath Ent./Interscope Recs. 2000) (CD) (“I am whatever you say I am. If I wasn’t, then why would you say I am?”).
writing conference rehabilitate a “negative” margin ethos? Does anonymous grading affect how ethos is constructed? Empirical studies, similar to Anne Enquist’s 1996 study of law student responses to commenting, would be fruitful in further understanding how ethos is constructed in the margins and the role it plays in this critical part of legal writing education.

137 Anne Enquist suggests similar lines of research including research that explores whether “students may be more receptive to, and therefore able to benefit from, extensive critiques if the legal writing professor has established a good rapport with the class.” Enquist, supra n. 10, at 1131.
IT HAPPENED TO ME: SHARING PERSONAL VALUE DILEMMAS TO TEACH PROFESSIONALISM AND ETHICS

Julie A. Oseid

“Today we will discuss some tough ethical, moral, and professional dilemmas I have faced and continue to face as an attorney. No, these things did not happen to a ‘friend’ of mine. No, these things did not happen to a lawyer I read about in a disciplinary opinion. No, these things did not happen to an actor playing a lawyer on television. These things happened to me. Some of these things happened before I finished law school; some happened two months ago. Welcome to my life. And here is the surprising part: it will not be that different from your life as a lawyer,” I say.

“Hmmm. This could be good,” the first-year student thinks to himself.¹

I project one of my own stories on the screen and ask a student to put himself in my place and decide what action to take:

You are a law clerk for the local county attorney’s office. You have researched some assault issues for a pending case. The county attorney who prosecutes the assault case invites you to sit in the gallery for part of the trial. When you are in a restroom stall during a break, you overhear the defendant’s sister, who is the next witness for the state, talking to the defense attorney, who is washing her hands at the sink. The witness says she hopes the prosecutor will not ask her about “the night before the fight because Jimmy was saying some really bad stuff.” Do you

¹ © 2006, Julie A. Oseid. All rights reserved. Assistant Professor of Law, University of St. Thomas School of Law. The Author thanks Steven J. Johansen, Jeff Oseid, Kelsey Oseid, Greg Sisk, and Rob Vischer for their helpful comments on earlier drafts. I also thank Mary Beth Beazley, Brooke Bowman, Michelle Cue, James Dimitri, Lisa Hatlen, Barbara Kalinowski, and James Levy for their editorial assistance. The Author acknowledges the assistance of Professor Stephen D. Easton, University of Missouri Law School, for his invaluable advice on professional responsibility and his equally invaluable advice to “start writing” when I was making excuses to not write and submit this Article. His advice has always steered me in the right direction.

¹ Obviously, it might be a female student who thinks, “Hmmm. This could be good.” In fact, it would be great if all students, both male and female, had that reaction. For ease of reading, I use the feminine pronoun for the professor, and the masculine pronoun for the student.
(1) Walk out of the stall, introduce yourself to all, and say you know they did not want you to overhear their conversation, so it will be your little secret.

(2) Stop breathing, wait until they leave, and then report what you heard to the prosecutor.

(3) Keep all the information to yourself because you know they did not want you to hear it, or

(4) Make a legal determination that the prosecutor has enough evidence to prove intent, so you will not compromise yourself by reporting information you heard in a bathroom stall.

After the student chooses what to do, we discuss the ethical, moral, and professional issues raised by the situation. It seems very real to the students because it is real; it happened to me.²

In law school, where hypotheticals rule, the use of a real situation from the professor’s practice is something completely different. Law school professors have as much fun as fiction writers. They make up characters, plots, places, and situations to help their students learn a particular legal concept. They are good storytellers. But the stories are often not real, or if real, they are not firsthand.

Several authors have recognized the value of telling stories, both nonfiction and fiction, to teach professional responsibility and legal ethics.³ Students are more likely to respond personally to an ethical dilemma presented in a story rather than to reading an attorney disciplinary action.⁴ The use of stories enables students to

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² See infra sec. II(B)(1) (discussing the obligation to slightly modify the facts to protect client confidentiality).


⁴ See Gillers, supra n. 3, at 65 (discussing stories about legal ethics that have a lawyer as the central character and the use of stories helps the students “identify with the lawyers they are about to become”).
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develop empathy for those outside their own experiences, and to make better judgments about “what is wise or proper to do in a given situation.”

Despite recognizing that storytelling enhances student learning, few professors share their own personal struggles with ethical dilemmas.

This Article introduces a teaching method in which a Legal Writing professor shares her own real-life struggles with value dilemmas. For purposes of this Article, the real-life struggles are labeled “value dilemmas.” Value dilemmas are life situations that activate your conscience and require you to choose one action over another.
another. The choices you make will depend on ethical, moral, and professional considerations. In the bathroom stall example, you must choose to either speak or be silent. Another example: you cannot physically be in two places at one time. You can either attend your son’s baseball playoff game or your client’s annual meeting.

Students do not come to law school as blank slates. Instead, students come to law school with many and varied life experiences. They have received moral training from their families, religious institutions, and their prior educational institutions. Further, “[t]hese students, consciously and unconsciously, use their experiences as the frame of reference against which they compare and contrast their everyday law school experiences.” They also use their frame of experience to decide how to behave. Judge John T. Noonan, Jr. and Richard W. Painter explain,

A lawyer, like any other person, is ultimately responsible not only to legal and professional standards, but also to his own conscience. Conduct which is in complete accordance with rules of professional conduct and other law may still violate a lawyer’s sense of right and wrong. If so, she should consider an alternative course of action.

Value dilemmas give students a chance to explore their own moral compasses as they struggle with real-life situations faced by the professor. Students learn that they may have to rely on their experiences, consciences, and The Golden Rule to decide how to act. Not all value dilemmas can be solved by consulting the ABA’s Model Rules of Professional Conduct (Model Rules).

10 Steven H. Hobbs, Symposium Introduction: Sharing Stories about Our Commitment to Teaching Ethics, 26 J. Leg. Prof. 101, 119 (2002). Alan Lerner points out that, “[W]e are also born with the neural tools to develop values. During our lives we are immersed in the ‘beliefs, values, sanctions, rules, motives and satisfactions’ of our particular communities.” Lerner, supra n. 3, at 665 (citation omitted).
13 Id. at viii (“Ethical decision making, problem solving and problem avoidance are each best learned by examining actual situations and the conduct of actors who are real people.”).
14 Schiltz, supra n. 7, at 709 (defining The Golden Rule as “Do unto others as you would have them do unto you. Be honest. Be fair. Be courteous. Be compassionate. Be true to your word.”).
15 Model R. Prof. Conduct (ABA 2002). The majority of states have adopted some version of the Model Rules, and students should be advised to consult the appropriate state
The value dilemmas presented in a Legal Writing class should not be limited to challenges faced in legal research and writing, but instead encompass many different aspects of the professor's life as an attorney. Patrick J. Schiltz notes,

It is one thing to teach about the theory of ethics and to immerse students in abstract thought. It is quite another to teach about the practical reality of ethics, and to draw the attention of students to problems confronted by flesh-and-blood attorneys with whom they can readily identify—perhaps because one of those attorneys is their own professor.\(^\text{16}\)

The professor shares her own value dilemmas, recognizing that this sharing is the best context to teach ethics, morality, and professionalism.\(^\text{17}\)

Part I of this Article explains the theoretical basis for presenting the value dilemmas in a first-year Legal Writing class, and advocates for presentation in a Legal Writing class because the classes are small, the professors use various teaching techniques, the professors have extensive practice experience, and modeling by a practitioner helps students gain a context for the types of value dilemmas they will face in their legal practice. Part II describes the method by making suggestions for selecting which personal value dilemmas to share, designing a format to present the value dilemmas, and making the actual presentation. Part III provides a description of the ten specific value dilemmas I present. These value dilemmas are an illustration of the types of moral and ethical choices practicing lawyers face daily. Part IV addresses the

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\(^{16}\) Id. at 782.

\(^{17}\) Paul Ferber notes,

[If] a student learns an ethical principle in the context of reading a case and discussing the principle in class, that limited context will make it more difficult for the student to transfer that learning later, as lawyer, to recognize the same or similar type of problem as one in which the student-learned principle might solve an ethical issue arising in practice.

main disadvantage of using the teaching method: the possibility that a student will react negatively when they discover what action the professor took in any given situation.

I. THEORETICAL BASIS FOR PRESENTING THE VALUE DILEMMAS IN A FIRST-YEAR LEGAL WRITING CLASS

Any law school professor contemplating a proposal that asks her to include more material in an already packed syllabus needs to be convinced that adding the topic is worth her time.\(^\text{18}\) Most Legal Writing professors already address professionalism as it relates to legal research and writing.\(^\text{19}\) The “It Happened to Me” value dilemma examples are worth adding because every lawyer will face these issues, and only one hour is needed to effectively teach the value dilemmas.\(^\text{20}\)

Further, a Legal Writing class is an ideal setting to introduce first-year students to value dilemmas. The answers to three additional questions support presentation of the value dilemmas in a first-year Legal Writing class: (1) Why should first-year law stu-

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\(^{18}\) In the typical Legal Writing class, a professor will teach a wide variety of topics including the United States court system, case briefing, effective case reading, issue spotting, use of analogies and distinctions, case synthesis, rule analysis, rule application, making legal arguments, outlining techniques, large-scale and small-scale organization, writing style, editing, rewriting, basic formats for legal memoranda and briefs, legal citation, persuasive writing, oral advocacy, client counseling, and client interviewing. The MacCrate Report lists ten fundamental lawyering skills including proficiency to: develop and evaluate strategies for solving a problem or accomplishing an objective; analyze and apply legal rules and principles; identify legal issues and to research them thoroughly and efficiently; plan, direct, and (where applicable) participate in factual investigations; communicate effectively, whether orally or in writing; counsel clients about decisions or courses of action; negotiate in either a dispute-resolution or transactional context; employ—or to advise a client about—the options of litigation or alternative dispute resolution; practice effectively; and represent a client consistently with applicable ethical standards. [MacCrate Report of the Task Force on Law Schools and the Profession](http://www.abanet.org/legaled/publications/onlinepubs/maccrate.html) (accessed Nov. 20, 2006). Each of these topics is covered to some degree in a typical Legal Writing class.

\(^{19}\) The following nonexclusive list of professionalism topics as they relate to research and writing is emphasized: timeliness, competence, accuracy, honesty, compliance with court rules, diligence, empathy, candor, and civility. Melissa H. Weresh addresses many ethical and professional considerations as they relate to legal writing in her new book. Melissa H. Weresh, *Legal Writing: Ethical and Professional Considerations* (Matthew Bender 2006); see also Michael R. Smith, *The Next Frontier: Exploring the Substance of Legal Writing*, 2 J. ALWD 1, 13 (2004) (listing several articles related to ethics and professionalism in legal writing).

\(^{20}\) See infra sec. II. A three-credit Legal Writing class will meet for forty hours in the first semester.
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Students be exposed to value dilemmas?; (2) Why present the value dilemmas in a Legal Writing class?; and (3) Why should a Legal Writing professor, who often is not an expert in professional responsibility, teach value dilemmas?

A. Value Dilemmas Should Be Presented in the First Year of Law School

Students at most law schools are required to take Professional Responsibility as a required upper-level course.21 Most students also must pass a Professional Responsibility portion of the Bar exam before they are allowed to practice law.22 So, why teach morality, ethics, and professional responsibility in a first-year class? Value dilemmas will permeate each student’s life on a daily basis. Early and frequent exposure will give students the necessary tools to handle difficult situations. Judge Harry T. Edwards emphasized, “[E]thics can and should be taught pervasively, in almost every law school course.”23 Those who practice law are in complete agreement. Amy Cohen notes,

Given that the most frequently selected choice in response to the Practitioner Survey question, “What skills did you find yourself least prepared for when you began your practice?,” was “Ethical Issues,” it should be obvious that law schools need to spend more time preparing students for the ethical dilemmas they will face in practice.24

21 See Curtis, supra n. 9, at 492; see also Hobbs, supra n. 10, at 110–111 (noting that those teaching professional responsibility or ethics classes use various teaching methodologies).
22 See Curtis, supra n. 9, at 492.
23 Harry T. Edwards, The Growing Disjunction between Legal Education and the Legal Profession, 91 Mich. L. Rev. 34, 74 (1992). David T. Link, who was the Dean at Notre Dame Law School, advocated for a pervasive method of teaching ethics so that “every professor in every course” would discuss ethics. David T. Link, The Pervasive Method of Teaching Ethics, 39 J. Leg. Educ. 485, 485 (1989); see also Hobbs, supra n. 10, at 110–111 (some teach ethics by the pervasive method and others across the curriculum (citing e.g., Deborah Rhode, Professional Responsibility: Ethics by the Pervasive Method (Aspen Publishers 1994), and James E. Moliterno & John M. Levy, Ethics of the Lawyer’s Work (West 1993))); Lerner, supra n. 3, at 701–704 (noting methods by which ethics can be taught pervasively).
24 Amy B. Cohen, The Dangers of the Ivory Tower: The Obligation of Law Professors to Engage in the Practice of Law, 50 Loy. L. Rev. 623, 633–634 (2004) (survey of copyright and trademark attorneys); see also Luke, supra n. 11, at 855–856 ("Prior to entering the profession, most of our students have had no other articulated exposure to ethics and professional responsibility except for [a professional responsibility class"]); Schiltz, supra n. 7, at 779 ("First, as many have argued, we can teach ethics pervasively. We can put ethical issues on the table. We can do so not just in professional responsibility class, but in all classes . . . .")
Simply put, something so important should be taught early and often.\textsuperscript{25} Many students who enter law school do not believe they will face tough ethical decisions because they have no understanding of the context in which value dilemmas arise.\textsuperscript{26} Several authors have suggested that professional responsibility is best taught through the use of stories\textsuperscript{27} or fictionalized television programs,\textsuperscript{28} or through using a combination of techniques like cartoons, film and television, and written narratives.\textsuperscript{29} Yet, each of these methods relies on the traditional law school model of using fictionalized stories.

By sharing personal stories about value dilemmas, a professor provides instant context for when and how these dilemmas arise.\textsuperscript{30} Students notice when a lawyer\textsuperscript{31} stands in front of them and says, “I was just like you. I thought I wouldn’t have to face these tough issues. I thought I would know exactly what to do if I did face the issue. Then, even before I had a license to practice law, I had to make tough choices. In addition, I continue to be faced with tough value dilemmas. These dilemmas will be part of your life from now until the day you stop practicing law.” It cannot get any more real

\begin{itemize}
\item \textsuperscript{25}See Curtis, \textit{supra} n. 9, at 503 (“Whenever ethics is an integral part of a course, students must learn to assimilate and absorb these ethical requirements and make them part of their personal habits.”). Law students, who are often in their twenties and thirties, might also be at a good age to discuss moral issues. See Subha Dhanaraj, Student Author, \textit{Making Lawyers Good People: Possibility or Pipedream?} 28 Fordham L. Rev. 2037, 2070 (2001) (citing empirical studies in moral psychology).
\item \textsuperscript{26}See Goldberg, \textit{supra} n. 3, at 420.
\item \textsuperscript{27}See Menkel-Meadow, \textit{Telling Stories in School, supra} n. 3 (asserting the particular usefulness of stories in teaching legal ethics); see also Menkel-Meadow, \textit{Can They Do That? supra} n. 3.
\item \textsuperscript{28}See Goldberg, \textit{supra} n. 3 (analyzing the use of the television show \textit{The Practice} to teach law students professionalism).
\item \textsuperscript{29}See Scherr & Farber, \textit{supra} n. 3 (evaluating how the use of popular culture images aids in teaching law students about professionalism).
\item \textsuperscript{30}Menkel-Meadow, \textit{Telling Stories in School, supra} n. 3, at 793 (“Perhaps the strongest argument for the use of stories (by ‘literary lawyers’) and real cases (by legal clinicians) is the value placed on contextual knowledge and decision-making.”). Betty Luke emphasizes that students need a context even after taking a professional responsibility course. Luke, \textit{supra} n. 11, at 845. She elaborates,
\begin{itemize}
\item although it can be assumed these students have a substantive background knowledge of the rules, each entering class displays the same entry level of inexperience and naiveté when confronted with the realities of interacting with a client, meeting the demands and frustrations of a case, and confronting the dynamics of interpersonal relationships . . . .
\end{itemize}
\begin{itemize}
\item \textit{Id.}
\end{itemize}
\item \textsuperscript{31}I take pride in reminding my students that I am a lawyer, just like they will be.
than that in a classroom setting. By giving the students a context for value dilemmas in their first year, the professor provides a foundation for subsequent discussions of ethics, morality, and professionalism.

Sharing the stories behind the value dilemmas also introduces students to the rich tradition of storytelling in the legal profession. Lawyers in practice often learn how to handle value dilemmas by sharing and listening to “war stories.” The use of value dilemmas in the classroom gives students a glimpse into how they will continue to rely on other lawyers’ experiences to decide how to behave ethically and morally.

In addition, even those students who acknowledge that they might face tough value dilemmas naively think it will be easy to decide what to do. By introducing this subject in a required first-year course, the students learn that not only are value dilemmas a prevalent part of life as a lawyer, but also that it is rarely easy or obvious to decide what to do. Further, discussing these issues in the first year alerts students to the reality that they will face these value dilemmas soon.

The only way for a professor to make it more real inside or outside of the classroom is for that professor to live as a lawyer. See Thomas L. Shaffer, On Teaching Legal Ethics with Stories about Clients, 39 Wm. & Mary L. Rev. 421, 421–424 (1998) (discussing the advantages of using clinic clients and students’ real experiences with those clients to teach ethical dilemmas); see also Luke, supra n. 11, at 856–861 (noting that clinic experiences give students a context for learning professionalism and ethics). As noted in Section I(B)(3), most Legal Writing professors have extensive practice experience. Even a brand-new Legal Writing professor knows what it is like to practice law and to be faced with difficult value dilemmas.

Deborah Maranville notes that law school often fails to provide a context that “will both engage students and help them learn more effectively.” Deborah Maranville, Infusing Passion and Context into the Traditional Law Curriculum through Experiential Learning, 51 J. Leg. Educ. 51, 52 (2001).

One author noted,

Few professions have a stronger oral tradition than law. War stories are a part of that tradition. Think of them as parables, which my dictionary defines as “a usu[ally] short fictitious story that illustrates a moral attitude or a religious principle.” War stories are not presented as fictitious, of course, but like “the fish I caught in the summer of ’72,” they tend to get embellished with the passage of time. . . . Embellished or not, war stories about legal ethics dilemmas are exactly what we should include in our classes.

Gillers, supra n. 3, at 66 (footnotes omitted); see also Leslie C. Levin, Lawyers in Cyberspace: The Impact of Legal Listservs on the Professional Development and Ethical Decisionmaking of Lawyers, 37 Ariz. St. L.J. 589, 598 (2005) (discussing how trial lawyers learn about tactics and advice from listening to “war stories”).

As noted in section II, a professor should choose value dilemmas from all times in her life as a lawyer, including time spent as a law student, law clerk, lawyer, and teacher.
Finally, students enter the legal profession on the first day of law school. Thus, they should consider the moral and ethical implications of the profession as early as possible. With an early introduction, students can recognize the value dilemmas they will be faced with in law school and throughout their professional life. Students might be most receptive to these messages in their first year. As Alan Lerner notes,

Again, if it is their intuitions, developed over many years, that we are trying to overcome or reinforce in connection with their roles as lawyers, we can expect them to be more open to that in the first year before they become jaded.

Seize the ripe opportunity and present the value dilemmas during the first year of law school.

B. Value Dilemmas Should Be Presented in a Legal Writing Class

But why teach these value dilemmas in the Legal Writing class? Most law schools require at least five additional doctrinal classes in the first-year curriculum. These doctrinal classes usually meet for more hours during the semester than the Legal Writing class, so a one-hour time commitment is a smaller percentage of overall doctrinal class time. In fact, value dilemmas should permeate the curriculum. The more exposure law students have to ethics and professionalism, the more equipped they will feel to handle the value dilemmas they will inevitably face.

Three unique features of a Legal Writing class make it a particularly

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37 Most schools emphasize the moral and ethical implications of the school’s Honor Code. See e.g. John Fisher, Dean’s Column, W. Va. Law. 10 (Aug. 2004) (Dean of the West Virginia College of Law explains that law students affirm both the Honor Code and rules of professional responsibility as governing their conduct as law students.).

38 Lerner, supra n. 3, at 704.

39 For example, at the University of St. Thomas School of Law, all first-year students take Contracts, Civil Procedure, Torts, Property, Constitutional Law, and Criminal Law in addition to Legal Writing.

40 See supra sec. I(A).

41 The University of St. Thomas School of Law website notes, “The law school’s faculty and curriculum will be distinctive in supporting and encouraging students’ integration of their faith and deepest ethical principles into their professional character and identity.” U. of St. Thomas L. Faculty, University of St. Thomas School of Law, About the School of Law, Vision Statement, Professional Preparation, http://www.stthomas.edu/law/about/mission.asp (Mar. 20, 2002). Although the University of St. Thomas adds a faith component, many law schools presumably encourage students to incorporate ethical principles into professional decisions.
ideal setting for teaching the nuances of value dilemmas: the small size of the class, the use of varied teaching methods during the class, and the real-life experience that Legal Writing professors bring to the classroom.

1. Legal Writing Classes Are Small

First, a student’s first-year Legal Writing class is often the student’s smallest class. For example, at the University of St. Thomas School of Law, there are usually twenty to twenty-two students in each section of Legal Writing. In all other first-year classes, the average class size is seventy-five students. Without addressing the issue of whether law school should create a “kinder and gentler” environment, a small class size facilitates discussion. In addition, small classes give students a more personal relationship with the professor. This small class environment makes it easier for students to discuss value dilemmas. Ann Iijima notes,

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42 See Michael Vitiello, Professor Kingsfield: The Most Misunderstood Character in Literature, 33 Hofstra L. Rev. 955, 956 (2005) (arguing for the effectiveness of a traditional Socratic method of teaching in the law school environment and noting, “Partially in response to such attacks [against the Socratic method], law schools have become gentler places in a misguided attempt to become kinder to their students”).

43 Debra Moss Curtis points out that the legal research and writing classroom might be the ideal place to teach professionalism because professors can pose a problem, ask students to reflect on it, build exercises around possibilities for handling the situation, and then evaluate students’ abilities to handle the issue. Curtis, supra n. 9, at 504–505. Professor Curtis suggests that a “discussion format of material presentation seems particularly well-suited to this approach, as these discussions will surely build from a general agenda presented to students.” Id. at 505.


[Law] students tend not to establish close relationships with their teachers because of the relatively high student/faculty ratio, the predominance of large classes (particularly in first-year courses), the lack of regular feedback, and the common perception that the faculty are distant and unsupportive.\footnote{46 See Iijima, supra n. 45, at 528.}

A small class size can make it easier for students to discuss the value dilemmas, particularly if the students have differing moral approaches to the value dilemmas.\footnote{47 See Lerner, supra n. 3, at 693 (surmising that a law school classroom “might well be appropriate for the introduction, open discussion, and reflection upon morally diverse values”).}

2. Legal Writing Professors Use Varied Teaching Methods

Second, Legal Writing professors use many different teaching methods. So do some doctrinal professors, but the Socratic method continues to be the primary teaching method used in doctrinal classes.\footnote{48 See Steven I. Friedland, How We Teach: A Survey of Teaching Techniques in American Law Schools, 20 Seattle U. L. Rev. 1, 28 (1996) (“According to the Questionnaire, an overwhelming majority of those who taught first year classes used what they perceived to be the Socratic method . . . . This data indicates that the Socratic approach remains firmly entrenched in legal education.”).}

But Legal Writing is particularly suited to the introduction of various teaching methods.\footnote{49 Ann Iijima notes that teaching methods alternative to the Socratic method are “used very little in traditional courses.” Iijima, supra n. 45, at 528.}

For example, Legal Writing professors conduct in-class workshops, provide written critiques, and meet individually with students in conferences.\footnote{50 Mary Beth Beazley, Better Writing, Better Thinking: Using Legal Writing Pedagogy in the “Casebook” Classroom (Without Grading Papers), 10 Leg. Writing 23, 40–41 (2004) (suggesting that several legal writing teaching methods are adaptable to the casebook classroom).}

Legal Writing professors also edit writing samples while the entire class observes and comments about the effectiveness of the sample.\footnote{51 See Judith B. Tracy, “I See and I Remember; I Do and Understand”—Teaching Fundamental Structure in Legal Writing through the Use of Samples, 21 Touro L. Rev. 297 (2005) (describing how to use sample documents to teach students how to research legal problems, analyze legal authority, and write legal documents); see also Beazley, supra n. 50, at 56–57 (describing Professor Joe Kimble’s “live grading conference,” the review of one sample document, and the review of pre-annotated samples).}

Additionally, students peer edit each other’s work\footnote{52 See Kirsten K. Davis, Designing and Using Peer Review in a First-Year Legal Research and Writing Course, 9 Leg. Writing 1 (2003).}

and work in small groups to analyze legal problems.\footnote{53 I form groups of three or four students to work together in a “law firm” to analyze
students experience in Legal Writing is “an immeasurably valuable tool in addressing ethical problems.” It helps students to discuss value dilemmas with others including family, friends, colleagues, and spiritual advisors.

I present the value dilemmas using a multiple-choice format, rather than a variant of the Socratic method. Students are likely to be more receptive to this approach because they are already used to their Legal Writing Professors presenting the material in a variety of ways.

In Legal Writing, professors teach many skills including critical thinking, writing, and researching. These skills are foundational to the practice of law. Professionalism, including consideration of morality and ethics, is similarly foundational and is, therefore, one more skill that should be taught in a skills class.

3. Legal Writing Professors Have Extensive Practice Experience

Third, Legal Writing faculty members often have extensive practice experience. That is not always true of doctrinal faculty. To share actual experiences of value dilemmas, a teacher must have practiced long enough to have faced those dilemmas. The American Bar Association Professionalism Committee recommends that “only faculty with extensive practice experience . . . teach the basic and advanced ethics and professionalism courses.” Further, students want teachers who have practical experience.

legal problems, brainstorm about organization, discuss persuasive techniques, and complete short writing assignments.

Lerner, supra n. 3, at 698.

Id.

See infra sec. II(B)(2).

See Luke, supra n. 11, at 853 (contending that law professors should teach ethics and professionalism as an additional skill).

See Goldberg, supra n. 3, at 419.

See id. at 420 (quoting Sec. of Leg. Educ. & Admiss. to B., Report of the Professionalism Committee: Teaching and Learning Professionalism 18 (ABA 1996); see also Mitchell Nathanson, Taking the Road Less Traveled: Why Practical Scholarship Makes Sense for the Legal Writing Professor, 11 Leg. Writing 329, 337 (2005) (Nathanson’s 2003–2004 AALS Directory of Law Teachers Survey showing doctrinal professors with a mean of 2.12 years of law firm experience before teaching compared with legal writing professors who had a mean of 4.5 years.).

See James B. Levy, As a Last Resort, Ask the Students: What They Say Makes Someone an Effective Law Teacher, 58 Me. L. Rev. 49, 77 (2006); see also Cohen, supra n. 24, at 634 (law school teachers have an obligation to “connect with the world of practice and to see
It is only those professors with practice experience or connections with the practicing bar who can present the real-life value dilemmas. Legal Writing professors have the necessary practice experience to effectively present a variety of value dilemmas.

C. Modeling By a “Non-expert” Prepares Students for Their Own Real-Life Value Dilemmas

Most law schools have faculty members who are experts in professional responsibility. Some might argue that the experts should teach the value dilemmas. Why should a Legal Writing professor teach a concept that an expert could teach? In addition to the Legal Writing faculty’s practical experience discussed above, Legal Writing professors can teach the value dilemmas because many of the value dilemmas presented fall between the cracks of the rules, or create personal moral and ethical choices not addressed in the rules.

Many of the value dilemmas I present involve choices between professional and personal commitments. The Model Rules do not address these conflicts. For these issues, a Professional Responsibility expert is no more qualified to give advice than any other lawyer. First-year law students will discover that no knowledge of specific rules is needed to solve these value dilemmas. For value

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61 After spending a sabbatical shadowing lawyers in a law firm, Amy Cohen observed, “My experience made me more sensitive to the types of ethical and professionalism issues confronted in practice . . . . These ethical questions, among countless others, are often difficult to balance against the realities of the attorney-client relationship and the pressures of building revenues. Again, these are the types of issues that a responsible law professor should incorporate into the teaching of substantive materials so that students can grapple with these questions before they are faced with them in the realities of practice. Cohen, supra n. 24, at 641–642; see also McCaffrey, supra n. 17, at 65 (“[Moot case] technique also creates excellent opportunities to introduce students to real-world ethical dilemmas that lawyers routinely face and gives students a sense of what it is really like to practice law . . . .”).

62 See infra sec. II(B)(3) (suggesting that a Legal Writing professor consult a Professional Responsibility expert before presenting the value dilemmas).

63 Goldberg, supra n. 3, at 420–421 (“Practitioners know that the most difficult and absorbing ethics issues are not those addressed by the Code or the Rules, but those that slip between the cracks, leaving the lawyer with nothing on which to rely but judgment and a sense of professionalism.”).

64 Id. at 419–420. For those value dilemmas that do touch on conduct addressed in the Model Rules, the applicable Model Rules should be examined and explained. See infra Sec. II(B)(3).

65 Students might also feel frustrated and complain that, without knowledge of the
dilemmas that do not raise an applicable Model Rule, the students themselves become the “experts.” This offers a preview into their future lives as lawyers. Very few students will become Professional Responsibility experts, yet all of them must become familiar with the Model Rules and proficient in making decisions about value dilemmas. Presenting the value dilemmas and asking the students to grapple with them will help “train and develop in . . . students the habit of exercising thoughtful consideration of their actions and the repercussions of their actions.” It will also help the students recognize that many decisions they make as lawyers will raise ethical issues.

II. HOW TO PRESENT THE “IT HAPPENED TO ME” VALUE DILEMMAS IN CLASS

Using the “It Happened to Me” value dilemmas exercises requires only three steps: selecting value dilemmas, designing a multiple-choice format to convey the value dilemmas, and, finally, presenting your value dilemmas to the class.

A. Step 1—Selecting the Value Dilemmas

Selecting which value dilemmas to include requires three separate tasks: practicing law, reflecting on your time in practice, and selecting the specific value dilemmas to share with your class. You have already accomplished the first task by practicing. Initially, you might think you did not face many value dilemmas in your career, but if you further reflect, you will find that you have several value dilemmas to share. Start by thinking of all those times

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66 See Marjorie A. Silver, Commitment and Responsibility: Modeling and Teaching Professionalism Pervasively, 14 Widener L.J. 329, 345 (2005) (discussing the use of an exercise early in a Civil Procedure class that reminds students that they “bring intelligence, common sense, and problem-solving skills” to their very first day of law school).

67 Luke, supra n. 11, at 844. Betty Luke also notes that she is a “work in progress” and she strives to bring to a conscious level those things she has unconsciously understood. Id.


69 See supra sec. I(B)(3) (discussing how professors who teach Legal Writing usually have extensive practice experience).
your heart was pounding and you felt an adrenaline rush while you were practicing law. Now, eliminate the times you had those physical reactions only because you were in trial, at an important client meeting, or in front of a panel of judges. You will be left with the times when you faced a value dilemma. Did you notice a mistake in an appellate brief that already was submitted to the court? Did you wonder how much time you should bill for a task? Did you suspect that your deposition witness might not be telling the truth? Of course, trials, client meetings, and oral argument can present additional value dilemmas. Did the judge ask you about a controlling case that you did not know existed? Did you suspect your expert’s trial testimony was misleading? You now have a list of potential value dilemmas.

Next, reflect on the value dilemmas you faced. Choose “It Happened to Me” examples that will convey the breadth and complexity of the value dilemmas that attorneys face. I select value dilemmas that lead to tough choices because very valid arguments can be made in support of at least two different actions. Consider the goals you want to teach when selecting your value dilemmas. My own list has the following ten categories:

1. a beginner’s mistake;
2. a personal morality conflicting with representation;
3. a conflict between technical compliance with the rules and personal morality;
4. making a good faith effort that has unintended consequences;
5. a conflict between a personal commitment and a professional commitment;
6. foregoing one method to achieve a noble goal;

Steven Hartwell suggests that moral development occurs when there is “moral disequilibrium.” Hartwell, supra n. 68, at 132. He elaborates,

The capacity of a course to foster moral development depends, at least in part, on the degree to which a course promotes moral disequilibrium. A course promotes disequilibrium when the values of the students are challenged by conflicted thinking about right and wrong, a challenge which the students cannot resolve at their current level of moral thinking. This level of conflict can be easily introduced into a course in professional responsibility because of the relative ease in which ethical issues can be raised that cannot be resolved by the Model Rules.

Id.
It Happened to Me

(7) discovering inadvertently disclosed documents;
(8) confronting the temptation to cover up a mistake;
(9) facing the pressure to be productive; and
(10) taking an opportunity to make a point about your own values.

B. Step 2—Designing the Format for Presenting the Value Dilemmas

Designing a format for presenting the value dilemmas takes three steps: (1) modifying the facts to protect client confidentiality; (2) creating a multiple-choice format; and (3) reviewing your value dilemmas with a Professional Responsibility expert.

1. Modify the Facts to Protect Client Confidentiality

The first step in designing the format is the most critical. After you select your list of value dilemmas, you must change the names and facts enough so that you do not violate client confidentiality.\(^{71}\) Explain to the class that even though the “It Happened to Me” exercises involve value dilemmas that you faced, you have changed the underlying facts to comply with the Model Rules.\(^{72}\)

2. Create a Multiple-Choice Format

Next, select a format to present your value dilemmas to the class. I use a multiple-choice format. The multiple-choice format might initially appear to be a limiting method of presenting the dilemmas, but it gives the students a starting point for discussion. Include the options you believe are most likely, but allow the students to suggest other possible actions. In the second example I present to the class, I list several possible actions in the multiple-choice format, but in the real-life event, I did not take any of these

\(^{71}\) “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).” Model R. Prof. Conduct 1.6(a) (note that paragraph (b) does not apply to “war stories”).

\(^{72}\) Some lawyers break the client confidentiality rule when they tell “war stories,” but you do not need to create an additional value dilemma by presenting confidential client information to your class.
actions. This early example encourages students to consider the multiple-choice answers as only a starting point for discussion.

In addition to giving the students a starting point for discussion, the multiple-choice format provides an ideal format for injecting humor. You can add humorous options, like “run for your life,” that can ease some of the tension inherent in discussing the serious subjects raised by the value dilemmas. In my experience, the tension that arises every time value dilemmas are discussed can itself be a point of discussion. The tension means that you have selected a good topic for discussion. The emotions raised by discussing the value dilemmas also help the students remember the discussion. Alan Lerner points out that students engage emotionally by

seeking to discover and understand the full context, identifying and creating options, discerning the ethical choice, and acting on it by exercising judgment to decide what to do, and communicating that judgment to a client and/or supervisor who might prefer a different response, knowing that she may face adverse consequences from her choices.

This multiple-choice format furthers these goals.

3. Ask a Professional Responsibility Expert to Review Your Value Dilemmas

As a final step in design, review your planned presentation with a Professional Responsibility expert. The Professional Responsibility expert can ensure that each of your value dilemmas includes all relevant references to the Model Rules and any additional state rules that might control the lawyers’ conduct. This consultation is imperative.

C. Step 3—Presenting the Value Dilemmas

I present each of my ten multiple-choice value dilemmas by typing each value dilemma on a separate sheet of paper and using the document camera to project the value dilemma to the whole class. I use the word “you” in the examples, so the students envi-
sion themselves in my (the lawyer’s) position. I ask one student to read each value dilemma, including all possible options, out loud. Then, I ask that student to choose which action he would take. After that, I invite comments from other students in the class. I act as a facilitator as students propose various ideas about what “I” should do when faced with the value dilemma. After a complete discussion, I tell the students which option I took in the real-life event. I call on another student to read the next value dilemma until we have completed all ten value dilemmas.

I have considered, but not yet tried, presenting one value dilemma a week throughout the entire semester. This is how I teach legal citation, and it very effectively helps students learn the concept by building on earlier knowledge. A once-a-week method of presentation would have the additional advantage of getting the students to think about ethics on a regular basis throughout their first semester. I think an “It Happened to Me—Value Dilemma of the Week” might be the most effective way to present the value dilemmas.

One final note about presenting the value dilemmas: some might argue that the professor should not reveal what action she actually took in each situation. This may very well work for others, but I doubt it could work for me. I come from a long line of storytellers, literature lovers, and movie fans. Endings are carefully guarded secrets that are never revealed until after everyone in the family finishes the story. But I cannot resist answering the “What did you do?” and “What happened?” questions. Further, as explained in the goals sections of each value dilemma discussion, it is only after revealing what action I took that the class can discuss all the moral, ethical, and professional points raised by the value dilemmas.

75 Gillers, supra n. 3, at 64–68 (proposing the use of videotapes to present ethics questions, and requiring the students to “react ‘in’ rather than ‘to’ the story”).
76 I present the value dilemmas in half-hour segments during two different classes.
78 See infra sec. III.
III. EXAMPLES OF VALUE DILEMMAS PRESENTED IN CLASS

I use ten experiences from my own life as examples. The following examples, modified to protect client confidentiality, make up my current list. The value dilemma, exactly as I present it to the class, is in italics. In the “Goal” section following each italicized example, I discuss my reasons for including this particular value dilemma, and the ethical, moral, and professional questions raised by the value dilemma. In the “The rest of the story” section, I finish the story of what actually happened.

A. Example 1: A Beginner's Mistake—Baby Lawyer

You are a new associate practicing in a midwest state and you need to travel to upstate New York to interview a client. Your secretary asks you what arrangements he should make for your travel. You tell him to

(1) Make plane reservations in the middle of the day to New York City, in first class, and reserve a Hertz car.

(2) Make plane reservations in the middle of the day to New York City, in coach class, and reserve a National car.

(3) Make plane reservations at night to Newark, in coach class, and find the cheapest rental car available.

Goal: This value dilemma highlights the importance of using common sense, even after receiving a license to practice law. In the real-life equivalent, I chose Option 3. I had been poor for so long (something just about every student in your class will relate to) that I did every single thing as inexpensively as possible. I was twenty-six years old, I had never been to Newark, and I had no

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79 I recognize that if you accept my thesis that you should use your own personal experiences then my examples provide only a general guide. My examples are offered to give some insight into the types of value dilemmas you could share with your students.

80 See supra sec. II(B)(1) (regarding the protection of client confidentiality).

81 As noted, I enjoy stories. When I was a child, we listened daily to Paul Harvey's show and impatiently waited for “the rest of the story,” which almost always had an O. Henry surprise ending.
idea where I was going. I decided to fly at night because I did not think I should waste a work day traveling. I arrived in the Newark airport at 10 p.m. There was no counter for John’s Auto Rental so I made a phone call and John said he would pick me up. He pulled up in a van with “John’s Auto Rental” written on a cardboard sign taped to the door. Of course, I got in. Only as he pulled away did I think about cement shoes and the river. He drove to a trailer house under a bridge where there were five rental cars parked. I rented a car, made my way out of Newark in the dark, and drove three hours to upstate New York (who knew it would be so dark and hilly?).

The Rest of the Story: My motto after this experience is that a lawyer should not spend her client’s money frivolously, but all clients prefer a living lawyer. I still traveled, but I always made arrangements with reputable, recognizable companies.

B. Example 2: Moral Objection to Client’s Product—Goody Two Shoes

You start on your first day in a law firm. This is the day you have been waiting for, working toward, dreaming about. You have on brand-new “lawyer” clothes, and you are proud that you are finally a licensed lawyer. The day is full of wonder: you get an office, people welcome you to the firm, and you will finally be making some money. Then, a partner from your department stops by and assigns you a task for a client who makes a product to which you are morally opposed. Do you

(1) Agree to handle the matter because it is only a procedural issue, and you think maybe if you just do this one thing you can get yourself off the client’s case later.

(2) Explain to the partner that you have a moral opposition to the product and so you would prefer not to work on the case.

82 It is not necessary or wise to share the exact nature of this product. You could suggest several possibilities: you are a member of PETA (People for the Ethical Treatment of Animals) and the product is a butchering device, or your parent recently died after using this client’s medical device. With a little imagination, each student should be able to envision a product to which he is morally opposed.
(3) Begin questioning your moral opposition to the product, have an internal moral debate about whether the product is as bad as you initially thought, then decide that you will agree to the representation.

Goal: As noted, one downside of the multiple-choice format is that it can limit the scope of possible actions the students think they can take. I use this example early because, in the real-life equivalent I did not take any of the listed actions, but instead chose Option 4: Say yes to handling the project because you cannot imagine saying no to any partner on the first day of work, but then reflect on whether you can morally continue in the representation, decide that you cannot, and then explain your position to the partner when you turn down the project the next day.

I include this value dilemma because it is a good example of a situation where the Model Rules are only marginally helpful. This is a situation that falls between the cracks of the technical rules. The closest help comes from the conflict of interest rules, specifically Model Rule 1.7(a)(2) that prohibits a lawyer from representing a client if “there is significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.”\(^\text{83}\) Larry Natt Gantt, II has noted that disciplinary actions and case law have not extensively discussed a potential conflict between a lawyer’s personal moral interests and a client’s interest.\(^\text{84}\) However, he suggests, “An attorney who feels strongly about the moral implications of his client’s cause must ensure that his feelings do not ‘temper’ his efforts in advancing a client’s objectives.”\(^\text{85}\) Thus, students can discuss what action they should take when they face a conflict between a personal moral conviction and a client’s product, and whether their personal moral beliefs would “temper” their representation.

The Rest of the Story: I was put on another case that went to trial five months later. I had the invaluable experience of working with a fantastic litigation team, and I even examined my first

\(^{83}\) Model R. Prof. Conduct 1.7(a)(2).
\(^{84}\) Larry O. Natt Gantt, II, More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations, 18 Geo. J. Leg. Ethics 365, 404 (2005) (“Perhaps the lack of cases stems simply from the fact that many lawyers’ personal moral concerns do not affect their representation either because they intentionally leave their morality out of their professional role or because their personal moral code is so open-ended or ill-defined that it would not by its nature affect their professional role.”).
\(^{85}\) Id.
trial witness as a first-year associate. The head litigator on the trial team later told me that he asked me to be on his team because he thought I must have “guts” to turn down a project as a new associate.

C. Example 3: Hiding in the Bathroom Stall—Letter of the Law

You are a law clerk for the local county attorney’s office. You have researched some assault issues for a pending case. The county attorney who prosecutes the assault case invites you to sit in the gallery for part of the trial. When you are in a restroom stall during a break, you overhear the defendant’s sister, who is the next witness for the state, say to the defense attorney, who is washing her hands at the sink, that she hopes the prosecutor will not ask her about “the night before the fight because Jimmy was saying some really bad stuff.” Do you

(1) Walk out of the stall, introduce yourself to all, and say you know they did not want you to overhear their conversation, so it will be your little secret.

(2) Stop breathing, wait until they leave, and then report what you heard to the prosecutor.

(3) Keep all the information to yourself because you know they did not want you to hear it.

(4) Make a legal determination that the prosecutor has enough evidence to prove intent, so you will not compromise yourself by reporting information you heard in a bathroom stall.

Goal: This value dilemma teaches two lessons: what you should do when you are the lawyer in the bathroom stall, and what you should do when you are the lawyer washing your hands at the sink.

First, you might be faced with choosing between following the letter of the law versus following a personal value. Your personal morality may abhor eavesdropping. “Hey, I’m no snitch,” you tell yourself. However, you made no effort to hear this conversation. In fact, in light of the circumstances, it would be almost impossible for you not to hear the conversation. You know that you should
zealously represent your client, the State. This was not a conversation between an attorney and client (and even if it had been, the privilege was probably waived by conversing in a public place). In the real-life equivalent, I chose Option 2.

Second, I use this value dilemma to teach the importance of keeping both your client and all your witnesses quiet in public places. As any prosecutor or defense attorney knows, a busy elevator is no place to review testimony. You never know who else is on that elevator—or in the bathroom stall.

**The Rest of the Story:** As I recall, the prosecutor intended to thoroughly examine this witness about intent before learning what I overheard. The defendant was convicted of assault.

**D. Example 4: Good Faith Effort to Help—Backfires!**

You are seven and a half months pregnant and you have a two-year-old who has decided to turn into Velcro toddler so she can permanently attach herself to your already giant body. You live in a 1912 house with no air conditioning, and it is a hot July day. Your house is packed with relatives who are visiting from out of town. You have decided to resign from your position as an associate with a large firm to stay home with your family. You will announce your resignation the next day. The phone rings. It is the most senior partner from your division telling you that a client, a prominent community member, has a daughter who was pulled over after a domestic dispute and found to have a bag of marijuana in her backpack. Unfortunately, the daughter has a misdemeanor record, and the county attorney is charging her with a felony. This partner

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86 As stated in Rule 1.2 of the Model Rules of Professional Conduct, A lawyer should pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.

“The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” Model R. Prof. Conduct 1.3 cmt. 1.

87 See David A. Green, Lawyers as “Tattletales”: A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information, 20 Ga. St. U. L. Rev. 617, 622 (2004) (traditionally either the client or lawyer can waive the attorney-client privilege through disclosure to a third party).
has helped you from the day you started with the firm. He remembers that you worked for a couple of years during law school in the county attorney’s office. He wonders what you know or could find out about plea agreements before the arraignment on Monday, July 5, at 8:00 a.m. Do you

(1) Sing that old country western favorite, “I Ain’t Working Here No More.”

(2) Admit that your criminal days were in the long distant past and you really do not know the county attorney’s policy on plea agreements.

(3) Tell him you still have a couple of buddies at the county attorney’s office and you will get back to him, but then conveniently forget to call your buddies.

(4) Tell him you still have a couple of buddies at the county attorney’s office, make a phone call, find out the normal plea arrangement, and report back to the partner.

Goal: This value dilemma satisfies three goals: it gives a very specific context for a value dilemma; it demonstrates that good intentions can have bad results; and it emphasizes the importance of an apology.

The first goal is to give the students a detailed scene from real-life where there are several things affecting a decision. This example provides immediate context for how value dilemmas arise. They do not happen in tranquility when the attorney has plenty of time to reflect on and consider all the ramifications of every option. Instead, value dilemmas most often arise in the messiness of life, when quick decisions must be made.

The second goal is to show that even when you have good intentions, your actions may have an unintended result that backfires. I chose Option 4, but I forgot to take human nature into account. The prosecutor in charge of the case found out about my informal phone call and considered rescinding the usual plea agreement because he viewed the phone call as an attempt to garner special favors. Adding to the disaster I created, the daughter hired her own attorney who was not too happy that someone tried to meddle with the plea arrangement. Luckily, once the mess was straightened out, the normal plea agreement was offered and accepted.
This brings me to the third, and most important, goal of including this value dilemma. I apologized to everyone involved. My apology to the defense attorney was particularly heartfelt. What could I say except, “I made a mistake. I did not consider all the ramifications of my actions. I meant to help, but instead I created a mess for you and your client. I’m sorry.” He forgave me. The important lesson is that we are human, thus we will make mistakes, so admit your mistakes when you make them.88

The Rest of the Story: Just the thought of this experience makes me squirm. I learned the invaluable lesson that it is okay to take a deep breath, think about something for a couple of hours, ask a few more questions, and do what you think is right. If I make a mistake,89 I apologize.

E. Example 5: Personal Commitment Conflicts with a Professional Commitment—Uncle Freddy

You have a wonderful great uncle whom you love. He loves you, too. He dies. You have a deposition scheduled on the day of his funeral. To complicate matters, the funeral is in a town 600 miles away. Do you

(1) Cancel the deposition and drive to the funeral.

(2) Continue with the deposition, miss the funeral, but send a nice bouquet of flowers.

(3) Try to reschedule the deposition, but learn that the witness you are scheduled to depose is ill and may not be available on a rescheduled date, so you miss the funeral and conduct the deposition.

(4) Write a heartfelt apology to your great aunt explaining the situation, apologize for missing the funeral, and vow to yourself that you will make up your absence from the funeral.

88 In my experience, admitting a mistake can be a surprisingly difficult thing for lawyers to do. It would be an interesting empirical study to see whether people who have a hard time admitting they are not perfect are attracted to the legal profession, or whether law school creates professionals who will not admit mistakes. I like to remind students that many criminal law professors teach that it is always the cover-up that gets defendants in the most trouble. Of course, always avoid criminal activity, but always, always, always avoid a cover-up.

89 See infra ex. 8.
Goal: The goal is to share at least one value dilemma that still haunts you. This value dilemma again highlights the point that the Model Rules will not solve every professional dilemma attorneys face. I chose Options 3 and 4, but I may have made the wrong choice. In fact, the exact details of why I was not able to attend the funeral are no longer clear to me. All I remember fifteen years later is that I missed the funeral.

The Rest of the Story: I visited my Aunt Gen (Uncle Freddy’s wife) this summer. I told her how sorry I was that I missed the funeral. She is one of those wonderful, kind, gentle, gracious women who replied, “I’m just so glad you are here today.”

F. Example 6: Questionable Method to Achieve a Noble Goal—Trying to Help the Oppressed

You are representing a thirty-year-old woman who agreed to stay with her friend’s sixteen-year-old daughter while the friend vacationed in Europe. Your client worked from 8:00 a.m. to 5:00 p.m., and her friend knew that she would not be available until 5:30 p.m. At 3:30 p.m., the daughter invited two friends over after school. One of the friends brought a BB gun with him and shot the other friend in the eye, permanently blinding him. The injured boy brought a civil action against several parties, including your client. The plaintiff’s attorney calls you and asks you to make a counterclaim against the insurance company providing the homeowner’s policy. The insurance company is already a party to the lawsuit, based on their policy covering the absent homeowner. You read the policy closely, but realize that there is no coverage for your client. Do you

(1) Make the counterclaim in an attempt to appease the plaintiff’s attorney who is trying to put pressure on the insurance company to throw in its limits.

(2) Threaten to make a counterclaim against the plaintiff for infliction of emotional distress.

(3) Candidly tell the plaintiff’s attorney that you have read the policy and cannot in good faith make a counterclaim against the insurance company.

(4) Tell your client about the attorney’s suggestion and admit your reluctance to make the counterclaim, but
ultimately say it is up to your client to make the final decision.

**Goal:** Include at least one very tough case. As students might expect, lawsuits of this sort are extremely stressful for the client. I chose Option 3. I explained the situation to my client, and added that I would always represent her to the best of my abilities, but I was not willing to make a frivolous claim.\(^\text{90}\)

I emphasize to the class that a lawyer’s good reputation is critical for a successful career.\(^\text{91}\)

**The Rest of the Story:** The insurance company ultimately threw in its limits based on its coverage of the homeowner. The case settled without my client contributing to the judgment.

**G. Example 7: Your Opponent Inadvertently Discloses Material—The Smoking Gun**

You are a new associate at a law firm, so the smoking gun shows up in unlikely places like document productions. You represent the defendant in litigation. You are at a document production held at the offices of the plaintiff’s attorney. You are reviewing two boxes of documents and fighting off the urge to fall asleep when, at the very back of the second box, you see a couple sheets of handwritten notes. It takes awhile for you to figure out what you are seeing, but you realize that you are looking at some potentially attorney-client privileged or work-product documents, also known as “smoking gun” documents. The handwritten notes describe the weaknesses of the plaintiff’s case, and the lawyer’s reluctance to handle the case at all. One document appears to be notes taken during a client meeting. Do you

(1) Ask to see the plaintiff’s attorney so you can discreetly return the attorney-client privileged documents to him.

(2) Try to calm your beating heart while you pull out your spy camera to take photographs of the documents.

\(^{90}\) See supra n. 86 (discussing Model R. Prof. Conduct 1.3 cmt. 1).

\(^{91}\) Stephen D. Easton, *My Last Lecture: Unsolicited Advice for Future and Current Lawyers*, 56 S.C. L. Rev. 229, 248 (2004) ("A lawyer’s single most important asset is his or her reputation.")
(3) Try to calm your beating heart and call a trusted colleague from your firm for advice.

(4) Dictate the contents of the “smoking gun” documents, and tell the plaintiff's attorney that you will take copies of both banker's boxes of documents so you can look at them back in your office. You have also carefully noted the identifying numbers of the documents so you have a record of all that was included in the production.

Goal: This value dilemma raises issues both about the importance of consultation with more experienced lawyers, and the decision about what to do when the situation is not addressed in the Model Rules. In the real-life equivalent, I asked for advice because I was not sure what I should do. I knew from my Professional Responsibility class that the attorney-client privilege could be waived, and that I had a duty to zealously represent my client. I called a trusted senior lawyer at my law firm. She advised me to take the action described in Option 4 because, in her experience, she found that documents sometimes mysteriously disappeared between the time of the production and the time copies were made. I followed her advice. I emphasize to the students that you must make some decisions on your own, but it is often prudent to consult with a mentor when facing a particularly close ethical call. Not every attorney will handle this situation in the same way. Some might not ask for a copy of the documents.

This value dilemma is a particularly good example because there are arguments for both positions. A valid argument can be made that the inadvertently disclosed document should not be

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93 See supra n. 86 (discussing Model R. Prof. Conduct 1.3 cmt. 1).

94 As a side note, this was in the days before cell phones, so I made a phone call from a quiet office. I used a quiet voice as I explained the situation to the senior attorney. She responded in a whisper (even though no one from the plaintiff's firm could hear her) as she gave me advice. We both laughed about this later, and wondered aloud why it is that when someone whispers, we feel compelled to whisper back.

95 See Schiltz, supra n. 7, at 715–716 (explaining that his mentor, James Fitzmaurice, once received a lengthy memorandum that the opposing lawyer had written to his client summarizing the strengths and weaknesses of the opponent's position and strategy for the case. Fitzmaurice returned the memo without reading or copying it, but other lawyers in the case used it without informing the opponent that they had the memo. This incident also occurred prior to the adoption of Model Rule 4.4(b) discussed infra notes 97–98 and accompanying text.).
read or used. An equally valid argument can be made that the inadvertently disclosed document should be used. Lawyers who decide not to use the inadvertently disclosed document may be applying The Golden Rule by determining that they would not like an opponent to use an inadvertently disclosed document against them. Lawyers who decide to use the inadvertently disclosed document may decide that lawyers often use the opponent’s mistakes to the advantage of their clients. Andrew Perlman explains,

Even though inadvertent disclosures of this sort are becoming increasingly common because of fax machines, email, and electronic discovery, the law governing the subject is still unsettled. Courts, rules drafters, and ethics opinions have offered conflicting advice about what receiving lawyers must do under these circumstances.96

I suspect that lawyers struggle mightily over this dilemma for two reasons: the lawyer can see himself making the same inadvertent mistake and it may be a support person, not the lawyer, who made the mistake.

The Model Rules intentionally fail to answer the question of what action the lawyer should take. At the time of this inadvertent document disclosure, there were no specific guidelines in the Model Rules about the inadvertently disclosed document.97 Apparently, the “inadvertently disclosed document” issue arises more frequently now that fax machines and e-mail make it relatively easy to mistakenly send documents to unintended recipients. This was one of the main areas of contention during the American Bar Associa-


97 The ABA first addressed the issue of what lawyers should do when receiving misdirected materials in 1992. Formal Opinion 92-368 (Inadvertent Disclosure of Confidential Materials) concluded “that a lawyer who mistakenly receives materials intended to be privileged or confidential should refrain from examining them, notify the lawyer who sent them and abide by that lawyer’s instructions for their return.” Eileen Libby, The “Oops” Factor: Latest Model Rule Leaves Wiggle Room for Lawyers Receiving Misdirected Materials, 92 ABA J. 26 (Feb. 2006). Eileen Libby notes, [Formal Opinion 92-368] came in for its share of criticism, particularly on grounds that, even when a lawyer receives a document that could win a client’s case, the opinion would require the lawyer to give more weight to a careless adversary’s obligation of confidentiality than to the lawyer’s own obligation of zealous representation.

Id. The ethics committee formally withdrew its 1992 opinion in Formal Opinion 05-437. Id. The area of inadvertent disclosure is now addressed in Model Rule of Professional Conduct 4.4.
tion Ethics 2000 Commission’s revision of the Model Rules. The revised rules added a new subsection (b) to Model Rule 4.4, which only mandates notification to the inadvertent sender, but does not prohibit use of the document. Comment (2) to Model Rule 4.4 states, “Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived.” Interestingly, Comment (3) provides protection for at least one of the possible options:

Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

Eileen Libby notes, “Meanwhile, no uniform rule regarding the treatment of materials that are inadvertently sent to opposing counsel has evolved at the state level. The best solution may be to be very careful before hitting the ‘send’ button.”

The Rest of the Story: Three days after the arrival of all the documents, the plaintiff’s attorney called and said the plaintiffs were dropping the case. I was planning to spend the entire weekend preparing a partner for depositions of the principal players at the plaintiff’s headquarters on Monday. I never found out if it had anything to do with the “smoking gun” documents, but my weekend was spared from slogging through two banker’s boxes of documents.

H. Example 8: You Are Tempted to Cover Up a Mistake—Who Me?

You are a new Legal Writing professor. You emphasize the extreme importance of accuracy in writing and citation. It is very early in the semester and you are still building your reputation with your students. After the first week of a writing assignment, you

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98 Model Rule 4.4(b) states, “A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.”

99 Libby, supra n. 97, at 26; see also Perlman, supra n. 96, at 783–785 (reviewing how all the fifty states plus the District of Columbia handle the issue of inadvertently disclosed documents).
hand out a research list that you later discover contains a major citation mistake. You have cited to the second series of a reporter instead of to the first series. Do you

(1) Tell the students about the mistake, but blame it on your administrative assistant.

(2) Tell the students about the mistake, but say you take full responsibility for any errors made by anyone (implying that your administrative assistant made the mistake).

(3) Tell the students about the mistake, plus admit that you made it all on your own because you did not give yourself enough time to proofread the list.

Goal: Include at least one fairly current experience. Here, I chose Option 3.

The Rest of the Story: I failed to allow enough time to carefully proofread. I emphasize that, even under the time pressures that are part of every lawyer's daily life, care must be taken to avoid mistakes. Some of my own mistakes have turned into my greatest teaching moments. I apologized to my students who now understood first-hand how frustrating it was to find a source when it was incorrectly cited. This example also reiterates the importance of making an apology.

I. Example 9: Pressure to Be Productive—Double Billing

How do you bill thirty hours in one day? Believe it or not, it was possible in the 1980s, and you did not even have to give up sleep to do it. How? Double billing. At that time it was common practice to bill a client for every hour spent traveling. So, say you are flying to San Francisco and your travel time is about five hours. You could bill all that time to the client. If you worked on a file for another case you could bill your time to that client. Do you

(1) Rationalize that you are not spending time doing what you would like to do, so it is fine to double bill.

(2) Recognize that the 1,850 hour per-year requirement at your law firm (equivalent to billing about thirty-seven hours a week with two weeks off) is horrific and you need to make up these hours somehow, so you will double bill.
It Happened to Me

(3) Recognize that double billing is common practice. Lots of good and honest people do it so it must be okay.

(4) Bill the travel time, but use it to work on the case for the client you are traveling for.

Goal: I include this value dilemma for two reasons: it illustrates how lawyers who overreach can have consequences for everyone, plus it raises the students’ awareness of the pressure to be productive. It was, at one time, common for lawyers to double bill. However, even though it was common, it may never have been ethical or professional. In 1993, the ABA Standing Committee on Ethics and Professional Responsibility issued an opinion stating that double billing was professional misconduct. In the real-life equivalent, I would bill all my travel time, and work on the case I was traveling for during the majority of that time. Although double billing is no longer an option, I also use this example to introduce the pressure lawyers in law firms face to meet the minimum billable-hour requirement. Further, double billing might still be occurring, but now the rules clearly label this professional misconduct. Students must decide early in their careers how to bill fairly and ethically. Stephen Easton notes, “How you resolve billing requirement shortfalls will determine what kind of person you will be in the practice of law.”

The Rest of the Story: I never really did buy that double billing thing.

J. Example 10: You Make a Point about Your Own Values—All Equal

You are attending the deposition of a third-party defendant in a civil case. You arrive at the deposition on time. About half an hour after the deposition begins, the most recognizable plaintiff’s attorney in the metropolitan area arrives to represent another minor party. He does not identify himself, but you recognize him instantly, as would any member of the bar. During the deposition, he

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100 See Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871, 918–919 (1999).
101 Billing for Professional Fees, Disbursements and Other Expenses, ABA Formal Ethics Op. 93-379.
102 Easton, supra n. 91, at 258.
writes on your legal pad, “Who are you?” You write back, “Julie Oseid, representing the third-party defendant.” Before you slide the legal pad back to him you add, “Who are you?” He looks up with surprise and shock, but then signs his name with a flourish.

**Goal:** Sometimes, it is easy to interject your own values into your legal practice. As my parents told me, “You are not any better than anyone else. But remember that you are not below anyone else either. We are all equal.” I also use this story to teach students not to be intimidated by the big shots. Plus, I remind them that if and when they become big shots, they should not push the little people around.

**The Rest of the Story:** I kept that piece of paper for years.

**IV. WARNING—THE DISADVANTAGE OF USING PERSONAL VALUE DILEMMAS IN CLASS**

This Section of the Article is normally devoted to discussing both the advantages and disadvantages of using this teaching method. I discussed the advantages of presenting value dilemmas in Section I. Thus, I turn to what are commonly termed “disadvantages,” but here “warning” is probably a more accurate word.

“Warning” is a better topic heading because there is only one major downside to the use of real-life experiences: it is likely that at least one student will decide that you did not take the appropriate action in at least one of your examples. This student will decide that your action was wrong, amoral, or immoral.

Humans have a psychological aversion to reexamining past decisions. We do not like to confront the possibility that we may

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103 I could have used the word “risk” instead of “warning,” but I know that lawyers and law professors are risk averse, so I hope that the word “warning” will not elicit the same response as “risk.” See Karen Gross, *Process Reengineering and Legal Education: An Essay on Daring to Think Differently*, 49 N.Y. L. Sch. L. Rev. 435, 437 (2004) (noting that lawyers and law professors are risk averse, “although they are far from alone in fearing change”).

104 In addition, using any stories to teach ethics has some downsides. Students may misinterpret the point of the story or place it in an inappropriate context. Because these downsides are common to all storytelling, and not unique to using personal stories, they are not explored in any greater depth.

105 Of course, if you do not share what action you took, you can avoid this pitfall.

106 You might try to predict which example could prompt this reaction from a student, but you cannot be sure. I have been surprised by the actions that disturb the students. So, be prepared that a student might disagree with the action you took in any of your examples.

107 See Levin, *supra* n. 34, at 629 (“There is a psychological tendency not to re-examine decisions once they have been made, and so experienced lawyers who follow practices that violate the ethical rules may not be quick to re-examine their practices.”). Still, as legal
have made the wrong choice. Instead, we want to perceive our actions as consistent with our values.\textsuperscript{108} If you use value dilemmas from your own life as a lawyer, you must be prepared to deal with a disagreement about whether you took the right action. It can be painful personally, particularly if you consider yourself an honest, ethical, and moral person. On the other hand, you can view yourself, like your students, as a “work in progress.”\textsuperscript{109} Perhaps your students will convince you that another choice, maybe one you did not even imagine, may have been more moral, ethical, or professional.

You might decide it is too high a price to pay. My experience is that it is worth the price. No other in-class experience can teach context for value dilemmas quite like the sharing of your own personal experiences.

\textbf{V. CONCLUSION}

I conclude with my most recent experience with our society’s ever-present focus on warnings. I am terrified of horses. Naturally, I have a daughter who loves horses, takes riding lessons, and wants to share her interest with her mother. Last summer I agreed to ride a horse with her on a family vacation. We signed all kinds of waivers, mounted our horses,\textsuperscript{110} and then listened to a five-minute warning and disclaimer about how many risks we were taking: horses are unpredictable animals, the ranch was not responsible for unexpected natural events, and potential injuries might include loss of limb or life. At that point, my daughter had such a look of delight on her face that I was willing to attempt all the dangers of a trail ride. Not only did I survive, but I also saw incredible views.

A discussion of the “It Happened to Me” value dilemmas gives students an incredible view of how and when tough value choices will arise during all stages of their careers. Sharing your own personal stories presents a tremendous opportunity to challenge stu-

\textsuperscript{108}See Lerner, supra n. 3, at 674.

\textsuperscript{109}Luke, supra n. 11, at 844.

\textsuperscript{110}My “horse” was really a mule, but permit me to share my own war story: it was a huge mule.
udents to think about their own ethics, morality, and professionalism and reflect on how their values will influence the way they will practice law. Despite the warning, I urge you to “get on the horse” and share your own “It Happened to Me” value dilemmas.
HELPING STUDENTS DEVELOP A MORE HUMANISTIC PHILOSOPHY OF LAWYERING

Beth D. Cohen∗

Well I learned a whole lot about life in law school.
Learned how to make a wrong right in law school.
I learned how to talk way above your head.
I used to be charming, but then instead
I went to law school.

Well I learned a whole lot about greed in law school.
And I saw a future Senator cheatin’ in law school.
He said, I used to feel bad when I was wrong,
Now I distinguish my position and I move right along
’cause I’ve been to law school.

Hold me now.
I got a “B” in Evidence, I am proud
’Cause I know right now
How I can set you up so you fall down.

And I learned a whole lot about pain in law school.
And I even saw a little cocaine in law school.
Oh yeah my Mama thought the music business was a disgrace,
But I ain’t never been to a sleazier place
Than when I went to law school.

∗ © 2006, Beth D. Cohen. All rights reserved. Associate Professor of Law and Director of the Legal Research and Writing Program at Western New England College School of Law, Springfield, Massachusetts. The Author teaches Legal Research and Writing, Advanced Legal Research and Writing, Judicial Externship Seminar, Legal Education Achievement Program, and Professional Responsibility. A sincere and special thank you to Chris Whalley, law student and research assistant, for his tireless work and enthusiasm on this project.

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Well I lost a whole lot of my life in law school.
I traded credibility and timing for law school.
But then I learned how to use the other side of my brain.
I used to be carefree and partially sane
Until I went to law school.
And I graduated from law school.
And I learned a whole lot about life in law school.¹

I. INTRODUCTION

The lyrics of the “Law School” song capture the often demoralizing and unsatisfactory experience of many law school students.² Although intellectually stimulating and challenging, law school, and ultimately the practice of law is often an unhappy and unhealthy endeavor.³ In fact, although the number of students entering law school has remained relatively constant, the number of lawyers, particularly women, leaving the profession or generally dissatisfied with the profession, has been of growing concern.⁴

² McMullan, supra n. 1; see also Lawrence S. Krieger, Psychological Insights: Why Our Students and Graduates Suffer, and What We Might Do about It, 1 J. ALWD 259 (2002) (bibliography included) [hereinafter Psychological Insights]; Lawrence S. Krieger, What We're Not Telling Law Students—And Lawyers—that They Really Need to Know: Some Thoughts-in-Action Toward Revitalizing the Profession from Its Roots, 13 J. L. & Health 1 (1998–1999) (detailing law student and lawyer distress caused by competitive measures of success and setting forth principles that focus on internal motivations and individual attitudes) [hereinafter What We're Not Telling Students]; see generally William W. Eaton, Occupations and the Prevalence of Major Depressive Disorder, 32 J. Occupational Med. 1079 (1990) (study finding lawyers to have highest rate of depressive disorder among 104 occupations).
³ Patrick J. Schiltz, On Being a Happy, Healthy, and Ethical Member of an Unhappy, Unhealthy, and Unethical Profession, 52 Vand. L. Rev. 871, 874–888 (1999) (citing statistics that legal professionals suffer disproportionately from health and psychological issues and ethical problems, and details the poor health and well-being of lawyers; also sets forth advice on what to avoid regarding career paths and choices); see Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession 23–38, 45–48 (2000); Martin E.P. Seligman et al., Why Lawyers Are Unhappy, 23 Cardozo L. Rev. 33 (2001).
Consequently, legal education and the legal profession have begun to respond to these concerns. Responding to these concerns requires ongoing assessment, questioning, and reflection about what we as educators and members of the legal profession want students to learn during law school, learn about life, and learn about life in the law. With these concerns in mind, viewing law school as the entry into the profession, a fundamental consideration is how to help students more effectively develop a sustainable philosophy of lawyering during law school that lends itself to the rigors and demands of life, law school, and lawyering.

Generally, a philosophy of lawyering refers “to the basic principles that a lawyer uses to deal with the discretionary decisions that the lawyer faces in the practice of law.” A philosophy of lawyering also includes an approach that attempts to address and balance the conflicts and tensions among the various roles of a lawyer. The various roles of the lawyer include fiduciary, advo...
cate, officer of the court, individual, and member of the legal profession and of the larger community. A philosophy of lawyering “operates at three interrelated levels: the personal, the practice, and the institutional.” Defining what is meant by philosophy of lawyering, however, is not nearly as crucial as introducing students to the process and skills by which they can evaluate their options and approaches. This Article considers the need to help students develop a cohesive philosophy of lawyering and suggests some ideas and methods to help introduce these concepts and concerns to students. Although this Article focuses primarily on aspects of the legal research and writing curriculum and pedagogy as well as professional development programs that can enhance the curriculum, the concepts are applicable and transferable to other subjects and courses. The purpose of this Article is to explore the issues raised by a conscious decision to help students consider and develop a beneficial philosophy of lawyering in areas including the development of legal research and writing curriculum and professional development programs.

8 Model R. of Prof. Conduct preamble ¶ 1 (ABA 2005).
9 Crystal, supra n. 7 (delineating the various lawyering roles of advocate, officer of the court, fiduciary, individual, and professional and discussing the tensions among the various roles).
11 For another commentator’s approach to this issue, see Lawrence S. Krieger, Essay on Professionalism and Personal Satisfaction: The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness, 11 Clin. L. Rev. 425, 426 (2005) (arguing “(1) that satisfaction and professional behavior are inseparable manifestations of a well-integrated and well-motivated person; and (2) that depression and unprofessional behavior among law students and lawyers typically proceed from a loss of integrity—a disconnection from intrinsic values and motivations, personal and cultural beliefs, conscience, or other defining parts of their personality and humanity.” The author suggests ways to teach professionalism, and suggests as a professional model “the wise, compassionate lawyer-statesperson.”).
II. THE NEED TO DEVELOP A PHILOSOPHY OF LAWYERING

A. Curriculum

When students begin their legal education, they also begin to develop their professional habits and skills. However, considerations of helping students to develop their professional identity, their philosophy of lawyering—a concept of how, as professionals in the law, they will relate to their clients and relate to the community—are often not addressed, or may be displaced or subsumed by the rigors and practicalities of the demanding law school curriculum. Helping students to develop an accessible and practical philosophy of lawyering, while also assisting in the forging of their professional identities and their place in society as professionals, is a valuable, yet often neglected aspect of both legal education and the practice of law. Given the unparalleled access of the legal research and writing faculty to first-year law students, this faculty has the best opportunity to promote professionalism and the development of a humanistic philosophy of lawyering.

The first thing to address with students is competition. As new classes of students enter the profession of law, a profession struggling against a tide of disaffection, adding more opportunities for students to consider a broader, more humanistic and holistic approach to a lawyer’s place in the society of problem-solvers may help ease some of the discontent. Students arrive at law school with diverse experiences and backgrounds and are generally excited and energetic about the study of law and becoming law-

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12 “Teaching Responsibility, not just to one’s own career but to the system in general, is an important part of legal education and could never be taught simply by the memorization of black-letter rules alone.” Peter F. Lake, When Fear Knocks: The Myths and Realities of Law School, 29 Stetson L. Rev. 1015, 1020 (2000); see generally James D. Thaler, Jr., The Law School Dilemma—Student or Lawyer in Training, 29 Stetson L. Rev. 1265 (2000).

13 Crystal, supra n. 6, at 76 (recognizing the lack of guidance and consensus regarding a philosophy of lawyering).


15 See Ruth Ann McKinney, Depression and Anxiety in Law Students: Are We Part of the Problem and Can We Be Part of the Solution? 8 Leg. Writing 175 (2002); Martha C. Nussbaum, Cultivating Humanity in Legal Education, 70 U. Chi. L. Rev. 265 (2003).
However, students often face a difficult transition, and, as the “Law School” song notes, their enthusiasm is often dampened by or replaced by self-doubt and insecurity. Legal education, instead of embracing diversity of thought, opinion, and experience traditionally tends to relegate individual perspective in favor of the notion of “thinking like a lawyer.” Typically, the lawyer in thinking like a lawyer is conceived and presented as a thoroughly competitive notion of “advocate or gladiator” rather than as a collaborative, compassionate, and humanistic problem-solver or counselor, advisor, or problem-avoider.

Viewing the lawyer’s role as predominantly or exclusively one of a competitive advocate in litigation underemphasizes legal work that involves counseling, advising, negotiation, and other types of more collaborative and compassionate dispute resolution and problem-solving. For example, the casebook and Socratic-method approach of legal education, with the primary focus on litigation and the corresponding high valuation of extrinsic measures of success, generally stresses the competitive win-lose perspective. This approach gives students a distorted sense of the validity of the lawyer’s role as counselor, advisor, and conciliator. The focus on learning to build arguments and distinguish positions based on the law, generally without thorough consideration of the impact on the relationships involved, tends to dehumanize and compartmentalize the practice of law.

Some students also enter law school affected with deep cynicism and doubt about entering the legal profession, a profession they recognize as being fraught with problems. Helping these students develop a positive attitude toward lawyering and helping them develop an ethical philosophy of lawyering is critically important to the individual students and the profession. See Richard J. Heafy, Moral Attorneys; Moral People: Law Students Reflect on the Principles They Intend to Follow in Their Professional Lives, 8 Issues in Ethics (Markkula Ctr. for Applied Ethics) (Summer 1997).


The Socratic method, in various forms, “remains the traditional and most honored legal teaching methodology.” Torrey, supra n. 19, at 102.


In response, a number of practitioners have found that a multi-disciplinary approach to client problem-solving allows greater efficiency in some cases and an environment where “clients feel seen, heard and cared for in an emotionally respectful atmosphere.”
manizing has taken a heavy toll on the well-being of lawyers and law students. The depression and dissatisfaction among law students and lawyers is well documented. Consequently, the need to help students develop a philosophy of lawyering that takes into account a more humane and satisfying way of practicing law has become more urgent.

Furthermore, the first-year curriculum is typically dominated by classroom rather than experiential learning. Clinics and externships that provide opportunities to engage in some of the more practical aspects of problem-solving, where students typically begin in earnest to define their professional identities and philosophies, are traditionally not available until after students complete their first year studies. In view of the current structure of mainstream legal education—the focus on the casebook and Socratic and adversarial method—the legal research and writing course provides an excellent opportunity for first-year students to go beyond the confrontational casebook method by considering lawyer’s role as a problem-solver in society in relation to the personal, practical, professional, and institutional dimensions of the study and practice of law.

B. Professional Development

Helping students develop a philosophy of lawyering may also be viewed as an essential part of professional development. Nu-
merous studies detail the distress caused by law student disaffectedness, law student depression, and other stress related problems. Moreover, lawyer dissatisfaction, stress, and depression contribute to many unhappy lawyers leaving the profession and, perhaps even more disturbing, many unhappy lawyers remaining in practice. Encouraging law students to reflect on and explore the practice of law in more humane terms, while considering the impact of their work on their own lives and the lives of others, is likely to ease some of the feelings of isolation and disconnect. For example, there are now many professional organizations and practice approaches that recognize the importance of human connection in the practice of law, the importance of finding meaning in the practice of law, and the ongoing quest to attain a balanced life in the face of grave unhappiness and dissatisfaction within the profession.

Despite the feelings of isolation and disconnect, the law, at its best, is generally a collegial profession, and, like practicing lawyers, law students often desire a connection to the broader community. Although it is important for students to be fully immersed in the study of law and to become part of the law school community, complete disconnect from the “outside world,” the world beyond the classroom, often fundamentally distorts students’ perspective regarding the impact of the law and often proves unhealthy and isolating for students themselves. Although law students are a relatively transient population, in law school for only a few years, their experiences, and the opportunities available to them, have a profound impact on their perception of the study and practice of law and their future life in the law. Therefore, it is crucial for legal research and writing faculty to consider professional development and career satisfaction throughout legal education and to provide and develop opportunities for students to connect with the law in

30 See e.g. Krieger, supra n. 11, at 434–438; Schiltz, supra n. 3.
31 See generally Krieger, supra n. 11; Deborah L. Rhode, The Professionalism Problem, 39 Wm. & Mary L. Rev. 283 (1998) (describing lawyers’ feelings of dissatisfaction with their profession and concern over the decline of professionalism); Schiltz, supra n. 3.
34 See Ann Juergens, supra n. 10, at 418–419.
ways that are affirming rather than demoralizing. The legal research and writing course provides a valuable opportunity to introduce important issues of professionalism, ethics, and career satisfaction. If students develop positive attitudes toward the study and practice of law and the lawyer’s role as a humane problem-solver, the impact is likely to transcend law school and create a more satisfied individual and professional.

In order to achieve such connection with the law and collegiality within the profession, it is vital to integrate opportunities for students to consider and develop the broader aspects of their professional identity. As part of developing their philosophy of lawyering, students should consider their professional development and identity through an examination of professionalism issues such as the moral implications of lawyering, the importance of pro bono work, and various dispute resolution approaches including holistic lawyering, collaborative lawyering, and other humanistic approaches.

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35 "It is almost too obvious to state that if our operant paradigms, teaching methods, or other practices exert pressures that undermine the physical health, internal values, intrinsic motivation, and/or experience of security, self-worth, authenticity, competence, and relatedness of our students, we should expect the negative results that studies of law students (and lawyers) consistently demonstrate: major deficits in well-being, life satisfaction, and enthusiasm, flourishing depression, anxiety, and cynicism." Krieger, supra n. 14, at 124–126.

Furthermore, positive attitudes about the legal profession and the practice of law are also likely to improve the reputation of lawyers in our society. See generally ABA Sec. of Litig., Public Perceptions of Lawyers: Consumer Research Findings, http://www.abanet.org/litigation/lawyers/publicperceptions.pdf (Apr. 2002).

36 "There is a bottom-line message for law students and lawyers in all of this: If you have the wrong values and motives, your life will not feel good regardless of how good it looks. And there is a bottom-line message for law teachers: Do everything possible so that the law school experience preserves and strengthens, rather than dampens, the enthusiasm, idealism, and integrity (in its broadest sense) of your students." Krieger, supra n. 11, at 438.


39 Holistic lawyering is "an orientation toward law practice that shuns the rancor and bloodletting of litigation whenever possible; seeks to identify the roots of conflict without assigning blame; encourages clients to accept responsibility for their problems and to recognize their opponents’ humanity; and sees in every conflict an opportunity for both client and lawyer to let go of judgment, anger, and bias and to grow as human beings." Ingrid Tolleson, Enlightened Advocacy: A Philosophical Shift with a Public Policy Impact, 25 Hamline J. Pub. L. & Policy 481, 505 (2004) (citing Keeva, supra n. 33, at 139).

40 "Collaborative law was originally a family law model in which the parties and their attorneys contractually agree at the outset that they will not litigate. They focus on resolution and problem-solving without the threat of court filings and process. Thus, unlike other forms of alternative dispute resolution in which a lawsuit is filed first and then referred for
approaches to lawyering. Integrating such considerations into the legal research and writing course and the law school community is likely to capture the students’ energy and enthusiasm and enrich the students’ educational experience.

In law, a profession that requires continuing education, the earlier that law students are able to consider their place in the larger community and value “ethical ambition,” the better for the student as an individual and as a professional in the community of lawyers. In fact, the book Ethical Ambition begins with the question, “[h]ow can I maintain my integrity while seeking success?” and research and writing faculty should introduce this question to students as a valuable tool to help address their life’s work. Helping students consider the moral implications of lawyering may enable them to effectively “reconnect law and morality and make tangible the idea that lawyering is a ‘public profession,’ one whose contribution to society goes beyond the aggregation, assembling, and deployment of technical skills.” “In this way lawyers committed to using their professional work as a vehicle to build the good society help legitimize the legal profession as a whole.” Helping students develop a philosophy of lawyering that considers the moral and human impact of the profession “elevates the moral posture of the legal profession beyond a crude instrumentalism in which lawyers sell their services without regard to the ends to which those services are put.” The impact of integrating such considerations into the legal research and writing curriculum and into the broader law school culture will likely benefit the student, the lawyer, and the community.

 mediation or arbitration, mutually satisfactory cooperative resolution is the focus of all parties from the outset.” Wright & Garlo, supra n. 21, at 11–12.  
41 For useful summaries of many of these humanistic or “healing” approaches to law practice see id. and infra nn. 80 and 119.  
42 Bell, supra n. 29.  
43 Id. at 1.  
45 Id. at 3, 3 n. 7.  
46 Id. at 3.  
47 One commentator has argued for lawyers to adopt a “nurturer” model in their professional approach:  

The lawyer as nurturer implies a focus on the client’s needs encompassing humanistic, analytical and technical approaches to conflict resolution. The metaphor, however, does not imply a “new-age,” “feel-good,” “touchy-feely,” or “warm-fuzzy” approach to lawyering. Proficiency in the intellectual and technical rigors of legal analysis, or “thinking like a lawyer” is fundamental to capable and accomplished lawyering. However, compassion is equally pragmatic. It functions
Because, as the “Law School” song notes, law school can often be an isolating place, it is important to encourage students to see themselves as part of the law school community and the larger community as a “lawyer in training.”

This includes helping students to consider the broader impact of their approach to lawyering on their professional development. Legal research and writing courses and the legal research and writing faculty are actively involved in addressing these issues, facilitating these discussions, and helping students to consider issues of professional development. Approaching law school from the “lawyer in training” perspective calls for consideration of the interrelatedness of professional and personal lives. Recognizing that work is a significant part of one’s life and that it provides “[a]n opportunity for discovering and shaping where the self meets the world” underscores the importance of providing a forum to explore and nurture this area of professional development. “To have a firm persuasion in our work—to feel that what we do is right for ourselves and good for the world at exactly the same time—is one of the great triumphs of human existence.”

Law school in general, and the legal research and writing curriculum in particular, is a good place to introduce students to the lifelong pursuit of exploring these essential values. The legal research and writing course provides a wonderful forum to help students consider their professional choices and paths in order to help students develop their philosophy of lawyering. As more lawyers and law students consider and practice law in a way that values both effective and compassionate problem-solving, perhaps more

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48 McMullan supra n. 1; Thaler, supra n. 12 (discussing how to become a lawyer in law school rather than remaining just a student).
50 See Thaler, supra n. 12.
51 David Whyte, Crossing the Unknown Sea—Work as a Pilgrimage of Identity 4 (Riverhead Bks. 2001).
52 Id.
53 “At its best, work seems never-ending only because, like life, it is a pilgrimage, a journey in which we progress not only through the world but through stages of understanding. Good work, done well for the right reasons and with an end in mind, has always been a sign, in most human traditions, of inner and outer maturity. Its achievement is celebrated as an individual triumph and a gift to our societies. A very hard-won arrival.” Id. at 12.
will attain “one of the great triumphs of human existence . . . to feel that what we do is right for ourselves and good for the world at exactly the same time.”\textsuperscript{54}

III. TECHNIQUES TO HELP DEVELOP A CONSIDERATION OF A MORE HUMANISTIC PHILOSOPHY OF LAWYERING

A. Curriculum

Legal research and writing faculty can help students develop a more humanistic philosophy of lawyering within the context of curricular design and classroom discussions. For example, numerous articles describe the benefits of integrating social justice issues into the legal research and writing curriculum.\textsuperscript{55} “Teaching social justice issues supports the creation of more sensitive and understanding attorneys.”\textsuperscript{56} Assignments can be developed that incorporate considerations of the law as a healing profession where lawyers are viewed as humanistic and compassionate problem-solvers instead of solely as advocates wielding the sword for a client.\textsuperscript{57}

If litigation is appropriately viewed as a last resort of conflict resolution, integration of other problem-solving methods and approaches may help broaden students’ perspective and understanding of the law and provide students with a more realistic assessment of how lawyers in practice incorporate a range of problem-solving techniques.\textsuperscript{58} Therefore, teaching communication skills, oral and written, need not always be framed within the adversarial model. Indeed, many legal research and writing programs incorporate negotiation, letter writing, and interviewing and counseling exercises into the first-year curriculum.\textsuperscript{59} Such exercises

\textsuperscript{54} Id. at 4.

\textsuperscript{55} See e.g. Miki Felsenburg & Luellen Curry, \textit{Incorporating Social Justice Issues into the LRW Classroom}, 11 Persps. 75 (2003); Edwards & Vance, supra n. 49, at 65–70. “In raising social justice issues, a professor helps students develop a broader sense of themselves and of the world.” Edwards & Vance, supra n. 49, at 67.

\textsuperscript{56} Id. at 66.


\textsuperscript{58} See e.g. Tollefson, supra n. 39, at 504–509.

\textsuperscript{59} 2006 Survey of the Association of Legal Writing Directors and the Legal Writing Institute question 20 (available at www.alwd.org); Ken Kirwin et al., Presentation, \textit{Writing outside the Usual Box: Expository Writing Options in LRW Courses} (Biennial ALWD Conf., 2005) (copy of materials on file with Author); see Kate O’Neill, \textit{Adding an Alternative Dis-
provide students with opportunities to consider lawyering skills outside of the litigation context. Incorporating these approaches into the curriculum, even if not the central focus, may provide a vehicle for students to solve problems more collaboratively and may also afford them the opportunity to more directly consider the impact of options and resolutions on the relationships of those involved in the dispute.

Additionally, the integration of small group projects within the class fosters collaborative learning and takes into account various learning styles often excluded from the dominant approach to legal education. Going beyond the Socratic and casebook methods to incorporate different assignments into the legal research and writing classroom and curriculum also provides the opportunity to discuss diversity among lawyering roles, approaches, and philosophies. For example, discussion of different problem-solving approaches among students may be used to explore diverse approaches and philosophies among lawyers. Such subtleties are often ignored in favor of keeping everyone on the same page, a tendency that may exclude valid opinions and approaches leading to further student isolation and dissatisfaction. Therefore, it is important to validate divergent views and approaches of students and lawyers within the legal research and writing curriculum and the classroom. After all, the law is not a science but a human endeavor, which, at its best, strives to solve problems in the context of what is just and fair within the confines of the adversarial system that ideally views litigation as a last resort.

In addition to incorporating collaborative and dispute resolution discussions and assignments into the curriculum, another vehicle to demonstrate lawyers’ role in the broader community is to assign a book such as Damages: One Family’s Legal Struggles in the World of Medicine as part of the legal research and writing curriculum. Damages, a non-fiction work by Barry Werth, details
the compelling story of a medical malpractice case and its impact on the lives of the family, lawyers, medical professionals, and insurance carriers. Damages, which Western New England College law students read during the summer before entering law school, provides invaluable insight into the human impact of litigation and the significance of the work of the lawyers involved in all aspects of the case. Damages provides a context within which to discuss the life of a lawsuit from all perspectives. In addition to providing a basis for substantive legal research and writing assignments, the book also provides a framework to discuss different lawyering roles, approaches, strategies, and philosophies.

The factually rich details of the real-life drama provide an opportunity to explore many professionalism issues in relation to the various roles of the lawyers involved. For example, Damages effectively exposes the complicated layers of the lawyers’ relationships among themselves, and with clients, experts, and adversaries. Damages also provides students with a realistic perspective of the many complicated and competing interests that must be balanced in the practice of law. Moreover, Damages provides a

Daily et al., Damages: Using a Case Study to Teach Law, Lawyering, and Dispute Resolution, 2004 J. Dis. Res. 1, 3–6.

64 “In Damages, when Donna Sabia went into labor on April 1, 1984, she was expecting healthy twins. Instead, one baby was stillborn—and the other just barely clung to life. Caring for their son would exhaust the Sabias emotionally, financially, and physically, and put a nearly lethal strain on their marriage—but after deciding that a lawsuit might bring them some relief, they discovered that what it brought was a seven-year-long maelstrom of conflict, stress, and further expense. This examination of the Sabia family’s story brings us not only into their lives but into the lives of the doctors, lawyers, insurance carriers, and countless other players in this heartrending tale of human sorrow which is also, in the words of The San Francisco Chronicle, ‘a disturbing biopsy of a system in serious need of an overhaul.’” See generally Barry Werth, Damages (Simon & Schuster 1998).

65 For a more comprehensive discussion of the use of the book Damages, see Jeanne Kaiser & Myra Orlen, Using a Literary Case Study to Teach Lawyering Skills: How We Used Damages by Barry Werth in the First-Year Legal Writing Curriculum, 12 Leg. Writing 59 (2006).

66 After working through the issues in the book from several standpoints, including a variety of writing assignments, students are invited to discuss Damages and how it affects their view of the legal system. For many students, since the book is assigned prior to the beginning of the first semester at law school, Damages is their first introduction to the real life application of the law, the lives of lawyers, and the effect of litigation on its participants. See also Daily et al., supra n. 63, at 3–6.

67 For a more detailed examination of the assignments, see Kaiser & Orlen, supra n. 65.

68 For example, one theme is the relative role of “truth” in the litigation process. See generally Alexander Scherr & Hillary Farber, Popular Culture as a Lens on Legal Professionalism, 35 S.C. L. Rev. 351 (2003) (describing and advocating the use of images of lawyers from popular culture such as cartoons and other media to teach issues of ethics and professionalism).
common language and reference point for the students, and the book can be used illustratively throughout the year to exemplify the significant impact of litigation on the lives of all those involved. Reading and discussing *Damages* enables students to grapple with the difficult issues of lawyering including the indeterminacy of facts, the role of truth in the law, and, significantly, the impact of various lawyering philosophies and strategies on the lives and relationships of those affected by a lawsuit.

The opportunity to read a book such as *Damages* during the first year of law school provides students with realistic insight regarding the complicated impact of litigation on peoples’ lives and may therefore serve to temper the potentially dehumanizing effect of the casebook method. In light of the pervasive casebook method in traditional first-year curriculum, students need to be cognizant of the fact that, from the outset, the very decision of whether to accept a case or file a lawsuit is a decision with serious moral, ethical, professional, and institutional consequences; one that should not be taken lightly, without due consideration of the ramifications. Such considerations raise issues of the different roles of the lawyer and the impact of various lawyering strategies and philosophies on the progression of a lawsuit and resolution of a dispute. Assigning a book such as *Damages* provides a good vehicle to integrate these important professional issues into the legal research and writing curriculum and also to weave in discussions of the importance of developing a lawyering philosophy that considers these issues.

Although there are valid pedagogical reasons to frame legal research and writing assignments in the litigation context, assignments and discussions can transcend the familiar adversarial paradigm to introduce other problem-solving strategies.
even when assignments are set in typical adversarial posture, there are opportunities to discuss how the implementation of various lawyering techniques may have avoided the escalation to litigation or resolved the dispute by employing other means.\textsuperscript{73} To dis-

\begin{itemize}
\item \textbf{Collaborative Lawyering}: The mission of collaborative law is “[t]o promote the non-adversarial practice of law. To promote collaborative law, which resolves legal conflicts with cooperative, rather than confrontational, techniques, and in which lawyers do not litigate—thereby encouraging parties to reach agreements in a creative and respectful manner. To educate the public and the legal community about the process and value of collaborative law.” Mass. Collaborative L. Council, \textit{About Us}, http://www.massclc.org/about.html (accessed Apr. 1, 2007).
\item \textbf{Therapeutic Jurisprudence}: “[C]oncentrates on the law’s impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic and anti-therapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law’s role as a therapeutic agent should be recognized and systematically studied.” David B. Wexler, \textit{International Network on Therapeutic Jurisprudence}, http://www.law.arizona.edu/depts/uprintj/ (accessed Jan. 14, 2007).
\item \textbf{Preventive Law}: “The National Center for Preventive Law (“NCPL”) is dedi-
suade students of the misconception that most disputes ultimately wind-up in litigation, it may also prove helpful to discuss the specific pedagogical considerations for setting the assignment in litigation. In the legal research and writing context, the widely recognized curricular goal of teaching students analytic writing in the form of drafting major types of documents that lawyers are called on to draft, including law office memoranda and court briefs, often dominates the curricular choices. Thus, students are primarily writing within the context of litigation or impending litigation. However, within the context of problem design and classroom discussions, faculty can introduce philosophies and approaches to the practice of law that include focus on problem resolution and win-win solutions beyond the typical win-lose result of litigation.

For example, as in the case chronicled in Damages, analysis of legal issues and lawyering strategies can include consideration of the impact of the litigation on the relationships of those directly and indirectly involved in the dispute including the parties and the community. Reflections about what happens following the escalation of a legal dispute, including a focus on the future relationships of those involved, may also help to introduce and incorporate themes of taking a more holistic view of how to approach problems
cated to preventing legal risks from becoming legal problems.” The Center is also based at California Western School of Law and provides materials and information to those interested in the theories and practice of Preventive Law. Cal. W. Sch. of L., National Center for Preventive Law, http://www.preventivelawyer.org/main/default.asp (accessed Aug. 17, 2006).

- **Mediation:** New approaches to mediation include transformative mediation and the understanding-based approach to mediation. In the understanding-based approach to mediation, “the mediator seeks to work directly and simultaneously together with the parties throughout the mediation in the effort to support their finding their resolution to their conflict.” Ctr. for Mediation in L., About the Center, The Center's Model for Mediation: The Understanding-Based Approach to Mediation, http://www.mediationinlaw.org/about.html #centersapproach (accessed Aug. 17, 2006).

- **Transformative Mediation:** “In the transformative view, conflict is primarily about human interaction rather than “violations of rights” or “conflicts of interest.” The “transformative” or “relational” mediation approach seeks to restore balance and transform the conflict into positive and constructive interaction by helping the parties “identify the opportunities for empowerment.” Inst. for Study of Conflict Transformation, Inc., The Transformative Framework, http://www.transformativemediation.org/transformative.htm (accessed Aug. 17, 2006).


75 Brill et al., *supra* n. 74, at 5–8.
and help clients resolve issues beyond the hired-gun adversarial model.\textsuperscript{76} The holistic approach to the practice of law may include efforts to reconcile, forgive, understand, and empathize within the context of maintaining a philosophy of respectful law practice and a commitment to the non-violent practice of law and use of non-violent language and strategies.\textsuperscript{77}

It is important to recognize that lawyers are often accused of escalating conflict.\textsuperscript{78} A legal research and writing curriculum that provides students with the opportunity to consider dispute resolution options and lawyering philosophies that take a more holistic and humanistic view of the consequences of the escalation of disputes, beyond the externally defined economic measure of success, will likely have a beneficial impact on the individual, the practice, and the institutional levels.\textsuperscript{79} In fact, recent studies indicate that lawyers who embrace a more humanistic, less adversarial approach to the practice of law express greater fulfillment and happiness.\textsuperscript{80} Conceivably, discontent and depression could give way to greater fulfillment and happiness among law students who are introduced through the legal research and writing curriculum to more humanistic and holistic lawyering strategies and philosophies from the start of their legal education.

\textit{B. Professional Development}

Professional development is another venue where legal research and writing faculty can help students develop their philosophy of lawyering. For example, as noted above, helping first-year students connect with the community greatly enhances the educational experience.\textsuperscript{81} Activities such as mentoring students, formally and informally; hosting a diverse range of speakers; sponsoring legal trainings; and organizing community-based volunteer pro-

\textsuperscript{76} Intl. Alliance of Holistic Laws., supra n. 73; see David A. Binder et al., \textit{Lawyers as Counselors: A Client-Centered Approach} (2d ed., West 2004) (discussing the client-centered approach to lawyering).


\textsuperscript{78} See Daily et al., supra n. 63, at 4.


\textsuperscript{80} Steven Keeva, \textit{Listen Well}, 91 ABA J. 76 (Sept. 2005) (attributing recent increases in lawyer satisfaction to growth in areas of collaborative law and restorative justice); Wright, supra n. 57.

\textsuperscript{81} See supra nn. 17–46 and accompanying text.
grams are effective ways for legal research and writing faculty to help students consider and develop their own professional identity and philosophy of lawyering early in their legal training.

In addition, it is also helpful for the legal research and writing faculty to introduce students to different lawyering roles and how to recognize and reconcile the tension between them. In the context of analyzing legal problems and strategies, it is beneficial to consider the lawyer as an individual, a fiduciary, and an officer of the court. First, consider the lawyer as an individual with a personal and moral framework and the corresponding self-defined, self-determined duties owed to the self, family, and community. Next, consider the roles of the lawyer as a fiduciary, an advocate, and a representative. In these roles, the lawyer must try to balance the corresponding duties of loyalty, zealous representation and its limits, confidentiality, competence, communication, and delegation of decision-making authority. Finally, to complete the discussion, it is important to consider the lawyer’s role as an officer of the court and representative of the legal system. In these roles, the lawyer must attempt to balance the obligations of candor to the tribunal, communication and fairness to others, aspirations of pro bono work and public service, and the foundational goal of working toward improving the system of justice. Addressing these various ethical issues of lawyering in the context of legal research and writing, problem-solving, and professional development should take into account the benefits of developing a philosophy of lawyering in relation to the corresponding professional responsibilities.

82 See generally Daicoff, supra n. 4, at 1411–1414; Tollefson, supra n. 39, at 488–489.
83 See generally Model R. Prof. Conduct preamble ¶¶ 1–3 (ABA 2006); Crystal, supra n. 7, at 6, 11–32 (delineating the various lawyering roles of advocate, officer of the court, fiduciary, individual, and professional and discussing ways to resolve the tensions among these various roles).
84 Crystal, supra n. 7, at 4–5.
85 Id. at 1–4.
86 See generally Model R. Prof. Conduct preamble ¶¶ 1–13.
87 Id. at preamble ¶¶ 6, 13; Model R. Prof. Conduct 3.3 cmt. 2 (Candor toward the Tribunal); Crystal, supra n. 7, at 3–4.
88 See Model R. Prof. Conduct 3.3 (Candor toward the Tribunal), 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 6.1 (Voluntary Pro Bono Publico Service), 6.2 (Accepting Appointments).
89 See Deborah Rhode, Presentation, Expanding the Role of Ethics in Legal Education and the Profession (Santa Clara U., Jan. 17, 2002) (presented as part of the 2001–2002 Markkula Ethics Center Lecture Series); see also Benjamin H. Burton, The ABA, the Rules, and Professionalism: The Mechanics of Self-Defeat and a Call for a Return to the Ethical, Moral, and Practical Approach of the Canons, 83 N.C. L. Rev. 411, 480 (2005) (mentioning
1. Volunteer Experience

When law students, often new to the area, are able to connect with the community beyond the law school, there are numerous benefits, including integrating pro bono service into their professional lives and philosophy of lawyering. Furthermore, legal research and writing faculty efforts to establish early connections between law students and the community greatly enhances the classroom component and depth of the educational experience.

Given the demands of law school, encouraging students to fully integrate pro bono work into their professional development is a significant challenge. However, addressing this challenge provides valuable opportunities for law schools to offer flexible and manageable community volunteer opportunities. These opportunities enhance students’ sensibilities about the impact and importance of maintaining a commitment to pro bono work at an early stage of their careers. The unparalleled access of the legal research and writing faculty to first-year law students provides considerable opportunities for legal research and writing faculty to increase student awareness and involvement in such programs as part of professional growth and development.

Unfortunately, although law schools generally offer numerous clinics and public interest externships, these programs are typically limited to upper-level students. First-year students, enthusiastic about beginning the study of law, are an underutilized community resource for many under-funded community programs in need of volunteers. These volunteer projects also provide a reference point for students to appreciate the role of a lawyer in conjunction with the role of other professionals in problem-solving, as well as the need for lawyers to develop problem-solving skills beyond those used in case analysis. These insights are important considerations in professional development and in developing a cohesive philosophy of lawyering. Therefore, it is important for the legal research and writing faculty to support and facilitate such pro-

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91 Cochran, supra n. 28, at 431, 435 (recognizing that clinics and externships are typically not required and are often limited to a small number of upper-level students).
grams and community connections in order to nurture professional development and to enhance the relevance of effective communication and problem-solving skills so fundamental to the legal research and writing curriculum.

Another benefit is that students who avail themselves of these hands-on learning experiences are exposed firsthand to different lawyering and counseling approaches. Students who volunteer witness firsthand the impact a lawyer can have in obtaining access to justice for members of a disenfranchised community. These experiences and insights enrich classroom discussion in the legal research and writing course by providing students with a context of the lawyer’s role in various problem-solving situations. Significantly, these volunteer experiences are even more crucial to first-year students who are just beginning to form their own identities as lawyers, most notably in the legal research and writing course where students more concretely assume the role of a lawyer for purposes of completing assignments. Therefore, incorporating community volunteer opportunities for first-year law students introduces students to actual lawyers practicing in underserved areas of the law. These examples provide an actual and readily accessible context for incorporating social justice considerations into the legal research and writing curriculum.92

Finally, offering community volunteer opportunities for first-year law students provides a vehicle to help students gain a broader perspective of problem-solving philosophies and humanizes the practice of law. Students who participate in these volunteer programs bring to their legal research and writing class additional insight into the collaborative nature of the problem-solving role of lawyers problem-solving in the community. For example, over the course of the past few years, Western New England College School of Law, in collaboration with the YWCA Visitation Centers, designed and implemented an interdisciplinary “Domestic Violence Community Service Project.”93

92 See id. at 437–440; Edwards & Vance, supra n. 49, at 65, 73 (noting that introducing social issues in the legal writing classroom enhances students’ understanding of the relationship between public interest advocacy and the legal writing and analysis course); Rowe, supra n. 28 (providing an in-depth discussion of legal research and writing courses and the skills learned in relation to law study and practice).

93 A sincere thank you to Barbara Loh, YWCA Visitation Center Director; Chris Newman, Northampton Site Coordinator; Brenda Douglas, Springfield Site Coordinator; Kim Zadworney and Kelley Cooper-Miller, former students involved in the Western New England College School of Law Women’s Law Association; all of the dedicated student volunteers; and Dean Arthur Gaudio for his support of the community volunteer initiatives.
The YWCA Visitation Centers in Western Massachusetts provide supervised visitation services for families affected by domestic violence “as a way of maintaining on-going parent-child contact pending reunification or termination of parental rights.” The YWCA Visitation Center in Springfield, Massachusetts, established in 1994, was one of the first in the state. The Probate and Family Courts in Western Massachusetts can order supervised visitation in the YWCA Visitation Centers so that batterers may visit their children in a “safe, neutral place, with monitoring and accountability.” Prior to the establishment of Visitation Centers, “[w]omen and children, often suffering post traumatic stress disorder, were left unprotected and vulnerable to further trauma and victimization when unsupervised visitation was ordered.” In addition to court ordered supervised visitation, referrals can also be made by the Department of Social Services, battered women’s programs, victim witness advocates, batterers’ intervention programs, men’s groups, attorneys, therapists, community agencies, or the parents themselves.

At the start of this Project, there was more than a six-month wait for families to schedule court-ordered supervised visitation. The backlog was due primarily to the shortage of trained visitation monitors. This collaborative project set out to help alleviate the waiting time by training law students interested in domestic vio-

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95 Id. at 17 n. 28 (citing Family Violence: Emerging Programs for Battered Mothers and Their Children (Natl. Council of Juv. & Fam. Ct. Judges 1998)). According to the YWCA of Western Massachusetts, the first Visitation Center in Massachusetts was established in 1991 in Brockton, a southeastern town in Massachusetts. Memo from YWCA of W. Mass., to Beth D. Cohen, Asst. Prof. of L. & Dir. of Leg. Research & Writing Prog. at W. New Eng. College Sch. of L. and Students at W. New Eng. College Sch. of L., Supervised Visitation Milestones 1 (copy on file with Author). By 1999, the Massachusetts Department of Social Services Domestic Violence Unit funded seventeen visitation centers statewide. Id. at 2.
96 Ltr. from Barbara Loh, M.S.W., L.I.C.S.W., Dir., YWCA Visitation Ctr. in W. Mass. to Beth D. Cohen, Asst. Prof. of L. & Dir. of Leg. Research & Writing Prog. at W. New Eng. College Sch. of L., Recognizing National Supervised Visitation Month (May 5, 2003) (copy on file with Author).
97 Id.; see also Sheeran & Hampton, supra n. 95, at 17 (noting that both the Model Code on Domestic and Family Violence and the American Bar Association support the use and establishment of visitation centers.).
99 Conversations with Barbara Loh, M.S.W., L.I.C.S.W., Dir., YWCA Visitation Ctr. in W. Mass. (Oct. 2003).
100 Id.
lence to serve as monitors for court-ordered supervised visitation. As an interdisciplinary and collaborative program, the Domestic Violence Community Service Project provides important benefits to both the community and the law students. The volunteer program helps alleviate the shortage of trained supervised visitation monitors by providing law students who are interested in becoming trained court-ordered supervised visitation monitors. These additional monitors help provide more access to protection for underserved families and their children. Furthermore, students who participate as volunteers witness firsthand an example of a collaborative inter-disciplinary approach to problem-solving: lawyers and social workers working together for a common good. This experience reinforces the topics introduced in the legal research and writing curriculum regarding humane, holistic, and collaborative methods of problem-solving.

Although the YWCA Visitation Center had an on-site methodology in place for training members of the community to serve as court-ordered visitation monitors, in order to create a training model that would enhance the educational experience for law student participants, we included training that put the program into the broader legal context.

101 Id. (crediting law student volunteers as reason that program remained solvent during funding cuts).

102 The primary role of the court-ordered visitation monitor is to make certain that all required protocols are adhered to by all family participants and to record observations of the supervised visit. Id. The recorded observations provide monitoring and accountability to the probate and family court. Id. The students were trained to complete observation reports in the required objective and descriptive manner. As monitors, asked to be objective observers, the students are able to experience firsthand how difficult it is to avoid insinuating their own perspective and judgment into a given situation. Students are able to experience an awareness of their own subjectivity and the difficulties in remaining objective even when describing something through firsthand observation. The experience of serving as a monitor exemplified the importance and power of word choice as well as the impact of the report on the reader, all invaluable insights for law students learning to appreciate the power of language.

103 Unlike training for other volunteers, we supplemented the training in order to provide the law students with a broader understanding of the legal issues raised in domestic violence cases. Therefore, a lawyer from Western Massachusetts Legal Services provided students with an overview of the legal advocacy issues involved in domestic violence cases. The issues regarding court-ordered supervised visitation were put into the broader legal context for the students. The presentation allowed students to integrate their experiences as monitors within the broader framework of issues raised by domestic violence, the impact on families, the role of legal services, advocates, social workers, and the courts. Many students who volunteered were interested in finding out more about the family law practice area in general. Before her death, Professor Catherine Jones, a faculty member who taught family law, also attended these sessions and provided additional perspective about some of the legal issues raised as well as further institutional support for the project.

We also arranged for the student volunteers to visit the Probate and Family Court and
sensitive to the students’ academic schedules, agreed to provide some of the preliminary training at the law school. Follow-up sessions were on-site at the two western Massachusetts YWCA Visitation Centers, and students were fully trained to comply with the YWCA Visitation Center protocol.\textsuperscript{104}

Additionally, other meetings were held at the law school after students had the opportunity to monitor cases. These additional meetings, as well as the on-going support and guidance of the YWCA staff, provided added support for students throughout every stage of the training process. As part of the on-going support, and in an effort to strengthen the link between the practical experience of serving as a monitor and the educational considerations, we held follow-up sessions at the law school with students, professors, and social workers from the YWCA. These sessions provided a collegial opportunity for students to share and reflect on their varied experiences. With the awareness of how the monitors’ observation reports are used by advocates and the courts, the meetings also provided a contextual framework to discuss a variety of issues including the interplay between law and fact and objective versus subjective analysis.

Students who participated as volunteers gained practical understanding of complex issues that are a significant part of the legal research and writing curriculum. The use of facts, the importance of storytelling, and the difference between predictive or objective writing and persuasive writing are cornerstones of the legal research and writing course.\textsuperscript{105} Furthermore, the volunteer experience provided a forum to discuss cross cultural sensitivity meet with a judge. In addition to the benefits of observing the emotionally palpable atmosphere of the court, the judge addressed the students and welcomed questions from them. The judge shared his perspective and insight about the mechanics and philosophy of the court ordered supervised visitation program as well as the sweeping impact of domestic violence. The judge confirmed the importance of neutral monitoring and accountability. He explained when he might order supervised visitation and touted the importance of, and alternatives provided by, the program. The judge also discussed the role of the monitors, and detailed what the court was looking for in the reports. Finally, he explained how the information contained in the reports was used in the decision-making process. This session provided students with an invaluable opportunity to view the inner workings of the adversarial system.

\textsuperscript{104} There are nationally recognized standards promulgated by the Supervised Visitation Network that include standards regarding all facets of the services provided. Supervised Visitation Network, \textit{Standards for Supervised Visitation Practice}, http://www.svnetwork.net/Standards.html (accessed Sept. 10, 2006). The most recent version of the standards was adopted on May 19, 2006. \textit{Id.}

\textsuperscript{105} See Brill et al., supra n. 74, at 5–8; see also Carrie Menkel-Meadow, \textit{Telling Stories in School: Using Case Studies and Stories to Teach Legal Ethics}, 69 Fordham L. Rev. 787 (2000).
and access to justice issues. Pedagogically, participation in the program raised students’ awareness of important social issues and legal strategies thereby increasing the opportunity to greatly enrich the discussion of these issues when raised within the context of the legal research and writing curriculum.

This modest yet successful effort helps serve an important community need and provides students, most of whom are in their first year of study, with an invaluable opportunity to volunteer in a capacity that provides insight into the complexities of innovative and interdisciplinary problem-solving. Moreover, this model can be adapted in other states and in other areas of practice. In fact, the law school has also collaborated with the Court Appointed Special Advocate (CASA) program to have students trained as special advocates for children in cases involving domestic violence. The training also took place at the law school and the trained student volunteers were sworn to serve as CASA advocates.

The model for the interdisciplinary volunteer opportunities provided by the Domestic Violence Community Service Project and the CASA program is transferable to other visitation center programs as well as to other areas of practice. The projects can be expanded to provide an umbrella for other volunteer opportunities for law students within the community. Such opportunities broaden the students’ understanding of the practice of law and the impact of the law on the lives of those in the community.

The volunteer opportunities also highlight access to justice issues and the disparity of allocation of resources. Law students, especially those influenced by the negative public perception of

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107 Students are continuing to volunteer in the project; the feedback has been extremely positive, and we plan to expand the project next year. The introductory training sessions at the law school were open to everyone and were extremely well attended. Most students in attendance volunteered for the project. Other students came to find out more about the program, family law, and legal services. Although many of the initial volunteers were first-year students, others were upper-level students in family law courses. Word of the project also spread to alumni who attended the training sessions, volunteered, and were trained to serve as monitors.


109 Students completed the thirty-hour training program.
lawyers, observe firsthand the dedication among lawyers, judges, and other professionals doing good work in the community. Such firsthand experience provides an invaluable supplement to the classroom component of the legal research and writing course specifically and legal education in general. Creating volunteer opportunities also provides an important foundation for students to begin developing their professional identities and considering a more humanistic philosophy of lawyering.

2. **Mentoring Programs**

In addition to providing community volunteer opportunities for students, mentoring programs are effective to increase support and connection in the lives of law students.\footnote{110} For example, as director of the legal research and writing program, I have collaborated with student groups and law school administrators to help facilitate student-to-student mentoring and student-to-lawyer mentoring.\footnote{111} During Orientation, first-year students are assigned upper-level student mentors to ease the transition and adjustment to law school.\footnote{112} Later in the first year, students are assigned a community legal mentor for general professional support and guidance. This mentoring program is established through collaboration with career services and in cooperation with alumni and local bar associations. Therefore, during the first year of law school, students have access to student mentors and professional mentors, lawyers and judges, for support and guidance. Many aspects of the mentoring program are administered through the legal research and writing program because our program offers us unparalleled access to first-year students.

Mentors provide an invaluable resource for students, model volunteerism, and add an opportunity for an early introduction to

\footnote{110} Although faculty are generally available to provide a great deal of informal mentoring and support, formal mentoring programs connect students with practitioners who are able to provide additional support and insight for the students. Students may shadow them for a day and observe court hearings. Mentors are also available more informally to answer student questions and concerns. Additionally, meeting future colleagues demystifies some of the profession for students.

\footnote{111} Thank you to the numerous students, lawyers, and judges who have volunteered to serve as professional mentors. Thank you also to the Assistant Dean and Director of Career Services Paula Zimmer and Assistant Dean of Law Student Affairs Nancy Sykes.

\footnote{112} For another example of a law school mentoring program designed to foster ethical standards among students, see generally Patrick J. Schiltz, *Making Ethical Lawyers*, 45 S. Tex. L. Rev. 875, 879–889 (2004).
the collegiality of the profession. The mentors add a supportive connection within both the context of the law school community and the greater legal community. Right from the start, in addition to learning about the law, students begin to meet their colleagues, develop their professional reputation, and develop their professional persona. Mentoring programs foster collegial relationships and add strength to the connection between the law school and the community of lawyers while also confirming that the study and practice of law need not be isolating. These are important principles for students to consider while developing their philosophy of lawyering. Furthermore, students are often able to “shadow” their mentors and gain insight into heretofore mysterious legal proceedings such as motions and depositions. This real-life perspective and experience adds a level of understanding of the legal research curriculum and assignments that is difficult to duplicate within the confines of the traditional law school curriculum.

Another method of bridging the gap between the practicing legal community and academia is for the legal research and writing faculty to coordinate efforts to bring members of the legal community to the law school as guest speakers and as volunteer judges in the moot court program. Following the first-year legal research and writing moot court argument, students have the opportunity to speak informally about the practice of law with a lawyer who served as the judge. Additionally, as director of the legal research and writing program, I collaborate with career services to host lawyers and judges as guest speakers on a variety of legal practice areas as part of a “Lunchtime Lawyering” program. These informal discussions provide another opportunity to introduce students to lawyers practicing in traditional areas such as real estate, or in a small firm practice, as well as practice areas such as collaborative law and transformative mediation. Helping to provide numerous opportunities for students to meet lawyers practicing in different areas and with different philosophies of practice, is another concrete way that legal research and writing faculty can help bridge the gap between education and practice, one of the critical goals of lawyering skills courses.

3. Professional Training Programs

In addition to bringing members of the legal community into the law school and sending students into the community as volunteers, sponsoring continuing legal education events that are open
to students as well as lawyers, provides another opportunity to help students learn about different practice philosophies. For example, Western New England College School of Law Legislative Institute and the Massachusetts Collaborative Law Council co-sponsored training on Collaborative Law Practice.\textsuperscript{113} The training generated interest and enthusiasm from students, faculty, and area lawyers. Additionally, providing mediation training for interested law students and lawyers provides another opportunity for students to add practical dispute resolution skills as a supplement to their classroom litigation focused education.\textsuperscript{114} Although such training is usually quite expensive, some projects obtain grants to offset the cost in exchange for a volunteer requirement.\textsuperscript{115} The range and diversity of the participants in the mediation training as well as the focus on transformative mediation\textsuperscript{116} provided a solid foundation for the students to add these skills to their problem-solving repertoire.

Providing legal trainings that focus on the collaborative and humanistic practice of law demonstrates to students that there are diverse approaches to the practice of law, something that often

\begin{footnotesize}
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\item\textsuperscript{113} This was a collaborative effort. I would like to specifically thank attorney Eileen Sorrentino and all of the members of the Massachusetts Collaborative Law Council.
\item\textsuperscript{114} The formal qualifications for mediators may vary from state to state or rules may or may not be determined by specific courts for mediators. For a sample discussion of some differing qualification standards, as well as their advantages and disadvantages, see generally Norma Jeanne Hill, \textit{Qualification Requirements of Mediators}, 1998 J. Disp. Resol. 37, 39–50.
\item\textsuperscript{115} After serving on the advisory board of a local mediation program, I, along with numerous law students, participated in mediation training sufficient to meet court-promulgated uniform rules on dispute resolution. Working with the mediation program, we were able to schedule the training so that students were able to participate.
\item\textsuperscript{116} One commentator recently noted that

Robert Baruch Bush and Joseph Folger argued that the true purpose of mediation is to help individuals gain a better understanding of each other and themselves. Mediation, [Bush and Folger] wrote, should be neither evaluative nor facilitative, but rather “transformative.” Whether or not the dispute that brings parties together with a mediator is resolved is less important than the individuals’ gaining new understanding, new skills for dealing with problems that may arise in the future, and an enhanced sense of control over their lives.

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gets lost in the casebook method of the traditional first-year curriculum. Incorporating consideration of professional development issues and opportunities for positive connection with the law throughout the first-year curriculum helps students to put the “lawyer in training” approach into practice. Providing opportunities for students to explore the notion of the practice of law as a compassionate and humanistic problem-solving mechanism may help to alleviate some of the disconnect and dehumanization endemic in the study and practice of law.

IV. CONCLUSION

In summary, against the backdrop of the rising dissatisfaction of those entering or already in the legal profession, law faculty and administrators in general, and legal research and writing faculty specifically, have opportunities to help students develop a more satisfying way to study and practice law. Developing legal research and writing curriculum more inclusive of humanistic ideals and creating opportunities for pro bono professional development from the start of law school may help ease some of the negativity and discontent in the study and practice of law.

Helping students consider their role as compassionate problem-solvers in the greater community and helping students develop a more humanistic and holistic philosophy of lawyering can help to improve the way that students study law and practice law. The benefits transcend the legal research and writing curriculum to help create a more unified view of the study and practice of law.

117 Helpful websites:
• Contemplative Practice: http://www.contemplativemind.org/practices/
• Comprehensive Law: http://www.fesl.edu/faculty/daicoff/law.htm
• Humanizing Legal Education: http://www.law.fsu.edu/academic_programs/humanizing_lawschool/humanizing_lawschool.html
• International Academy of Collaborative Professionals: http://collaborativepractice.com/
• International Alliance of Holistic Lawyers: http://www.iahl.org/
• Massachusetts Collaborative Law Council: https://ssl4.westserver.net/massclc.org/home.htm
• Restorative Justice: http://www.restorativejustice.org/
• Therapeutic Jurisprudence: http://www.therapeuticjurisprudence.org/
• Transforming Practices: http://www.transformingpractices.com/
• Visionary Law: http://www.renaissancelawyer.com/
and a more unified view of a life in the law. Helping students to appreciate that “[a]n ethical endeavor at which you can work with passion and integrity is a key component in a satisfying life” will ultimately lead to more satisfied students, lawyers, and members of society.\(^\text{118}\)

\(^{118}\) Bell, supra n. 29, at 17.
DEAN WEXLER’S REMARKS

Joan G. Wexler

Good afternoon. I am Joan Wexler, Dean of Brooklyn Law School, and it is my pleasure to welcome you to our Legal Writing Symposium, celebrating the twenty-fifth anniversary of the Brooklyn Law School Legal Writing Program.

We are very proud of our outstanding Legal Writing Program, which teaches cogent, persuasive, and eloquent writing—an essential skill for the practicing attorney. We are also proud of our outstanding writing faculty—authors of three of the leading writing textbooks and many scholarly articles. Our writing faculty are also active participants in legal writing conferences.

Some years ago, faculty members at Harvard University’s Graduate School of Education and the John F. Kennedy School of Government, and twenty-three other colleges and universities conducted an assessment of how undergraduate students could make the most of their educations. Two conclusions from the Assessment are relevant to our discussion here today.

First, the Assessment found there is one academic goal that is widely shared by students: they want to improve their writing. They know they will be asked to write an enormous amount in college, and most expect this to continue after they graduate.

Second, the Assessment found that there is a close relationship between the amount of writing for a course and the students’ level of engagement in the course. The more students write, the more engaged they are with their learning.

The importance of writing has been emphasized in the legal academy as well, through the increased professionalization of legal writing programs, the development of legal writing scholarship,
and the expanded number of writing courses offered beyond the first year of law school. This Symposium explores the relevance of the writing-across-the-curriculum movement to legal education. Participants will consider the ways in which faculty may creatively use writing to teach doctrine and to develop students’ analytic and persuasive skills, and will report on some of the problems they have encountered.

I hope you find these presentations stimulating, and I thank you for coming.
Developing writers is everybody’s business. It is not a simple, easy task that will be finished and out of the way by the end of next week or next year. Developing critical thinkers and writers is . . . one of the central works of education. Writing is . . . every teacher’s responsibility.¹

I. INTRODUCTION

Although the role of language is as important in law as in any academic discipline, law schools were not among the first to embrace writing across the curriculum.² Not so long ago, the prevailing notion concerning law school writing curricula was that writing is writing and anybody who can get into law school should already know how to do it. Implicit in this view is a premise that writing is the discrete skill by which a writer records what he or
she has to say. Under this view, the role of writing in the law school curriculum is easily limited to students recording their answers to an essay exam at the conclusion of each doctrinal course and producing a memorandum and a brief that conform to formal conventions in a first-year legal writing course.

As first-year legal writing programs have evolved over the past thirty years or so, the instrumental view of writing has begun to give way to an understanding that legal writing is inextricably linked to legal thinking—and only rarely will entering law students already know how to do that. Changes in accreditation standards of the American Bar Association also reflect increasing recognition of the importance of writing to legal education.

The growth of law school writing programs followed a fundamental shift in composition theory, which moved the field from a product-based view of writing to a process-oriented approach that emphasizes the role of the recursive process of drafting and revising in forming the writer’s understanding of the content to be communicated. The focus of teaching shifted from studying the

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3 For an overview of the development of law school writing programs, see Marjorie Dick Rombauer, First-Year Legal Research and Writing: Then and Now; 25 J. Leg. Educ. 538 (1973), and J. Christopher Rideout & Jill J. Ramsfield, Legal Writing: A Revised View, 69 Wash. L. Rev. 35 (1994).


5 In 1996, the ABA added to its requirement of “one rigorous writing experience” a standard requiring “an educational program designed to provide its graduates with basic competence in legal analysis and reasoning, legal research, problem solving and oral and written communication.” Sec. for Leg. Educ. & Admis. to B., Standards for Approval of Law Schools and Interpretations stand. 302(a)(2) (ABA 1996). Standard 302(a) now reads in pertinent part,

A law school shall require that each student receive substantial instruction in:

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(2) legal analysis and reasoning, legal research, problem solving, and oral communication;

(3) writing in a legal context, including at least one rigorous writing experience in the first year and one additional rigorous writing experience after the first year;

(4) other professional skills generally recognized as necessary for effective and responsible participation in the legal profession.


6 For an important early discussion of this approach, see Linda Flower & J.R. Hayes, Problem-Solving Strategies and the Writing Process, 39 College English 449 (1977). Professor Joseph M. Williams describes the writing process as follows:

Most experienced writers get something down on paper or up on the screen as fast as they can, just to have something to revise. Then as they rewrite an early draft into something clearer, they more clearly understand their ideas. And
attributes of an effective final document to analyzing and consciously practicing the knowledge-generating writing processes by which the final document is produced. This process approach is compatible with social discourse theories of composition, which emphasize the role of rhetorical context and the collaboration of author and audience in creating meaning from texts. A social-discourse approach to composition emphasizes the role of providing specific real world contexts for writing in promoting both knowledge generation and communication.

Process and social discourse approaches to composition reflect the premise that understanding the experience of the learner is central to improving the quality of education; that premise also underlies both cognitivist and constructivist approaches to learning theory. Cognitivist theory focuses on identifying and facilitating the mental processes involved in knowledge acquisition; constructivist theory is also process-based but places greater emphasis on the role of the learner in constructing meaning within authentic social contexts.

Research into the acquisition of expertise demonstrates the importance of sustained, deliberate practice in facilitating learning. This research suggests that even the most effective first-year writing sequence cannot provide sufficient opportunities for students to practice skills in research, analysis, and writing. Additional experience in research and writing in classes throughout the curriculum will better prepare students for lifelong learning in their profession.

This Essay will first discuss these theoretical justifications for teaching writing across the law school curriculum in terms of specific curricular goals: learning the structure of legal analysis, learning to prepare effective professional documents, and developing legal imagination and professional voice. Then the Essay will

when they understand their ideas better, they express them more clearly, and when they express them more clearly, they understand them even better . . . .


7 See Rideout & Ramsfield, _supra_ n. 3, at 51–56.
8 See _id._ at 56–62.
9 See _infra_ nn. 22–26 and accompanying text.
10 See _infra_ nn. 27–35 and accompanying text.
11 For a fuller discussion of these goals, see Carol McCrehan Parker, _Writing throughout the Curriculum: Why Law Schools Need It and How to Achieve It_, 76 Neb. L. Rev. 561 (1997).
discuss practical concerns that urge the conclusion that writing across the law school curriculum is essential—now more than ever.

Practical justifications for teaching writing across the curriculum include the central importance of written communication in practice; the explosion in availability of legal authority and other information that requires ever more skill and efficiency in selection and synthesis of appropriate authorities; and law firm economics that increasingly require new lawyers to be ready to practice law immediately upon hiring. At the same time that employers' expectations of new law graduates have increased, evidence indicates that preparation in research and writing in secondary and undergraduate schools has diminished. The Essay will note concerns raised by recent studies and conclude with a discussion of suggestions for a “writing revolution” made by the National Commission on Writing in America’s Schools and Colleges and ways that law schools may implement those suggestions.

II. THEORETICAL JUSTIFICATIONS FOR WRITING ACROSS THE CURRICULUM

A. Cognitivist Theory and Learning the Structure of Legal Analysis

Cognitivist learning theory focuses on what happens in the learning process between the stimulus and the response and conceptualizes learning as the active storage of information in an organized, meaningful, and useable manner for the long term. According to this view, information is organized by way of mental structures—schemata—of existing understanding that adapt in response to stimuli to assimilate new learning. The cognitive approach focuses on changing the learner by encouraging him or her to use active learning to make connections between previously learned material and new material. The cog-
nitivist approach emphasizes metacognition and introspection; the structural and organizational aspects of information; task analysis to identify mental processing tasks; and the use of multiple representations to facilitate transfer of information.\textsuperscript{16}

Process theories of composition reflect these cognitivist values. By focusing on recursive steps of gathering information, organizing what has been learned and finding the gaps, returning to the information to fill gaps, moving to a preliminary draft, revising, and rethinking—with feedback at various points in the process to encourage introspection and development of metacognition—students develop better understanding of what they are doing when they undertake a writing project.\textsuperscript{17} As Professors Jeffrey Kovac and Donna Sherwood wrote,

\begin{quote}
Perhaps the best way to develop a new idea is to write about it . . . then revise and revise [and revise] until what was once poorly understood is finally clear.\textsuperscript{18}
\end{quote}

The National Writing Commission put the point more simply: “Writing is how students connect the dots in their knowledge.”\textsuperscript{20}

Writing experiences in the first-year legal writing course and throughout the law school curriculum can help students internalize the structures of legal thought and develop more conscious and efficient processes for analyzing legal problems and communicating analysis. The goal, of course, is that the students will be able to apply learning gained in one context to issues arising in

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\textit{Id.} at 26.

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Natl. Commn. on Writing in Am.’s Schs. & Colleges, \textit{supra} n. 1, at 3.
\end{footnotesize}
new contexts. Although a first-year legal writing course may introduce students to analytic schemata, such as organizing by issue and using something like IRAC to organize discussion of each point, the categories implicit in those organizational conventions reflect complicated mental structures built only through repeated encounters with legal problems and authorities.

B. Constructivist Theory, Discourse Theory, and Learning the Tools of the Trade

Constructivist learning theory shares the cognitivist premise that learning is an active process. Constructivists view learning as constructed by each individual from his or her experience and as socially negotiated from multiple perspectives working in collaboration. Learning is situated in real world settings that present the “complex, multilayered, ill-structured, and ill-defined problems that arise in real life.” Accordingly, the approach emphasizes opportunities to develop personal interpretation of experiences and collaboration with others within complex learning environments that incorporate authentic activity. A constructivist approach to legal education seeks to foster awareness of multiple perspectives and of the student’s own role as an interpreter of legal texts.

Similarly, social discourse theory in composition emphasizes the social construction of meaning in texts. The text is understood within its rhetorical context—that is, the purpose, intended and unintended audiences, scope, and form—of the writing.

By creating documents in the forms that lawyers use to communicate in practice, students learn the logic embedded in the standard forms of professional documents, confront ethical issues,

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21 For an excellent and practical discussion of research on transfer and teaching methods designed to enable law students to better use what they have learned in one situation to solve a problem in another, see Laurel Currie Oates, I Know That I Taught Them How to Do That, 7 Leg. Writing 1 (2001).
24 Schwartz, supra n. 13, at 380 (footnote omitted).
26 See generally Beazley, supra n. 17, at 50–51; Rideout & Ramsfield, supra n. 3, at 56–61.
and experience both the challenges of communicating with the various, and often multiple, audiences for the documents, as well as the challenges of researching issues for which the authorities provide no clear answer. Writing assignments that provide realistic professional experiences can be offered throughout the law school curriculum—in doctrinal classes using the problem method, through simulations in practice-oriented courses, and in legal clinics.27 Experiences in preparing professional documents within authentic contexts help law students develop the tools of their trade—the communicative skills they will need to practice law.

C. Acquisition of Expertise and Development of the Legal Imagination

While first-year writing programs can provide a solid foundation in the structure of legal analysis and an introduction to basic forms of legal documents, those courses probably cannot provide the sustained practice over time that students need in order to become experts in legal analysis, research, and writing. Research in expertise has focused on the paths traveled by experts in various fields to examine what they know and how they came to know it.28 In particular, this research has studied the attributes of reliably superior performance by experts, exhibited under conditions that capture the essence of expert performance in the domain, such as the conditions of competition for athletes or difficult cases in medical diagnosis for physicians.29

Superior performance does not necessarily involve the most extensive recall of information.30 Experts’ knowledge cannot be reduced to sets of isolated facts but, rather, reflects contexts of applicability, and experts can retrieve key information with little attentional effort. Research indicates that experts notice features and patterns of information that novices do not; experts organize a great deal of content in ways that reflect deep understanding.31

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27 For a discussion of benefits of an integrative curriculum, in which lawyering, professionalism, and legal analysis are taught together from the beginning, see William M. Sullivan et al., Educating Lawyers: Preparation for the Profession of Law (Jossey-Bass 2007) (a publication of The Carnegie Foundation for the Advancement of Teaching).
29 Id. at 4.
30 How People Learn, supra n. 15, at 40–41.
31 Id. at 31.
While an expert’s schemata will organize knowledge conceptually so that it is available to solve problems efficiently, a novice lacking that structure will likely focus on superficial aspects of the problem.\(^{32}\)

Moreover, research indicates that experts in various domains share similar experiences in acquiring their expertise.\(^{33}\) Researchers have concluded that experts are not identifiable based on native ability or sheer time spent on the activity or access to resources.\(^{34}\) Instead, what experts share is a history of “deliberate practice” in their field of expertise.\(^{35}\) Professor K. Anders Ericsson wrote,

> Based on a review of a century of laboratory studies of learning and skill acquisition, [expert researchers] concluded that the most effective learning requires a well-defined task with an appropriate difficulty level for the particular individual, informative feedback, and opportunities for repetition and correction of errors. When all these elements are present[,] they used the term deliberate practice to characterize [these] activities.\(^{36}\)

It is no stretch to see how writing may provide occasions for deliberate practice of lawyering skills in law school. A writing assignment designed to present analytical tasks at the appropriate difficulty level for the students provides the occasion for the professor to give informative feedback and then to offer students opportunities for repetition and correction of error.

Expert-learning theory combines aspects of cognitivist and constructivist learning theories and both process and discourse theories of composition. Professor Michael Schwartz has described expert learning as self-regulated learning, by which a student consciously employs recursive loops of the following steps: forethought, performance, reflection, and forethought.\(^{37}\) He noted that expert self-regulators seek opportunities to self-evaluate, compare

\(^{32}\) See id. at 36–42. This feature of expert performance has important implications for legal education. For example, index-based research provides practice in organizing knowledge conceptually, while a word-based search may not require the researcher to move beyond superficial aspects of a problem.

\(^{33}\) Ericsson, supra n. 28, at 2.

\(^{34}\) Id. at 20–21, 28–30.

\(^{35}\) Id. at 21.

\(^{36}\) Id. at 20–21.

outcomes to well-defined goals, while naive self-regulators do not know how to self-evaluate, avoid the process, and compare socially. The naive self-regulator engages in “self-handicapping strategies such as low effort, spreading [himself or herself] too thin with work and other competing activities, and procrastination,” behaviors that are likely to contribute to stress and low achievement in law school.

Research suggests that acquisition of expertise in a field requires about ten years of deliberate practice, occupying as many as four to five hours per day. Non-deliberate practice, such as time spent on routine tasks or rote repetition without reflection, does little to promote development of expertise. Often, deliberate practice ceases after “good enough” achievement. If beginning law students are to become expert lawyers, deliberate practice must continue beyond the three years of law school, and a goal of law school curricula should be to encourage students to develop the discipline of actively monitoring their own learning and progress.

The key questions for legal education are “what do expert lawyers know how to do?” and “how can law schools facilitate deliberate practice of those skills?” An obvious place to look for answers is the practicing bar. In 1992, the American Bar Association published a report, popularly known as the MacCrate Report, that emphasized the importance of comprehensive instruction in lawyering skills. In identifying the skills that are fundamental to the successful practice of law, the MacCrate Report listed first that

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38 Schwartz, supra n. 37, at 463.
39 Id.
40 For a persuasive and sensitive discussion of the importance of teaching self-directed learning strategies in law school, see Cathaleen A. Roach, A River Runs through It: Tapping into the Informational Stream to Move Students from Isolation to Autonomy, 36 Ariz. L. Rev. 667 (1994).
41 Ericsson, supra n. 28 at 10–11.
42 Id. at 42.
43 See id. at 20–25; Ronald T. Kellogg, Professional Writing Expertise, in The Cambridge Handbook of Expertise and Expert Performance 398–399 (Cambridge U. Press 2006) (discussing the professional writer’s need to progress beyond skill in knowledge-telling to knowledge-transforming composition and to do so within a particular domain, directed to its particular audiences).
44 See Ericsson, supra n. 28, at 35 (discussing acquisition of expert performance in the absence of supervised instruction after a “brief period of instruction followed by a limited period of effortful adaptation”).
expert lawyers know how to solve problems. The Report breaks down that skill as follows:

1. Identifying and diagnosing the problem;
2. Generating alternative solutions and strategies;
3. Developing a plan of action;
4. Implementing the plan; and
5. Keeping the planning process open.

While this list of skills may assume a body of knowledge on which the lawyer may draw, knowledge alone is not sufficient to provide the solution to a problem that is novel and unique; rather, the list of skills emphasizes knowing how to approach those problems. As Professor Blasi wrote, “[A]mple evidence [exists] that people who are skilled problem-solvers are much more likely to actively engage in reflecting on their experiences and to be consciously aware of the state of their knowledge . . . and learning . . . .” The methods associated with the process approach to composition, such as reflective writing and producing multiple drafts with feedback, comport with this research.

In law, problems are analyzed with reference to texts and by means of effective communication. Accordingly, deliberate practice—with coaching—in reading and reframing texts and in collaborating on negotiated meaning of texts should promote acquisition of expertise in legal analysis. Experts in legal analysis may be expected to be particularly skilled in seeking and recognizing connections in texts; identifying circumstances in novel situations that may permit useful analogies to precedent and potential to transform doctrine to adapt to changing circumstances; thinking

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46 Id.
47 Id. at 138; see Blasi, supra n. 16, at 328.
48 Blasi, supra n. 16, at 360.
50 In assessing research on writing and learning, Professor Laurel Oates concluded that writing assignments best promote development of expertise when they require the student to write, and thus think, in the way that a lawyer writes and thinks . . . . [I]nstead of simply telling what they know, the students are being required to monitor their comprehension, assess the importance of various pieces of information, recognize structures, and make connections between pieces of new information and between new information and previously acquired knowledge, all of which are acts that can result in knowledge transformation.

Laurel Currie Oates, Beyond Communication: Writing as a Means of Learning, 6 Leg. Writing 1, 21–22 (2000).
critically; and exercising independent judgment while working in
collaboration with others. An expert lawyer will recognize features
and patterns in legal authorities and factual circumstances that
will not be apparent to a novice.51

Writing across the curriculum in law school offers myriad op-
portunities for deliberate practice of these skills. Research and
writing assignments set within authentic contexts encourage de-
v elopment of students’ legal imagination—their ability to think
transformatively about policy, doctrine, and facts. A compositional
approach to legal education that includes reflective writing may
also help students develop and learn to trust their individual pro-
fessional voice.

III. PRACTICAL JUSTIFICATIONS FOR WRITING
ACROSS THE CURRICULUM

If theoretical justifications for writing across the curriculum
are persuasive, then practical concerns urge law schools to move
forward quickly. In 1996, Professor Ruta Stropus observed that
legal education is being squeezed from both sides.52 On one side,
economics make law firms less likely to provide apprenticeship
training than they once were, while on the other, undergraduate
institutions are devoting fewer resources to teaching analytic and
communication skills.53 In the ten years that have followed, the
situation has not improved.

One law firm consultant recently noted features of the prac-
tice environment that law graduates are likely to face:

• firms that are less stable and more specialized;
• high billable hour expectations;
• firms less willing to train inexperienced lawyers, of whom
  a smaller percentage will make partner;
• more mobile lawyers; and

51 “Research on expertise suggests the importance of providing students with learning
experiences that specifically enhance their abilities to recognize meaningful patterns of
information.” How People Learn, supra n. 15, at 36 (citations omitted).
52 Ruta K. Stropus, Mend It, Bend It, and Extend It: The Fate of Traditional Law
53 Id.
• firms seeking a quick return on their investment in a new lawyer.\textsuperscript{54}

In this faster-paced and more fluid business environment, law firms expect newly hired, first-year associates to be proficient in legal writing and analysis.\textsuperscript{55}

At the same time that law firms’ expectations of law graduates have increased, evidence indicates that preparation in research and writing in secondary and undergraduate schools has diminished.\textsuperscript{56} The Neglected “R”—The Need for a Writing Revolution, a report of the National Writing Commission, describes a crisis in education, noting a number of disturbing findings:

• the extended research paper (“senior thesis”) is dead;
• 39% of high school seniors have not received (or rarely received) English assignments of three pages or longer;\textsuperscript{57}
• 75% of students have no writing assignments in history or social science courses;
• 22% of high school seniors are deemed “proficient writers”; and
• 1% of high school seniors are deemed “advanced writers.”\textsuperscript{58}

In addition, Reading at Risk,\textsuperscript{59} a report of the National Endowment for the Arts, notes a drastic decline in reading of literature,
especially among the eighteen- to twenty-four-year-old group. Rather than reading books, which requires focused attention, this group is more likely to read online, which involves a shorter attention span and may encourage intellectual passivity. The online reader may choose to click on something else, rather than to engage in critical thinking regarding texts or even careful reading of challenging material. Accordingly, students may arrive at law school having engaged in far less deliberate practice of reading skills.

These reports suggest that students are unlikely to enter law school with extensive experience in analytical writing or close reading of texts. To acquire the “refined internal representations to simultaneously image, execute, and provide feedback about their produced performance” required for expert skill, students will need to devote many hours to deliberate practice of those complex skills. Consistent opportunities for individualized feedback, repetition, and correction of errors, such as those afforded by writing assignments, are essential to students’ progress.

A third report, based on a study by the Association of American Law Libraries, may be the most disturbing of all. This report notes both that students begin law school without basic research skills and that students view themselves as adequate to good researchers and that students view themselves as adequate to good researchers.

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60 Id.; see Roach, supra n. 56, at 305–307.
61 See Reading at Risk, supra n. 59, at vii.
63 Ericsson, supra n. 28, at 35.
65 Id. at 868. They may not have used an online catalogue, or know the difference between a full-text and index search, or know how to consult the index of a set of books. See id. at 867.
66 Id. at 868.
In the frame of expertise theory, having acquired what they believe to be “good enough” skills, these students may be resistant to the idea that they must undertake deliberate practice of legal research; however, skillful legal research encompasses far more than locating sources using a word search. As Professor Ian Gallacher wrote,

[T]he legal research process is where law students first experience the framing of a legal issue from a given set of facts and then the exploring of legal doctrine within the factual context of the given problem. In effect, legal research is where law students first begin to think of the law in a problem-solving light . . . .

In the frame of the cognitivists, the stimuli presented by a legal problem may not trigger an appropriate response from a student who lacks the basic research schemata. A student who is unfamiliar with index searching is more likely to rely on a word-search method based on superficial, but specific, aspects of the problem, the results of which may or may not be on point and probably will not be complete. Nevertheless, the search will yield results, and the student may believe that those results are adequate. Even more problematic, results obtained from a word search using conceptual, but overbroad, terms (for example, “negligence”) likely will be unmanageable and may serve to discourage students from thinking in conceptual terms. Without experience in research based on conceptual categories, students lack an important foundation for developing analogical understanding and legal imagination. Accordingly, research in conjunction with writing across the curriculum is essential to law students’ preparation to practice their profession.


"[R]esearch requires the poetic quality of imagination that sees significance and relation where others are indifferent or find unrelatedness; the synthetic quality of fusing items thertofofore in isolation; above all the prophetic quality of piercing the future, by knowing what questions to put and what direction to give to inquiry."

Id. (quoting Felix Frankfurter, The Conditions for, and the Aims and Methods of, Legal Research, 15 Iowa L. Rev. 129, 134 (1930)).

68 This point is discussed at greater length in my article, A Liberal Education in Law: Engaging the Legal Imagination through Research and Writing beyond the Curriculum, 1 J. ALWD 130 (2002).
Advocates for teaching writing across the curriculum in law schools find strong support in the Report of the National Writing Commission.69 That report, *Neglected “R,”* offers a writing agenda for the nation that emphasizes that writing requires time and that strongly endorses writing across the curriculum, stating: “Research is crystal clear: Schools that do well insist that their students write every day and that teachers provide regular and timely feedback . . . .”70

To implement its writing agenda, the Commission proposed a five-year writing challenge for the nation, seeking support of leaders from education, government, business, and philanthropies, and offering specific recommendations concerning development of a comprehensive writing policy; doubling the time that students spend writing; convening a national conference on writing; improving instruction in writing; and providing the necessary resources for change.71

How will legal education answer the challenge? That question suggests a host of other questions. With respect to developing a comprehensive writing policy, what kind of research and writing curriculum would it take for law schools to fully prepare students to meet the challenges they will face upon graduation? With re-


70 Id.

71 A Writing Agenda for the Nation

- Every state should revisit its education standards to make sure they include a comprehensive writing policy.
- That Policy should aim to double the amount of time most students spend writing . . . [and] insist that writing be taught in all subjects and at all grade levels . . . .
- National political leadership should put the power of the bully pulpit to work through a National Conference on Writing.
- Higher education should address the special roles it has to play in improving writing. All prospective teachers, no matter their discipline, should be provided with courses in how to teach writing. Meanwhile, writing instruction in colleges and universities should be improved for all students.
- States and the federal government should provide the financial resources necessary for the additional time and personnel required to make writing a centerpiece in the curriculum.
- . . . .
- Writing should be assigned across the curriculum.

*Id.* at 3–4.
spect to increasing time devoted to writing, how much time do law students spend writing? How much time did they spend writing as undergraduates or in employment before law school? How could writing across the curriculum be achieved in law schools? With respect to constructive use of the bully pulpit, what can organizations of writing teachers do to promote writing in the law school curriculum? With respect to improving instruction of writing, how can law schools and legal writing teachers contribute to professional development opportunities in writing for all law teachers? Concerning financial resources, what resources are currently available? What sources might be approached or cultivated? What are the best uses of those resources? Finally—and most importantly—can we imagine a law school that “insists that students write every day and that teachers provide regular and timely feedback?”

These questions deserve answers. With fewer opportunities for law graduates to learn as apprentices at law firms, law schools are the principal places for deliberate practice of the analytic and communicative skills that students will be expected to bring to their first jobs and of the discipline they will need to develop expertise throughout their careers. Writing and research across the curriculum serves students by inculcating those skills and that discipline. By writing, law students learn the tools of their trade and grow as interpreters of law.

72 See Natl. Commn. on Writing in Am.’s Schs. & Colleges, supra n. 1, at 28. For a probing discussion of the “routine practices, habits, and tacit effects” of legal education that shape our ability to imagine radical reform, see Philip C. Kissam, The Discipline of Law Schools 243–264 (Carolina Academic Press 2003). A recent publication of The Carnegie Foundation for the Advancement of Teaching, Educating Lawyers: Preparation for the Profession of Law, proposes such radical reform. See supra n. 27. While Educating Lawyers does not focus explicitly on writing across the curriculum, several of its recommendations speak directly to WAC’s goals. In particular, it recommends that law schools offer a curriculum that integrates doctrine, “lawyering,” and professionalism and that law schools support faculty to work across the curriculum, especially encouraging doctrinal faculty to “observe or participate in the teaching of lawyering courses and clinics.” William M. Sullivan et al., Summary: Educating Lawyers: Preparation for the Profession of Law 9 (Carnegie Found. for Advancement of Teaching 2007) (copy on file with Author).

73 See Beazley, supra n. 17 (arguing persuasively for a “move forward to an apprenticeship method in law teaching”).
WRITING ACROSS THE LAW SCHOOL CURRICULUM IN PRACTICE: CONSIDERATIONS FOR CASEBOOK FACULTY

Pamela Lysaght

The theoretical, educational, and practical justifications for incorporating more writing into casebook courses—i.e., non-legal-writing courses—have been advanced by Professor Parker and others. I would like to pick up on two themes from her presentation and the literature—the importance of familiarizing students with the tools of their trade and the reality of law firm economics—and discuss how they relate to incorporating a writing assignment in a casebook course.

© 2006, Pamela Lysaght. All rights reserved. Pamela Lysaght is an associate professor of law and director of writing programs at University of Detroit Mercy School of Law. This Article was presented at a symposium hosted by Brooklyn Law School titled Teaching Writing and Teaching Doctrine: A Symbiotic Relationship? The Author thanks Professor Marilyn Walter for organizing the symposium, as well as for her extraordinary leadership in the legal writing field. The Author also thanks Professors Kristin Gerdy and Elizabeth Fajans for their invaluable editorial comments on earlier versions of this Article.


2 This Article uses the terms "casebook courses" and "casebook faculty," which were coined by Professor Mary Beth Beazley. As used here, the terms describe non-legal-writing courses—i.e., "doctrinal" courses—taught by non-legal-writing faculty. The term "doctrinal"—as in doctrinal courses and doctrinal faculty—is disfavored because it fails to recognize that legal writing faculty, as well as other skills faculty, also teach doctrine. As Professor Amy Sloan has written, there are, in fact, a number of similarities between the "pedagogical goals in a traditional first-year doctrinal class and a typical first-year legal research and writing class . . . ." Amy E. Sloan, Erasing Lines: Integrating the Law School Curriculum, 1 J. ALWD 3, 3 (2002). One obvious difference, however, is that legal writing courses are not dependent upon traditional casebooks; hence, the preferred terms "casebook courses" and "casebook faculty" more accurately describe non-legal-writing and skills courses and faculty. But see Julie Cheslik, The Battle over Citation Form Brings Notice to LRW Faculty: Will Power Follow? 75 UMKC L. Rev. 237, 238–239 (2004) (noting the emergence of the term "casebook faculty" but suggesting that the term may be "derisive"). The terms as used in this Article are not intended to be derisive.
In many ways, a writing assignment in a casebook course can function as a bridge or passage to practice in ways that assignments in legal writing courses cannot—at least not as well. This is because casebook courses can introduce students to a broader array of legal documents (the tools of the trade) and sources than the more typical legal writing course, which often by necessity focuses on those types of assignments that provide a basis for teaching objective writing and persuasive writing—typically, memoranda, briefs, and client letters. While these are venerable vehicles for teaching legal analysis and writing, they do not exhaust the types of documents lawyers encounter routinely. Students need exposure to these other types of documents before they enter the practice. An assignment in a casebook course also allows students to apply what they have learned about writing and research in their Legal Research and Writing (LRW) courses to new situations. Furthermore, casebook courses can place more emphasis on the finished product—the documents that the students produce—rather than on the process of writing, which focuses in part on using writing to create meaning.

The reality of law firm economics is that there is no gentle passage that helps students with their transition from law school to law practice. The golden years of partners mentoring newly minted lawyers, if those golden years ever existed, have been vir-

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3 According to the 2006 survey conducted by the Association of Legal Writing Directors and the Legal Writing Institute, memoranda, appellate briefs, pretrial briefs, and client letters are the most common assignments in required legal writing courses. *2006 Survey of the Association of Legal Writing Directors and the Legal Writing Institute* question 20 (available at www.alwd.org and www.lwionline.org); see also Eric B. Easton et al., *Sourcebook on Legal Writing Programs* 21 (2d ed., ABA 2006).


tually extinguished under the burden of billable hours.\textsuperscript{6} Employers desire, even seek, graduates who can competently prepare an effective document on behalf of their client, often in a short amount of time.\textsuperscript{7} Law faculties often debate the extent of their ultimate role in preparing students to enter the profession, a debate that may be unique in professional education: Other professional schools routinely incorporate experiential learning into their curricula. Curricular debates aside, individual law faculty who take seriously their students’ preparation for the practice of law may find that requiring their students to draft relevant legal documents in their casebook courses promotes their students’ transition from law school to law practice.\textsuperscript{8}

But, agreeing that a writing assignment in a casebook course is worthwhile is one thing; execution is quite another. As with any new endeavor, there are choices and considerations. This article will consider those choices and considerations a casebook professor may encounter initially. I will first highlight the challenges casebook faculty may face in developing writing assignments; second, I will propose a process or methodology for creating effective writing assignments, focusing on assignments for casebook courses; and finally, I will discuss briefly effective critiquing.\textsuperscript{9}

\textsuperscript{6} Byron D. Cooper, \textit{The Integration of Theory, Doctrine, and Practice in Legal Education}, 1 J. ALWD 51, 53 (2002).

\textsuperscript{7} In fact, employers seek far more. “Today’s legal employer wants competency, respect, trust, judgment, flexibility, communications skills, resilience, management skills, an ability to work with others, leadership, a strong work ethic, and a commitment to client service.” Molly Warner Lien, \textit{Breach of Trust: Legal Education’s Failure to Prepare Students for the Practice of Law}, 1 J. ALWD 118, 120 (2002).


\textsuperscript{9} Most of this material draws heavily on my own experiences in helping to develop and implement University of Detroit Mercy’s Writing-across-the-Curriculum Program, which was begun in 1998, as well as many discussions over the years with colleagues at other law schools that were considering developing a writing-across-the-curriculum program. In particular, the characteristics of, and the process for, creating effective writing assignments in a casebook course discussed in part 2 are based on workshops conducted at
I. THE CHALLENGES

Casebook courses share certain common features in how they are traditionally taught and in how they are typically staffed. First, most casebook courses are taught using casebooks. Second, most casebook courses generally culminate in a final exam—often an essay-style exam. Third, many schools staff casebook courses with traditional tenure-track or tenured faculty who have often distanced themselves, in pre-disposition as well as in years, from the practice of law. Yet the very structure of casebooks, the typical examination style, and the distance from practice can make creating meaningful assignments more challenging.

First, casebooks are filled with appellate decisions from various jurisdictions. These decisions are supplemented with, for example, sections from a restatement, law review excerpts, statutes, possibly uniform laws or model codes, and even the occasional international treaty or law. But the reality of law practice is that clients pose questions that must be resolved in the context of a particular jurisdiction. Professors teaching from a casebook may not be as sensitive to jurisdictional issues and hierarchy of authority principles as are legal writing professors and real-world lawyers. Thus, just thinking in terms of creating a problem within a jurisdiction may pose a challenge.10

Second, casebook faculty often rely on Socratic dialogues or lectures to deliver the material, but they just as often test by the problem method, using essay questions.11 In other words, professors teach students how to tear apart a case, but they test on their ability to synthesize a number of cases and other sources in the casebook.12 On exams, students typically are provided a fact pat-

10 See also Cooper, supra n. 6, at 61; Easton et al., supra n. 3, at 22.
11 For a general critique of law school examinations, see Nancy B. Rapaport, Is “Thinking Like a Lawyer” Really What We Want to Teach? 1 J. ALWD 91, 99–102 (2002). For a brief discussion of the “unintended consequences” of relying on the case-dialogue method of teaching law students, see Sullivan et al., supra n. 8, at 5–6.
12 There is a disjuncture between these two methods that has not been adequately discussed in the legal literature. (And, the topic is beyond the scope of this article.) There are, however, proponents of teaching through the problem method. See e.g., Susan Kurtz et al., Problem-Based Learning: An Alternative to Legal Education, 13 Dalhousie L.J. 797 (1990); Myron Moskovitz, From Case Method to Problem Method: The Evolution of a Teacher, 48 St. Louis U. L.J. 1205 (2004); Myron Moskovitz, Beyond the Case Method: It’s Time to Teach with Problems, 42 J. Leg. Educ. 241 (1992); Steven J. Shapiro, Teaching First-Year Civil Procedure and Other Introductory Courses by the Problem Method, 34 Creighton L. Rev. 245 (2000).
tern designed to incorporate a multiplicity of issues. Students are required to identify an issue, provide the relevant rule from the casebook or supplemental source, and develop the arguments. Students then move on to the next issue in the fact pattern. Moreover, students are often encouraged to focus on developing the potential arguments rather than the bottom-line conclusions. Additionally, students are usually required to write an essay rather than communicate their answer through a type of legal document. Even if the students are required to structure their essay as a legal document, it is most often in the form of a client letter or memorandum—two documents already familiar to students and thus less challenging than new genres.

Writing assignments, on the other hand, often require a more complex synthesis and analysis than what is expected in a typical in-class examination. Instead of focusing on numerous issues, the student is presented with one or two issues, requiring in-depth research and analysis. Moreover, the conclusion is often very important in a writing assignment that seeks to provide advice to a client. Finally, the resolution of that analysis is communicated through a type of legal document—not an essay.

Even if individual casebook faculty create highly nuanced examinations that require students to develop sophisticated analyses that ultimately advise the client on how to proceed in the given situation, it is unlikely the professor provides substantive feedback and suggestions for improvement—in analysis, writing, and organization—on each student’s examination. Yet, meaningful feedback is important to the learning process.\(^\text{13}\) Indeed, the time it takes to evaluate a writing assignment, which is considerably more than the typical essay exam, can act as a restraint for many casebook faculty with healthy scholarship agendas.

Put another way, experience in creating and grading essay examinations does not necessarily translate into developing writing assignments that require students to prepare a type of legal document on behalf of a client with a problem in the subject area.\(^\text{14}\) Thus, the structure of casebooks and the evaluation process in

\(^{13}\) See infra pt. III.

\(^{14}\) For discussions of how casebook faculty’s lack of experience in designing writing assignments presents opportunities for coordination and collaboration with legal writing faculty, see Lisa Eichhorn, *The Role of Legal Writing Faculty in an Integrated Curriculum*, 1 J. ALWD 85, 90 (2002); Lysaght & Lockwood, supra n. 1, at 105–106; Suzanne E. Rowe & Susan P. Liemer, *One Small Step: Beginning the Process of Institutional Change to Integrate the Law School Curriculum*, 1 J. ALWD 218, 222–224 (2002).
most casebook courses pose challenges for the casebook professor who is not experienced in developing and grading writing assignments.

The third potential challenge—intellectual distance from practice—can be especially difficult. This is because, if we are honest with ourselves, distance from practice can involve ingrained attitudes about the practice of law. How often do we hear faculty—or ourselves—make disparaging remarks about the everyday practice of law?15 Similarly, some faculty are openly hostile to the “skills” side of legal education, which often accounts for certain attitudes about legal writing and clinical faculty.16 Thus, it may be a particular challenge for them to see how a writing assignment can have intellectual integrity yet teach students how to prepare a legal document. And, unless a writing assignment is mandated in certain courses or across the curriculum, this challenge may prove insurmountable.

The temporal distance from practice is relatively easy to overcome: Casebook faculty can consult with legal writing faculty and

15 An obvious disdain, or at least an obvious indifference, for the practice of law sometimes seems to be a prerequisite for hiring: “What qualifies a person, therefore, to teach law is not experience in the work of a lawyer's office, not experience in dealing with men, not experience in the trial or argument of cases, not experience, in short, in using law, but experience in learning law.” Joel Seligman, The High Citadel: The Influence of Harvard Law School 37 (Houghton Mifflin Co. 1978) (quoted in Rapaport, supra n. 11, at 101 n. 36); see also Daniel B. Hinshaw, Models from Other Disciplines: What Can We Learn from Them? 1 J. ALWD 165, 181 (2002) (“In a discussion group this morning, a comment was made that most individuals who join law school faculties don’t like to practice their profession, I would suggest that this statement is worthy of some reflection. If you could come to a real understanding of why you don’t like to practice your profession, you may come to the heart of what you need to do to fix it.”).

practitioners of the subject area for ideas. Graduates are an invaluable resource.

II. CREATING EFFECTIVE ASSIGNMENTS
IN CASEBOOK COURSES

The characteristics of an effective writing assignment depend on the purpose of the assignment. If the purpose of the assignment is to teach legal writing, then there is an additional challenge for the casebook professor not discussed above in Part 1. Unless the professor is also an experienced legal writing professor, he or she is probably not familiar with learning theories, composition theories, and the literature on effective critiquing—all of which inform the modern legal writing course. This lack of expertise is in no way fatal, but it cannot be ignored. In my view, the teaching of legal writing as a discipline is best left to legal writing professors, especially where law schools have invested in the program and the professors so that the professors can gain the expertise to teach writing effectively.

If, however, the purpose is to supplement the legal writing program and, even more important, to create a bridge to the practice of law, which is my thesis, then I would suggest that effective casebook writing assignments have three characteristics. First, the assignment has a realistic quality to it—i.e., it is not an academic exercise. Second, the assignment requires students to communicate their solution through a type of legal document (particularly not one covered in the required legal writing program). Third, the assignment exposes students to a range of research resources, especially in that subject area.

I will offer some examples from my criminal law course. One semester, students prepared an analysis of pending legislation in Michigan concerning the issue of consent in date-rape cases. For a comprehensive discussion of the modern legal writing course, see generally Easton et al., supra n. 3, and the sources cited therein.

17 For a comprehensive discussion of the modern legal writing course, see generally Easton et al., supra n. 3, and the sources cited therein.

18 Indeed, writing assignments in casebook courses should enhance a school’s legal writing and research program, not supplant it. See Lorne Sossin, Discourse Politics: Legal Research and Writing’s Search for a Pedagogy of Its Own, 29 New Eng. L. Rev. 883, 896 (1995) (noting the importance of a separate legal research and writing program).

19 For a more in-depth explanation of how these characteristics relate to the elements of a comprehensive writing-across-the-law-school-curriculum program and how those promote learning, see Lysaght & Lockwood, supra n. 1, at 100–106; see also Easton et al., supra n. 3, at 191–193. For a discussion of the characteristics of effective writing assignments in first-year required legal writing courses, see Easton et al., supra n. 3, at 22–24.
follow-up assignment, students were told to assume the legislation had passed and they were required to draft standard criminal jury instructions. Another semester, students drafted proposed legislation to address pedophilia with an accompanying bill analysis discussing the need for the proposed legislation. This required them to conduct a thorough review of the current legislation and case law. (In light of the Jessica Lunsford case in Florida, Michigan’s laws protecting children from pedophiles looked inadequate.) These assignments were relevant to the subject, involving real-life issues. The students learned how to draft legislation and jury instructions and how to develop a bill analysis report. And, they were exposed to a variety of resources: in addition to statutes, cases, and legislative histories, they looked to statistical data, crime reports, and various media reports. The students were highly engaged and enthusiastic about the projects.

But, creating effective writing assignments with these characteristics requires planning. The following section provides a process that I have employed for a number of years. A caveat: Any time one creates a list of steps, it suggests a linear and sequential process. That is not the case. Some of these steps, particularly the first two, occur concurrently because one informs the other.

A. Determine the Purpose and Context of the Assignment

An effective writing assignment in a casebook course becomes a supplemental text, a “pedagogical partner” to the primary teaching materials. Consequently, the goal is to create an assignment that requires students to research the problem, arrive at a solution or strategy, and apply that solution or strategy in the context of preparing a realistic legal document. Early tasks in problem development, therefore, involve determining which doctrines or concepts students will be required to research and the type of document students will prepare to communicate their solution or strategy.

In selecting the doctrine, care should be taken to create a problem that is interesting and has a “real-life” quality to it. Be-
cause students need to practice their researching skills as well as their writing and drafting skills, students should have to research in sources prevalent in that subject area. For example, a problem in a Professional Responsibility course should require students to research ethics opinions. Therefore, in selecting the doctrine, available resources is an important consideration. Moreover, it may be necessary to introduce students to the range of resources available and how to locate and use those resources. This can often be accomplished by asking a law librarian to provide a guest lecture or an out-of-class tutorial.

In selecting the type of document, consider the types of legal documents that may be unique to that area of practice. For example, a course in real estate transactions could require students to draft condominium documents; a course in family law, a divorce settlement; and a course in trusts and estates, a will or codicil.\(^{22}\)

Having students prepare documents for which there are readily available forms provides an additional pedagogical opportunity: Students need to learn how to modify forms to suit their clients’ needs. Examples that cut across many subject areas include having students draft legislation or jury instructions. If students have not been instructed on how to locate and use the particular type of document in their required legal writing and research course, it may be necessary to introduce the document in the casebook course.

Whatever the nature of the assignment, it should be manageable while enhancing the students’ abilities to tackle increasingly more complex problems than encountered in their first-year legal writing course. Creating manageable assignments is an art—not a science—borne of experience. In general, however, manageable assignments are “challenging but not overwhelming to students.”\(^{23}\)

Inexperienced professors may find it helpful to consult briefly with a legal writing professor, who will be able to provide a realistic estimate of how much time the students will need to complete the assignment.

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\(^{22}\) *See also* Easton et al., [*supra* n. 3, at 180–181.]

\(^{23}\) *Id.* at 22.
B. Determine the Timing of the Assignment

Two factors inform this determination. First, when can the assignment realistically be returned to students with feedback?24 (This should be before the final exam.) More specifically, where in the semester is there a block of time to grade the assignment, and how large is that block of time? Second, is it necessary to cover certain doctrinal material before the assignment can be handed out?

As to the first, sometimes the block of time available to evaluate students’ performance, with appropriate feedback, determines the nature of the assignment. Less grading time means the assignment needs to be relatively short and not particularly burdensome to grade. A number of assignments lend themselves to these limitations—for example, contractual clauses, proposed legislation or amendments to current legislation, pleadings, and jury instructions. Ideally, the course syllabus would provide the date that students will receive their assignment as well as when their graded papers will be returned.25

The second factor—whether certain material has to be covered in class before the assignment is given—may of course influence the doctrinal goal of the assignment. It is always possible, however, to use the assignment to cover material that will not be discussed in class, or to hand out the assignment in advance and time the completion of it to when the material will be covered in class, perhaps at a more sophisticated level since students will already have some familiarity with the concept or theory. All of these timing events work; they just require planning.

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24 For a discussion of the importance of providing students with feedback and credit for their writing assignments, see Lysaght & Lockwood, supra n. 1, at 103–104; see also Easton et al., supra n. 3, at 192–193.

25 I also find it useful to include on the syllabus for the day their assignments will be returned a requirement that they review their copy of the assignment they submitted. This ensures that the material is fresh in their minds and makes the review process, if class time is devoted to discussing the assignment, more meaningful. See also Bannai et al., supra n. 20, at 209.
C. Consider How the Problem Will Be Presented to Students and the Nature of the Instructions for Completing and Submitting the Assignment

Whatever the nature of the assignment, it should be factually complete, i.e., students should have everything they need to complete the assignment (except, of course, research). An exception is when the very nature of the assignment requires students to find out more information before arriving at a solution or a strategy. For example, certain facts may be given to the class, and part of the assignment may be to conduct a client interview.

Another consideration is whether to use a fact pattern or to draft (or appropriate from another source) the necessary documentation, or to use a combination of the two. Canned fact patterns are disfavored because they do not replicate practice. In other words, clients do not walk into an attorney’s office with a fact sheet, such as students are presented with for examinations, providing all the necessary facts to solve the problem. Providing a more realistic experience for students involves creating the documents that comprise a record or client file, such as a complaint, an answer, interrogatories, and depositions. Of course for some types of assignments, such as preparing an analysis of pending legislation, very little documentation is necessary.

Considerations in developing the instructions involve determining the role the professor will assume and whether students can collaborate on the assignment—in whole or in part, for example sharing research. The most typical roles that a professor might assume include the client (to facilitate uncovering the facts through an interview) and the senior partner (to provide mentoring). In either case, it is important to communicate to students beforehand what assistance they can expect from their professor—in class and during office hours. Similarly, the degree to which students will be permitted to work together or discuss the assignment with their classmates (or others) needs to be communicated to students, preferably in writing, when the assignment is distributed. There are good reasons to allow collaboration, especially on the actual completion of the assignment. Lawyers in a law firm do not typically work in isolation. They discuss, debate, and collaborate, time permitting. Students need opportunities in law school to
learn how to collaborate in creating documents. More mundane considerations regarding instructions include whether to impose page or word limits, margin limits, specific formatting requirements, and the like. If the professor chooses to impose requirements, they should be included with the assignment. Another consideration is whether to set a due time in addition to the due date. This involves determining whether students can show up at the end of class to submit the assignment. It is also helpful to have a late submission procedure and policy. This helps to avoid having to make difficult decisions by putting the burden on the students to follow a specific procedure, ensuring equality of treatment. (An example of these types of instructions is included in Appendix A.)

D. Test the Assignment

Casebook faculty drafting writing problems for the first time will no doubt note that the process outlined above bears some similarities to drafting essay examinations. But, writing assignments are less forgiving than examinations. Students have the assignment in hand; they are working on the assignment longer than three or four hours, the time of a typical law school exam; and they are, for better or worse, discussing the assignment with each other, at least in broad terms. They will know if the assignment is not working or, worse, is an exercise in futility. And, they will resent the waste of their time and the missed learning opportunity.

One of the most helpful ways to test the assignment is to prepare an evaluation checklist before distributing the assignment to students. Drafting a checklist helps focus the objectives of the assignment as well as the range of permissible answers. It is worth noting, however, that checklists for writing assignments, just like checklists for examinations, need to be flexible, allowing the professor to make necessary adjustments after some initial grading of the papers. (An example of a checklist is provided in Appendix B.)

26 Lysaght & Lockwood, supra n. 1, at 105.
27 See also Bannai et al., supra n. 20, at 212.
28 On the importance of making sure the assignment works, see Bannai et al., supra n. 20, at 206–207.
29 Easton et al., supra n. 3, at 62.
III. THREE TIPS FOR EFFECTIVE CRITIQUING

Critiquing students’ work is a powerful teaching tool. Indeed, a good critique provides students with evaluative feedback, promotes appreciation of how the reader reacts to their writing, and motivates them to improve. There is a growing body of literature on critiquing writing assignments. While much of the literature is aimed at optimizing learning through assessment in legal writing courses, experience has shown that certain practices are suitable for writing assignments in casebook courses. First, a combination of margin comments and end comments is more effective than simply handing back a checklist. The margin comments focus on specifics, including reader reaction, while the end comments provide a summation of the strengths and weaknesses, along with suggestions for improvement. In drafting either type of comment, it is helpful to recall that effective critiquing is not editing; instead, it is a dialogue between reader and writer, mentor and student.

Second, comments should be measured and not exclusively negative. The goal is to provide a balance—commenting on both the strengths and weaknesses in the paper. In truth, occasionally a paper is submitted about which there is very little to say that is positive. This problem can be especially difficult for the novice teacher. Moreover, the novice may view the use of negative comments as a way to justify a failing grade. In these situations, how-

30 Id. at 54–55; Steven J. Johansen, “What Were You Thinking?”, Using Annotated Portfolios to Improve Student Assessment, 4 Leg. Writing 123, 127 (1998); Gregory S. Munro, How Do We Know If We Are Achieving Our Goals?: Strategies for Assessing the Outcome of Curricular Innovation, 1 J. ALWD 229, 237 (2002).
31 Jessie C. Grearson, From Editor to Mentor: Considering the Effect of Your Commenting Style, 8 Leg. Writing 147, 159–164 (2002).
33 Easton et al., supra n. 3, at 55.
34 Id.; Grearson, supra n. 31, 159–164.
35 Nancy Soonpaa, Using Composition Theory and Scholarship to Teach Legal Writing More Effectively, 3 Leg. Writing 81, 99 (1997).
36 Easton et al., supra n. 3, at 57.
ever, it is sometimes more useful to summarize the problems and then ask the student to meet with the professor. The individual conference offers an opportunity to discuss the problems in more detail without overwhelming the student by over-commenting on the paper itself.

Third, an in-class discussion of the assignment provides an opportunity to go over the analysis in depth and to discuss the types of problems students had, why they had them, and how to they can avoid them in the future. These in-class discussions should occur shortly after students have received their critiqued papers. For those professors concerned with spending class time on this endeavor, another option is to create a general memorandum addressed to all students that covers what would have been said in class. Also, it is often useful to place a few of the better papers on reserve so that students can review their own work in light of these examples.

IV. CONCLUSION

Law firms are increasingly expecting newly minted lawyers to arrive with a tangible portfolio of experience gleaned from law school. Providing students with assignments that replicate practice so as to better prepare them to bridge the chasm between the study and the practice of law need not, and should not, be the exclusive province of legal writing and clinical faculty. Casebook courses offer excellent opportunities for students to expand their writing and research experiences in ways that ease their transition from law school to law practice.

37 See also id. at 59.
APPENDIX B

CRIMINAL LAW
WRITING ACROSS THE CURRICULUM
ASSIGNMENT CHECKLIST

Student Number:

- Rationale
  - problem of proof in acquaintance rape cases
  - protection of marriage

- Background
  - role of consent in prosecution of CSC cases
  - role of presumptions in criminal cases

- Analysis
  - advantages of proposed legislation
  - disadvantages of proposed legislation

- Recommendation

- Depth of research

- Writing

- Organization

Grading Scale:

- 40 = 4.0 (A)
- 35 = 3.5
- 30 = 3.0 (B)
- 25 = 2.5
- 20 = 2.0 (C)
- 15 = 1.5
- 10 = 1.0 (D)
- 5 = 0.5 (F)

1 Author's Note: For writing assignments, I have found that general checklists that allow me to grade “holistically,” as opposed to allocating points for each discrete item on the checklist, work best. Thus, if a writing assignment is worth 40 points, I equate those 40 points to a 4.0 scale and evaluate the overall effectiveness of the paper according to that scale. The checklist in this Appendix follows that format. Conversely, for exams in my casebook courses, my checklists are more detailed with allotted points for each item.
INTEGRATING CONTRACT DRAFTING SKILLS AND DOCTRINE

Eric Goldman

In February 2006, I participated in the Symposium, Teaching Writing and Teaching Doctrine: A Symbiotic Relationship?, at Brooklyn Law School. I prepared some personal and unscientific observations about the challenges of concurrently teaching legal doctrine and contract drafting. Obviously, there is a rich literature on these topics that I did not try to address; instead, my goal was simply to acknowledge my first-hand experiences wrestling with these challenges and discuss some specific solutions I have tried. This brief Essay recaps my presentation.

Despite occasional celebrations of contracts as the epitome of freedom and autonomy, in reality, contracts are heavily regulated. First, public policy prohibits some private exchange choices outright. Second, every private exchange is subject to default gap-filler provisions. Third, the parties may choose words that, due to inconsistent statutory or common law meaning, may not adequately express the parties’ desired agreement.

A contract drafter cannot accurately effectuate the parties’ intent without understanding this regulatory backdrop. Accordingly, contract drafting students must learn the doctrinal context applicable to their contracts. But mastery of contract doctrine, alone, is insufficient for good contract drafting. Contract drafting also requires some technical skills that apply universally regardless of the contract’s substance.

In a perfect world, contract-drafting students would learn both contract doctrine and technical drafting skills concurrently. However, class time scarcity makes this ideal difficult to achieve in any one course. Simply put, teaching contract drafting is time-consuming. Teaching doctrine takes time because many contract types are subject to their own unique bodies of law and prevailing industry norms. Teaching drafting skills also takes time because it requires teaching the material with both breadth and depth. The
drafting process implicates many different skills, and teaching each skill may require exercises that specifically address those skills. Meanwhile, students improve their skills with each repetition, but reinforcing each skill through multiple exercises increases the time demands exponentially.

As educators, we cope with this time scarcity in one of two principal ways: (1) covering both contract doctrine and drafting skills in an integrated fashion (a tricky balancing act), or (2) segregating doctrine from skills-building. While sometimes doctrine/skill segregation makes sense, or is a practical necessity, integrating the pedagogy has significant benefits. Repeated exposure to doctrinal material through skills-building can provide unique insights into the rules’ policy justifications, legal contours, and practical effects. In turn, when students have learned the applicable law, students engaged in skills-building exercises can better understand the importance of precise drafting and the consequences of poor drafting.

Therefore, as educators, we have a unique pedagogical opportunity to use drafting skills-building to reinforce doctrine. But how can we overcome the time scarcity in our courses? Let me offer three examples of ways that I have integrated drafting and skills training into my doctrinal courses.

I. REVIEWING AGREEMENTS

Sometimes I walk students through an actual agreement as a type of capstone review. After covering the substantive law, the agreement can illustrate how contract drafters respond to the underlying substantive law.

For example, in Intellectual Property, at the end of the trade secret module, I distribute a sample nondisclosure/“confidentiality” agreement.\(^1\) Nondisclosure agreements are ubiquitous in corporate and intellectual property settings, but many practitioners do not realize that these agreements are, at their core, trade secret licenses. To make this point, I walk students through each word of the agreement, pointing out how the drafting reflects the substantive trade secret law we just discussed.

In Software Licensing, I teach a module about the various exclusive rights of intellectual property owners. Then, I review the license grant section of an actual software license agreement to explain how the language should reflect the statutory rights. I even include an agreement review exercise in Contracts. At the semester’s end, I distribute a sample agreement and narrate it paragraph by paragraph. For example, we discuss the force majeure clause—a provision that lawyers typically gloss over mindlessly. However, because the students have just reviewed some force majeure cases, the force majeure clause suddenly has real-life meaning, and it becomes immediately clear how students can draft the contract to deal with unwanted default rules.

II. DRAFTING LECTURE MODULES

In some situations, I give brief drafting lectures to explain contract drafting issues. These modules integrate doctrine and skills by demonstrating how to use the doctrinal material in real-life situations. For example, online “privacy policies” are ubiquitous on the Internet and a mainstay of a cyberlawyer’s practice. In Cyberlaw, after we study online privacy law, I teach a brief module about “best practices” (both substantive and procedural) for drafting online privacy policies. This module reinforces some substantive points about online privacy while providing students with specific actionable drafting recommendations.

In Copyrights, I typically spend a class covering some counter-intuitive rules that dramatically affect contract drafting, such as a

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2 Id. at http://www.ericgoldman.org/Courses/contracts/iplicensegrants.htm. For example, a copyright owner has the exclusive right to “reproduce,” “distribute,” “prepare derivative works of,” “publicly perform,” “publicly display,” and “digitally perform” a copyrighted work. See 17 U.S.C. § 106 (2000).


stringent statute of frauds\textsuperscript{6} and a non-waivable right to terminate ownership assignments or license grants thirty-five to forty years after the transfer was made.\textsuperscript{7} Any lawyer drafting a copyright license or assignment needs to know these rules and to contemplate them in the contract. The drafting lecture module allows me to explain the practical consequences of these rules and highlights the critical importance of knowing a contract’s regulatory context.

\textbf{III. DRAFTING EXERCISES}

Finally, I occasionally incorporate drafting assignments into doctrinal courses. There is no substitute for “doing” drafting, but drafting exercises are time-consuming. Here is how I try to balance the competing demands for time.

Contracts (for me) is a one-semester four-unit course, so it is undeniably time-squeezed. Nevertheless, I add a three-step contract drafting exercise\textsuperscript{8} without sacrificing doctrinal coverage. The exercise involves a hypothetical sports endorsement contract. In Exercise A,\textsuperscript{9} the students enumerate the major issues that the contract should address. The students do not actually draft contract terms; this is just an issue-spotting exercise. I ask students to issue-spot from both sides to highlight the importance (and limitations) of perspective. In Exercise B,\textsuperscript{10} each student adopts a side (licensor or licensee) and drafts a clause addressing the endorser’s objectionable conduct (sometimes called a “morals” clause). Students do not draft the entire contract; that would be too hard and time-consuming. In Exercise C,\textsuperscript{11} students negotiate a morals clause with another student. The negotiation provides a capstone experience because students realize the limits of their drafting in Exercise B. In Exercise B, most students use extremely client-favorable language, not considering if an opposing party would ever agree to such language. In Exercise C, students learn firsthand what happens to such language when an opposing advocate pushes back. The negotiation exercise gives students a valua-

\textsuperscript{6} The statute of frauds applies to ownership assignments and exclusive licenses. See 17 U.S.C. § 204(a) (2000).
\textsuperscript{9} Id.
\textsuperscript{10} Id. at http://www.ericgoldman.org/Courses/contracts/draftingexercise2.pdf.
\textsuperscript{11} Id. at http://www.ericgoldman.org/Courses/contracts/draftingexercise3.pdf.
Integrating Contract Drafting Skills and Doctrine

A plausible perspective on the entire course. In many cases we study, the litigated contract provision (or lack thereof) does not make sense, encouraging students (and me) to disparage the litigants for their drafting failures. After the exercise, students realize that previously unfathomable contract language may result from negotiated compromise.

To save class time for doctrinal coverage, the entire process takes place outside of class. Students draft and negotiate on their own time. After each step, I hold an optional review session (about half of the students come). In the review sessions, we discuss both process and substance. Typically, I pose some questions to the students and then lead a guided discussion. This discussion usually reveals that students use different techniques and approaches to deal with the exercises, allowing their peers to consider the efficacy of those alternatives.

Students get some feedback from these sessions as they benchmark their choices against their peers’. Students also get feedback from (1) my written comments on their drafts, (2) a sample answer I draft, and (3) a compilation of student submissions so that they can see what their peers actually produced. Usually, after seeing their peers’ work, students realize that they were not alone in finding the problem difficult.

In Software Licensing, I give students a statute governing the effects of bankruptcy on a software license. Section 365(n) of Title 11 of the United States Code is very confusing due, in part, to poor statutory drafting. I also give students a real-life contract in which the parties make elections under Section 365(n). I ask the students to figure out what the parties wanted to accomplish. Then, I ask students to redraft the provision to accomplish this goal in fewer words. I offer a prize to the student with the shortest redraft. The prize (though trivial in value) encourages students to evaluate every word carefully and to eliminate unnecessary words.

When I taught the course in Spring 2005, I got responses ranging from about 35 words to more than 150. One student took

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12 For examples of the questions I use to prompt the discussion, see id. at http://www.ericgoldman.org/Courses/contracts/draftingexercise3debrief.pdf.
16 I love Slinkies. Therefore, I maintain a supply of cheap Slinkies to give away in these types of situations. The winner of the redraft effort chooses a Slinky from my stash.
the position that no contract clause was needed at all (thus, she submitted a clause with zero words). This offered a wonderful opportunity to explore how and when contracts can rely on default statutory provisions. As usual, I commented on each student’s answer, wrote up my own answer, and shared all submissions so students could see their peers’ drafting. Because the drafting and feedback principally took place outside of class, the students explored a complex doctrinal area and had an integrated skills experience without consuming much class time.

IV. CONCLUSION

As professors, we face scarce class time—too much to teach, not enough time to cover it all—and this scarcity pressures us to sacrifice skills training in our doctrinal courses (and doctrinal material in our skills courses). Yet, integrated coverage provides unique pedagogical opportunities to show students the real-life importance of legal doctrine and to build student skills contextually. As this brief essay has explored, there may be ways to overcome the time squeeze, so I hope this will encourage creative thinking about ways to balance teaching doctrine and skills. The pedagogical payoffs are worth it!
LEARNING FROM EXPERIENCE:
ADDING A PRACTICUM TO A
DOCTRINAL COURSE

Elizabeth Fajans*

Several speakers this afternoon have described tried and true
courses, courses that have successfully used writing to teach, rein-
force, or provide a different perspective on doctrine or lawyering
skills. The practicum I am discussing today is untried,¹ but it
draws on the pedagogical strengths of a writing and skills course
and embeds those skills in a doctrinal context. As such, it repre-
sents a novel, blended approach to law teaching that has much to
offer students.

The practicum will be added to the administrative law class
that Professor Kelly already teaches. It will be a two-credit, two-
hour per week workshop course that will fulfill Brooklyn Law
School’s upper class writing requirement and be open to ten of the
students taking administrative law. Although this is only a small
percentage of the administrative law class, the entire lecture class
will play a role in defining and critiquing the project the practicum
students work on. First, the doctrinal class will sponsor the bill the
practicum students will draft. Later, the doctrinal class will be
divided into interest groups commenting on the practicum’s pro-
posed administrative regulations. This interplay between the do-
ctrinal class and the practicum not only adds verisimilitude to the
drafting experience, but it is also a practical way to expose a large
number of students to the challenges of rulemaking prose.

I. BACKGROUND

For the past two years, Professor Kelly has incorporated a
simulation into her administrative law class. It was intended to
give students some hands-on experience with drafting legislation
and regulations in the hope such exposure would teach them about

¹ My colleague, Claire Kelly, and I team taught this practicum for the first time in
spring 2007, but we were preparing for it at the time of the symposium in 2006.
some of the challenges and pitfalls of the enterprises, and some of
the differences between drafting statutes and drafting administra-
tive regulations. She also believed that this exposure would enrich
their understanding of the administrative state by placing the
primary doctrinal concepts of administrative law into an appropri-
ate practical context.2

Professor Kelly conducted the simulation throughout the en-
tire semester, taking a few minutes from each class. She gave the
students a problem to solve and the opportunity to write a law that
would solve the “problem.” For example, one problem asked stu-
dents to write a statute reforming a school’s grading policies and
empowering a committee to create procedures for implementation
and violations. The class debated the issues, took polls, and draft-
ed legislation that empowered an administrative committee to im-
plement its policy. Once enacted, some of the students were formed
into groups within the committee to issue Notices of Proposed
Rulemaking (NPRM) for several issue areas. The remainder of the
class was divided into interest groups who commented upon the
proposed regulations.

Students found this exercise both enjoyable and informative;
however, the simulation did not teach all it could teach. First, Pro-
fessor Kelly had only a limited amount of class time to devote to
this exercise. Second, because student contributions were volu-
tary and ungraded,3 they were often hastily conceived and pre-
pared. Third, as class enrollment grew—up to 80—the simulation
became unwieldy; there were too many proposed bills, too many
proposed agency rules, too many comments on the rules, and too
little time to review them.4

We thought a practicum would remedy this situation by
providing students with better grounding in the fundamentals of
drafting and more time for brainstorming and preparing the sta-

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2 As Pamela Lysaght and Christina Lockwood note, “[r]equiring students to place
the doctrinal concept in context while working on a concrete legal problem . . . helps students
who may not have understood the concept in isolation. Further, students who thought they
understood the concept may not have realized the intricacies involved until they attempted
to apply the concept to a legal problem. Having completed the document, the students have
a better understanding of the doctrine—learning is enhanced.” Pamela Lysaght & Cristina
D. Lockwood, Writing-across-the-Law-School-Curriculum: Theoretical Justifications, Cur-
ricular Implications, 2 J. ALWD 73, 101 (2004).

3 Contributions did count, however, as class participation.

4 Simulations, especially those resulting in a written product, are labor intensive for
both teacher and students. See Elliot M. Burg, Clinic in the Classroom: A Step toward Coop-
ute and its implementing regulations. Moreover, a rule drafting simulation seemed to us like a good way of promoting creative thinking because it requires students to explore a problem and to invent a solution. Because this is a change from much of the critical thinking in law school, where the focus is often on applying or critiquing existing law, it is a valuable experience.\(^5\) And, although only the students in the practicum would draft the documents, the entire administrative law class would still participate in the process, providing both ideas and comments on the statute and regulation, and experiencing—at least secondhand—some of the lessons that can be derived when theory is put into practice. These lessons derive from a program of active learning, a realistic context for learning professional responsibility, and the integration of skills and theory—including problem solving, negotiating, and drafting.\(^6\)

II. THE CONTOURS OF THE PRACTICUM

The practicum will begin with four classes on the fundamentals of drafting. Although these skills classes will be my primary responsibility, Professor Kelly and I intend to audit each other’s classes and lend our perspective where appropriate.\(^7\) The first class will be an introduction to drafting—both the problems and the solutions. We will delve into normative prose and sensitize students to semantic and syntactic ambiguity, to terms of authority, and to the differences between, and appropriate use of, specific, general, and vague language. The second class will center on ways to avoid some types of ambiguity through the use of definitions, tabulated sentence structure, proper punctuation, and document design. In the next class, students will learn how to conceptualize a rulemaking document. Topics include gathering information, brainstorming and troubleshooting, and adapting boilerplate and models. Students will also learn how to test content by assessing

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[7] Collaboration between legal writing and doctrinal faculty cannot help but be mutually fruitful. Legal writing faculty can acquire helpful background and methodology for “approaching problems in a particular subject area . . . . Doctrinal faculty will find in legal writing faculty a rich resource in how . . . . to include . . . . a skills agenda in a subject course.” Lysaght & Lockwood, *supra* n. 2, at 105. Equally profitable might be a three-way collaboration: clinical, legal writing, and doctrinal faculty.
completeness, consistency, and level of generality, and how to test structure for logical sequence and overlap. We will end this unit with a class on the ethics and politics of legislative drafting, the process of drafting a rulemaking document, the components and conventions of the genre, and the impact of statutory construction on the drafter.\(^8\)

While this background is being covered in the practicum, the entire administrative law class will be discussing the legislative component of administrative law, including the nondelegation doctrine, the separation of powers doctrine, problems of vagueness, executive supervision of agency action, and congressional control of agency functioning. These classes will provide the context within which legislation is written. Professor Kelly will also reserve time for the administrative law class to discuss the substance of the statute that the practicum students will write. Students in the doctrinal class will be divided into interest groups for that discussion, but the class must eventually come to a resolution that results in a directive to the practicum students. In other words, the class will function as the bill’s sponsor and the practicum as its legislative drafter.

Once the doctrinal class has issued its directive to the practicum students, the practicum students will begin to draft the enabling legislation. In order to capture the collaborative nature of many drafting projects, we envision dividing our practicum students into pairs and assigning particular sections of the statute to each pair. The practicum classes will, at this point, be working sessions, and Professor Kelly and I will act primarily as facilitators. The students will need to discuss each pair’s contributions to the enterprise, and the statute’s overall substance, effectiveness, completeness, consistency, accuracy, and organization.

Once the drafters are satisfied with their work, the statute will be submitted to the entire administrative law class for discussion, vote, and, if necessary, amendment. In addition, the bill will provide the rest of the class with some hands-on examples that will expose them to some of the drafting issues on which the practicum students have been working. (Of course, if the class finds many “hands-on” errors and refuses to pass it, we may need to exercise some discretion and decree it law.) At this point, the practicum students will change from legislative drafters of the statute to administrative rule drafters. We hope this change of

\(^8\)The syllabus for this course with some tentative readings follows as Appendix A.
roles will further sensitize students to the complexities of drafting. We anticipate that our students’ efforts to implement the statute they wrote will reveal previously unrealized problems and complexities.\(^9\) The change of role will also teach students about the differences between legislative drafting and regulatory drafting. As one administrative rule drafter notes:

> Drafting a rule differs from drafting legislation in that a legislature can address almost any issue it desires, while a rule maker is limited to the authority delegated to it by its enabling legislation. When drafting a rule, consequently, the drafter must always be aware of the scope of the authority delegated to the agency adopting the rule. If the legislature has granted broad discretion to an administrative agency, the agency has substantial leeway to exercise discretion and affect policy in the rule development process. If, however, the legislature has placed specific limitations on the agency’s discretion, the freedom of the agency and thus of the rule drafter to make policy decisions through a rule is limited. The drafter must continually ask whether the rule is within the statutory authority of the agency and whether it is consistent with any prescriptive language in the statute.\(^{10}\)

These lessons will be reinforced in the doctrinal class, which will, at this point, move on to a discussion of the sources of administrative process, that is, agency processes as imposed by the Constitution, the Administrative Procedure Act (APA), the enabling statute, and the agency itself. Thus, for example, students will learn that both the Constitution and the APA require there be some kind of agency adjudication of any administrative regulation.

Students will also learn about the process of notice and comment in rulemaking. After an agency proposes a rule, various interest groups draft comments to which the agency must respond and in light of which the agency must justify its rule. The large administrative class will again be divided into interest groups to

\(^9\) Indeed, Professor Kelly and I have been discussing how much feedback to give on the first assignment, the legislative bill. We are thinking of giving minimal comments on the theory that students will learn from their mistakes and from their opportunity to correct some of those mistakes in the agency rules. Moreover, as Lysaght and Lockwood note, students should be exposed to “ill-structured problems, meaning those that . . . mimic the multi-dimensional problems students will face in practice where there is often not an easy answer. Such problems challenge students to use higher-level thinking and create new cognitive structures and understanding to creatively solve the problem.” Lysaght & Lockwood, supra n. 2, at 102.

\(^{10}\) Robert J. Martineau, Jr., Administrative Rules, in Robert J. Martineau & Michael B. Salerno, Legal, Legislative, and Rule Drafting in Plain English 132 (West 2005).
comment on the agency’s proposal. Once the class submits these comments to the practicum students, practicum classes will be used to brainstorm appropriate responses and to draft the rule.

The last practicum assignment will be an agency or judicial decision—an assignment that is responsive to the third component of the administrative law class, namely, judicial review of agency rulemaking and agency adjudication. Students will be presented with a hypothetical involving, for example, an appeal based on the validity of, or ambiguity in, their rules. Just as the attempt to implement a statute would hopefully force students to reflect on the efficacy of their statute, so might an opinion force them to reflect on the efficacy of their regulations.  

III. CONCLUSION

Practica are an excellent and workable model for writing-across-the-curriculum proposals. The biggest obstacle for such proposals tends to be resources. Teachers understandably find a writing component or drafting course labor intensive. But this model, which involves a limited number of practicum students working on collaborative projects, is less laborious than other writing courses and has the additional virtue of involving a large lecture class, albeit more peripherally, in the drafting process. Because of this, both of us hope the workload will be manageable and are adding this practicum to our normal teaching loads, at least on an experimental basis.

Admittedly, collaborative student work has both benefits and drawbacks. Clinicians—who have, perhaps, the most extensive experience with student collaborations—say that some of the more important benefits include better brainstorming because of diverse perspectives, a better work product as a result, and increased collegiality leading to greater involvement and satisfaction. On the other hand, one of the important drawbacks they describe is the

11 For a description of a client-based simulation in an administrative law class, see Michael Botein, Simulation and Roleplaying in Administrative Law, 26 J. Leg. Educ. 234 (1974).


13 These benefits are discussed at greater length in David F. Chavkin, Matchmaker, Matchmaker: Student Collaboration in Clinical Programs, 1 Clin. L. Rev. 199 (1994).
difficulty of pairing students effectively. Societal factors (race, gender, sexual orientation, socioeconomic status) occasionally impede student interactions, as do varying abilities. These difficulties can be minimized if teachers explicitly identify the development of collaborative skills as a goal of the course and of the profession, and make collaboration one of the evaluation criteria.\textsuperscript{14} This seems especially appropriate when the written product is, in practice, a collaborative effort.

Another difficulty with collaborative work is evaluation. Teachers must decide whether to grade on the basis of work product alone or whether to grade individual performance, and how to do it. Teachers who grade individual performance in a collaborative enterprise frequently require their students to report on their tasks and obligations.\textsuperscript{15}

These difficulties aside, the practicum model strikes us as sound pedagogy. It is responsive to three dominant theoretical approaches in composition theory. First, it incorporates the instrumental, product-based approach, teaching students about the conventions of format and style.\textsuperscript{16} Second, it takes the class through the writing process, forcing them to gather information, to generate and organize content, and to assess the adequacy of the meanings they memorialize in language in light of class response and administrative interpretation.\textsuperscript{17} Finally, it employs a social context, social discourse approach, teaching students about “the social context in which writing takes place and, thus . . . the ways in which writing generates meanings that are shaped and constrained by those contexts.”\textsuperscript{18} Here, students learn about both legislative and administrative process, about both the constraints and compromises the process imposes on drafters, and about the vistas that commentators and interest groups open up for them. In short, it requires students to create and articulate the purpose of their document, to capture that purpose in appropriate language, and to have that language assessed by peers and interpreted in administrative regulations and by courts. It is a course where writing is

\textsuperscript{14} Id. at 235–237.

\textsuperscript{15} Id. at 236.

\textsuperscript{16} In the instrumental approach, the product is a transparent document that reflects the writer’s thoughts and that conforms to the conventions of the discipline. Such documents establish an author’s credibility. See Carol McCrehan Parker, \textit{Writing throughout the Curriculum: Why Law Schools Need It and How to Achieve It}, 76 Neb. L. Rev. 561, 565–566 (1997).

\textsuperscript{17} See id. at 566.

\textsuperscript{18} Id.
truly a tool for learning—unless, when we actually teach it, we learn otherwise.
APPENDIX

ADMINISTRATIVE LAW & PRACTICUM

REQUIRED BOOKS

Administrative Law Text

Practicum Text
- Handouts

ASSIGNMENTS

Administrative Law: Class 1
- *Introduction: The Legislative Connection: Vagueness* (pages 1–29, 59–77 (up to but excluding note 3 on page 77) and 78–94).
- Appendix A: Constitution, Articles I, II, and III.

Administrative Law: Class 2

PRACTICUM 1
- Poor Drafting: The Problem and the Cure Syntax and Semantic Ambiguity, Words of Authority, Vagueness & Generality, Conditions, Penalties
- Robert Martineau & Michael Salerno, *Legal, Legislative, and Rule Drafting in Plain English* 71–73 (West 2005) [Martineau].

Class 3
• Executive Supervision of Agency Action: Appointment and Removal (pages 190–220).
• Executive Supervision: Congressional Power (pages 220–229 (up to but not including note 6)).

PRACTICUM 2

Class 4
• Executive Supervision: Congressional Power and Executive’s Policy Initiation (pages 231–255, 255–267).
• Begin Class Discussion on Practicum Problem

Class 5
• Executive Supervision: Executive’s Policy Initiation (pages 268–279: 288–292; 298–301).
• Administrative Adjudication: Due Process (Appendix C: APA, sections 554, 556, and 557, pages 312–315: 322–335 (up to but not including 335)).

PRACTICUM 3
• Conceptualizing and Organizing [WLP] (pages 3–24).
• Impact of Legislative Process and Statutory Construction on Drafting [Martineau] (pages 92–95, 104–114).
• Drafting within the Law and Determining Substance
• Thomas R. Haggard, Legal Drafting 209–217 (West 2003).
Class 6

**PRACTICUM 4**
- Samples of Enabling Legislation
- First Practicum Assignment (Enabling Legislation)

Class 7

Class 8

**PRACTICUM 5**
- Class Discussion of Legislation, Collaborative Drafting

Class 9
- Review Appendix C: APA, section 553.

**PRACTICUM 6**
- First Practicum Assignment Due (Enabling Legislation)
Class 10
- *Administrative Rulemaking: Procedural Requirements and Substantive Review* (pages 509–532 (up to but not including note 4); 535–542 (up to and including the note on page 542)).
- Class Discusses Proposed Legislation

Class 11
- Class Votes on Proposed Legislation

**PRACTICUM 7**
- Drafting Agency Rules
- Martineau (pages 132–143).
- Sample NPRMs
- Other Handouts

Class 12
- *Administrative Rulemaking: Bias and Prejudgment and Exemptions from Section 553 Requirements* (pages 576–593 (up to and including note 1)).

**PRACTICUM 8**
- Second Practicum Assignment, Notice of Proposed Rulemaking (NPRM), Class Discussion of Regulations, Collaborative Drafting

Class 13

Class 14
PRACTICUM 9
- NPRM Due and Class Finalizes

Class 15
- Class Discussion on Comments to NPRM

PRACTICUM 10
- Comments to NPRM Due: Group Works on Response to Comments

Class 16

Class 17
- Review Appendix C: APA, sections 701, 706.
- Review Appendix C: APA, sections 702, 704.
- Class Discussion on Comments to NPRM

PRACTICUM 11
- Group Works on Regulations Comments

Class 18

PRACTICUM 12
- Regulations Due and Class Finalizes

Class 19
Class 20

**PRACTICUM 13**
- Fourth Practicum Assignment (Judicial Review of Agency Action).

Class 21
- Catch Up and Review

**PRACTICUM 14**
- Opinion Due
VIGNETTES FROM A NARRATIVE PRIMER

Philip N. Meyer*

[S]omewhere along the way one discovers that what one has to tell is not nearly so important as the telling itself.¹
—Henry Miller

I. WHY TEACH NARRATIVE PERSUASION?

Let me begin by positing a broad initial claim: Attorneys, especially litigation attorneys, work in what is largely a storytelling or narrative culture. Legal arguments are, perhaps, best understood as disguised and translated stories. Even arguments whose structure is seemingly more formal and legalistic (as in appellate briefs or the judicial rhetoric of a United States Supreme Court opinion)² may be best understood as narrative. It may appear initially that paradigmatic forms of legal reasoning “tame” narrative³ and bring narrative impulses under control, translating and reshaping the story for purposes of argumentation. But let us assume, momentarily, that our notions of justice and right outcome are fundamentally grounded in and governed by narratives.⁴ Let us assume that we are truly narrative creatures and that we construct our sense of how the world works, of who we are, and of how events transpire, with the stories that are told to us, that we tell to others, and that we tell to ourselves. We use stories to order and mediate overwhelming environments of perceptions, informational

* © 2006, Philip N. Meyer. All rights reserved. Professor of Law and Director of Legal Writing, Vermont Law School. I am grateful to Anthony G. Amsterdam for allowing me to reproduce portions from initial drafts of work-in-progress, and to borrow insights and analyses as well. Errors, problematic observations, and misjudgments are my own, exclusively. I also offer my thanks to Johanna Evans and Evelyn Marcus for excellent research assistance.

⁴ I use the synonyms “stories” and “narratives” interchangeably and trust that this will not confuse readers.
data, and factual noises that might otherwise be incomprehensible. Stories are enabling and empowering and, indeed, fundamental to how we fashion our beliefs and how we act upon them.

Further, assume that our determination of the appropriate law governing a particular case, what is “right” in a particular case, what the outcome “should be,” is likewise shaped by stories. Thus, perhaps more often than we care to admit, it is narrative that truly does the persuasive work in legal advocacy. If this is so, then it behooves legal writing professors teaching persuasion, law students who will become attorneys, and attorneys litigating cases, to better understand how stories work, and to develop a narrative tool kit supplementing the analytical skills traditionally taught in law school and emphasized in legal writing programs. This requires building upon the clinician’s admonition to her students that it is crucial in advocacy to tell a good story, albeit one subject to the constraints and conventions of legal storytelling practice, by developing a methodology for teaching narrative persuasion.

Narrative skills may seem intuitive to us, since we are so much the product of stories. We are immersed in films, commercials, literature, advertisements, news narratives, etc. But is it apparent what a “good” (effective) story is—especially in the context of legal writing and skills training? What, for example, are the components of a “plot” or a narrative “theme”? What is narrative structure? What are some recurring and effective plots in the various areas of legal practice? Who are the “characters” in a law story? How are they “cast” on stage? What roles do various characters play, and how are they best depicted or developed? What, exactly, is narrative time, and how is it best represented in narrative, e.g., chronologically or through such techniques as flash-back and flash-forward? What is the role of settings or environments? What stylistic lessons might lawyers learn from other masterful storytellers, e.g., practitioners of creative non-fiction or practitioners of the modern novel and short story?

Of course, legal storytelling is a carefully circumscribed business. The stories told and their tellings must be truthful, factually accurate, and meticulous. Further, there would be danger and destabilization in legal pedagogy if the law were taught and understood exclusively as merely the battle of competing narratives built upon shifting legal foundations, rather than legal argumentation based upon principles, precedent, and stare decisis. Narrative persuasion in the law is obviously not unbounded storytelling; narratives are constrained by and shaped to fit legal rules, legal cultural
assumptions, and the conventions of legal writing practice. Within
this framework, some lawyers seem remarkably sensitive to, and
adept at selecting the “right” narratives and—especially in written
appellate argumentation—knowing how to carefully translate core
narratives into the language of analytical positivism. This is espe-
cially so when narratives more broadly encompass stories about
the law and not just stories about the facts. Specifically, narrative
persuasion in advocacy is not limited to the Statement of the Case.
Narratives often shape the choice of issues and the internal or-
izational structure of effective arguments.

Yet, our pedagogy in legal writing and reasoning does not tra-
ditionally emphasize narrative persuasion. Instead, we emphasize
the assumptions of analytical positivism embodied in the doctrinal
curriculum. Simply put, legal writing professors rarely provide law
students with the narrative tools necessary to supplement the ana-
lytical tools placed into their fledgling-lawyers’ tool kits. Why do
we fail to emphasize the narrative dimensions of legal writing?
Perhaps legal writing courses are shaped to embody the presum-
tions of a doctrinal curriculum that, at least initially, tips the legal
world upside down and elevates doctrine over the often-disputed
and ever-shifting factual terrains of practice. Law students are
already confused when the facts are fixed in place, and the stu-
dents (especially during their first year) struggle to tease out legal
doctrine from complex appellate cases. Perhaps, like some doctri-
nal colleagues, legal writing professors are also suspicious of the
power of narratives and tend to think of stories as inherently fi-
cctional. Further, students are traditionally tested on their ability to
identify and retrieve relevant doctrinal rules and apply doctrine
within often rigidly organized analytical formats that fix into place
what one of my students has called the “floating factoids” pre-
ented in typical law school examination hypotheticals. It might be
premature (and perhaps disastrous) to suggest to first-year law
students the notion that creative narrative persuasion is often out-
come-determinative in legal advocacy.

Perhaps many legal writing professors are still somewhat de-
ensive politically based upon our historical status within the law
school; this may affect choices in legal writing pedagogy to create
curricula that is shaped, and perhaps misshaped, to fit into the
shadows and presumptions of the doctrinal courses. Or perhaps,
alternatively, we may fear that emphasizing narrative persuasion
might make students cynical or somehow undermine their work
dissecting and teasing doctrinal legal rules from opinions and ap-
plying doctrine to predigested facts. Finally, when we talk about narrative persuasion, perhaps we simply do not have an adequate vocabulary that allows us to systematically isolate and teach the various skills necessary. Unfortunately, we then tend to ignore or deny what effective practitioners know: litigation attorneys need to be effective storytellers. Further, narrative skills can be developed. And it is possible to envision an effective pedagogy for teaching narrative persuasion in law school legal writing programs.

Assuming that some of what I assert is correct, how might legal writing professors better provide law students with the narrative tools to become more effective practitioners? How might we supplement the clinician’s admonition that it is crucial for an attorney to tell a good story? What might be the content of these narrative lessons? What sources might we recommend to our students as instructional models? In this Essay, I provide some preliminary responses to these questions. In doing so, I present brief sections from a text-in-progress. I hope these slivers are not unduly fragmented; rather, I hope that they will suggest vocabulary and illustrate what some of this pedagogy might look like. These excerpts from a narrative primer (Part II) are intended to initiate a discussion of this fascinating topic and the possibilities of a new writing and skills pedagogy to enhance advocacy training, rather than to formulate an agenda or provide a complete text. I reserve that project for another day.

A. About the Narrative Primer

I am currently teaching collaboratively with clinicians, legal writing professors, and advanced-level practitioners a class on narrative persuasion for practitioners (primarily federal public defenders) at a Persuasion Institute, which meets annually. Presentations, exercises, and workshops explore and teach the art of narrative persuasion. Moreover, I am co-author of a narrative

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5 For example, I learned a great deal about effective storytelling during two years well spent at the Iowa Writers’ Workshop. Also, there is well-developed literature about storytelling practice by many masterful novelists, short story writers, and practitioners of the art of creative non-fiction.

primer-in-progress designed to incorporate some of the lessons from this larger project. The purpose of the exercises and materials in the primer, like the purpose of the Persuasion Institute, is to teach defense attorneys in post-conviction relief cases about narrative persuasion.

This is a different type of project for me. For the past twenty-five years I have worked primarily as a professor and Director of Legal Writing. It has been a long time since I practiced law and many years since I worked as a clinician in a law school civil legal clinic. Although I teach the first-year doctrinal criminal law course in addition to teaching legal writing, I am not an expert in habeas corpus, appellate criminal law practice and procedure, or post-conviction relief practice in death penalty cases. Other clinicians and practitioners serving as faculty at the Persuasion Institute, and, indeed, most of the participants at the Persuasion Institute, have more practice experience. Consequently, although I serve as faculty, I find myself learning more than I am teaching; I am learning, especially, from my co-author of the primer that may someday serve as a supplement to the Persuasion Institute. Based in large measure upon materials presented initially at the Persuasion Institute, the primer is titled *Retelling the Story: A Guide to Narrative for Attorneys Representing Condemned Inmates*. Recently, with the advice, suggestions, and materials provided by my co-author, I completed drafts of several lessons.

At the request of Marilyn Walter and Elizabeth Fajans, and with some trepidation about letting incomplete and undeveloped materials out into the world prematurely, I presented several preliminary excerpts from an initial draft to an audience of legal writing teachers at the Brooklyn Legal Writing Symposium celebrating twenty-five years of the Brooklyn Law School Legal Writing Program. After the presentation, colleagues requested copies of the illustrations from creative non-fiction (e.g., excerpts from Norman Mailer’s *Executioner’s Song* and Truman Capote’s *In Cold Blood*) and from a narrative critique of the Statement of the Case in a post-conviction brief, *Tison v. Arizona*. Presumably, these professors believed that the excerpts and the accompanying commentary were suggestive of exercises that could be incorporated into their writing courses to teach narrative persuasion.

The Legal Writing Institute agreed to publish the excerpts. Since these pieces are fragmented and somewhat acontextual, I

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thought initially about submitting for publication the draft of a single lesson from the primer rather than vignettes. After some waffling, however, I decided to replicate the fragmentary nature of my oral presentation and publish vignettes from several lessons to provide a sampling of the types of materials and analyses that the narrative primer will present. I also added to my introduction a “roadmap” explaining why these particular excerpts were chosen, and identifying how they fit into the overall scope or structure of the proposed primer. Moreover, I identified the other materials included in each of the lessons selected, and explained how the excerpts fit within individual lessons. Finally, because these are excerpts from a text with no scholarly footnotes, I added references to some of the academic sources that inform the text.

B. Proposed Structure of the Primer

The primer’s target audience is attorneys representing convicted persons and condemned inmates in appellate and post-conviction relief proceedings. The text identifies skills that are especially relevant to legal writing and advocacy and provides a narrative “tool kit” that supplements the traditional analytical, organizational, and writing skills taught in law school legal writing and reasoning courses. The aim of the primer is not to be comprehensive. Rather, it focuses upon a limited number of concepts fundamental to narrative persuasion. The language employed in the primer is pragmatic and functional; the text avoids high literary theory and academic terminology and defines the vocabulary introduced.

The primer is organized thematically by “lessons.” Substantively, these lessons analyze various components and principles of narrative persuasion. Lessons are also included on topics especially relevant to legal writers that are not generally included in other narrative primers. For example, a lesson is included on detective and mystery stories. Many legal arguments, especially in post-conviction relief cases, typically assume forms that closely resemble detective and mystery stories, and a typology of various structures of mystery stories may provide a useful inventory for practitioners. Likewise, it is important for practitioners to critique and deconstruct the stories underlying opposing briefs. Thus, another lesson emphasizes the skill of narrative critique.
In this Essay, I excerpt vignettes from four lessons in the primer: Style, Plotting, Character, and Setting. I selected excerpts that may be relevant for legal writing professors teaching about narrative persuasion. For example, the excerpts on “showing rather than telling” and “how to use quotations” are relevant for first-year law students, and the critique of the Statement of the Case in *Tison v. Arizona* may provide a helpful exercise in an appellate advocacy course or a moot court program. Alternatively, other excerpts provide fundamental narrative vocabulary (e.g., definitions of plot and theme) that might be useful to law students.

C. Excerpts from Four Lessons

The first sequence of vignettes is from the lesson on Style. “Style” in this primer means something different than the components of legal writing style traditionally taught in legal writing courses and often emphasized in legal writing texts. Subtopics include, for example, using visual details to construct scenes (showing) as a powerful alternative to summaries (telling), and understanding rhythm in narrative as the purposeful alternation between scene and summary. The excerpt from Norman Mailer’s *Executioner’s Song* illustrates how to construct a powerful scene through the use of compelling visual details, and how to develop a scene through showing rather than telling. Second, since narratives in legal briefs are often composites of quotations, transcripts, and excerpts from opinions assembled in a purposeful bricolage, another subtopic is *telling in different voices*. In the illustration taken from Truman Capote’s *In Cold Blood*, Capote employs witness testimony exclusively to recreate the initial discovery of the Clutter family murders. A third subtopic in this lesson is perspective or point of view. I use Gardner’s basic description of five per-

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8 Three asterisks (*** ) indicate major elisions from the larger work. Because these are fragments from a larger text, this Essay is necessarily incomplete. Its purpose is merely to provoke initial inquiry into this fascinating topic.
spectives typically employed by writers and provide an excerpt from analyses of several legal briefs.

The next sequence of vignettes is from the lesson on Plotting. Subtopics in this lesson include, for example, developing and translating legal issues into narrative themes; converting arguments into stories; how to use beginnings, endings, and temporality in plotting (e.g., where do you begin the story in time, and where do you end it?); and how to develop a narrative structure in legal briefs (e.g., starting with a difficulty or trouble that breaks the initial steady-state and moving purposefully into the progressive complications of the middle of the plot towards the climax, resolution, and coda). There is analysis of topics particular to post-conviction relief practice, in particular, whether the story should call for a transformative ending or a return to an initial “steady-state.” That is, the lesson on Plotting anticipates “the distinctive characteristics of stories that make a return to the anterior steady-state feel like the right ending and stories that need to project a new-and-different steady-state in order to come out right in the end” and “how to set up [the] story from the beginning so that the reader is cued into either a restorative or a transformative dynamic.” This lesson also develops the idea that it is “not only in the composition of the obviously ‘factual’ sections of a brief or pleading but also in the legal sections that one can use narrative techniques.” The narrative structures of literary and legal examples are analyzed. Finally, the lesson concludes with an exercise that enables readers to plot the narrative in a complex case based upon the facts presented in Richard North Patterson’s novel Convic-

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13 Excerpts from a subtopic on sentence structure included in the lesson on Style are omitted from these vignettes. Amsterdam describes this topic, “The remaining subtopic has to do with the use of sentence structure (particularly the allocation of material to dominant and subordinate clauses, the crafting of different levels and kinds of subordinate clauses, and the use of appositive phrases and other forms of ‘asides’), verb tense and mood, modal verb, and vocabulary choice to embed in the narrative [or exclude from it] conceptions of agency, causality, logical connections, and other visions of How the World Works . . . .” Narrative Primer e-mail, supra n. 2, at 177–192, 195–199; Anthony G. Amsterdam & Randy Hertz, An Analysis of Closing Arguments to a Jury, 37 N.Y. L. Sch. L. Rev. 55, 67–69 (1992).

14 Narrative Primer e-mail, supra n. 11.

15 Id.
These illustrations and exercises are not included in this article.

The final vignettes are from the lesson on Character. Briefly, the Character lesson includes subtopics such as how to create character; the importance of character and internal motivation; character as action; and the use of psychological details and physical descriptions to shape characters. Another subtopic is the selection and casting of characters, including how characters, particularly in the legal arguments in briefs, can be legal actors, prior decisions, or even legal entities (e.g., a renegade court of appeals). In this Essay I include an excerpt from Tobias Wolff’s memoir *This Boy’s Life*; it illustrates superbly Fitzgerald’s dictum that “ACTION IS CHARACTER.”

The last vignettes are excerpts from the lesson on Setting. Coverage includes settings as crucial components of narrative and environments as potentially outcome-determinative in some legal narratives. The excerpts include a brief illustration of the depiction of a setting from an essay by Joan Didion and a critique of several paragraphs from the Statement of the Case from the petitioner’s brief in *Tison v. Arizona*.

**D. Suggested Readings**

Scholarly literature about narrative, narratology, and narrative theory is vast; it is pervasive and ever-expanding in diverse academic fields from film theory to literary studies to continental philosophy. In law, there is a newly emergent, vigorous, and extensive scholarship focused upon narrative jurisprudence. The purpose of the primer is not to provide extensive references to this literature. Instead, the purposes of the primer are to simplify academic terminology without reducing the complexity of ideas and to turn academic exploration into a pragmatic text useful to attor-

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17 Tobias Wolff, *This Boy’s Life* (Grove Press 1989).
21 Some years ago, in an introduction to a symposium on legal storytelling, I attempted to categorize the various strands of the then newly-emergent narrative jurisprudence. See Philip Meyer, *Will You Please Be Quiet, Please?: Lawyers Listening to the Call of Stories*, 18 Vt. L. Rev. 567 (1994).
neys. At the suggestion of the editors of this Journal, I provide some references for readers interested in exploring the scholarship on legal storytelling and narrative jurisprudence. In doing so, I identify several sources that deepened my own understanding of the narrative components of legal argument. These readings may serve as starting points or, perhaps, suggest a reading strategy for legal writing professors.

My recommendations begin with the relevant sections on narrative from Anthony Amsterdam and Jerome Bruner’s path-breaking book *Minding the Law*.22 This core text, written by two of the preeminent practitioners of narrative theory applied to the law, covers three primary topics that have profoundly influenced recent thinking about the nature of law: categorization theory, rhetoric, and narrative. The theoretical material in Chapter Four, entitled “On Narrative,” provides a brilliant synthesis of narrative theory in relation to legal analysis.23 The writing is clear and accessible. Of equal importance are the notes to this chapter.24 These notes provide a syllabus for a graduate-level self-study course in narrative theory, and my bookshelf is gradually accumulating these books. In Chapter Five, the theory is applied to macro- and micro-analytic readings of the narrative components of two United States Supreme Court civil rights decisions.25 Taken together, the theory, applications, and notes provide a thorough and informative introduction to narrative theory applied to the law. As a supplement, or for a more general introduction to narrative theory, I recommend Jerome Bruner’s engaging book *Making Stories: Law, Literature, Life*.26 As its subtitle suggests, this short book provides a reader-friendly introduction to the import of narrative in law, literature, and life, and serves as a complement to *Minding the Law*. Finally, I recommend reading the initial chapter in Peter

23 Id. at 110–142.
24 Id. at 355–163. Notes provide precise references to significant narrative theorists with thoughtfully annotated footnotes, including leading scholars such as Paul Ricoeur, Aristotle, Jerome Bruner, Roland Barthes, Victor Turner, Mircea Eliade, Northrop Frye, William Labov and Joshua Waletzsky, Peter Brooks, Paul Grice, Hayden White, Tzvetan Todorov, Vladimir Propp, Kenneth Burke, Mikhail Bakhtin, and Michael Riffaterre. The work of prominent legal scholars writing about narrative and law, such as Robert Cover and James Boyd White, are also noted.
Brooks’s *Reading for the Plot: Design and Intention in Narrative*. Brooks, the preeminent American narrative theorist, serves as core faculty at the Persuasion Institute; his analysis of plotting (narrative design and construction) was a significant influence on the primer’s approach.

Next, I recommend two texts that provide excellent models for applying narrative theory to legal argumentation. These texts provide templates for my own work and for the work of many others. The first is Anthony G. Amsterdam and Randy Hertz’s now classic article, *An Analysis of Closing Arguments to a Jury*. The second is a more recent collection of articles analyzing the various narrative components of the Rodney King trial. I particularly encourage legal writing professors to read the introduction by Anthony G. Amsterdam, Randy Hertz, and Robin Walker-Sterling. This introduction explains the authors’ focus on narrative through careful and systematic analysis of (1) why narrative is important in litigation, (2) the specific uses that a litigator can make of narrative, and (3) the basic structure and process of narrative. Of particular interest to legal writing professors desiring to try out some of these approaches in their own scholarly work is a list of lawyering theory articles applying these macro- and micro-analytic techniques based upon narrative theory and a companion list of recent articles exploring the “theoretical underpinnings” for this type of work.

I also recommend several narrative primers by well-established writers and teachers of writing (fiction and journalism). The first two are written by John Gardner and David Lodge. Curiously, both have the same title. John Gardner’s *The Art of Fiction* presents Gardner’s passionate beliefs about integrity in writing, and provides structured guidance that is often as relevant for the legal writer as it is for the novelist. David Lodge’s book is lighter and perhaps more engaging; it is also full of marvelous illustrations. And I recommend James B. Stewart’s excellent primer

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28 Amsterdam & Hertz, *supra* n. 13, at 55.
30 *Id.* at 2 n. 2.
31 *Id.*
32 Gardner, *supra* n. 12; Lodge, *supra* n. 12.
on narrative journalism, *Follow the Story.* Stewart is a Pulitzer Prize winning journalist and a former editor of the front page of the *Wall Street Journal.* He supplements wisdom about narrative journalism with a sampling of articles that apply the lessons he teaches. Finally, I recommend the ruminations on technique and the self-reflective insights provided by writers in the Paris Review series of interviews “Writers at Work.”

* * *

II. VIGNETTES FROM THE PRIMER

A. Style

*Every sentence has a truth waiting at the end of it and the writer learns how to know it when he finally gets there.*

—Don DeLillo

1. From the Introduction to the Lesson

This lesson looks at the various stylistic components of narrative. It is helpful to develop a pragmatic vocabulary for systematically analyzing alternative approaches to “story elaboration” in legal practice. These choices initially appear to take place “on the surface” of the storytelling, but are connected to and embedded within other aesthetic choices that are not so readily apparent, such as those pertaining to plot, character, narrative time, and setting. The choices discussed in this lesson, however, are readily apparent on the surface: in the voice of the narrator and in the style of narration; in the choice of who the narrator or narrators will be; in the narrative perspective or perspectives from which the story is told; in the use of images and details to arrest the attention of the judicial reader and, perhaps, to capture the imagination.

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36 Lodge, *supra* n. 12, at 117–120.
of this reader as well; in the selective use of quotations; and in the “showing” versus the “telling” of the story. As in other lessons in this primer, we do not attempt to be comprehensive in raising all relevant issues and aspects of style and narrative elaboration. Instead, we choose a range of issues that are particularly relevant to narrative persuasion.

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2. “Showing and Telling”

In another essay for writers entitled *Showing and Telling*, David Lodge identifies the virtues and vices of “showing” as compared to “telling.” Initially, he observes, the “purest form of showing” is “quoted speech of characters, in which language exactly mirrors the event,” while the “purest form of telling is authorial summary, in which the conciseness and abstraction of the narrator’s language effaces the particularity and individuality of the characters and their actions.” The sophisticated brief writer employs the “virtues” of each technique, often choosing to build briefs largely from verbatim excerpts of transcripts, direct quotations from opinions, and from external and purportedly objective sources.

Lodge admonishes the young writer that overuse of authorial summary is not only deadening, it may also be “unreadable.” Many briefs, however, despite the best intentions of the writer, are often painful to read because the writer fails to know what to put in, what to leave out, and how and when to use showing instead of telling. Nevertheless, summary has its uses, and these functions can be made explicit, as Lodge observes, “it can, for instance, accelerate the tempo of a narrative, hurrying us through events which would be uninteresting, or too interesting—therefore distracting, if lingered over.”

Norman Mailer is masterful in striking an aesthetic balance between showing and telling; he knows when to weight showing over telling. Here, from Norman Mailer’s *The Executioner’s Song*,

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37 Id.
38 Id. at 122.
39 Id.
40 Id.
41 Id. (emphasis added).
is a brief description of the murder of Max Jensen by Gary Gilmore.\textsuperscript{42} Mailer takes great pains to show the murder rather than tell about it; he scrupulously avoids mediating the images with fancy language—there are no visible screens of perception placed over events, no “authorial summaries” to interfere with the impact of the spare words. But there are also apparent strategies in the intentionally minimalist description: Mailer focuses upon imagery. He sketches in only the most basic physical details of the interior of the bathroom where the shooting takes place, and describes only a few crucial physical traits of the victim in reaction to the events.\textsuperscript{43} He makes no deeply intrusive psychological observations about Gary Gilmore; he leaves it to the reader to make those judgments. Mailer has the confidence in his reader and his own authorial command of the material to simply get out of the way; in his nonfiction writing, Mailer often prefers to stay on the rich surface of the images. It is as if the imagery is a documentary film clip shot from the objective perspective of an omniscient and unseen narrator who, only briefly and in the most delicate way, dips into the mind of Jensen, the victim, to observe the meaning of Jensen’s misplaced smile.\textsuperscript{44} There is no room for extraneous description. Mailer’s style is purposefully spare, yet precise; the words facilitate, rather than disturb, the reader’s clear visualization of the scene:

Gary walked around the corner from where the truck was parked and went into a Sinclair service station. It was now deserted. There was only one man present, the attendant. He was a pleasant-looking serious young man with broad jaws and broad shoulders. He had a clean straight part in his hair. His jawbones were slightly farther apart than his ears. On the chest of his overalls was pinned a name-plate, MAX JENSEN. He asked, “Can I help you?”

Gilmore brought out the .22 Browning Automatic and told Jensen to empty his pockets. So soon as Gilmore had pocketed the cash, he picked up the coin changer in his free hand and said, “Go to the bathroom.” Right after they passed through the bathroom door, Gilmore said, “Get down.” The floor was clean. Jensen must have cleaned it in the last fifteen minutes. He was trying to smile as he lay down on the floor. Gilmore said, “Put

\textsuperscript{42} Mailer, supra n. 9, at 223–224.

\textsuperscript{43} Id.

\textsuperscript{44} See id. at 223.
your arms under your body.” Jensen got into position with his hands under his stomach. He was still trying to smile.

It was a bathroom with green tiles that came to the height of your chest, and tan-painted walls. The floor, six feet by eight feet, was laid in dull gray tiles. A rack for paper towels on the wall had Towl Saver printed on it. The toilet had a split seat. An overhead light was in the wall.

Gilmore brought the automatic to Jensen’s head. “This one is for me,” he said, and fired.

“This one is for Nicole,” he said, and fired again. The body reacted each time.

He stood up. There was a lot of blood. It spread across the floor at a surprising rate. Some of it got onto the bottom of his pants.

He walked out of the restroom with the bills in his pocket, and the coin changer in his hand, walked by the big Coke machine and the phone on the wall, walked out of this real clean gas station.45

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3. Telling in Different Voices

Often, the strongest narratives are not created through the voice of the author. Rather, they are provided by the voices of other speakers and writers. The brief writer must assemble and transform compelling collages of quotations into structured compositions of pieces, developed from previous tellings and retellings of the story. These pieces are often reconfigured in some new way that makes this retelling compel the responsiveness of the court. The voices that speak through the brief are often in the form of quotations from transcripts, testimony, and judicial opinions. The use of other voices, from purportedly objective or disinterested sources, like prior appellate opinions, is a powerful narrative tool. In an important sense, the brief writer is rendering the statement of the case through the use of quotation, another technique employed in nonfiction, in which the art is often in the quality of the investigation, and in the meticulous exploration and reassembly of what the pieces of testimonial evidence reveal. Nonfiction is usual-

45 Id. at 223–224.
ly characterized by a *monologic* or fixed narrative perspective, in contrast to the multiple and shifting perspectives, or *dialogic* structure, that often characterize narrative in the complex structures of the modern novel. This integrated relationship, in part, explains our choice of nonfiction illustrations in this lesson of our primer.

*In Cold Blood*[^46] is an illustration from nonfiction, where Truman Capote undertakes an investigation into the murder of the Clutter family in Kansas in 1959, retelling the story from a deeper literary perspective than was usual in the journalistic accounts of that time. Capote’s deeper literary perspective returns “to the surface,” when Capote reveals the scene of the murder itself, by replacing his own novelist’s eye and voice with that of the journalist’s. Capote relies exclusively on direct quotations from a witness who accompanies the sheriff to the Clutter residence to investigate the possibility of a crime.[^47] Capote interviews this witness extensively, and then knows enough to simply employ the witness’s story with remarkable verbatim quotation. Capote’s “writer instinct” allows him to see the specialness of the material. He uses that material extensively to reveal the horror of the murder scene discovery. In making this choice, Capote adopts a voice that is completely authentic; this authentic voice then provides an eye for visual detail and unintended ironic insight that surely would seem contrived and manipulative if spoken directly in Capote’s own authorial voice. The witness, Larry Hendricks, is a schoolteacher who had taught one of the murdered Clutter children.[^48] Before beginning his dark journey to the Clutter farmhouse, he “decided I’d better keep my eyes open. Make a note of every detail. In case I was ever called on to testify in court.”[^49]

In the initial part of Larry Hendricks’s story, Capote relates how Hendricks discovers the murder victims, the members of the Clutter family.[^50] We quote this excerpt from Capote’s *In Cold Blood* at some length. Note how the story, even in partial excerpt, moves purposefully, like a miniature, self-contained Gothic horror tale; Hendricks enters the Clutters’ family farmhouse and then goes room to room, each door opening upon a new discovery more

[^46]: Capote, *supra* n. 10.
[^47]: *Id.* at 62–65.
[^48]: *Id.* at 60, 62.
[^49]: *Id.* at 61–62.
[^50]: *Id.* at 62–65.
gruesome and frightening than the previous one.\footnote{51} Note also how the quotation is shaped into a complete elliptical piece, like the mini-story of the social worker in the \textit{Williams v. Taylor} brief,\footnote{52} framed within the larger narrative. It begins with a steady-state, and the steady-state is breached by the discovery of a trouble; the conflict or tension is progressively developed as the narrator moves from room to room making his horrific discoveries. The situation is eventually resolved, at least temporarily, as the “[a]mbulances arrived,” and “the house began to fill up.”\footnote{53} The darkness lifts a bit, and this sliver of light permits the narrator to back off, psychologically, from his powerful recollections—to remove himself, and the reader as well, from the narrative reinvention of the murder scene and what had happened within it.

It is as if the narrator has the psychological need to shape the images into narrative forms, not so much for the benefit of the listener, but for himself—to gain some control over the material, and some sense, perhaps, of psychological closure upon the horror of the unfolding images. Capote has the authorial confidence to rely extensively upon these blocks of external voices and quotations, carefully shaped and set within the context of a larger narrative:

Well, the TV was on and the kids were kind of lively, but even so I could hear \textit{voices}. From downstairs. Down at Mrs. Kidwell’s. But I didn’t figure it was my concern, since I was new here—only came to Holcomb when school began. But then Shirley—she’d been out hanging up some clothes—my wife, Shirley, rushed in and said, “Honey, you better go downstairs. They’re all hysterical.” The two girls [Hendricks’s children]—now they really were hysterical. Susan never has got over it. Never will, ask me. . . . Even Mr. Ewalt [a middle-aged farmer], he was about as worked up as a man like that ever gets. He had the sheriff’s office on the phone—the Garden City sheriff—and he was telling him that there was “something \textit{radically} wrong over at the Clutter place.” The sheriff promised to come straight out, and Mr. Ewalt said fine, he’d meet him on the highway . . . .

[Hendricks accompanies Ewalt to meet the sheriff on the highway.]

The sheriff arrived; it was nine thirty-five—I looked at my watch. Mr. Ewalt waved at him to follow our car, and we drove

\footnote{51} {\textit{See id.}}
\footnote{52} {\textit{Infra} pt. II(A)(4).}
\footnote{53} {\textit{Id.} at 65.}
out to the Clutters’. I’d never been there before, only seen it from a distance. Of course, I knew the family. Kenyon [Clutters’ son] was in my sophomore English class, and I’d directed Nancy [Clutters’ daughter] in the “Tom Sawyer” play. But they were such exceptional, unassuming kids you wouldn’t have known they were rich or lived in such a big house—and the trees, the lawn, everything so tended and cared for. After we got there . . . [the sheriff] radioed his office and told them to send reinforcements, and an ambulance. Said, “There’s been some kind of accident.” Then we went in the house, the three of us. Went through the kitchen and saw a lady’s purse lying on the floor, and the phone where the wires had been cut. The sheriff was wearing a hip pistol, and when we started up the stairs, going to Nancy’s room, I noticed he kept his hand on it, ready to draw.

Well, it was pretty bad. That wonderful girl—but you would never have known her. She’d been shot in the back of the head with a shotgun held maybe two inches away. She was lying on her side, facing the wall, and the wall was covered with blood. The bedcovers were drawn up to her shoulders. Sheriff Robinson, he pulled them back, and we saw that she was wearing a bathrobe, pajamas, socks, and slippers—like, whenever it happened, she hadn’t gone to bed yet. Her hands were tied behind her, and her ankles were roped together with the kind of cord you see on Venetian blinds. Sheriff said, “Is this Nancy Clutter?”—he’d never seen the child before. And I said, “Yes. Yes, that’s Nancy.”

Hendricks then describes the discovery of the victims in the next rooms, Mrs. Clutter and then Hendricks’s former student, Kenyon. Hendricks seems to relive the discoveries, literally, each more frightening and vivid than the one before. It is akin to a victim of post-traumatic stress rediscovering an immutable past that makes the present pale by comparison. The horrible discoveries are mingled with small visual details and observations that starkly contrast with the facts of the deaths themselves that seem, somehow, beyond commentary. This unconscious “technique” seems to re-emphasize the horror for the reader. Finally, there is the discovery of Mr. Clutter’s body in the sixth page of the quotation as Hendricks tells his story.

54 Id. at 61–62.
55 Id. at 63–64.
Then the sheriff said, “Where’s this go to?” Meaning another door there in the basement. Sheriff led the way, but inside you couldn’t see your hand until Mr. Ewalt found the light switch. It was a furnace room, and very warm. Around here, people just install a gas furnace and pump the gas smack out of the ground. Doesn’t cost them a nickel—that’s why all the houses are overheated. Well, I took one look at Mr. Clutter, and it was hard to look again. I knew plain shooting couldn’t account for that much blood. And I wasn’t wrong. He’d been shot, all right, the same as Kenyon—with the gun held right in front of his face. But probably he was dead before he was shot. Or, anyway, dying. Because his throat had been cut, too. He was wearing striped pajamas—nothing else. His mouth was taped; the tape had been wound plumb around his head. His ankles were tied together, but not his hands—or, rather, he’d managed, God knows how, maybe in rage or pain, to break the cord binding his hands. He was sprawled in front of the furnace. On a big cardboard box that looked as though it had been laid there specially. A mattress box. Sheriff said, “Look here, Wendle.” What he was pointing at was a bloodstained footprint. On the mattress box. A half-sole footprint with circles—two holes in the center like a pair of eyes. Then one of us—Mr. Ewalt? I don’t recall—pointed out something else. A thing I can’t get out of my mind. There was a steampipe overhead, and knotted to it, dangling from it, was a piece of cord—the kind of cord the killer had used. Obviously, at some point Mr. Clutter had been tied there, strung up by his hands, and then cut down. But why? To torture him? I don’t guess we’ll ever know. Ever know who did it, or why, or what went on in that house that night.

After a bit, the house began to fill up. Ambulances arrived, and the coroner, and the Methodist minister, a police photographer, state troopers, fellows from the radio and the newspaper. Oh, a bunch. Most of them had been called out of church, and acted as though they were still there. Very quiet. Whispery. It was like nobody could believe it. A state trooper asked me did I have any official business there, and said if not, then I’d better leave. . . . I started walking home, and on the way, about halfway down the lane, I saw Kenyon’s old collie and that dog was scared. Stood there with its tail between its legs, didn’t bark or move. And seeing the dog—somehow that made me feel again. I’d been too dazed, too numb, to feel the full viciousness of it. The suffering. The horror. They were dead. A whole family.
Gentle, kindly people, people I knew—murdered. You had to believe it, because it was really true.\textsuperscript{56}

Capote, although a masterful stylist in his fiction, steps out of the way and allows the power of the voices to speak. He does this throughout \textit{In Cold Blood}. He is equally masterful as an interviewer, extracting stories and images from his interviewees. He is also a superb investigator, unearthing letters, correspondence, and introspective scribblings. Perry Smith is one of the two men convicted of these murders. Capote’s sensitivity allows him to see deeply into Perry’s psychology through artful shaping and editing of Perry’s letters and diary. These materials allow the reader to establish a deep empathy for and understanding of Perry’s character, his motivations, and even his rage. It would have been ineffective, or certainly less powerful, to describe, through “authorial summary,” the horrors of Perry’s childhood or incarceration or familial relationships. Perry’s own testimony, and the testimony culled from documents and letters, is shaped into a complex and subtle mitigation argument, allowing the reader to emerge with a transformative sense that while the death sentence may match the horror of the crime, there is no logic or fit with the soul of the perpetrator.

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4. \textit{Perspective}

David Lodge observes, “[t]he choice of the point(s) of view from which the story is told is arguably the most important single decision that the [writer] has to make, for it fundamentally affects the way readers will respond, emotionally and morally.”\textsuperscript{57} To this insight John Gardner adds, “[i]n contemporary writing one may do anything one pleases with point of view, as long as it works.”\textsuperscript{58} What “works” for legal practitioners involves answers to such initial questions as: What, exactly, is point of view? Why should the writer/practitioner privilege one perspective over another? What are the advantages and disadvantages of differing perspectives, and their possible utility in the tool kit of the legal storyteller? Is it

\textsuperscript{56} Id. at 64–66 (emphasis added).
\textsuperscript{57} Lodge, supra n. 12, at 26.
\textsuperscript{58} Gardner, supra n. 12, at 155.
possible, or appropriate, to shift points of view within the text of an argument without “breaking the frame” of the narrative?

A starting point for answers to such questions appears in Gardner’s identification of five common points of view or perspectives in narrative composition. The “first person” is, perhaps, the most “natural” voice, because it allows the writer to write as he thinks and talks, and to write simply about how he perceives the world. The second often-adopted narrative perspective, according to Gardner, is the “third person subjective, a point of view in which all the ‘I’s are changed to ‘he’s or ‘she’s and emphasis is placed on the character’s thoughts.” The third “point of view” or perspective Gardner labels is the “third-person objective,” which is “identical to the third-person subjective except that the narrator not only never comments himself but also refrains from entering any character’s mind. The result is an ice-cold camera’s-eye recording. We see events, hear dialogue, observe the setting, and make guesses about what the characters are thinking.” Fourth, there is the “authorial omniscient point of view.” In this fourth voice, the writer speaks as, in effect, God. He sees into all his characters’ hearts and minds, presents all positions with justice and detachment, occasionally dips into the third-person subjective to give the reader an immediate sense of why the character feels as he does, but reserves to himself the right to judge (a right he uses sparingly).

Finally, Gardner identifies the “essayist omniscient” and differentiates this perspective from that of the authorial omniscient: “The language of the authorial-omniscient voice is traditional and neutral . . . . Every authorial-omniscient voice sounds much like every other.” In contrast, “[t]he essayist-omniscient voice, though it has nearly the same divine authority, is more personal.” The “essayist-omniscient” voice is more personal because the fact of a speaker, and the identity of the speaker, is intimated by “personal” qualities in the “voice” of the writer.

59 Id. at 155–159 (setting out points of view).
60 Id. at 155.
61 Id.
62 Id. at 157.
63 Id. at 157–158.
64 Id. at 157.
65 Id. at 158–159.
66 Id. at 159.
While David Lodge and John Gardner’s audience is a literary audience in the purest sense, many of the techniques and stylistic innovations they describe are already apparent in the careful choices of legal practitioners. For example, arguing ineffective assistance of counsel and raising powerful mitigating evidence that was not presented in the capital sentence in Williams v. Taylor, defendant’s counsel first speaks of omitted evidence abstractly, based upon a “traumatic childhood,” and a mother who “drank herself into a stupor almost daily while pregnant with him.” By itself, these abstractions are merely cliché and without impact upon the reader. However, it is the imagery and details from “uncontroverted juvenile records,” presumably from the notes and direct observations of an “objective” social worker who had visited the family’s home, and who was charged with protecting the children on behalf of the State, that visually capture the quality of Williams’s childhood, and manage to bring “the sordid conditions of Williams’s home” to life for the reader:

Lula and Noah [the parents] were sitting on the front porch and were in such a drunken state, it was almost impossible to get them up. They staggered into the house to where the children were asleep. Terry, age 1, and Noah Jr., age 3, were asleep on the sofa. There was an odor of alcohol on the breath of Noah Jr. . . . Oliver [Olivia] had just awakened and was very sick. She said she was hungry and had been drinking whiskey. Ohair was completely passed out and never could be awakened. He did not have on any clothes . . . .

The home was a complete wreck . . . . There were several places on the floor where some one had had a bowel movement. Urine was standing in several places in the bedrooms. There

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69 Id.
70 Id.
were dirty dishes scattered over the kitchen, and it was impossible to step any place on the kitchen floor where there was no trash... The children were all dirty and none of them had on under-pants. Noah and Lula were so intoxicated, they could not find any clothes for the children, nor were they able to put the clothes on them. There was stuffed pickle scattered on the floor in the front bedroom.

Noah and Lula were put in jail, each having five charges of neglect placed against them. The children had to be put in Winslow Hospital, as four of them, by that time, were definitely under the influence of whiskey. When Dr. Harvey examined them, he found that they had all been drinking bootleg whiskey. They were all hungry and very happy to be given milk, even the baby [Terry] drank a pint of milk before stopping. Oliver [Olivia] said they had not had any food all day. Ohair was still so drunk he could not talk.\footnote{Id. at 4.}

The writer recognizes the power of this imagery, and highlights these paragraphs as a frame for the argument. He does not comment upon the meaning of this evidence. But he has the confidence to present the images, and simply conclude, “Williams’[s] parents were jailed for criminal neglect, and the children were placed in a foster home where they were badly treated before being returned to their parents three years later.”\footnote{Id. at 4–5.} The understatement serves the vivid imagery well, as it is left to the reader to understand the defendant as a product of his bleak social history. The imagery, conveyed through hard visual detail \textit{invites}—but the understated framing language does not \textit{force}—the reader to enter momentarily into the horrific world of the defendant as a small boy.

But what, specifically, is it in these paragraphs that gives them power? Is it merely that the images are compelling in and of themselves? Is it that the speaker’s voice is that of an objective third party, a social worker who is charged with protecting the children? Or is there something about the style of the presentation itself that is compelling? The stenographic quality of the sentences? The concreteness of the imagery? The use of specific names? The active verbs giving shape to the images? The unmediated quality of the social worker’s storytelling, set prominently at the start of the legal argument? There is a certain awkwardness and
almost physical repulsion that the social worker and the reader may feel when forced to look upon the imagery. Perhaps some of the same stylistic devices and strategies that professional writers employ intentionally are here incorporated intuitively or unconsciously to draw the reader into the darkly compelling imagery of this discrete vignette.

The social worker's voice and perspective is that of a camera watching the sequence of events unfolding. The social worker arrives at the home and records in narrative sequence what she looks upon. First, the parents are sitting on the porch, so drunk that it is "almost impossible for them to get up." She follows them "staggering into the house" and there sees the sleeping children. There is the compelling sensory detail as she smells the drunken breath of one child, and then sees another naked child so drunk that he could not be awakened. In the next paragraph she surveys the disarray of the room, so disgusting and congested that the parents could not find any clothes to put on the children. She concludes with the unintended irony and authenticity of observing "stuffed pickle scattered on the floor." The vignette has a third paragraph: the children are temporarily safe at the hospital, yet under the influence of bootleg whiskey; all the children say they are hungry because they had not eaten; the baby drinks a pint of milk; one of the children is so drunk that he still cannot talk.

The details carry a concussive forcefulness that is emphasized through use of concrete detail and visual images captured in the short staccato rhythm of the sentences. Likewise, the power of the details is compressed into a stand-alone vignette, a mini-story with a beginning (the social worker arriving at the house), and a middle (the trouble immediately apparent at the house that deepens as the social worker enters with the drunken parents). At the end of the three-part story structure, the situation is momentarily resolved as the children are temporarily safe at the hospital. The writer of the brief has framed this completed vignette, a story-within-a-story, making it stand out visually for the reader.

The power of images and concrete visual detail do not have to be presented through external voices, however. They may, with equal effect, be presented through the "voice" of the advocate. Thus, for example, in describing a defendant drugged for trial and unable to participate effectively in his defense in *Riggins v. Nevada*, the brief-writer implicitly assumes the fixed perspective (the

third-person limited perspective) of a juror watching the trial, employing a voice that confidently embodies either an understated irony, or, perhaps, an unstated sense of moral outrage about the defendant’s predicament. The writer’s emotional response is not translated into explicit rhetoric, and the emotional or psychological response of the writer is not revealed to dissipate the power of simple repetitive visual images. Rather, the writer “stays on the surface”\textsuperscript{74} through the use of equally simple language, and active verbs, to stylistically complement the images. There is purposefulness and economy in the selection of images and in the sentences; these stylistic choices are buttressed by careful selection of quotations, and consistency of perspective, to keep the reader’s attention riveted.

The opening in the \textit{Riggins} brief is deceptively simple. Unlike the use of the social worker’s perspective in \textit{Williams}, there is a writer’s shrewdness and intentionality apparent in the stylistic choices that, at first glance, may seem intuitive. Specifically, the “emotional pivot”\textsuperscript{75} of this narrative argument is captured in a single crucial image that is highlighted repetitively throughout the text of the argument; yet it is an image that does not call attention to itself or make the repetition monotonous or off-putting to the reader. Initially, it is the image of the defendant Riggins sitting as a “zombie” at trial, unable to participate in his own defense, as the jury misinterprets the psychological meaning of his passivity and calmness. The evocative Statement of the Case begins

Petitioner David E. Riggins is presently under sentence of death after he was so heavily drugged by the State of Nevada that he appeared like a zombie throughout his trial. Despite Riggins’ objection while competent to receiving medication during his trial, and despite substantial evidence that Riggins would have been competent to stand trial without medication, the State of Nevada forced Riggins to ingest extremely high dosages of the antipsychotic drug Mellaril each day of his trial. The medication sedated Riggins; it made him appear apathetic, uncaring, and without remorse. Riggins was therefore prevented from presenting the best evidence he had—his unmedicated demeanor—to support his only defense—that he was legally insane at the time of the crime.\textsuperscript{76}

\textsuperscript{74} Lodge, \textit{supra} n. 12, at 117–120.
\textsuperscript{75} Thanks to Barry Scheck for suggesting this term.
After compressing the legal particulars of the case, providing the background of Riggins’s illness in a brief, vivid, and straightforward explanation of the psychiatric diagnosis, the writer presents an equally brief and clear description of the effects of the antipsychotic drug Mellaril. He then returns to the image that provides the “emotional pivot” for his argument, which will subsequently be translated into an equally vivid and imagistic legal theme. The writer continues, careful not to make the repetition of imagery monotonous, or to appear overly calculated and precious. That is, the technique does not call attention to itself, or to the language. It does not reveal the writer’s deeper intentionality in setting up his legal argument, but “stays on the surface,” emphasizing the image of Riggins being force-fed massive over-dosages of Mellaril:

Accordingly, Riggins was forced to ingest 800 milligrams of Mellaril each day of his trial, a dosage every psychiatrist considered excessive. Dr. Jurasky . . . described this dosage as enough to “tranquilize an elephant. . . .” It was no surprise, therefore, that Riggins was seen closing his eyes during the hearing on his motion to terminate the medication and had a zombie-like appearance throughout his trial.

Riggins’[s] sole defense was insanity, and he took the stand to prove this. [The writer then presents a vivid selection of Riggins’s delusions from his testimony that allegedly provided the reasons why he was compelled to kill the victim.] The state exploited Riggins’[s] drug-induced demeanor during his trial, and in so doing, directly contradicted its pre-trial representations to the court . . . .

The writer explains, by quoting from the prosecutor’s closing argument, how the state’s expert witnesses and argument focused upon Riggins’s demeanor at trial, a condition that they had authorized: “Does Riggins express sorrow, no. Does he express remorse, no.” He then returns to the imagery of the “zombie,” and how Riggins’s demeanor, caused by the Mellaril, undermined the mitigation arguments based on “extreme emotional disturbance” and “remorse” at sentencing:

Rather than looking like the emotionally disturbed individual that he is, the heavily sedated Riggins sat calmly and impas-

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77 Id. at 6–7.
78 Id. at 8.
sively through the sentencing hearing. Although he wanted to express the grief and sorrow he felt for killing Wade [the victim], the medication prevented him from doing so, and, in fact, prevented him from reading a statement he had prepared expressing these sentiments.\textsuperscript{79}

The elliptical storytelling returns to the image of the zombie that is translated and spun deeply into the fabric of the legal argument. There are careful repetitions that avoid becoming obvious and rhetorically manipulative. The writer begins by describing the ways that the state may permissibly “advance a compelling interest to restrict a defendant’s fundamental right to testify” by the “least restrictive [alternative] available” including the least acceptable of these alternatives in some situations, “binding and gagging the witness.”\textsuperscript{80} The writer then translates the image of the zombie into the imagery of the witness who was effectively “bound and shackled” by the forced ingestion of massive doses of Mellaril preventing him from presenting an effective defense thus violating his right against self-incrimination by “effectively present[ing] evidence against himself by compelling him to appear unremorseful, apathetic and sane.”\textsuperscript{81}

The image of the defendant, zombie-like, is the emotional pivot at the core of the defendant’s powerful yet simple legal argument. Like the brief writer in Williams who, by using quotation effectively, steps back and out of the way of the mini-story told by the social worker, the writer distills and compresses his emotional response into compelling visual imagery. He translates and shapes his comparatively simple legal argument into a law story woven around the image, paring down the story, and employing a writing style as close to the surface of the imagery as possible. This invites even the skeptical judicial reader to respond directly to the powerful and unmediated imagery.

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\textsuperscript{79} Id.
\textsuperscript{80} Id. at 21.
\textsuperscript{81} Id. at 17.
B. Plotting

Plot, let us say in preliminary definition, is the logic and dynamic of narrative, and narrative itself is a form of understanding and explanation. 82

—Peter Brooks

What is plot? Simply put, plot sequences events into a story. Plot provides a meaning to the sequence—a purposeful and intentional context, rather than a random selection of images and scenes, or pieces of perceptions and experiences. Plot points to something larger—a meaning and order beyond the events as merely interchangeable links in a random chain, or discarded pieces in a pile. Formulating the plot of a story implies that there is some causal relationship between the events, that they are more than just a list of unrelated occurrences. The relationship is cumulative; notions of plot make the whole greater than the mere sum of its parts, and the connection of events has a larger significance. What does this mean? First, that a plot “goes somewhere.” It has purpose and trajectory; a forward momentum, as events build purposefully upon one another, directed toward some culmination or termination. An implicit promise is made that with the ending will come revelation of some meaning beyond merely the simple completion of the action.

Peter Brooks observes in Reading for the Plot, that the dictionary definitions of the various alternative meanings of plot share a conceptual sense of restraint and “closed shape.” They include: (1) a small piece or measured area of land; (2) a background plan or diagram; (3) a series of events outlining the action of a narrative or drama; or, (4) a secret plan or scheme. 83 All these alternatives are characterized by “the idea of boundedness, demarcation, the drawing of lines to mark off and order.” 84 Plots establish an internal coherence, and this story-logic is violated at the peril of the author who then risks losing the imaginative attention of the reader; this is especially crucial for the legal storyteller because the attention of the always-skeptical judicial reader is especially precious.

82 Brooks, supra n. 27, at 10.
83 Id. at 11–12.
84 Id. at 11.
What are the characteristic pieces of a plot? An initial definition is taken from *Minding the Law*:

A narrative . . . needs a plot with a beginning, a middle, and an end, in which particular characters are involved in particular events. The unfolding of the plot requires (implicitly or explicitly):

1. an initial *steady state* grounded in the legitimate ordinariness of things,
2. that gets disrupted by a *trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
3. in turn evoking *efforts* at redress or transformation, which succeed or fail,
4. so that the old steady state is *restored* or a new *(transformed)* steady state is created,
5. and the story concludes by drawing the then-and-there of the tale that has been told into the here-and-now of the telling through some *coda*—say, for example, Aesop’s characteristic *moral of the story*.

That is the bare bones of it. 85

Before analyzing more complex examples from legal storytelling, it may be instructive to provide a brief and simple illustration of this narrative structure in action,86 adapted from the narrative primer by the novelist/critic and teacher David Lodge based upon a one-paragraph short story by Leonard Michaels:

**THE HAND**

I smacked my little boy. My anger was powerful. Like justice. Then I discovered no feeling in my hand. I said, “Listen, I want to explain the complexities to you.” I spoke with seriousness and care, particularly of fathers. He asked, when I finished, if I wanted him to forgive me. I said yes. He said no. Like trumps.87

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85 Amsterdam & Bruner, *supra* n. 2, at 113–114 (emphasis in original).
86 For additional illustrations, see introductory essay by Anthony G. Amsterdam, Randy Hertz, and Robin Walker-Sterling in Ty Alper et al., *Stories Told and Untold: Lawyer Theory Analyses of the First Rodney King Assault Trial*, *supra* n. 29.
87 Lodge, *supra* n. 12, at 215.
Lodge observes that *The Hand* “conforms to the classic notion of narrative unity”\(^88\) with its beginning, middle, and end. These three movements are defined in a more pragmatic and economical way than even our austere definition provides: “a beginning is what requires nothing to precede it, an end is what requires nothing to follow it, and a middle needs something both before and after it.”\(^89\) *The Hand* is an emotionally complex and subtle story, despite the fact that it is only one paragraph long. The first three sentences are the beginning of the story. The initial implicit “antecedent” steady-state of presumed domestic tranquility is immediately broken: the narrator has “smacked his little boy.” This clearly marks the arrival of the trouble or conflict in the story. Trouble takes many forms. It may be internal, such as a conflict within the character of the protagonist. Or the trouble may be caused by an external force (e.g., an antagonistic force in the environment) or by a clear antagonist (e.g., a villain in melodrama). In *The Hand*, the trouble caused by the hand is within, and yet simultaneously, beyond the control of the narrator-protagonist.

The narrator then attempts to describe his emotional state, and identify the nature of the problem: His anger is “powerful. Like justice.”\(^90\) This movement marks a rapid shift into the middle or what is sometimes referred to as the *progressive complications* of the plot. This movement is marked by the deepening conflict between father and son, and within the psychology of the father. The narrator/father discovers that he has “no feeling in [his] hand.” As Lodge observes, the hand is “both a synecdoche and metaphor for the ‘unfeeling’ parent.”\(^91\)

And then the father speaks directly to his son, attempting to justify his actions to resolve the conflict. Here, in the language of our definition, the narrator is *evoking efforts at redress*. That is, the narrator *struggles to return* to the implied prior antecedent steady-state before he inflicts punishment upon the son and the written narrative begins. “Listen, I want to explain the complexities to you,” the father says, apparently speaking to his son, although it is left to the attention of the careful reader to understand who is speaking to whom.\(^92\)

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\(^88\) *Id.* at 216.
\(^89\) *Id.*
\(^90\) *Id.* at 217.
\(^91\) *Id.*
\(^92\) *Id.*
Lodge notes Michaels’s choice of the adult word “complexities,” and the narrator’s speaking to his young son with “seriousness and care, particularly of fathers.” The reader perceives the narrator’s discomfort in his struggle for the return to reestablish his previous relationship with his son (the implied anterior steady-state of presumed tranquility). There is irony in the father’s meticulous choice of words, as the father sensitively attempts to explain the situation to his son—especially when in the previous sentence he admits that he has “no feeling” in his hand, and it seems to operate independently of his will. But, in the end, at the climax, it is the son, perhaps, who truly understands the predicament. The son asks, when the father finishes speaking, “if I wanted him to forgive me” (not—as may be anticipated in a “stock” story script that conforms to normative expectation—whether he, the son, is forgiven after his punishment). Thus, the son attempts a reversal, and attempts to move forward establishing a new or transformed steady-state and a different relationship of power between father and son. And then there is the climax: “I said yes. He said no.” There is no clear return to the implied anterior steady-state that preceded the story. Nor is there movement to a different (transformed) steady-state identified in our definition. Instead, there remains an uncomfortable disequilibrium or irresolution; the climax does not fully resolve the situation.

The coda acknowledges the situation at the end of the story, as the father stands in a curious and ambivalent relationship with his son, captured in the two-word comment from a card-game metaphor, almost like a stand-off but not quite, “like trumps.”

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C. Themes

Closely connected with plot is the concept of narrative theme. The dictionary defines theme as “a subject on which a person

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93 Id.
94 The term from narratology for reversal is “peripeteia.” For those interested, a dictionary of narratology defines peripety as “[t]he inversion (reversal) from one state of affairs to its opposite. For example, an action seems destined for success but suddenly moves towards failure, or vice versa. According to Aristotle, peripety (peripeteia) is, along with recognition (anagnorisis), the most potent means of ensuring the tragic effect.” Gerald Prince, Dictionary of Narratology 71 (U. Neb. Press 2003).
speaks, writes, or thinks; a topic of discussion or composition.”

The second definition is, perhaps, even more relevant: a theme is “a subject which provokes a person to act; a cause of or for action or feeling.” Also relevant is the definition of theme as “the principal melody or plainsong in a contrapuntal piece; a prominent or frequently recurring melody or group of notes in a composition.”

Characteristically, the narrative theme is deeply embedded in the plot, and the plot often returns to this “recurring melody.”

Robert McKee, the screenwriting teacher, suggests a synonym to help students better understand the concept of theme also at the core of plot structure in movie-making:

Theme has become a rather vague term in the writer’s vocabulary. . . . I prefer the phrase Controlling Idea, for like theme, it names a story’s root or central idea, but it also implies function: The Controlling Idea shapes the writer’s strategic choices. It’s yet another Creative Discipline to guide your aesthetic choices toward what is appropriate or inappropriate in your story, toward what is expressive of your Controlling Idea and may be kept versus what is irrelevant to it and must be cut.

McKee emphasizes that this idea must be expressed, and then proved through depiction of events, without explanation: “Storytelling is the creative demonstration of truth. A story is the living proof of an idea, the conversion of idea to action. A story’s event structure is the means by which you first express, then prove your idea . . . without explanation.”

McKee’s advice to prospective screenwriters regarding theme is applicable to legal storytellers. For example, many post-conviction relief briefs on behalf of condemned inmates are about betrayal—typically betrayal of the defendant by the system and the actors within it—and the failure of the system to operate effectively. A “betrayal story” as an articulation of theme seems flat and generic. It merely identifies a stock script from a generic bag of story themes. Nevertheless, the identification and articulation of a theme, or controlling idea, often enables a lawyer to more care-

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96 Id.
97 Id.
99 Id. at 113.
fully and systematically plot the story; gradually a more sophisticated and particularized narrative theme evolves.

John Gardner observes that the

writer sharpens and clarifies his ideas, or finds out exactly what it is that he must say, testing his beliefs against reality as the story represents it, by examining every element in the story for its possible implications with regard to his theme.100

This is good advice for the legal storyteller just as for the novelist. To this he adds, “theme . . . is not imposed on the story but evoked from within it—initially an intuitive but finally an intellectual act on the part of the writer.”101 This seems especially true in the creation of compelling legal narratives, in which the plot must be carefully developed in relation to the articulation of an underlying theme, capturing the imagination, emotion, or intellect of the skeptical judicial reader.

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D. Character

“Character is fate for a man.”102

—Heraclitus

Character is “arguably the most important single component” of some modernist storytelling forms.103 Character is often at the core of legal storytelling as well. But what is character? Is it a composition of psychological traits and attributes? Is it an accumulation of roles and behaviors? Is it a core identity? Is it the shell of physical description? Is it some controlling myth that dominates us, inhabits our soul, and compels us mysteriously in our conduct and behavior? Is it the transposition of “real life” onto the page? Or is character primarily a function of narrative? Do we intuitively adopt certain storytelling notions about character from narratology and folk psychology and fit these into the conventions of legal storytelling?

101 Id. at 177.
103 Lodge, supra n. 12, at 67.
Let us begin by observing that “character” has multiple, disparate and, often, conflicting meanings. As Heraclitus observed, a man’s character is his fate. The Gods, however, at least in his time, were largely in control of the fates and, consequently, of character. Individuality was stolen at the expense of the Gods. Sophisticated and literary notions of complex psychological characterizations, motivations, and individuated personalities simply were not possible. Nevertheless, this long-ago definition anticipates the pragmatic concerns of modernist storytelling, including legal storytelling practices.

The confusions and contradictions in defining and understanding various notions of “character” in modern storytelling, psychology, and philosophy are apparent as we look to provide a clear definition of what character is; even before we begin to address the “technical” dimensions of how to compose and construct characters. David Lodge observes that “character is probably the most difficult aspect of the art of fiction to discuss in technical terms.”

For the legal storyteller, just as for the novelist, character is often an important component of narratives, yet equally difficult to distill. Our notions of character and identity enable us to fulfill deep “psychological” needs or yearnings, and, simultaneously, to attribute power and purposeful clear-headed intentions to our actors. Character exists as a crucial component of our legal plot-driven stories, fixing responsibility, establishing causality, and providing meaningful closure to our stories. Thus, character enables us to arrogate the power of an omniscient Deity on behalf of actors who are often held singularly responsible, not only for their own conduct, but also for plotting the consequences of their actions, and knowing in advance how those actions factor into the stories that we later tell. “Character” enables actors to do in narratives what many of us have difficulty doing in our own lives—to control the story and the outcome of the plot through actions determined by some force residing within the actor—that explains the choices she makes, and how and why she exercises her free will to control the outcome of the story.

To clarify—in our legal stories, just as in realist novels, plots do not open outwards upon confusion, nor does an external environment usually dictate events. Despite Heraclitus’s observation, actors are not directed by “the Gods” or by forces outside of them-

104 Heraclitus, supra n. 102, at 210–211.
105 Lodge, supra n. 12, at 67.
selves. We emphasize free will in law stories; causation results from the deliberate choices and decisions of our actors. Further, in narrative persuasion in the law, we specialize in telling “hard,” compressed, plot-based narratives, inviting readers of our briefs to judge actions, make inferences about causation, and assign responsibility, based upon their “readings” of character, especially when there is little else to go on to explain behavior.

* * *

1. Character Composition

Vivid character can often be developed economically and elegantly through use of selected details. Depiction of character need not be comprehensive in design. In fact, an overload of psychological description and the baggage of too many identifying details may detract from effective characterization, especially in legal narratives. Effective characterization captures appropriate traits in images, or in careful descriptions, often through the selection of vivid details. These enable the reader to pull the pieces together into a composition—to construct the whole from the closely observed details, and thus, to compose the “character’s character.” What is left out is often as important as what is included. This does not mean that characterization is precious or self-conscious, or that it calls attention to itself in the writing; it flows from the story, as if the narrative and argument compel what is called forth from within. Nevertheless, effective depiction of character in legal storytelling, just as in literature, is a composition of choices that compels the imaginative attention and interest of the reader in the story, and often affords the reader sufficient room to do much of the composing herself.

Second, character does not have to be fixed or static. Characters develop as the story progresses with the actors’ motivations and actions often driving the narrative forward. Alternatively, the full dimensions of characters are typically revealed in the aftermath of dramatic events. Nor does character usually change or “move” at the same speed or trajectory as the plot itself; character may be revealed as actions responsive to the events depicted in the story—what Katherine Anne Porter identifies as “reverbera-
When asked about “character change,” Hemingway observed, “Everything changes as it moves . . . . Sometimes the movement is so slow it does not seem to be moving. But there is always change and always movement.”

Third, character can and does indeed imply conduct, not only attributing motivation and explanation to what has already happened, but also foreshadowing what will happen next. That is, the reader intuitively draws upon folk psychology and stock stories, metaphors, and psychological schema, to look forward as well as to look back into the past. Katherine Anne Porter, as she watched her fictional characters head towards their fates, observed,

Every once in a while when I see a character of mine just going towards perdition, I think, “Stop, stop, you can always stop and choose, you know.” But no, being what he was, he already has chosen, and he can’t go back on it now. I suppose the first idea that man had was the idea of fate, of the servile will, of a deity who destroyed as he would, without regard for the creature. But I think the idea of free will was the second idea.

We illustrate these three observations about character with excerpts from Tobias Wolff’s literary memoir, *This Boy’s Life*. In the first of a sequence of scenes, the reader is introduced to the character “Dwight,” who is a suitor of ten-year-old Tobias Wolff’s beloved mother. Dwight is described physically. Then, in a second scene, Dwight’s character is developed into a central figure in the narrative—Dwight, the distant suitor, will prospectively become Toby’s stepfather: Toby is being driven from Seattle toward his new home with Dwight in rural Washington. On the way, there are revelations of darker aspects of Dwight’s character. The character’s identity is revealed in actions and “reverberations.” The physical details of the initial depiction of Dwight, initially a minor character, now open like porous cracks or fissures upon Dwight’s “soul” as perceived through Toby’s eyes. Dwight emerges as the antagonist.

The compositional structure—through description, then action, and then dialogue—creates narrative momentum and the sense of unease and of foreboding about what will happen next.

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106 *Writers at Work 1963*, supra n. 34, at 151.
107 Id. at 233.
108 Id. at 152.
109 Wolff, *supra* n. 17, at 63.
There is no opportunity for Toby to “stop and choose” on his road to perdition. The language is deceptively simple. The story is bound by the “glue” of the narrative—the conflict between the two characters—and by an emotional intensity and the style of Toby’s voice—by what is unsaid as well as what is revealed in the dialogue itself. The whole is recreated from the pieces vividly in the mind of the reader, as if she is sitting uncomfortably in the car with Toby, watching the boy on his journey toward the fate that awaits him at his new home.

Dwight was a short man with curly brown hair and sad, restless brown eyes. He smelled of gasoline. His legs were small for his thick-chested body, but what they lacked in length they made up for in spring; he had an abrupt, surprising way of springing to his feet. He dressed like no one I’d ever met before—two-tone shoes, hand-painted tie, monogrammed blazer with a monogrammed handkerchief in the breast pocket. Dwight kept coming back, which made him chief among the suitors. My mother said he was a good dancer—he could really make those shoes of his get up and go. And he was very nice, very considerate.

I didn’t worry about him. He was too short. He was a mechanic. His clothes were wrong. I didn’t know why they were wrong, but they were. We hadn’t come all the way out here to end up with him. He didn’t even live in Seattle; he lived in a place called Chinook, a tiny village three hours north of Seattle, up in the Cascade Mountains. Besides, he’d already been married. He had three kids of his own living with him, all teenagers. I knew my mother would never let herself get tangled up in a mess like that.  

* * *

Dwight drove in a sullen reverie. When I spoke he answered curtly or not at all. Now and then his expression changed, and he grunted as if to claim some point of argument. He kept a Camel burning on his lower lip. Just the other side of Concrete he pulled the car hard to the left and hit a beaver that was crossing the road. Dwight said he had swerved to miss the beaver, but that wasn’t true. He had gone out of his way to run over it. He stopped the car on the shoulder of the road and backed up to where the beaver lay.
We got out and looked at it. I saw no blood. The beaver was on its back with its eyes open and its curved yellow teeth bared. Dwight prodded it with his foot. “Dead,” he said.

It was dead all right.

“Pick it up,” Dwight told me. He opened the trunk of the car and said, “Pick it up. We’ll skin the sucker out when we get home.”

I wanted to do what Dwight expected me to do, but I couldn’t. I stood where I was and stared at the beaver.

Dwight came up beside me. “That pelt’s worth fifty dollars, bare minimum.” He added, “Don’t tell me you’re afraid of the damn thing.”

“No sir.”

“Then pick it up.” He watched me. “It’s dead, for Christ’s sake. It’s just meat. Are you afraid of hamburger? Look.” He bent down and gripped the tail in one hand and lifted the beaver off the ground. He tried to make this appear effortless but I could see he was surprised and strained by the beaver’s weight. A stream of blood ran out of its nose, then stopped. A few drops fell on Dwight’s shoes before he jerked the body away. Holding the beaver in front of him with both hands, Dwight carried it to the open trunk and let go. It landed hard. “There,” he said, and wiped his hands on his pant leg.

We drove farther into the mountains. It was late afternoon. Pale cold light. The river flashed green through the trees beside the road, then turned gray as pewter when the sun dropped. The mountains darkened. Night came on.111

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I played the radio softly, thinking I’d use less power that way. Dwight came out of the tavern a long time after he went in, at least as long a time as we’d spent getting there from Seattle, and gunned the car out of the lot. He drove fast, but I didn’t worry until we hit a long series of curves and the car began to fishtail. This stretch of the road ran alongside a steep gorge; to our right the slope fell almost sheer to the river. Dwight sawed the wheel back and forth, seeming not to hear the scream of the tires. When I reached out for the dashboard he glanced at me and asked what I was afraid of now.

111 *Id.* at 87–88.
I said I was a little sick to my stomach.
“Sick to your stomach? A hotshot like you?”
The headlights slid off the road into the darkness, then back again. “I’m not a hotshot,” I said.
“That’s what I hear. I hear you’re a real hotshot. Come and go where you please, when you please. Isn’t that right?”
I shook my head.
“No sir.”
“That’s a goddamned lie.” Dwight kept looking back and forth between me and the road.
“Dwight, please slow down,” I said.
“If there’s one thing I can’t stomach,” Dwight said, “it’s a liar.”
I pushed myself against the seat. “I’m not a liar.”
“Sure you are. You or Marian. Is Marian a liar?”
I didn’t answer.
“She says you’re quite a little performer. Is that a lie? You tell me that’s a lie and we’ll drive back to Seattle so you can call her a liar to her face. You want me to do that?”
I said no, I didn’t.
“Then you must be the one that’s the liar. Right?”
I nodded.
“Marian says you’re quite the little performer. Is that true?”
“I guess,” I said.
“You guess. You guess. Well, let’s see your act. Go on. Let’s see your act.” When I didn’t do anything, he said, “I’m waiting.”
“I can’t.”
“Sure you can. Do me. I hear you do me.”
I shook my head.
“Do me, I hear you’re good at doing me. Do me with the lighter. Here. Do me with the lighter.” He held out the Zippo in its velvet case. “Go on.”
I sat where I was, both hands on the dashboard. We were all over the road.

“Take it!”

I didn’t move.

He put the lighter back into his pocket. “Hotshot,” he said. “You pull that hotshot stuff around me and I’ll snatch you bald-headed, you understand?”

“Yes sir.”

“You’re in for a change, mister. You got that? You’re in for a whole nuther ball game.”

I braced myself for the next curve.  

* * *

2. **Casting**

What is “casting” and why is it particularly crucial to legal storytellers? Casting relates to (1) the identities of various players in the story—those excluded as well as those included; (2) the timing of the characters’ appearances “on stage”; and, (3) the roles that the various actors play in relation to one another and in relation to the theme of the plot. Casting decisions are critical to develop and transform the narrative theme into the architecture of the plot. The cast of characters determines how the theme is developed into plot. Initially, we identify a brief inventory of relevant questions and related concerns pertaining to casting that may suggest possibilities and options to make a story work more effectively, and to make the story achieve its purpose as a tool for persuasion, transformation, and motivation of the reader. These questions and concerns include: What players are on the roster of potential characters? Who are they, and what kind of beings are they: individuals, groups, corporate entities, abstract concepts? What players are more or less central to the action? Which players are stable, which evolve? (As previously noted, some characters

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112 Id. at 89–91.

remain unchanged by the action—their goals, values, motives, attitudes, and emotions are reflections of an identity that remains stable; others progress, regress, vacillate.) What players are active, passive, dominating, or dominated in relation to others? What are the relationships and interdependencies among the players?

* * *

There are many different ways to compose characters, and these methodologies reveal how the writer understands and constructs her world, including the nature and identities of the people or “characters” who inhabit it. This is equally true for the legal storyteller as for the creative artist. Characters’ motivations may often be apparent—simply a desire to achieve a particular result within a scene. Or, motivation may be more complex—a product of past events, embodying subtle situational and environmental influences, etc. Characters in complex narratives are often motivated in ways that explain their actions to the reader and, equally important, provide the reader with belief in the authenticity of the story. Stories of greater complexity or subtlety demand a different approach to characterization. What is omitted is as important as what is included.

The point is that there is no one-size-fits-all approach to characterization. There are multiple possibilities and choices that must be strategically explored and —after the choices are made—artfully executed by the effective practitioner taking into account the purposes she is attempting to achieve, the nature and dynamics of the story itself, and, indeed, the talents, vision, and inclination of the writer/attorney.

* * *

E. A Sense of Place—Settings, Description, and Environments

_Beyond the lines of printed words in my books are the settings in which the books were imagined and without which the books could not exist. . . . I’m a writer absolutely mesmerized by places; much of my writing is a way of assuaging homesickness, and the_
settings my characters inhabit are as crucial to me as the characters themselves.\textsuperscript{114} —Joyce Carol Oates

This lesson explores settings and the depiction of complete environments, as compelling forces instigating and shaping stories and, indeed, often controlling specific narrative outcomes. While creating a sense of place in stories often does not have the power or significance of “character” in modern storytelling practices, descriptions of settings and environments are more significant than they may initially appear. To underestimate the potential of this important aspect of narrative, or to unintentionally diminish the power of settings and environments by inadvertence rather than strategic planning, is a risky choice. For example, mitigation stories in death penalty cases are often about how environments, rather than characters and human agency, control narrative outcomes. These stories shift responsibility away from individual characters exercising their free will, towards perceiving actions as dictated by environments and factors within those environments. Depicting the force of controlling environments may facilitate understanding and foster empathy, and may even compel imposing an alternative narrative outcome. Often, however, in reading many practitioners’ briefs, settings are minimal and descriptions are underutilized.

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1. \textit{Depicting Settings—A Brief Structural Analysis of a Setting Depicted in Joan Didion’s The White Album}\textsuperscript{115}

Joan Didion’s essay \textit{The White Album}, in her collection of essays with the same title, is partially, a retelling of the story of the aftermath of the Manson cult murders in Los Angeles in the summer of 1969. The paragraph we analyze is a self-contained descriptive fragment—an elliptical and numbered piece, set in a sequence of carefully arranged and numbered pieces. The arrangement is


\textsuperscript{115} Didion, \textit{supra} n. 19. Portions of this analysis are also included in Philip N. Meyer, \textit{Adaptation: What Post-Conviction Relief Practitioners Might Learn from Popular Storytellers about Narrative Persuasion}, in \textit{Law and Popular Culture} vol. 7 (Oxford U. Press 2004).
non-chronological and non-linear, yet, simultaneously, quite systematic and purposeful; there is an apparent narrative logic to the arrangement. Taken together, these pieces tell a story. Although the depiction of setting in the illustrative paragraph may seem like a spontaneous composition, a burst of poetic energy enabling the reader to recall a time and place through sensate fragments suggested by Didion, the evocation of setting is intentional and strategic. Further, this excerpt illustrates a range of techniques that help readers compose the setting for themselves. The excerpt provides a physical and temporal setting and evokes a psychic and internal landscape—a sense of place and a time where “everything was unmentionable but nothing was unimaginable.”

The reader is transported via this single paragraph, a set-piece of description. Didion makes the setting come alive, and provides a sense of place that is readily familiar, yet simultaneously eerily unfamiliar.

[1] We put “Lay, Lady, Lay” on the record player, and “Suzanne.” We went down to Melrose Avenue to see the Flying Burritos. [2] There was a jasmine vine grown over the verandah of the big house on Franklin Avenue, and in the evenings the smell of jasmine came in through all the open doors. [3] I made bouillabaisse for people who did not eat meat. [4] I imagined that my own life was simple and sweet, and sometimes it was, but there were odd things going on around town. [5] There were rumors. There were stories. Everything was unmentionable but nothing was unimaginable. This mystical flirtation with the idea of “sin”—this sense that it was possible to go “too far,” and that many people were doing it—was very much with us in Los Angeles in 1968 and 1969. [6] A demented and seductive vertical tension was building in the community. The jitters were setting in. [7] I recall a time when the dogs barked every night and the moon was always full. [8] On August 9, 1969, I was sitting in the shallow end of my sister-in-law’s swimming pool in Beverly Hills when she received a telephone call from a friend who had just heard about the murders at Sharon Tate Polanski’s house on Cielo Drive. [9] The phone rang many times during the next hour. These early reports were garbled and contradictory. One caller would say hoods, the next would say chains. There were twenty dead, no, twelve, ten, eighteen. [10] Black masses were imagined, and bad trips blamed. I remember all of

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116 Didion, supra n. 19, at 41.
the day’s misinformation very clearly, and I also remember this, and I wish I did not: I remember that no one was surprised.117

There is a great deal going on in this paragraph. The initial sentences [1, 2, 3] describe a scene by selecting details to convey a sense of place. These are not visual details exclusively. Rather they are sensate fragments: sounds, smells, tastes. The “sounds” are of Bob Dylan’s “Lay, Lady, Lay,” and Leonard Cohen’s “Suzanne,” popular songs evoking a specific cultural moment. Didion even speaks of going to see “The Flying Burritos,” a shorthand for the then popular country-rock band “The Flying Burrito Brothers.” The description confidently excludes explanations of these references. The shorthand is sufficient. Likewise, Didion identifies the “smell of jasmine” that comes in through “all the open doors and windows,” conveying both inviting sensuality (the jasmine) and vulnerability (through open windows) simultaneously. There is the taste of the bouillabaisse that is made “for people who did not eat meat,” implying that there are others who may be predators upon this dangerous landscape.

Didion locates herself here as well, as a character within this scene who imagines that her own life is both “simple and sweet.” [4] And then she provides the counterpoint of an interior setting or landscape of psychic dislocation. [5] There are “rumors” and “stories.” And there is “this mystical flirtation with the idea of ‘sin’—this sense that it was possible to go ‘too far,’ and that many people were doing it . . . .” The personal manifests aspects of a collective psyche: “A demented and seductive vortical tension was building in the community. The jitters were setting in.”[6] The interior observations color the exterior landscape in anticipation of what is coming: “[T]he dogs barked every night and the moon was always full.” [7]

Here, mid-paragraph, Didion shifts from description to intimations of action; these are echoes of events that have already taken place elsewhere in the city. They seem to bounce off, or resonate from the settings depicted initially in the paragraph, setting up the story that will follow. First Didion locates herself passively “sitting in the shallow end of my sister-in-law’s swimming pool in Beverly Hills” when the phone call comes in “about the murders at Sharon Tate Polanski’s house on Cielo Drive.” [8] The reports are “garbled and contradictory.” More dark fragments surface and leak

117 Id. at 41–42.
out into the world. One caller says “hoods,” the next “chains.” One says, “twenty dead, no, twelve, ten, eighteen.” [9] There are speculations on motives: “[b]lack masses were imagined, and bad trips blamed.” [10] There is, however, one psychological constant in the imagined descriptions—“that no one was surprised.”

What, if anything, may the legal storyteller take from a reading of description so personal and idiosyncratic as this one? The aesthetic conventions are seemingly far removed from the work of the lawyer. In John Gardner’s terminology, Didion’s style of description is poetic rather than discursive.118 That is, rather than building up its world “slowly and completely,” it “lights up its imaginary world by lightning flashes.”119 Didion depicts an external landscape through sensate fragments, and, perhaps, simultaneously implies an internal psychic landscape that the writer shares with her readers. Likewise, the premise that external events are called up from or anticipated by a collective consciousness, is something that would seemingly be anathema to, or could not possibly be conveyed by, a legal brief. Or could it? Might a legal brief convey the power of setting, and make the setting into an environment affecting or controlling the narrative outcome? Complete depiction of an environment may provide more than the mere accretion of detail, but can become, instead, a force controlling the outcome of the story.

* * *

2. A Narrative Critique of an Excerpt from Petitioner’s Brief in Tison v. Arizona120

This lesson concludes with a narrative critique of the initial portion of the Statement of the Case in the petitioners’ brief in Tison v. Arizona. In terms of narrative potentials and opportunities, the material in Tison is certainly as dramatic and compelling as the material in Didion’s The White Album and affords possibilities for constructing transformative narrative. Indeed, in terms of genre, it is the material of classical tragedy. Thematically, the story is about the sins of the father visited upon his sons.121 The first set-

118 Gardner, supra n. 100, at 44–45.
119 Id.
121 Toward the end of his dissenting opinion in Tison, Justice Brennan highlights this
The legal narrative in Tison is now about whether it is cruel and unusual punishment to execute the two surviving sons, taking into account the sons’ level of participation, and assumptions and inferences about their culpability (mens rea). Analytically, it is a complex legal story. But the complexity of the factual narrative of the events that take place in the desert matches, if not exceeds, the complexity of the legal story; in fact, one is inseparable from the other.

In terms of the material in this lesson, the external settings of the prison jailbreak and the desert are evocative physical land-

powerful underlying theme and subtext that seems inescapable, and even cites, in an accompanying footnote, to biblical and literary narrative precursors including Exodus 20:5; Horace’s Odes III, 6:1; Shakespeare’s The Merchant of Venice; and Ibsen’s Ghosts. Further, in text, Brennan speculates on why the jury sentenced Ricky and Raymond to death, given the public outcry against the family, the fact that the father was already dead, and that the children must pay fully for the sins of the father regardless of culpability:

The urge to employ the felony-murder doctrine against accomplices is undoub-
edly strong when the killings stir public passion and the actual murderer is be-
yond human grasp. And an intuition that sons and daughters must sometimes
be punished for the sins of the father may be deeply rooted in our consciousness.

Yet punishment that conforms more closely to such retributive instincts than to the Eighth Amendment is tragically [sic] anachronistic in a society governed by

our Constitution.

Tison, 481 U.S. at 184 (Brennan, J., dissenting).


123 We intentionally emphasize depicting the facts over cursory explanations of the law
for two reasons: the narrative component, not the legal analysis, is the focus of this text,
and the legal analysis, perhaps, can be reconceptualized as flowing from the narrative ra-
ther than the other way around.
scapes, ripe for description, and the internal psychological environment of the two sons existing within the spell of their powerful father is even more compelling. The appendix, portions of transcripts, and prior opinions provide rich textual sources for this material. These are crucial details awaiting transformation into narrative categories pertaining to the actions and characters of the various players in the drama. These evidentiary “facts” are not mere coloration for the legal argument; they are crucial to it.\footnote{Although much of the evidentiary detail is subordinated in the petitioners’ brief and placed in footnotes, or referenced with citations to appendix or record, or omitted altogether, the United States Supreme Court is nevertheless drawn to this compelling material in its opinion. Repeatedly, the Court looks to testimony to better understand petitioners’ internal processes pertaining to issues of culpability and petitioners’ participation in the murders. For example, Justice O’Connor’s opinion looks to “detailed confessions given as part of a plea bargain” but rescinded when the two surviving sons refused to testify against their mother as part of the plea bargain, to better understand what happened in the darkness in the desert (e.g., where the sons were physically at the time of the murder, and what the father was doing and thinking in the moments just before the execution of the Lyons family):}

Their father dead, the two surviving sons have been convicted of felony-murder and sentenced to die for the murders committed in the desert. Petitioners’ legal argument implicitly foregrounds this narrative, focusing in large measure upon analogizing the facts depicted in \textit{Tison} as they related to the United States Supreme Court’s then-recent decision in \textit{Enmund v. Florida}. \textit{Enmund} held that imposition of the death penalty upon an accomplice who was the driver of the getaway car in a robbery resulting

\begin{quote}
The Lyons and Theresa Tison [the fifteen-year-old niece] were then escorted to the Lincoln and again ordered to stand in its headlights. Ricky Tison reported that John Lyons begged, in comments “more or less directed at everybody,” “Jesus, don’t kill me.” Gary Tison said he was “thinking about it.” John Lyons asked the Tisons and Greenawalt to “[g]ive us some water . . . just leave us out here, and you all go home.” Gary Tison then told his sons to go back to the Mazda and get some water. Raymond later explained that his father “was like in conflict with himself . . . What it was, I think it was the baby being there and all this, and he wasn’t sure about what to do.”

The petitioners’ statements diverge to some extent, but it appears that both of them went back towards the Mazda, along with Donald, while Randy Greenawalt and Gary Tison stayed at the Lincoln guarding the victims. Raymond recalled being at the Mazda filling the water jug “when we started hearing the shots.” Ricky said that the brothers gave the water jug to Gary Tison who then, with Randy Greenawalt went behind the Lincoln, where they spoke briefly, then raised the shotguns and started firing. In any event, petitioners agree they saw Greenawalt and their father brutally murder their four captives with repeated blasts from their shotguns. Neither made an effort to help the victims, though both later stated they were surprised by the shooting.

\textit{Tison}, 481 U.S. at 141 (citations omitted).\end{quote}
in murder is disproportional to conviction for felony-murder.\footnote{458 U.S. at 801.} The Tisons’ legal argument turns upon persuading the court that \textit{Enmund} is controlling, and that the facts of one case are, as the petitioners’ brief put it, virtually indistinguishable from the other. That is, Ricky and Raymond Tison are no more culpable than the defendant in \textit{Enmund}, nor is their degree of participation in the murders readily distinguished from the defendant in \textit{Enmund}.

Nevertheless, a crucial portion of the Statement of the Case describing the crime in petitioners’ brief in \textit{Tison}\footnote{Br. for Petr. at 7, \textit{Tison}, 481 U.S. 137 (1987).}—the depiction of the horrific execution of a young family in the desert—seems minimalist in nature, and comes up short on developing the compelling core story. Nor is the depiction of the events of what took place in the desert, e.g., description of setting and creation of environment, vivid. Nor are the inner worlds, the characters of the various players developed. Consequently, the reader’s ability to empathize with or understand the players, their motivations, or their actions is limited,\footnote{Employing E.M. Forester’s terms, and using language suggested by the novelist Richard North Patterson at the Planning Conference for a Narrative Persuasion Institute (New York University School of Law, May 2003), Ricky and Raymond Tison are depicted as “flat” rather than “round” characters, even though these are the protagonists at the core of the drama, and it is crucial for the reader to visualize and differentiate them, and also to empathize with them.} even though these understandings are crucial to resolving the legal issues of the petitioners’ culpability and their degree of participation in the crime. In terms of Hollywood screenwriting vernacular, this narrative is “undercooked,” at least in terms of its complex narrative possibilities. The storytelling potential in the material is rich, and alternative choices could have been made. Nevertheless, unlike the excerpt from Didion, there is little that enables the reader to call up the narrative landscape, the various settings, or, perhaps most important, the psychological landscape as perceived by the two surviving Tison brothers, Ricky and Raymond, awaiting sentence of death.

Stylistically, the telling of the story in petitioners’ brief is equally flat; there is little that enables the readers to imagistically see or emotionally feel the powerful unfolding of narrative events that take place from the perspective of either Ricky or Raymond. This is so even though the previous tellings provide this dramatic material, and much of the material is ultimately cited in the majority and dissenting opinions in \textit{Tison v. Arizona}. In the petition-
ers’ brief, however, mere fragments of this material are subordinated into footnotes, and the Statement of the Case avoids directly confronting the narrative conflict, focusing instead upon a story that provides a bare scaffolding for legal argumentation in the body of the brief. Perhaps this design and the subordination of the story to the argument are strategic; the narrative perspective is distanced from the events of the story. But does that distance invite a higher level of abstraction in categorizing the factual circumstances of Tison that ultimately disadvantages the petitioners? Perhaps the petitioners’ attorney strategized that he did not want the literary dimensions of the material to overwhelm the clarity and simplicity of his legal arguments. In retrospect, would an alternative power-to-weight ratio of facts to law have better served his argument, especially given the closeness of the fit between the narrative and resolution of the legal issues in the argument?

* * *

3. Excerpt from the Statement of the Case in Petitioners’ Brief in Tison v. Arizona

[1] Petitioners Ricky and Raymond Tison were sentenced to death for killings they neither committed nor specifically intended. [2] Ricky and Raymond were convicted of breaking their father Gary Tison and his jailmate Randy Greenawalt out of prison. [3] They were 18 and 19 years old at the time of the breakout. Neither had any prior felony convictions. They lived at home with their mother and older brother Donald, and visited their father nearly every week during his eleven-year imprisonment preceding the breakout. [4] During those eleven years, Gary Tison was a model prisoner who ran the prison newspaper and assisted the prison administration in quieting a riot and strike in 1977.

[5] Despite his excellent prison record, Gary Tison was refused parole. He planned an escape, with the help of his brother Joseph, his three sons, their mother and other relatives. [6] According to the psychologist appointed by the sentencing court to evaluate petitioners prior to sentencing, “there was a family obsession, the boys were ‘trained’ to think of their father as an innocent person being victimized . . .” [7] Originally it was not intended for the three sons to participate in the breakout, but eventually they decided to become involved after receiving
an assurance from their father that no shots would be fired. And indeed no shots were fired during the breakout.

[8] Two days later, the car that was used for the escape—a Lincoln—experienced a second flat tire, thus incapacitating it. A decision was made to try to flag down a car to use to continue the escape. The car that was stopped—a Mazda—contained the Lyons family, consisting of a husband, a wife, a baby, and a niece named Theresa Tyson (no relation to petitioners.).

[9] Both automobiles were driven down a dirt road off the highway. The family was then placed by the side of the road, and the Tisons’ possessions were placed in the Mazda. The Lincoln was then driven 50 to 75 yards further into the desert. To ensure that the family would not be able to move the Lincoln and alert the authorities, Gary further incapacitated the Lincoln by firing into the car’s radiator. Those were the first shots that were fired during the entire episode.

[10] The father, Gary Tison, then told his sons to go back to the Mazda and fetch a jug of water for the Lyons family. [11] This combination of actions—further disabling the Lincoln and sending his sons to fetch water for the Lyons family—was plainly intended to communicate to Ricky, Raymond and Donnie the reassurance that the Lyons family would not be killed. [12] If there had been a plan to kill them, there would have been no need to waste ammunition in further incapacitating the car or to waste water on people who were going to be murdered. [13] The sentencing court itself found that, “It was not essential to the defendants’ continuing evasion of arrest that these persons were murdered.” Thus, the very “senselessness” of the killings made them unpredictable to Ricky and Raymond.

[14] While in the process of fetching the jug of water, the Tison brothers were shocked to hear the sounds and see the flashes of gunshots in the dark night as their father and Randy Greenawalt opened fire and shot the Lyons family. [15] Either their father had changed his mind at the last minute without telling his sons, or he had deliberately misled them into believing that the Lyons would be left alive with water in the incapacitated Lincoln.

[16] It was for these murders—which were neither committed by Raymond or Ricky Tison nor specifically intended or planned by them—that Raymond and Ricky Tison were sentenced to the penalty of death.

Several days after Gary Tison and Randy Greenawalt killed the Lyons family, the group was apprehended at a roadblock near Casa Grande, Arizona. The oldest brother, Donnie
Tison, was shot in the head during the apprehension and died from his injuries. Ricky, Raymond and Randy Greenawalt were arrested. Gary Tison, the father, initially escaped, but was found two weeks later dead of exposure in the desert.

The three surviving defendants were tried together for crimes committed during the breakout. They were convicted and sentenced to long prison terms. Each was then tried separately for the four murders, convicted and sentenced to death.\footnote{\textit{Br. for Petr. at 7–12, Tison, 481 U.S. 137 (1987) (footnotes and citations omitted).}}

4. \textit{Annotations, Observations, and Questions for the Reader}

These annotations revisit the initial paragraphs of petitioners’ Statement of the Case in \textit{Tison} describing the escape and the crimes committed in the desert and provide observations about the descriptions of settings and about other narrative dimensions (e.g., character, plot, narrative structure, and style). The purpose is not to criticize petitioners’ brief. Rather, it is to identify alternatives and creative choices. More important, it is to stimulate critical thinking in response to the excerpt. Numbered annotations refer back to the sentences in the Statement of the Case.

[1] The opening sentence provides a strong narrative hook for the reader. The observation that Ricky and Raymond were sentenced for death for killings “they neither committed nor specifically intended” identifies a theme (actual innocence). Stylistically, observe the strong rhythm of the sentence, how it covers a great deal of territory cleanly and forcefully, and arrests the reader’s attention.

[2] Note that the reader does not see and is not provided with sufficient detail to visualize either the prison setting or the jailbreak. Scenes, settings, and environments are overlooked, deleted, or dispatched quickly. Likewise, there will be little description in the forthcoming scenes in and of the desert. There is little particularity or sense of place. More important, perhaps, it is difficult for the reader to locate the various characters, in regards to events that occur, although this is crucial to the legal argument.

[3] We have previously observed that the material is potentially that of a classical tragedy, in which the doomed protagonists are destroyed, physically or spiritually, based upon some weakness or flaw in their character. At the end of a tragedy, the protagonist
typically comes to some awareness of what has occurred, and assumes some responsibility for shaping the ultimate outcome. The theme in *Tison* is potentially extremely powerful: The sins of the father are visited upon the sons. Why is this theme so understated and deemphasized in petitioner’s brief? If you were to redraft these facts, what alternative choices and decisions would you consider making?

There is nothing in the story that reveals how the acts of the two sons are controlled or manipulated by their dominating, charismatic, and powerful father. Would you incorporate additional “facts” that convey this part of the story?

[4] The father is potentially a terrible and powerful character, a true antagonist. It is the antagonist who often initiates the action and shapes the plot of crime stories. Why is Gary Tison’s character not fully developed? Why can’t the reader see him more clearly, listen to him talk, see him in action? Instead, he is depicted merely as a “model prisoner” who “ran the prison newspaper” and “assisted . . . in quieting a riot.” Later, cited briefly in footnotes, there is some of the psychological testimony, including the conclusion that he is “manipulative and controlling.” Is this sufficient? If you wrote this brief, how would you strengthen the depiction of Gary Tison as the antagonist?

[5] The reader is provided limited information to understand the characters of Ricky and Raymond Tison. They are flat rather than round characters—monochromatic rather than multi-dimensional. The reader cannot readily visualize or differentiate Ricky from Raymond Tison, or construct their identities. The reader is never invited inside their thoughts. Nor can the reader identify precisely where they are located and what they were doing at the moment the murders take place. This material is available. Yet none of this material, e.g., through transcripts, psychological observation, or prior judicial opinions, is directly incorporated into the story (although there are citations in footnotes to the joint appendix). Would it have been more effective to incorporate this additional material directly into the retelling of the story?

[6] Here, a single psychological observation is extracted from a psychologist’s report submitted to the sentencing court. Why is this quote selected exclusively? It makes an important psychological assertion, and draws a conclusion regarding the boys’ motivation to free their father. But is it sufficient? Does this quote raise as many questions for the reader as it suggests answers? For example, how were the boys “trained”? What is the “family obses-
sion”? Is there some way to further develop this? Where, within the plot structure, would you develop the boys’ motivation? How would you do it? Assuming the materials are available to draw upon, what specifically would you want to include in the narrative? Where would you put it?

[7] There is only a single footnote in which Raymond asserts that there was an “agreement with my Dad that no one would get hurt.” Is this sufficient to make this point?

[8] This paragraph provides a transition into the action of the story. The Tisons’ car has a flat tire, and the Tisons decide to hijack another car to continue the escape. The initial description focuses with particularity on the make of car, identified as a Lincoln, perhaps to differentiate it from the second car stopped by the Tisons, a Mazda. But in a description that, until now, has been abstract, it seems curious that these details are singled out. In contrast, most of the description is presented with passives. For example, “[a] decision was made to try to flag down a car”—there is no identification of who decided to “flag down” the vehicle to continue the escape, and who did what actions. The reader is left to speculate. The Lincoln “experienced a flat tire, thus incapacitating it.” The Mazda “contained the Lyons family,” “consisting of a husband, a wife, a baby and a niece named Teresa Tyson (no relation to petitioners).” Does the choice of verbs, the imprecision of the description, the use of passives, serve the story?

[9] Again, does the recurring use of passives work? Or does this technique distance the reader from the events of the story? Does it seem manipulative, as if the writer is intentionally refusing to allow the reader to see what is taking place, and is covering up the petitioners’ roles in these events?

[10] What, precisely, did the father say? How did he order the sons to “fetch” the water? Was he trying to get rid of them, because he had murder on his mind and did not want them to know of his decision? This is not made clear, and the reader cannot visualize this crucial sequence. Why isn’t this material directly incorporated into the text of the story itself? Instead, in the next sentence, the writer intrudes upon the narrative explaining why Gary sent Raymond and Ricky away, why Raymond and Ricky could not have anticipated the killings [11]–[12], and why “the very ‘senselessness’ of the killings made them unpredictable to Raymond and

\[129\] Id. at 8.
Ricky.” [13] Are these assertions the most effective strategies for persuading the reader? Are there alternative narrative strategies?

[14] Could the phrase “in the process of” be omitted from the initial sentence in this paragraph? There is an assertion that the Tison brothers “were shocked” to hear the sounds and “see the flashes of gunshots in the dark night.” Is there any “proof” of this assertion? Are there more persuasive ways to depict the boys’ reactions? Again, where were the boys during the murders? What was their physical proximity to the murder scene? Is the phrase “flashes of gunfire in the dark night” a cliché? Do these stylistic choices affect the persuasiveness of the story?

There are several long footnotes of evidentiary information from the joint appendix cited. These footnotes pertain to the boys’ beliefs as to whether their father had intended to commit the murders, and their actions and locations just before and during the murders. Also included in the footnotes is analysis of mistaken inferences in the state’s argument and analysis of the date of the boys’ determination to break their father out of jail. These are important points. But the force of a coherent and focused story may be lost in listing and combining this information in a footnote as the reader has difficulty moving from the plot to the information, and back again to the story. Is there an alternative structural design that would have been more effective?

[16] The petitioners’ attorney provides “closure” to the story of what happened before the trial. The two surviving brothers are captured. Although Gary Tison escapes initially, he subsequently dies in the desert. The story concludes by observing the trials of the defendants and their convictions for the various crimes committed during the breakout, and their trials, convictions, and death sentences for the four murders. Is this ending sufficient? How might the ending be rewritten and strengthened?

* * *

III. CONCLUDING REQUEST

Teaching narrative persuasion signals the future for teaching effective legal advocacy in writing and clinical courses. I hope the initial textual fragments presented in this Essay provide a window that enables readers to briefly view discrete aspects of this possibility. (I reemphasize that the excerpts presented in this Essay are merely fragments from a work-in-progress still in its early stages,
and the purpose of this Essay is not to provide a systematic approach to teaching narrative persuasion.) I deeply value the insights, observations, and responses of my professional colleagues in the legal writing community. Consequently, I would appreciate readers’ specific and general reactions to the excerpts presented in this Essay; it will be extremely helpful to developing and shaping the larger work. Please send responses in hard-copy to me by mail to Vermont Law School, Chelsea Street, South Royalton, Vermont 05068, or by e-mail (pmeyer@vermontlaw.edu or pmeyer6104@aol.com). In advance, I am grateful for your thoughts, comments, annotations, and ideas.
AN EVOLUTIONARY ENDEAVOUR: TEACHING SCHOLARLY WRITING TO LAW STUDENTS

Claire R. Kelly

A few years back I designed a course, “Scholarly Writing for Law Students,” largely as a result of my position as a Faculty Adviser to the Brooklyn Journal of International Law. In that capacity, I saw many students disappointed because they had not been selected by one of the school’s journals. As many of us know, students often see that selection as an honor that will help them gain employment rather than as a forum to write a note. Thus, during much of my time consoling these students, I explained the greatest value of journal membership is the exposure to scholarly writing, and that was something that they could pursue in other ways.

Among the lessons scholarly writing can teach, and among scholarly writing’s numerous benefits, is that students obtain a greater mastery of doctrine in a particular area and greater sophistication in thinking than provided by any final exam. It teaches students what it means to “really” know something, an experience that will be valuable to them once they are practitioners. They learn about the process of getting to know something deeply—a process that can be long, uncertain, and daunting. Getting them to the end of that process, while still in law school, is a gift, not the least because students learn how labor-intensive and evolutionary the process is.

Once I had won students over to my way of looking at the value of journal membership, they were all ready to write a note themselves, and of course their follow-up question was “Would you help me?” Initially, I worked with a series of students one by one to guide them through the process. Inevitably, I directed them to Elizabeth Fajans and Mary Falk’s book, Scholarly Writing for Law Students, and I spent a lot of time going over drafts and meeting...
with students individually to discuss their ideas. Eventually I realized a more profitable environment for these budding scholars would be a scholarly writing seminar.

In thinking about how to structure this seminar, I reflected upon my experiences as a writer discussing my ideas with my colleagues. I learned a great deal about scholarly writing and analysis, not only by discussing my ideas with my colleagues, but also by listening to my colleagues discuss their ideas: in brown bags talks, faculty fora, and workshops. I saw my ideas and work evolve through discussion with others.

Accordingly, my course is very much modeled on what we all experience as writers and as faculty members when we come up with an idea: run it past some colleagues, perhaps do a workshop or a symposium, or shop it around again and again in a variety of fora. This experience treats the writing process as a collaborative and evolutionary endeavor. Although, as I will discuss, I add components just for students (classes on research, editing, structure, etc.), the basic premise and theme are encouraging students to develop their ideas by articulating them to others and allowing themselves to reflect upon those ideas as they listen to others’ expressions of their ideas.

Here I will briefly outline the class design and its components and how collaboration aids each of the components. I will then briefly discuss how I think this model can be adapted to a seminar course in a doctrinal field.

I. CLASS DESIGN

I designed the class as a year-long class limited to seven students. Although I did not intend the class to be limited to third-year students, it was in effect so limited by the scheduling priorities set by our registrar. This limitation benefited the class, and I recommend limiting the class to graduating students who have had the chance to explore as many writing and doctrinal experiences as possible. I did intentionally limit enrollment in two ways. First, journal students could not take the course. As I mentioned, I designed the course for students who otherwise would not have had a scholarly writing experience. Second, students had to have received a B or better average in their legal writing classes. I felt students needed strong writing foundations to be able to tackle a year-long writing project and to help their colleagues in this collaborative setting. Fortunately, our school has other writing semi-
nars for students at all levels; those seminars expose them to a variety of documents and provide close supervision. Students who did not have a B or better average in their first-year writing courses could demonstrate their ability to take the scholarly writing course if they had received a B or better average in writing courses taken after their first year.

II. TOPIC DEVELOPMENT

Topic development was the obvious place to start, and I find that it is the most difficult step for students. In my experience, students start with a general idea or subject matter that interests them, but they do not know what they want to say about it. Alternatively, they know what they want to say, but it is unsuitable for a student note. For example, they want to say that “music should be free on the Internet” or “states should provide more services to the poor” or “war is a bad thing” or “war is a good thing.” These initial thoughts may be interesting and may serve as springboards for serious notes, but they lack a legal focus and often lead students to writing editorials that lack legal analysis. I often tell them that if I wanted someone’s editorial view of a subject I would ask my mother; what I need from them is legal analysis. In other words, students need to identify a legal problem, explain why it is a problem, venture a solution, and explain why the solution is viable.

To explain topic development, I have found I must explain what scholarly legal writing does. This is the hardest part of the course to teach in the collaborative setting, and I necessarily lecture for a good part of class. Fajans and Falk have an excellent section about this in their book, and I assign that.2 Another useful resource is Eugene Volokh’s *Academic Legal Writing.*3 But I also assign introductions from a selection of good student notes. Subscribing to the view of “show don’t tell,” I find that if students can read the part of a paper that says “Part I will do this and Part II will do that and in Part III I argue,” then they begin to get the idea of what a legal note is meant to do and as a result they begin to understand suitable topics. One of my favorite examples is the following:

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2 *Id.* at ch. 2.
The Note posits that analyzing personal jurisdiction in trademark Internet controversies by using a framework founded on physical contacts is inappropriate, because its uneven application to an electronic medium by the courts defeats the national uniformity policy of the Lanham Act. Part I provides an overview of the Internet. Part II examines trademark issues arising from Internet use. Part III examines the existing jurisdictional framework and the tests derived by the Supreme Court and surveys federal court decisions applying those tests to trademark issues and the Internet. Part IV reviews trademark legislative history and the national uniformity policy of trademark law that has been tested by court decisions and amended by Congress. Part V proposes a statutory solution to clarify personal jurisdiction in trademark controversies arising from the Internet and discusses the benefits and arguable disadvantages of a statutory enactment. This Note concludes that the policy of federal trademark law would best be served by an amendment to the Lanham Act expressly authorizing nationwide personal jurisdiction in infringement, dilution, unfair competition and false advertising controversies arising from electronic contacts on the Internet.4

The example is simple and clear. It shows students a note’s constitutive parts while at the same time showing how helpful to the reader a clear roadmap will be. An example such as this also helps students understand the general structure of a note, and thus gives them a way to think about their topics in that structure.

With this background, I find that by the second week I can introduce a collaborative component, and I ask students to explain their proposals and topics to the class using this structure. I then ask the class to articulate the legal analysis they think the author needs given the topic proposal as stated. One may think it is too early in the process to try to pin down analytical approaches given that topics and theses will inevitably change; however, accepting change, accepting comments from colleagues, and embracing the evolutionary process are goals of the course. Any one who has written a piece of scholarship experiences this evolutionary phenomenon, often spurred by constructive criticism and collaboration. Additionally, having students articulate their ideas out loud and in public will be helpful later when they need to assess where they

started in their thoughts, where they ended, and how they got there.

III. RESEARCH

Throughout the course, I take advantage of my colleagues here at Brooklyn Law School and their expertise. We have excellent research librarians here, and I ask them to provide some help to the students in starting their research. Because all of the students in the class are writing in different doctrinal areas, they are often on their own for research. I do ask them to complete research logs that I review, and we have a class on research techniques and proper attribution. Again, at this stage, the Fajans and Falk text is an invaluable resource.

Still, I found it useful to have some class discussion among the students about the problems they encounter while researching. Often students were able to help each other with research and sources even though they were working on very different topics. I suppose I should not have been surprised to see how eager they were to help each other with their projects, so much so that students would come in with sources for each other.

IV. BACKGROUND EXPOSITION

Early in the semester, I had a class on background exposition to try to get them writing from the very beginning. I tell students that writing a note is like making a stew: it works well only if you cook it slowly. So you have to start cooking early and accept that you will need to taste it along the way, add things, stir, and be flexible. As we all know, it is hard to start cooking when you are not sure of the taste you want in the end and when you are afraid of making a mistake. Getting students started on describing the problem, the area of law, or the literature in the area of law and telling them not to work on an analysis section yet is a useful way to make sure that they start cooking. Again, in class, the students explain the background to their colleagues and their colleagues prod them for more explanation or alert them to problems with the stories they tell. Having the students write up their background sections early also allows me to get the students to work on editing each others’ work while they are still in the middle of the writing process.
V. EDITING

Editing, not surprisingly, is one of the most valuable parts of this course. I have the students edit the background sections of each others’ papers. The task is much more valuable for the editor than the author. Lights flash on in the editors’ heads when they look at their colleagues’ papers. Suddenly they are struck by how annoying rambling musings become, how confusing gaps are, and how important roadmaps and topic sentences are. They also see what works. They may become convinced that using a hypothetical as a foil is useful, or that they really should delete the ten-page digression to which they were previously spiritually committed despite its limited relevance. Almost universally, the students took what they learned though editing someone else’s work and applied it to their own papers.

Finally, time spent on writing and editing background sections gives students room to work through their theses in their minds before they start writing their analysis sections and become unnecessarily committed to underdeveloped and sometimes faulty reasoning simply because they have written down those analyses. For some reason, once students have words typed on paper, they never want to delete them. A useful trick is to convince them to create a separate document in which they can save material for later or come back to it. Getting them to focus on background exposition and descriptive sections of the paper first while they think through their analysis more thoroughly saves a good deal of needless deletion later.

VI. THESIS DEVELOPMENT AND ANALYSIS

Finally, thesis development and analysis benefit most from the collaborative process. At least four times throughout the course, students are required to present their theses to the class in various stages of development: during topic development (when really they have no thesis but they may think they have one), when discussing research, at a separate class on thesis development and analysis, and during their final presentations.

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5 Fajans and Falk refer to a teacher who calls this psychological trick “the bone pile”—discarded ideas are saved at the end of the paper, or in a separate file, but can be retrieved if necessary. Fajans & Falk, supra n. 2, at 72 (citing Andrew P. Johnson, A Short Guide to Academic Writing 26–27 (U. Press Am. 2003)).
Requiring students to articulate their arguments out loud and defend them over time makes them clarify those arguments in their own minds and allows them to see how their arguments change. Often students think they have a brilliant idea but do not want to explain it to others until they are “done,” whatever “done” means. This is a big mistake. Explaining an idea to others focuses any writer on the gaps in the analysis. Others will certainly focus on those gaps, as well we know. Thus, although students are often so committed to their first ideas that they are reluctant to change, they must learn that papers and ideas evolve—they do change. The process of writing is about that evolution. Again, students listening to these articulations learn as well because while listening they often think in terms of their own papers. This should not surprise us, as I am sure we have all had the experience of attending a faculty workshop and thinking of the presenter’s project in terms of our own current projects. So too, students see the successful presentations as models for their own work, and when they diagnose problems in presentations, they apply those diagnostic skills to their own papers.

VII. FINAL PRESENTATIONS

Finally the students present their fully formed papers, which of course are never fully formed; they learn, as we do, that you can work on these things forever. But there must be closure. Because in the past when I have taught this course the students have written on different subjects, I try to invite faculty members who teach or write in the field to each student’s talk. It is a nice way of welcoming the students to a scholarly community and also allowing them (and me) to show off. It also is a time to discuss what needs to be done to get the paper ready for publication.6

VIII. ADOPTING THE COLLABORATIVE MODEL FOR SEMINAR COURSES

I have taught this course as purely a legal writing course in the past, and I look forward to doing so again in the future. I have also thought about using this model as a way to teach a doctrinal

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6 Incidentally, half the students who have taken the course have been published, often in other schools’ journals, and some with multiple offers of publication.
seminar. In another article in this volume, Elizabeth Fajans discusses the Administrative Law Practicum that she and I have developed. I think this scholarly writing model would work with administrative law or almost any course. My plan is to use it in another subject area that I teach, International Business Transactions, which covers a variety of unconnected subjects linked only by the fact that they are problems that are encountered by international business lawyers. I call it a “buffet course.” There are many items on the buffet to choose from, and we move from one item to another. I think it lends itself to a seminar in which students can choose from a variety of loosely related issues and subjects on which to write.

I would structure the course by first identifying what buffet items on the menu of possibilities appeal to the students, for example international sales, foreign sovereign immunities, carriage of goods at sea, and the like. And I would thereafter design the syllabus to track the various student projects. The course would need more classroom hours than the legal writing course and would probably need just as much time meeting with the students and reviewing their papers; however, the collaborative components of the course will probably be even more useful, and natural connections will appear among the topics.

7 Elizabeth Fajans, Learning from Experience: Adding a Practicum to a Doctrinal Course, 12 Leg. Writing 215 (2006).